

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

UNITED STATES OF AMERICA * Civil Docket No.
EX REL JOSHUA HARMAN *
VS. * 2:12-CV-89
* Marshall, Texas
*
* October 13, 2014
*
TRINITY INDUSTRIES, INC. & *
TRINITY HIGHWAY *
PRODUCTS, LLC * 9:16 A.M.

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE RODNEY GILSTRAP
UNITED STATES DISTRICT JUDGE

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(Proceedings recorded by mechanical stenography, transcript
produced on CAT system.)

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14 P R O C E E D I N G S

15 (In-chambers hearing.)

16 THE COURT: All right. Before we take up this
17 proposed exhibit from the Plaintiff, I want to touch on one
18 other thing quickly.

19 Last Friday, October the 10th, we completed
20 pre-trial hearings in regard to this case in anticipation of
21 jury selection this morning, being Monday the 13th. That
22 was Friday the 10th. That was the last of several -- I'll
23 say multiple pre-trial hearings, where the parties were free
24 to bring up pre-trial issues that the Court needed to
25 confront and deal with in anticipation of trial.

1 At the conclusion of the final pre-trial hearing
2 on Friday of last week, October the 10th, I asked the
3 Plaintiffs on the record if there were any other matters of
4 a pre-trial nature the Court needed to take up. The answer
5 was no.

6 I then asked the Defendants and the non-party
7 Texas A&M Transportation Institute if there were any other
8 matters of a pre-trial nature the parties needed to take up,
9 and the answer on the record was no.

10 Then after 5:00 o'clock on Friday, the following
11 motions were filed between the close of business Friday, the
12 10th of October and this morning, Monday, the 13th of
13 October: Plaintiff's motion for sanctions, Document No.
14 537, filed on Saturday, October the 10th; Texas
15 Transportation Institute's motion for sanctions, Document
16 539, filed on Sunday, October the 12th, yesterday;
17 Defendants' motion to stay the trial, Document 537, filed
18 about -- between 6:00 and 7:00 p.m. apparently on Friday,
19 the 10th of October, after the ruling was received from the
20 Fifth Circuit denying the Defendants' motion for a writ of
21 mandamus and alternatively to stay the trial had been
22 denied. Then we have Defendants' motion to stay regarding
23 pre-trial publicity and a request to reconsider the Court's
24 ruling on a jury questionnaire, Document 548. That was
25 filed today, Monday, the 13th of October, sometime after

1 midnight and before jury selection begins in a few minutes.

2 Also, we have Defendants' motion for judgment on
3 the pleadings pursuant to Rule 12(c), Document 545, filed on
4 Sunday, October the 12th, and we have Defendants' objections
5 to preliminary jury instructions, Document 547, also filed
6 yesterday, Sunday October the 12th.

7 All of these were filed after the final pre-trial
8 hearing on Friday, October the 10th. All of these were
9 filed after both parties affirmatively represented to the
10 Court that there were no other matters of a pre-trial nature
11 that needed to be taken up or considered.

12 For the record, the Court will carry all of these
13 pending matters that I've just recited in the record and
14 will begin voir dire and jury selection in the next few
15 minutes.

16 All right. We'll now turn to what's just been
17 handed to the Court, which appears to be a document dated
18 October the 10th, 2014, styled Memorandum From the Federal
19 Highway Administration, U.S. Department of Transportation.
20 Subject action, colon, ePlus w-beam guardrail terminal.
21 Appears to be from Tony First, Associate Administrator for
22 Safety. And it's been marked -- or the document before me
23 has been marked as Plaintiff's Exhibit 1286.

24 Mr. Carpinello, since it's marked as a Plaintiff's
25 exhibit, tell me what this is and what you're asking of the

1 Court.

2 MR. CARPINELLO: Yes, Your Honor. This apparently
3 was issued on Friday. We learned about it last night, and
4 actually got a copy at about 11:00 p.m. last night. We
5 believe that it's highly relevant. The -- the Defendants
6 are going to argue that the June 17 letter represents the
7 final and definitive position of the FHWA. This letter
8 indicates that it is not. The FHWA has specifically asked
9 for state DOTs to provide them information with regard to
10 crashes involving the ET-Plus, and they actually -- the FHWA
11 itself attaches to the letter or memorandum the November 17,
12 2005 memorandum of the FHWA, which in the third paragraph
13 specifically references that the FHWA can remove items from
14 the road if in-service performance indicates that the --
15 that the -- even -- even a product which has been certified
16 or found acceptable in accordance with testing can be
17 removed from the road.

18 And I think it's -- so I think the jury -- if --
19 if the Defendants are going to argue that the June 17 letter
20 is the final and definitive action of the FHWA, that we --
21 in all fairness, the Plaintiffs should be able to show that
22 it is not. And that the FHWA on Friday of this past week
23 has asked state DOTs to advise it of problems involving --
24 or crashes involving the ET-Plus and that -- that -- that is
25 on Page 2 under action and request for information.

1 So the FHWA has formally taken what it calls as,
2 quote, action. And since the FHWA is still -- has expressed
3 its intention to review in-service performance, that that --
4 that fact should be presented to the jury if the Pla -- if
5 Defendants, as we assume, will argue and present to the jury
6 the June 17 memorandum, which has been representative as the
7 FHWA's final definitive, quote, action on this matter.

8 THE COURT: Mr. Shaw, what's the response from the
9 Defendants?

10 MR. SHAW: Judge, first of all, as a practical
11 matter, I'm unsure -- I, like Mr. Carpinello, received this
12 late last night, after I became aware of it. I am unsure
13 that the memorandum was issued with the letter. If we can
14 clarify that for me, that would alleviate one of my
15 concerns. I'm unsure that they, in essence, go together.

16 So if Mr. Carpinello could maybe show me that
17 because that's not the way I got it. I got it with just the
18 letter, Judge, is the way that I received it.

19 THE COURT: All right. Well --

20 MR. CARPINELLO: I believe they were, but I --
21 because we don't have the FHWA in the case, what we can do,
22 Judge, is try -- this has been sent -- my understanding is
23 that this has been sent to all state DOTs, and I will
24 attempt during the morning to get a copy from a state DOT.
25 I mean, we do have subpoenas out there still enforced to

1 state DOTs, and asked them to provide to us exactly what
2 they got from the FHWA.

3 THE COURT: Well, what -- what I have before me in
4 the first paragraph says: In June 2014, in response to
5 several inquiries from state Departments of Transportations,
6 the Federal Highway Administration's Office of Safety issued
7 a memorandum regarding the federal aid eligibility of the
8 ET-Plus w-beam guardrail end terminal manufactured by
9 Trinity Highway Products. This memorandum updates the 2014
10 memorandum to advise you about several recent developments.

11 Now, do -- do either of you question that that
12 paragraph refers to the letter of June 17th, 2014?

13 MR. SHAW: No, sir.

14 MR. CARPINELLO: No.

15 THE COURT: Okay. Now, attached to this two-page
16 memorandum dated October 10th of this year is a copy of a
17 memorandum dated November 17th, 2005. Are both of you
18 satisfied that when FHWA issued the memorandum last Friday,
19 October the 10th of this year, that it was issued with the
20 copy of the November 17th, 2005 memorandum attached to it as
21 a part of it?

22 MR. CARPINELLO: That's our -- that's my belief,
23 but I think either --

24 THE COURT: Is that -- is that what the question
25 is that Mr. Shaw has raised?

1 MR. SHAW: That's my -- that's my concern, Judge.
2 I don't know if they're properly stapled together because
3 the way that I received it was just a -- was just the first
4 page.

5 THE COURT: Okay.

6 MR. SHAW: And not the part that's stapled to
7 that. I just don't know if they are, in essence, one
8 exhibit or maybe two pages was -- some memorandum -- because
9 this has been around for a while --

10 THE COURT: Yes.

11 MR. SHAW: -- here in this particular case. I
12 don't know that, Judge, and that's just kind of more of a
13 technical procedural objection. I wanted to point that out
14 to the Court. I understand it's hard for me to argue
15 timeliness, Judge, when we just got it on Friday, all of us,
16 but I do have just a substantive objection I need to put
17 into the record.

18 THE COURT: I understand that. Before you do, let
19 me ask one question. The memorandum dated November the
20 17th, 2005, a copy of which is stapled to the two-page
21 memorandum issued October the 10th, 2014, that November 17,
22 2005 memorandum, is it a pre-admitted exhibit in this case
23 already or is it not?

24 MR. CARPINELLO: Don't know the answer to that,
25 Judge.

1 MR. SHAW: Judge, I can't answer that question for
2 you, but I can find -- we can find out.

3 MR. CARPINELLO: We -- I think we can determine,
4 Judge. I understand Mr. Shaw's concern -- I think we can
5 determine -- it's our belief that the FHWA issued it with
6 these two memorandum. But Mr. Shaw just said that he got it
7 on Friday. We did not get this on Friday. We got this at
8 11:00 o'clock last night, and I'll tell you exactly how we
9 got it.

10 MR. SHAW: I'll -- I found out about it on Friday.

11 MR. CARPINELLO: We didn't know about it.

12 MR. SHAW: The reason I found out about it is
13 because I read it in a New York Times article referencing
14 it.

15 MR. CARPINELLO: Yeah, that came out -- that came
16 out last night at -- at 11:00 o'clock.

17 MR. SHAW: Okay. Well, that's when we got it.
18 I'm sorry.

19 THE COURT: All right. Gentlemen, one at a time.

20 MR. SHAW: I just want to make real clear, the way
21 we found out about it was a reference in a New York Times
22 article and then we began searching for it, presumably what
23 you did.

24 MR. CARPINELLO: Right.

25 MR. SHAW: When I received what was referenced in

1 the New York Times article, it was only the first couple of
2 pages.

3 THE COURT: Well, given that this wasn't issued
4 until Friday, the Court's not complaining about either of
5 you being dilatory in bringing it to my attention.

6 MR. SHAW: Sure.

7 THE COURT: Now, you have some matters you want to
8 put on the record, Mr. Shaw?

9 MR. SHAW: Just -- just -- just for the record,
10 Judge. Comes the Defendant Trinity and files its objections
11 to the admission of -- pre-admission of Plaintiff's Exhibit
12 1286 on the grounds of 401 and 403. Under the current state
13 of the law as recently pronounced by the Fifth Circuit, the
14 authoritative nature of the FHWA, conversations, as this
15 memorandum reflects about what state DOTs can do concerning
16 their own QPL, makes it irrelevant to the decision of what
17 the FHA -- FHWA has determined concerning the ET-Plus. For
18 that reason, it is not relevant and the chances of confusion
19 outweigh any probative value under Rule 403.

20 And we would offer that to the Court for -- for a
21 ruling, Judge.

22 THE COURT: All right. Let me ask this question,
23 Counsel. What is the earliest that this would, if
24 pre-admitted by the Court, be presented to the jury, to the
25 best of your knowledge?

1 MR. CARPINELLO: The -- we intend to reference it,
2 but not show it in the opening.

3 THE COURT: Well, I have concerns about -- I have
4 concerns about delaying action on this if you're going to
5 reference it in the opening and then for some reason it's
6 kept out, the Court's allowed you to prejudice yourself.

7 MR. CARPINELLO: If I -- if I might, Your Honor.
8 I -- I don't see -- I don't see -- with regard to the
9 memorandum itself, the two-page memorandum, I don't see any
10 legitimate basis to keep it out. It is federal action by --
11 the document itself says it's an update of a memo they
12 intend to rely on.

13 THE COURT: I understand that, and I agree with
14 that.

15 MR. CARPINELLO: Yeah.

16 THE COURT: I -- I'm going to -- notwithstanding
17 any objections by the Defendants, I'm going to pre-admit
18 Page 1 and Page 2, the actual memorandum issued on October
19 the 10th, 2014, which is marked as Plaintiff's Exhibit 1286.
20 That is without the attachment of the memorandum from
21 November the 17th, 2005. I'll carry the issue of whether
22 that memorandum should come before the jury.

23 First of all, to give counsel who both indicated
24 they didn't know, and the Court doesn't know because I asked
25 the question whether this is already among the pre-admitted

1 exhibits, and if it's not, I'll allow the Plaintiff to
2 reurge its admission before the actual publication of the
3 document -- the October 10th, 2014 document to the jury.

4 But so that the Plaintiff will know whether they
5 should or should not make reference to it in their opening
6 statement and given that it clearly states it is an update
7 of the June 17th, 2014 memorandum, although it doesn't date
8 it June 17th, it doesn't refer to it by the specific date,
9 both sides agree and the Court sees no question that the
10 reference in the October 10th memorandum to the earlier June
11 2014 memorandum regarding federal aid eligibility of the
12 ET-Plus w-beam guardrail end terminal manufactured by
13 Trinity, there's no question we're talking about, I think
14 it's Plaintiff's Exhibit 2, which is the --

15 MR. CARPINELLO: Defendants'.

16 MR. SHAW: Defendants'.

17 THE COURT: -- Defendants' Exhibit 2 which is the
18 actual June 17th FHWA memo. I'll pre-admit as Plaintiff's
19 1286 the actual memo from October the 10th, 2014, which is
20 one full page and a small portion at the top of Page 2.
21 I'll carry any issue about whether the November 17th, 2005
22 memorandum that is now attached to that October memorandum
23 is properly admissible and useable before the jury.

24 MR. CARPINELLO: Just for the record, Judge,
25 there's actually two memoranda attached. There's a November

1 17, 2005, and right after that following, there's a November
2 3, 2010, which is eight pages.

3 THE COURT: Oh. You're correct. Then my ruling
4 applies to all the attachments.

5 MR. CARPINELLO: We'll attempt to establish during
6 the morning that the two-page memo was issued by the FHWA
7 with the memos attached. We'll attempt to establish that as
8 we --

9 THE COURT: Well, I -- I will leave the burden on
10 the Plaintiff to reurge this before you would otherwise need
11 to offer it.

12 MR. CARPINELLO: Thank you, Your Honor.

13 THE COURT: But the two pages itself or the full
14 page and the portion of the second page that comprise the
15 memorandum of October the 10th, 2014, notwithstanding the
16 Defendants' objections, which are noted, the Court finds it
17 is relevant. The Court finds that it does have probative
18 value and does not unfairly prejudice the Defendants.

19 Therefore, the Court and -- and to the extent it
20 might conceivably prejudice the Defendants, that is
21 outweighed by the probative value of it.

22 Clearly, Counsel, the June 17th, 2014 letter is
23 the linchpin of the Defendants' case, and since this speaks
24 directly to that, the Court sees no reason it should not be
25 pre-admitted and presented to the jury. So the two-page

1 memorandum of October the 10th, 2014 is pre-admitted as
2 Plaintiff's 1286.

3 I'll withhold a ruling on anything else related to
4 this until it's urged at a later time.

5 MR. SHAW: And, Judge, the -- the Defendants'
6 objections are overruled?

7 THE COURT: As noted, yes.

8 MR. SHAW: Thank you.

9 MR. CARPINELLO: Without wearing out our welcome,
10 Judge, you -- you began the session by mentioning the
11 various motions that were filed over the weekend. I don't
12 know if you want to hear an explanation or justification as
13 to why --

14 THE COURT: I don't. As I said earlier off the
15 record, Counsel, it's time for trial. I asked for any other
16 pre-trial matters Friday afternoon, and both of you said you
17 had none. I've been inundated with last minute motions, I
18 assume primarily for appellate counsel over the weekend.
19 I'm not going to delay this trial to take these up. It
20 would take a considerable amount of time. I'll carry them,
21 but we're going to proceed with jury selection and trial.

22 MR. CARPINELLO: Thank you, Your Honor.

23 MR. SHAW: Thank you.

24 THE COURT: All right. Thank you.

25 (In-chambers hearing concluded.)

1 (Jury in.)

2 COURT SECURITY OFFICER: All rise.

3 THE COURT: Thank you. Be seated, please.

4 Good morning, ladies and gentlemen. Thank you for
5 being here.

6 My name is Rodney Gilstrap, and I am the resident
7 United States District Judge in the Eastern District of
8 Texas for the Marshall Division.

9 I've lived in Marshall since 1981. I practiced
10 law here for about 30 years. I've been on the bench here in
11 the U.S. District Court since 2011. I was born in Florida,
12 but as they say, I got to Texas as soon as I could. And I
13 attended both college and law school at Baylor University.
14 I'm married with two grown children. My wife owns and
15 operates a retail floral business here in Marshall.

16 Now, I tell you all these things, because in a few
17 minutes, I'm going to ask each of you to give me some of the
18 same type information about yourselves, and I think you're
19 entitled to know as much about me as I'm about to learn
20 about each of you-all.

21 We are about to engage in the selection of a jury
22 in a civil case. However, before we go any further, I want
23 to briefly review with you how we came to have our modern
24 jury trial system. If you look around you, you'll see that
25 we have a diverse mixture of the East Texas community here

1 today. That's how it should be; that's how the system is
2 designed; that's intentional.

3 If you look to the Old Testament, the first five
4 books commonly called the Pentateuch, you'll call that the
5 Jewish nation impaneled juries to decide issues of property
6 value and property ownership. The Greeks began using the
7 jury system about 1500 BC. The Romans adopted the jury
8 system from the Greeks. The Romans then brought jury trials
9 to what is now England in the fourth century AD.

10 By the 12th century AD, jury trials had been part
11 of the judicial system in England for over 800 years. And
12 in the 12th century, a tyrannical British king known as King
13 John attempted to do away with the right to trial by jury,
14 and that resulted in a confrontation with the king and his
15 nobles in a place called Runnymede. And out of that
16 confrontation on the plain of Runnymede came a document
17 called the Magna Carta, and that was signed by the king
18 guaranteeing the right to jury trials to the English people.

19 That document is so important that the precise
20 language from it regarding the guarantee to a right to a
21 trial by jury has been adopted verbatim in 28 state
22 constitutions of the various 50 United States of America.

23 As a consequence, the concept of trial by jury was
24 ingrained in those British colonists who settled what became
25 the United States.

1 But then in the late 1700s, another British king
2 with tyrannical tendencies, King George III, attempted again
3 to deny citizens the right to a trial by jury. A gentleman
4 known as Thomas Jefferson wrote a document complaining of
5 the various improprieties visited upon the American
6 colonists, the British colonists in America by King George
7 III. That document is called the Declaration of
8 Independence. And in the Declaration of Independence, one
9 of the principal complaints against the British Crown,
10 justifying the need to separate our country from England,
11 was the attempt to deny the people the right to a trial by
12 jury.

13 As a part of establishing the U.S. as an
14 independent nation, our United States Constitution adopted,
15 in 1787, and our Bill of Rights, which followed it in 1791,
16 were adopted. Through this long and hallowed process, we
17 came today to where we are.

18 Now, in Britain today and many other countries,
19 although by no means all the countries or even a majority of
20 the countries on this planet, there is a right to trial by
21 jury in criminal cases. But, ladies and gentlemen, I want
22 you to understand that the United States of America is the
23 only country in the world that guarantees to each of its
24 citizens the right to a trial by jury in a civil case, a
25 case as -- as -- such as the one we have before us today.

1 And that right to a trial by jury in a civil case is
2 explicit -- explicitly spelled out in the Seventh Amendment
3 to our Constitution, which is a part of our Bill of Rights.

4 So by each of you being here today, you are doing
5 your part as ordinary American citizens to help preserve,
6 protect, and defend our Constitution, our Bill of Rights,
7 and the right to a trial by jury.

8 Remember, ladies and gentlemen, as we go forward
9 today, no one -- no one was summoned for jury today in
10 Castro's Cuba or the People's Republic of China.

11 I always tell jury panel members, and I firmly
12 believe it, that jury service is the second highest form of
13 public service that any American citizen can render to his
14 or her country. Of course, the highest form of public
15 service, in my opinion, are those young men and women who
16 serve in our armed forces and who put their lives on the
17 line to guarantee our freedoms each and every day.

18 I don't know if it will happen today -- it
19 sometimes does; it is rare -- but through this process of
20 jury selection, if any of you on the panel are asked a
21 question that you believe is so personal and so private that
22 you are not comfortable answering it in front of the rest of
23 the members of the panel, then you have a right to let me
24 know of that circumstance, and I'll make arrangements for
25 you to answer that outside the presence of the rest of the

1 members of the panel. However, that is a rare occurrence,
2 but I want to make you aware of that.

3 The most important thing for each of you to keep
4 in mind as we go forward with jury selection today is that
5 you should give full, complete, and truthful answers to the
6 questions that are asked. Remember, ladies and gentlemen,
7 there are no wrong answers as long as your answers are full,
8 complete, and truthful.

9 The trial in this case, the beginning of the
10 actual evidence to be presented will start after lunch
11 today. And those of you that are selected from this panel
12 to comprise our jury in this case will need to be available
13 to begin the case after lunch today. I expect -- this is my
14 best estimate, but I expect that the evidence in this case
15 will run from today through Monday of next week, which would
16 be the 20th of October. So those of you that are selected
17 to serve on this jury from this panel will need to be
18 available not only through the remainder of today but
19 through the remainder of this week and through Monday of
20 next week.

21 Now, if there are -- knowing that, if there are
22 any of you who either have a surgery procedure scheduled for
23 yourself or an immediate family member, you have
24 non-refundable airline tickets or prepaid vacation tickets
25 that are non-refundable to take you somewhere away from

1 here, if there are other reasons that would make it
2 extremely difficult for you to serve on this jury, if you're
3 selected, then I need to know about that now.

4 If any of you fall in that category, would you
5 raise your hands and let me make a note of it.

6 That's Mr. Taylor, No. 5; Mr. Loyd, No. 9;
7 Mr. Ball, No. 10, Ms. McPherson, No. 13; Ms. Vincent, No.
8 15. And I'm trying to look at numbers. That's 20. Okay.
9 Is it Benge?

10 JUROR BENGE: Benge (pronouncing).

11 THE COURT: Benge (pronouncing). Okay. Thank
12 you. 20.

13 I see 38 in the very back. And another gentlemen,
14 you've got your hand up with a piece of paper. What's your
15 number?

16 THE COURT: 35. Thank you, sir.

17 Did I miss anybody? Okay. Thank you.

18 All right. At this time, I'm going to call for
19 announcements in the case of United States America ex rel.
20 Joshua Harman versus Trinity Industries and Trinity Highway
21 Products, LLC. This is Case No. 2:12-CV-0089.

22 And, Counsel, as you give your announcements, if
23 you'd identify everyone at your counsel table, including
24 your co-counsel and any corporate representatives, I'd
25 appreciate it.

1 What says the Plaintiff?

2 MR. BAXTER: Good morning, Your Honor. Sam Baxter
3 for the Plaintiff. We're ready, Your Honor.

4 With me at counsel table, I have T. John Ward,
5 Karen Dyer, George Carpinello, Jennifer Truelove. And right
6 at the end is Mr. Josh Harman, the Plaintiff in this case,
7 Your Honor.

8 And just so the jury will know, this gentleman
9 (indicating) is Mr. Diaz. He's going to be running some
10 graphics for us.

11 THE COURT: You're ready to proceed?

12 MR. BAXTER: We are ready, Your Honor.

13 THE COURT: What says the Defendants?

14 MR. MANN: Your Honor, good morning. Mark Mann
15 for Trinity and Trinity Highway Products. We're ready
16 subject to the motions pending before the Court. And if I
17 could introduce to the jury, Your Honor, Ethan Shaw, Russell
18 Brown, Mike Miller, Mr. Hernandez who will be our IT
19 gentleman, Mr. King, and Sarah Teachout. And, Your Honor,
20 we have with us for Trinity Highway Products, the president,
21 Mr. Greg Mitchell.

22 THE COURT: You're ready to proceed?

23 MR. MANN: Subject to the motions, Your Honor.

24 THE COURT: All right. Now, ladies and gentlemen,
25 you probably noticed that when I called for announcements in

1 this case, I called for the United States of America ex rel.
2 Joshua Harman versus Trinity Industries and Trinity Highway
3 Products. That's because this is a federal False Claims Act
4 case.

5 The federal False Claims Act prohibits the
6 submission of false or fraudulent claims for payment to the
7 United States Government. To enforce this prohibition, the
8 False Claims Act permits a private person called a relator
9 to bring and prosecute actions in the name of the United
10 States Government. The private relator acts as the
11 Plaintiff for purposes of pursuing the lawsuit.

12 The False Claims Act also allows such a Plaintiff
13 to collect a portion, somewhere between 25 and 30 percent of
14 any recovery, awarded as a part of the jury's award. In
15 this case, the relator, or Plaintiff, is Joshua Harman who
16 was introduced to you.

17 For sake of consistency, ladies and gentlemen, and
18 to avoid confusion, the lawyers and I will refer to Mr.
19 Harman as the Plaintiff, rather than the relator. It's a
20 little simpler to say Plaintiff rather than relator. It's
21 less likely for us to get confused. And even though he
22 might properly be called in a legal sense the relator, I'm
23 directing that he be referred to in this trial as either the
24 Plaintiff or Mr. Joshua Harman.

25 The Defendants in this case are Trinity

1 Industries, Inc., and its subsidiary, Trinity Highway
2 Products, LLC, who I will refer to collectively as Trinity
3 or as the Defendants.

4 The Defendants are in the business of among other
5 things manufacturing various highway safety products and
6 construction products for use across the United States on
7 its roadways and highways. This case relates to the
8 Defendants' sale of a guardrail end treatment, sometimes
9 referred to as a guardrail end terminal called the ET-Plus.

10 Plaintiff alleges that the Defendants violated the
11 False Claims Act by fraudulently enticing the United States
12 Government to pay for the ET-Plus end terminal systems that
13 were materially different in dimension and geometry from the
14 end terminal system that was crash-tested in 2005 and
15 accepted for use by the Federal Highway Administration.

16 In addition, Plaintiff alleges that Defendants
17 falsely certified to various states that the ET-Plus
18 terminal heads for which the states sought federal
19 reimbursement were the same end terminals that were
20 crash-tested in 2005 and accepted for use and approved by
21 the Federal Highway Administration.

22 You will often hear the Federal Highway
23 Administration referred to in this trial as the FHWA. The
24 FHWA is the Federal Highway Administration. It's a part of
25 the United States Department of Transportation, an agency of

1 the United States Government.

2 Defendants deny the Plaintiff's allegations and
3 state that it stands by the continuous acceptance of the
4 ET-Plus product. Defendants maintain that the FHWA, the
5 Federal Highway Administration, with full knowledge of the
6 Plaintiff's allegations, have confirmed multiple times that
7 the ET-Plus has been continuously accepted for federal aid
8 reimbursement from September the 2nd, 2005 to the present.

9 Defendants assert that they never knowingly made
10 any false representations about the ET-Plus' acceptance for
11 federal reimbursement. Defendants also assert that the
12 government has suffered no harm or damage, because the
13 government has always received and continues to receive full
14 value for what it pays for.

15 Now, what you've just heard is a very informal way
16 of describing in layman's language this case.

17 The -- the lawyers on both sides are about to
18 question the panel and each of you to gather information in
19 order to exercise their peremptory challenges and complete
20 the process of selecting the jurors who will try this case
21 as our jury.

22 Again, ladies and gentlemen, there are no wrong
23 answers as long as your answers to the questions are full,
24 complete, and truthful.

25 The lawyers and their clients are entitled to the

1 information to be gathered through these questions. The
2 lawyers are not trying to pry unduly into your personal or
3 private affairs. They're here to gather information for the
4 purpose of selecting a fair and an impartial jury.

5 I don't think that they'll ask you any question
6 that's improper. If I (sic) do, I will certainly tell them
7 so. They're experienced lawyers. They know the rules of
8 this Court, and I'm confident they'll stay within those
9 rules.

10 Again, I just want to emphasize how important it
11 is that you give full and complete answers. And if you feel
12 any serious and compelling hesitancy about answering the
13 question in front of the whole panel, again, it's not often
14 used, but you have the right to bring that to my attention,
15 and I will make arrangements for you to answer it outside of
16 the panel's presence.

17 One thing I do want to call your attention to,
18 because I suspect that some of the lawyers might ask you
19 questions about it, is the burden of proof in this case.

20 In this case, the jury impaneled will be called
21 upon to apply the burden of proof known as a preponderance
22 of the evidence. I'll say that again: A preponderance of
23 the evidence. I need to instruct you that when a burden --
24 when a party, rather, has the burden on any claim or
25 affirmative defense by a preponderance of the evidence, it

1 means that the jury must be persuaded by the credible or
2 believable evidence that that claim or affirmative defense
3 is more probably true than not true. I'll say that again:
4 More probably true than not true.

5 Sometimes we talk about that as being the greater
6 weight and degree of credible testimony.

7 Let me give you an example on preponderance of the
8 evidence. I think all of you on the jury panel can see in
9 front of me and in front of our court reporter the statute
10 of the Lady of Justice. You'll notice in her right hand,
11 she holds the sword of justice, which is lowered. In her
12 left hand, she holds the scales of justice, which are
13 raised, and those scales are balanced and exactly equal.

14 At the close of the evidence in this case, the
15 Court's going to submit questions to the jury that they must
16 answer by applying this burden of proof of a preponderance
17 of the evidence. And in applying that burden and placing
18 all of the evidence that the jury hears during the trial on
19 those scales of justice, if those scales then tip, even if
20 that tipping is ever so slightly in one direction or the
21 other, then the direction in which they tip is the greater
22 weight and degree of credible testimony.

23 That is the preponderance of the evidence, and
24 that indicates what the answer to the questions should be.

25 Now, I want you to all understand that at no time

1 in this trial will there ever be a burden of proof applied
2 to anything regarding beyond a reasonable doubt. Many of
3 you may have heard of beyond a reasonable doubt in the media
4 or on television or in the movies. That is the burden of
5 proof applied in a criminal case. It has absolutely no
6 application in a civil case like this.

7 The burden of proof to be applied by the jury to
8 the evidence that's heard in this case is a preponderance of
9 the evidence. Again, I give you these instructions because
10 it's possible that some of the lawyers will ask you about
11 your ability to fairly apply that burden of proof to the
12 evidence that you hear in this case, if you're selected to
13 serve as a juror.

14 Now, before the lawyers address you, I'm going to
15 let each of you stand and give your information to the
16 questions that I gave you my information about when we
17 started this process. I think each of you have a copy of
18 the questions, and they're also shown on the screens in
19 front of you.

20 So we'll start with Panel Member No. 1. And the
21 way we're going to do this, ladies and gentlemen, is we have
22 a handheld microphone here in the courtroom. I'm going to
23 have our court security officer, Mr. McAteer, bring that
24 handheld microphone to you, and if you will stand and use
25 the handheld microphone to answer these questions. And wait

1 until you have the microphone when it's your turn and do the
2 same thing, stand and use the microphone. That will make
3 sure that everybody, particularly the lawyers and their
4 clients, hear you.

5 Also, as we go through the rest of the process,
6 when the lawyers ask you questions, if you're going to
7 answer one of their questions, wait until the court security
8 officer brings you that handheld microphone. Again, stand,
9 if you will, and use that microphone to answer any questions
10 that you're responding to.

11 So we'll now start with Panel Member No. 1.
12 Ms. Harvey, if you'll give us the answers to those
13 questions.

14 JUROR HARVEY: Your Honor, my name is Rita Harvey,
15 and I live in Pittsburg, Texas. I have four children, three
16 of whom are living. I worked for 22 years for Shell Oil
17 Company at their Deer Park Petro Chemical complex, and at
18 the time that I retired, I was working in human resources.
19 I worked there, as I said, for 22 years. My educational
20 background is high school and some college. My spouse's
21 name is James C. Harvey. He also worked and retired from
22 Shell, and he served there for 26 years. I have no prior
23 jury service. I've been called a number of times, but not
24 selected.

25 THE COURT: Thank you, ma'am.

1 Let's go to Panel Member No. 2, Ms. Wagley.

2 JUROR WAGLEY: Your Honor, my name is Bonnie
3 Wagley, and I live in East Mountain, Texas, a little town
4 just outside of Longview. I also have four children, three
5 of whom are living. I have always been a homemaker for the
6 past 41 years. I feel like I will never retire from that --
7 from that job, and I love it. I had -- I finished high
8 school, but I feel like I should have an honorary degree
9 from Brigham Young University as many classes as I attended
10 with my kids when they were there. My spouse's name is
11 Charles, and he is a production assistant at Texas Eastman
12 and has worked there for 40 years. And I did serve on a
13 civil jury at least two decades ago.

14 THE COURT: All right. Thank you.

15 Panel Member No. 3, Ms. Maris.

16 JUROR MARIS: My name is Mary Maris, and I live in
17 Lone Star, Texas. I have three children. I work at the
18 First National Bank of Hughes Springs, the Daingerfield
19 branch, where I am the branch manager. And I've been there
20 20 years. I have some college. My husband's name is Steve,
21 and he's a clerk at Cost Saver. And he's been there, like,
22 three months. And I do not have any prior service.

23 THE COURT: All right. Mr. Kirkland.

24 JUROR KIRKLAND: My name is Jack Kirkland. I have
25 three children. I'm retired. I'm retired from General

1 Cable here in Marshall. I live in Marshall. And I worked
2 as an electrical engineer at General Cable for about 18
3 years. I have a Bachelor of Science degree in electrical
4 engineering. My spouse's name is Linda. Linda worked for
5 BancorpSouth here in Marshall. She's retired from there.
6 She was in customer service. And she worked there about 15
7 years. I was on one criminal jury a number years ago.

8 THE COURT: Thank you, sir.

9 Mr. Taylor.

10 JUROR TAYLOR: Your Honor, my name -- my name is
11 Mike Taylor. I live in Longview, Texas. I have three
12 children. I'm self-employed. I do life insurance and
13 annuity sales. I've been doing that work for 15 years. I
14 have a high -- high school associate and Bachelor's in
15 Business Administration. My wife's name is Latrell. She
16 works for the post office in Longview. She's been doing
17 that for about 15 years. And I've had prior jury service in
18 a criminal case about 10 years ago.

19 THE COURT: Thank you, sir.

20 No. 6, Ms. Carwile?

21 JUROR CARWILE: Carwile.

22 THE COURT: Thank you.

23 JUROR CARWILE: My name is Kristy Carwile. I live
24 in Hallsville, Texas. I do have one child. He's five years
25 old. I work for the Made-Rite Company, Dr Pepper. I'm a

1 sales rep. I've been there 18 years. I have a high school
2 diploma and two years of college. Spouse -- I have a
3 spouse, Christine Carwile. She's an RN for Heartsway
4 Hospice. She's been there 16 years. And I've never been
5 picked for jury duty.

6 THE COURT: All right. Mr. Ferrell, No. 7.

7 JUROR FERRELL: My name is Austin Ferrell. I live
8 in Big Sandy, Texas. I have no children. I currently work
9 for the Gilmer Housing Authority, and I've been there for
10 around seven years. I'm a part of the maintenance staff
11 there. I have -- I'm a high school graduate and currently
12 enrolled in college working toward a Bachelor's degree in
13 mathematics. I'm single. I'm not married. And I have no
14 prior jury service.

15 THE COURT: Thank you, sir.

16 We'll start on the second row of the jury box with
17 Panel Member No. 8, Ms. Hagerty.

18 JUROR HAGERTY: My name is Monica Hagerty. I live
19 in Hallsville, Texas. I have three children. I work at
20 Guaranty Bank & Trust. I'm a relationship banker there.
21 I've been there for about two months. I have some college,
22 and I'm currently attending. My husband's name is Daniel
23 Hagerty. He works at -- for Westlake Chemical. He's been
24 there for about a year and a half. And I have not ever been
25 picked for -- to be a juror.

1 THE COURT: Thank you.

2 Mr. Loyd.

3 JUROR LOYD: Gary Loyd. Two children. I work for
4 Eastex Telephone as a phone man, Internet. I've been there
5 for 19 years. High school with some college. My spouse's
6 name is Susan Loyd. She works for Louisiana State as an RN.
7 She's been there six years. And I have not served as a
8 juror before.

9 THE COURT: Thank you, sir.

10 Mr. Ball.

11 JUROR BALL: My name is Phillip Ball. I live in
12 rural Marion County, with a Cass County address. I have
13 three children. I wrote software for implantable medical
14 devices. I'm currently retired. I have trade school and
15 some college. My spouse's name is Margaret. She's a
16 retired RN, worked in hospital and did home health in the
17 greater Dallas area. And I have served on civil and
18 criminal juries.

19 THE COURT: Thank you.

20 Mr. Creel.

21 JUROR CREEL: Yes. My name is Phillip Creel. I
22 live in Gladewater. And I have two children. And I've
23 worked with Samson Resources for eight and a half years as a
24 gas compressor mechanic. I graduated high school, and I
25 have two years of community college. My wife's name is

1 Carol, and she owns an antique store in Gladewater. Been
2 there 11 years. And I have served on one criminal jury in
3 Bullard.

4 THE COURT: Thank you.

5 No. 12, Mr. Behr.

6 JUROR BEHR: My name is Marvin Behr. I live in
7 Big Sandy, Texas. I have four children. I work at the
8 International Alert Academy, and I work there as a director
9 of training. I've been there for 15 years. I also have an
10 associate degree in printing and publishing. My wife's name
11 is Carla. She's a homemaker, and I hope she never retires
12 from that. She's done that all her life. And I have not
13 served on a jury.

14 THE COURT: Thank you.

15 Ms. McPherson.

16 JUROR MCPHERSON: My name is Pauli McPherson. I
17 have one daughter. I'm retired from Eastman Chemical
18 Company after 30 years. Had some college. I'm divorced.
19 And I've served -- served on a civil -- civil jury twice.

20 THE COURT: Thank you.

21 No. 14, Ms. Jones.

22 JUROR JONES: My name is Deborah Jones, and my
23 mailing address is Marshall but I pay school taxes to
24 Hallsville, so I claim Hallsville. I have two children. I
25 am currently retired. Before that, I retired from the

1 Birdwell Independent School District, and I was an assistant
2 to the subject superintendent for personnel for 10 years. I
3 have a BBA from the University of North Texas. I'm widowed.
4 And I have served on a civil jury and also on a grand jury.

5 THE COURT: Thank you.

6 Now, we'll go around to No. 15, Ms. Vincent.

7 JUROR VINCENT: My name is Tammy Vincent. I live
8 here in Marshall, Texas. I have two children. I work for
9 Harrison County Sheriff's Department. I've been there for
10 about a year now. My husband works in the oilfield district
11 or in West Texas. I have some college. My husband's name
12 is Keith. And he's been in the oilfield business for about
13 the past 10 years. And I have served on a criminal case.

14 THE COURT: Thank you.

15 No. 16, Ms. Rutland.

16 JUROR RUTLAND: My name is Terri Rutland. I live
17 in Atlanta, Texas. I own a children's store. I've had it
18 for about 18 years. I have two grown children. And my
19 husband's name is Rick Rutland, and he's worked for 32 years
20 at International Paper Company. And I've never served on a
21 jury.

22 THE COURT: Okay. Thank you.

23 Mr. Horton, No. 17.

24 JUROR HORTON: My name is Phillip Horton. I live
25 in Queen City, Texas. I have two middle-aged daughters. I

1 teach school at Linden-Kildare High School. I have taught
2 there for 18 years -- have taught school for the better part
3 of 45 years. I have a Master's degree in educational
4 administration. My wife's name is Susan. She is retired.
5 She was a consiegere person for real estate agents. She
6 worked there for eight years. I have served previously on a
7 grand jury.

8 THE COURT: Thank you.

9 Mr. Young, No. 18.

10 JUROR YOUNG: My name is Michael Young. I live in
11 Longview, Texas. I have three wonderful kids. I work for
12 Key Energy Services in the Coil Tubing Division. I'm the
13 technical engineer in charge of the computerized data
14 acquisition systems. I have been there for approximately --
15 almost three years. I have an Associate's degree in applied
16 science in management and information systems. My wife,
17 Jamie Young, she works for Good Shepherd Medical Center.
18 She is a registered sleep tech, and she has been there for
19 approximately 13 years. And I have not served on any jury.

20 THE COURT: Thank you. We'll go around to
21 Mr. Toon, No. 19. He'll be next.

22 JUROR TOON: My name is Ken Toon. I live here in
23 Marshall. I've got three children. I'm retired from the
24 Harrison County Sheriff's Department, working part-time
25 security now for Tricorp. I worked there for 23 years. I

1 have some college. My wife's name is Sheree. She works at
2 Unitex. She's still working. She's been there
3 approximately 15 years. I have no prior jury service.

4 THE COURT: All right. No. 20.

5 JUROR BENGGE: My name is Brenda Bengge. I live in
6 Union Grove. I have one daughter. I've been at CVS
7 Pharmacy as a pharmacy technician for seven years, and
8 before that at an independent pharmacy for 37 years. I have
9 a high school education. My husband is Ron Bengge. He's
10 been in -- he's been a police officer for 40 years. He's
11 currently the Assistant Chief for Gilmer Police Department.
12 And I have -- my prior is civil.

13 THE COURT: All right. No. 21.

14 JUROR SCHRECENGOST: My name is Shawn
15 Schrecengost. I live in Gilmer, Texas. I have one grown
16 daughter. I've been in banking for the past 25 years. I
17 currently work for Citizen's National Bank in Longview,
18 Senior Vice -- Senior Vice President and loan officer. I've
19 been there for eight years. High school education. My wife
20 is Jean Schrecengost. She works for Axion, Inc., in
21 Longview as outside sales, and she's worked there for about
22 10 years. And I've had one civil case.

23 THE COURT: Thank you.

24 Ms. Beasley, No. 22.

25 JUROR BEASLEY: Good morning. I'm Cindy Beasley.

1 I live in Gilmer, Texas. I have four children, three
2 natural, one adopted. I work at a little company in White
3 Oak, Texas, called Celotex Industries where I'm the
4 administrative manager and also the valve and automation
5 specialist. I've been there about 11 years. I have an IT
6 degree in computer networking. My spouse's name is William
7 J. Beasley, and he works as a safety manager at Joy Global.
8 He's been there about 35 years. And I have no prior jury
9 experience.

10 THE COURT: Thank you.

11 No. 23, Mr. Kernan.

12 JUROR KERNAN: My name is Philip Kernan. I live
13 in Pittsburg, Texas. I've got three grown children. I'm
14 currently working at the -- as security officer at the
15 Luminant Monticello Plant in Mt. Pleasant. I've been there
16 about four years. I have some college. My spouse's name is
17 Gala. She works at Pittsburg High -- Junior High and been
18 there about 12 years as a teacher's aide. And I have no
19 jury service.

20 THE COURT: Thank you, sir. And if you'll pass
21 that mic back, we'll go to the next row, start with No. 24,
22 Mr. Morgan.

23 JUROR MORGAN: My name is David Morgan. Retired
24 from Exxon Mobil Pipeline after 35 years as a technician. I
25 have two children with six grandchildren. Some college. My

1 spouse's name is Gayle. She is a consultant with Montessori
2 education, still does some independent consulting. And
3 she's been there forever and probably won't ever retire. I
4 have served on civil and criminal cases.

5 THE COURT: Thank you.

6 No. 25, Mr. Adams.

7 JUROR ADAMS: My name is Johnny Adams from
8 Pittsburg, Texas. Don't have any children. I work for
9 Walmart Transportation, been there 13 years. I have high
10 school. Spouse's name is Diane. She -- we have had our own
11 trucking business for in excess of 20 years, and she helped
12 me run it. She's currently retired. And have zero jury
13 duty.

14 THE COURT: Thank you, sir.

15 No. 26, Ms. Holder.

16 JUROR HOLDER: My name is Krysten Holder, and I'm
17 from Pittsburg, Texas. I have no children and no spouse.
18 I'm currently employed at Guaranty Bond Bank in Mt. Pleasant
19 as the IT administrative assistant. Before that, I'm a U.S.
20 veteran. My educational background is I have a Bachelor's
21 in HR and I'm currently going back to school for a
22 Bachelor's in interdisciplinary studies. And I have no
23 prior jury service.

24 THE COURT: Thank you, ma'am.

25 No. 27, Mr. Ward.

1 JUROR WARD: My name is Michael Ward. I live here
2 in Marshall, Texas. I have two children, one that is
3 deceased. I work for Ledwell & Son Enterprises out of
4 Texarkana. I've been there 14 years. I sell
5 18-wheeler-type trucks. I attended college in Arkansas. My
6 wife's name is Terry. She does ultrasound -- for about 25
7 years. And I was on a criminal case.

8 THE COURT: Thank you, sir.

9 No. 28, Ms. Rogers.

10 JUROR ROGERS: My name is Cassandra Rogers. I
11 have no children. I'm employed at the First National Bank
12 of Hughes Springs, the Atlanta/Queen City branch. I work as
13 a bank teller, and I've been there for 22 years. I have
14 some college. My husband is James Rogers. He's a
15 self-employed logger. He's also semi-retired. Everybody
16 keeps calling him, but he's semi-retired. And I've served
17 on a grand jury.

18 THE COURT: Thank you, ma'am.

19 Let's pass that microphone back, and we'll go to
20 the next row, No. 29, Mr. Lewis.

21 JUROR LEWIS: My name is Tim Lewis. I have two
22 boys. I work for Air Cybernetics. I'm an A/C technician.
23 No college. My wife's name is Carrie. She works for
24 Longview Cancer Center as a nurse manager. She's been there
25 13 years. And no jury service.

1 THE COURT: Thank you, sir.

2 No. 30, Mr. Berry.

3 JUROR BERRY: My name is Garry Berry. I live in
4 Gilmer. Two children. I work for Upshur Rural Electric as
5 safety technician for 32 years. And I have two years of
6 college. My wife is Virginia. She works for Sabine Valley
7 MHMR. She was the secretary. And I believe she worked
8 there 25 years. And I've been on one criminal case.

9 THE COURT: Thank you, sir.

10 No. 31, Mr. Johnson.

11 JUROR JOHNSON: Yeah. Good morning, sir. My
12 name is Kevin Johnson. I live in Daingerfield, Texas. I've
13 got four kids, two boys, two girls. I previously worked for
14 Good Shepherd Medical Center as a street medic for 22 years,
15 and I'm currently working with US Steel as a fireman
16 paramedic. I've been there eight years. I'm currently
17 pursuing a Bachelor's degree in college. My wife's name is
18 Sheila. And she worked with Dr. McKellar out of Mt.
19 Pleasant for over 18 years until his passing. She's now
20 retired. I have served on a civil case in Morris County.

21 THE COURT: Thank you.

22 No. 32, Ms. Turner.

23 JUROR TURNER: I'm Angela Turner. I live in
24 Pittsburg. I have four children. And I am a teacher's aide
25 at New Hope Christian Academy in Ore City. I have some

1 college. My husband's name is John. He is retired US Navy
2 in 2006, and he has now been four years with Mt. Pleasant
3 Ear, Nose & Throat Clinic with Dr. Reed. And I have had no
4 prior jury service.

5 THE COURT: Thank you.

6 Mr. Wilson, No. 33.

7 JUROR WILSON: My name is Joe Wilson. I live in
8 Harmony, Texas. I have two grown boys. I'm retired from
9 Longview Police Department, and I worked there for 26 years.
10 I have some college. My wife's name is Victoria. She's
11 retired from -- as a dispatcher from Longview Police
12 Department, and she worked there probably 15 years. And I
13 did serve on a civil case several years ago.

14 THE COURT: Thank you, sir.

15 And we'll pass that back to No. 34, Ms. Parker.

16 JUROR PARKER: Hello. My name is Anna Parker. I
17 live in Atlanta, Texas. I have two adult children. I am
18 retired from Atlanta ISD. I also -- I still work. I am a
19 consultant and also the administrator of the First United
20 Methodist Church Day School. I have 40 years of experience
21 in education. I have a master's degree.

22 My husband is Olan D. Parker. He is retired from
23 Brookshire Grocery Company, and he was a meat market
24 manager. He worked over 30 years. And I have jury
25 experience as a -- in a criminal case. Thank you.

1 THE COURT: All right. No. 35, Mr. Small.

2 JUROR SMALL: My name is James Small. I live in
3 Longview, Texas. I have three kids. I worked -- the last
4 time I had worked, for Hallsville Independent School
5 District, and I am retired now. I worked for them 14 years.
6 I have a high school education and a little bit of college.
7 My wife's name is Brenda Small. She worked 31 and a half
8 years for Hallsville High School, and she is retired. Prior
9 jury service, I worked on -- I was on a civil case.

10 THE COURT: Thank you.

11 No. 36, Mr. McBride.

12 JUROR MCBRIDE: Hello. My name is Dan McBride. I
13 live in Gilmer, Texas. I work for J-W Power as a
14 technician, an instrumentation tubing technician in the
15 natural gas industry. I've worked there two and a half
16 years. My prior -- my education is a high school diploma.
17 My wife's name is Joann, a housewife of 38 years. And I
18 have served on no -- no prior jury.

19 THE COURT: Thank you.

20 No. 37, Ms. Jackson.

21 JUROR JACKSON: My name is Shannon Jackson. I
22 live in Linden, Texas. I'm a homemaker. I have some
23 college. My husband's name is Brad. He's an electric --
24 electrician, and he's been out of work for about a year.
25 And I've had no prior jury.

1 THE COURT: All right. 38, Mr. Adams.

2 JUROR KENNETH ADAMS: My name is Kenneth Adams. I
3 live in -- here in Marshall. I have six children. I have
4 retired from the City of Marshall after 29 years. I'm
5 currently driving a school bus for Marshall Independent
6 School District for 28 years. I have some college. My
7 wife's name is Mary. She's also a school bus driver for
8 MISD. She's been there 30 years. And I have had a previous
9 civil case.

10 THE COURT: Thank you, sir.

11 And we'll go to the next row, No. 39, Mr. Warren.

12 JUROR WARREN: Daniel Warren, Big Sandy, Texas. I
13 have four children. My wife's name is Kendall. She and I
14 own and operate TimberCreek Cabinets for the last 16 years.

15 THE COURT: Could you hold that mic a little
16 closer, sir?

17 JUROR WARREN: Okay.

18 THE COURT: Thank you.

19 JUROR WARREN: Some college and never been on a
20 jury.

21 THE COURT: All right. No. 41 -- no, excuse me --
22 No. 40, Ms. Ritter.

23 JUROR RITTER: My name is Patricia Ritter. I'm
24 from Ore City, Texas. I have three children. I work at
25 Elliott Electric Supply in Longview. Been there for about

1 five years. My husband's name is Billy Ritter. He's a
2 salesperson at Holt Caterpillar in Longview. He has been
3 there for just a little over a year now. And I do not have
4 any jury service.

5 THE COURT: All right. Now, No. 41, Mr. Clynch.

6 JUROR CLYNCH: Brandon Clynch. I'm from here in
7 Marshall. I have two children. I have a land surveying
8 business. I've had it for about 12 years. I have a college
9 degree. My wife's name is Paula. She's a stay-at-home mom
10 and bookkeeper for my business. I have a prior civil case.

11 THE COURT: All right. 42, Mr. Graham.

12 JUROR GRAHAM: My name is Monty Graham. I live
13 outside of Big Sandy, Texas. I had one daughter; she's
14 deceased. Two grandkids. Place of employment has been
15 numerous places. Most recent, I own my own art gallery for
16 about 15 years. And prior to that, service merchandise,
17 Hughes Aircraft, Advertising Concepts, Prospective
18 Communications, 40-plus years in the advertising and
19 education area. I now raise quarter horses and do my own
20 fine art. My educational background, college graduate. I'm
21 not married, and I've not had any jury service.

22 THE COURT: Thank you, sir.

23 No. 43, Mr. Fry.

24 JUROR FRY: My name is Robert Fry. I live in
25 Marshall. No children. I work for Marshall Independent

1 School District. I've been there 11 years. High school
2 education. No prior jury service.

3 THE COURT: All right, sir. If you'll pass that
4 mic over.

5 And next is No. 44, Mr. Hart.

6 JUROR HART: My name is Justin Hart. I live in
7 Longview, Hallsville School District. I have four children.
8 I've worked the last four years at CenterPoint Energy as
9 a -- started as a service tech; now I'm a corrosion
10 technician. I'm registered at Kilgore College working
11 towards a corrosion degree.

12 My wife is Jocelyn Hart, and she's -- she -- she
13 works part-time at a ribbon shop, and other times, she's a
14 mother at home. And I have no prior experience as a juror.

15 THE COURT: Thank you, sir.

16 Thank you, ladies and gentlemen.

17 You'll notice we've got some fans going here in
18 the courtroom. We had a little electrical issue over the
19 weekend, and the air conditioning got tripped and it didn't
20 come back on until this morning. So we have these fans.

21 I'm going to ask our court security officers and
22 my law clerks to help turn those off right now. The air is
23 back on. I think we'll be cool enough. And they do make a
24 lot of noise -- so that we can hear everybody. If it gets
25 too hot, we'll turn them back on, but it does make a

1 difference on the noise.

2 Okay. I need to say a couple more things to the
3 panel before I turn the questioning over to the lawyers.
4 The jurors that are actually selected to serve in this case
5 will serve in the role of the judges of the facts, and the
6 jurors selected will make the sole determination about what
7 the facts are in this case.

8 Now, my job as the judge is to rule on questions
9 of law, evidence, and procedure and to maintain the flow of
10 the trial and the decorum of the courtroom. Also, I want to
11 say a couple things to the panel about our American judicial
12 system that hopefully will put things in a proper
13 perspective for you and especially for those that are
14 selected to serve on this jury.

15 In every jury trial such as this, there are always
16 three participants: The jurors, the judge, and the lawyers.
17 It's important for each of you to understand that our
18 judicial system is an adversary system, which means simply
19 that during a trial, each of the parties will seek to
20 present their respective cases to the jury in the very best
21 light possible.

22 Now, lawyers are frequently criticized in the
23 media and the public, and the courts observed that this
24 criticism is often a result of a basic misunderstanding of
25 our adversary system in which the lawyers act as advocates

1 for the competing parties. As an advocate, a lawyer is
2 ethically and legally obligated to zealously assert his or
3 her client's position under the rules of our adversary
4 system. And by presenting the best case possible on behalf
5 of their clients, the lawyers will hopefully enable the
6 jurors to better weigh the relevant evidence to determine
7 the truth and arrive at a judge verdict based on that
8 evidence.

9 This system has served our nation well for over
10 200 years, and America's lawyers are indispensable part of
11 that process. So as we go forward during the trial, even
12 though there might be a time or two that I would frown or
13 admonish the lawyers from time to time, it's simply because
14 I'm trying to make sure that their advocacy doesn't get
15 outside the boundaries of our adversary system and the rules
16 of evidence and procedure.

17 But please keep in mind, ladies and gentlemen,
18 they are just doing their jobs, and it's important for all
19 of you to be aware of that as we go forward.

20 Also, ladies and gentlemen, I want you to
21 understand that throughout this trial, I am going to do my
22 very best to make sure that the jury has no idea about what
23 I personally think about the evidence or any of the
24 witnesses, because it is the jury's job, not mine, to
25 determine what the facts are in this case. And the jury

1 should not take any expressions or statements by me as
2 something to consider or a factor in making your
3 determinations about what the ultimate facts are in this
4 case.

5 So with those instructions, we're going to turn
6 the process over to the lawyers, who will ask questions of
7 the panel at this time.

8 We'll start with counsel for the Plaintiff.
9 Mr. Baxter, you may address the panel. Would you like a
10 warning on your time?

11 MR. BAXTER: I would, Your Honor. If you could
12 call me after five and then one.

13 THE COURT: Five minutes remaining and one minute
14 remaining?

15 MR. BAXTER: Yes, Your Honor. Thank you.

16 THE COURT: You may proceed.

17 MR. BAXTER: Thank you, Your Honor. May it please
18 the Court.

19 Ladies and gentlemen, my name is Sam Baxter. I'm
20 a lawyer here in Marshall. I've been in Marshall about 45
21 years, practicing law one way or another. And as you can
22 see, somebody sent out a memo to wear a black suit to court
23 today, and I didn't get the memo. So I apologize.

24 Let me do what Judge Gilstrap did and tell you a
25 little bit about myself. As I said, I've been here in

1 Marshall for 45 years practicing law for a long time. I was
2 in the DA's Office here as the Criminal District Attorney.
3 After that, I went on the district bench for just a little
4 while. Then I started practicing law with the Jones firm,
5 and now I'm with a law firm called McKool Smith. My office
6 is actually right next door.

7 I'm married. I have six children. I have three
8 adopted children, one from Brazil, one from Thailand, and
9 one from India. And I have three stepchildren that are in
10 the public schools here in Marshall. One is a sophomore in
11 Marshall. He plays quarterback for the JV football team; a
12 daughter that is a freshman cheerleader. And I have a
13 10-year-old stepson that is in Sam Houston that is the best
14 athlete of them all.

15 My wife works for an organization called CASA.
16 Anybody ever heard of CASA?

17 Good. CASA, for those of you that don't know, is
18 an organization that recruits volunteers much like
19 yourselves to help abused children get through the court
20 process to make sure they don't get dropped through and get
21 lost in the shuffle. And she's been doing that for a number
22 of years here in Marshall and in Jefferson and in Carthage.

23 As you might expect, no one would even consider me
24 for a jury, and I -- I've, like I said, been practicing law
25 here for all that time.

1 I'm joined at counsel table today by my friend, T.
2 John Ward. Mr. Ward is the only thing that keeps me from
3 being the oldest lawyer in the courtroom. So thank goodness
4 for that. I also have my law partner, which I introduced
5 earlier, Jennifer Truelove.

6 And I was amiss a while ago, Your Honor, that I
7 left some of my colleagues out. Kurt Truelove, who is the
8 lesser half of Jennifer Truelove, is one of the lawyers in
9 this case. And Mr. Josh Maness, who is here seated behind
10 me is why I lost him. They're both -- they're both from
11 Marshall.

12 I feel like I need to ask if you know anybody on
13 the other side. Now, as Judge Gilstrap told you, the
14 Plaintiff -- and let me introduce my Plaintiff again. And
15 this is Josh Harman. Mr. Harman is, as Judge Gilstrap told
16 you, known as the relator, but we're going to call him the
17 Plaintiff in this case. And he has brought a whistleblower
18 lawsuit on behalf of the United States of America.

19 The Defendants are Trinity Industries and Trinity
20 Highway Products. Now, there's a Trinity plant out on 80
21 West that makes tank cars and doesn't have anything to do
22 with that. And they're represented by Mr. Mark Mann, who is
23 here. He's from Henderson. Mr. Russell Brown, he's also
24 from Henderson. He's sort of got a dual role. I'll talk to
25 you about that in a minute, but he also is the lawyer for an

1 organization known as TTI or Texas A&M Transport Institute.
2 Mr. Shaw here is -- represents the Defendant. Mr. Mike
3 Miller is from Marshall, and they've got some other lawyers
4 that you'll probably see during the -- during the course of
5 the trial.

6 Is there anybody on the jury panel that knows any
7 of the lawyers representing Trinity or TTI?

8 And I guess probably particular Mr. Brown,
9 Mr. Mann, and Mr. Miller. Anybody know any of those
10 lawyers, been represented by of them, heard of them, know
11 anything about them?

12 Okay. Now, the Judge has told us that we can give
13 a very brief summary of what this lawsuit is about, and so I
14 want to endeavor to do that in under three minutes. But
15 here's what it's about.

16 My client, Joshua Harman, has been working on the
17 highway since he was 18 years of age, and he had a company
18 that installed guardrails.

19 And let me see a guardrail. Can I get on the --
20 Ms. Schroeder, can I get that on for Mr. Diaz? Thank you,
21 ma'am.

22 We've got Plaintiff -- maybe if you hit that
23 button. There we go.

24 And he installed guardrails like this all over the
25 United States but primarily in Virginia and the Atlantic

1 Seaboard. This happens to be the product that you're going
2 to hear a lot about. And it is a terminal head on the end
3 of a guardrail, and you're going to hear how that works.
4 But suffice it to say, he's installed these. And as he's
5 installing these, he realizes that something has gone awry,
6 because he starts seeing all over the highways and hears
7 reports about accidents involving these guardrails that are
8 horrific accidents.

9 And let me see if I can see one of the cars.
10 Accidents like this where the guardrail, after the car hits
11 it and the device that's supposed to protect the car from
12 either hitting another obstacle or hitting going down the
13 ditch or going down into the river, is actually being
14 harpooned by the guardrail, much to the consternation,
15 obviously, of anybody in that car.

16 And he starts seeing accidents like this all over
17 America, and he conducts his own investigation --

18 MR. MANN: Your Honor, I'm going to object to that
19 statement as totally outside of any evidence in this case
20 about all over the country. I object to that. That's
21 outside the evidence and not appropriate and certainly
22 prejudicial by saying that.

23 THE COURT: All right. Well, your objection is
24 overruled.

25 Let's proceed.

1 MR. BAXTER: Thank you, Your Honor.

2 THE COURT: Stay within your time, Mr. Baxter.

3 MR. BAXTER: Yes, Your Honor.

4 He then conducts his own investigation, and he
5 realizes that the product that we saw before has not been
6 approved by the federal government, and it has defects. And
7 as a result of that, he has become what is known as a
8 whistleblower. This is a whistleblower case, and it's part
9 of the False Claims Act that encourages people that has
10 information about companies that are defrauding the United
11 States of America to come forward and to blow the whistle,
12 and that's exactly what he's done in this case. And that's
13 the sort of evidence you're going to hear over the next week
14 or so.

15 Now -- I'm through with that, Your Honor. Thank
16 you.

17 THE COURT: Let's move along.

18 MR. BAXTER: Thank you.

19 I need to ask right upfront if anybody with that
20 brief explanation and the explanation that Judge Gilstrap
21 gave you earlier has heard anything about this case.

22 Now, I will tell you that there has been some
23 publicity on 20/20, on Inside Edition, Good Morning America,
24 ABC World News, in the papers on Bloomberg News. It's been
25 in the Dallas Morning News. It's been in the Marshall News

1 Messenger. It's been in the media.

2 Has anybody seen any of the reports on 20/20 or
3 Good Morning America or on television anywhere, even the
4 local TV station? If you can, I want you to not tell me
5 what you've seen but just raise your hand, because I suspect
6 that the Judge is going to want to talk to you individually
7 later.

8 So in the jury box, No. 5. And on the first row,
9 No. 17. And on the next row, No. 22 and No. 23, 28, 38, 33,
10 and way in the back, I can't --

11 JUROR GRAHAM: 42.

12 MR. BAXTER: And 42.

13 All right. Anybody else have seen anything about
14 this lawsuit or about this product or know anything about
15 the case or know any of the lawyers?

16 All right. Now, is there anybody on the jury
17 panel that thinks that for some reason or another the
18 whistleblowing statute is wrong and that you shouldn't be
19 allowed to blow the whistle and turn in fraud when the
20 American Government and taxpayers are being defrauded as an
21 allegation? Anybody think that's not right?

22 Now, the statute does not require -- because most
23 of the whistleblower cases involve employees of a company,
24 but the statute does not require you to be an employee. It
25 simply requires you to have done an investigation and find

1 facts out and turn it in.

2 Anybody got any problem with the fact that
3 Mr. Harman is not an employee of Trinity? He bought their
4 products. He was their customer. He installed their
5 products and did so proudly for a number of years until he
6 found this problem. Anybody think that you have to be an
7 employee to be a whistleblower? Anybody at all?

8 All right. Now, part of the whistleblower statute
9 says that the vast majority of the recovery, if there is
10 one, goes into the American Treasury. It goes back to the
11 taxpayers, but it also provides that there can be a portion
12 of that money go to Mr. Harman for the fact that he has
13 brought this lawsuit. That is eventually determined by the
14 Court, but it can be somewhere between 25 and 30 percent of
15 the reward that the jury fills in in this trial.

16 Is there -- anybody have any problem with the
17 statute that says, and has for 150 years, that if you're a
18 whistleblower and you bring a lawsuit, that you, in fact,
19 can get a portion of the proceeds? Anybody got a problem
20 with that?

21 All right. Now, anybody ever hit one of these
22 guardrails?

23 Can I have it back up, Mr. Diaz? Thank you.

24 Anybody ever hit one of these things, know anybody
25 that's had an accident, know anything at all about these

1 guardrails? Anybody at all?

2 Let me see a show of hands. Anybody had an
3 accident involving them or know anybody that has?

4 Is there anybody that's ever worked for TXDOT,
5 which is the state organization that, in fact, works on the
6 highways, in charge of the highways, or ever worked as an
7 installer for any safety equipment on the highways?

8 Who on the jury panel -- and I know there are a
9 couple -- have something to do with safety products at their
10 work? Let me see those hands.

11 No. 18. And we're going to start with you, if we
12 can, please, sir. And if you'll tell me, Mr. Young, what
13 you have to do with safety at your work.

14 JUROR YOUNG: I work -- in the oilfield, you're
15 always required to wear your personal protection equipment.
16 That includes hardhats, safety glasses, impact gloves,
17 various things, and I'm the one that makes sure that
18 everybody has their proper PPEs. I do the ordering for the
19 safety supplies, and that's about the extent of it.

20 MR. BAXTER: Mr. Young, when you order those
21 supplies, then you require your co-workers to wear them or
22 sometimes you wear them out on the job?

23 JUROR YOUNG: Yes. They are required. I'm not
24 the enforcer.

25 MR. BAXTER: Okay.

1 JUROR YOUNG: That's the supervisor.

2 MR. BAXTER: All right. But at least you provide
3 the equipment.

4 JUROR YOUNG: Yes, I provide the equipment. I
5 make sure we have plenty in stock.

6 MR. BAXTER: Do you expect that equipment to
7 work --

8 JUROR YOUNG: Yes.

9 MR. BAXTER: -- after you give it to them?

10 JUROR YOUNG: Yes.

11 MR. BAXTER: And you count on the manufacturer for
12 putting out a product that does what they say it will do?

13 JUROR YOUNG: Yes.

14 MR. BAXTER: Thank you, Mr. Young.

15 Right on the front row, Mr. McIntire (sic).

16 Yes, ma'am, you're Ms. Kern an -- you're
17 Mrs. Beasley, aren't you?

18 JUROR BEASLEY: Yes.

19 MR. BAXTER: Tell me what you have to do with
20 safety.

21 JUROR BEASLEY: We have a small company, and so
22 it's all of our responsibility to make sure that we are in
23 compliance with safety. And we wear our hardhats when we go
24 out on location and safety boots and our protective glasses
25 in the shop, and that's about it.

1 MR. BAXTER: Okay. Let me ask you the same
2 question I asked Mr. Young. When you put on those goggles
3 or you put on the helmet or you put on that safety
4 equipment, do you expect it to work?

5 JUROR BEASLEY: Absolutely.

6 MR. BAXTER: And do you expect it to work the way
7 they told you it would work?

8 JUROR BEASLEY: Yes.

9 MR. BAXTER: Okay. To protect you and your fellow
10 employees?

11 JUROR BEASLEY: Yes.

12 MR. BAXTER: Thank you, ma'am.

13 Who else on the next row?

14 Mr. Adams?

15 JUROR ADAMS: Yes, sir. We have been in the
16 transportation business. We have to use a thing called a
17 rod jumper to pull the pins on sliding tandems on trailers.

18 MR. BAXTER: Yes, sir.

19 JUROR ADAMS: And we expect them to work, because
20 if they mess up, it messes you up. They are spring-loaded
21 and they could come back and hurt you. And, yes, we expect
22 it to work right when we buy them.

23 MR. BAXTER: All right, sir. Let me ask you this,
24 Mr. Adams. I believe you said you were in the Transport
25 Division of Walmart.

1 JUROR ADAMS: Yes, sir.

2 MR. BAXTER: Do you actually drive one of their
3 trucks?

4 JUROR ADAMS: Yes, sir. Don't tell nobody,
5 though.

6 MR. BAXTER: Not a soul, sir; I promise.

7 But just in case you were driving a truck for
8 somebody up and down the highways, do you see these
9 guardrails?

10 JUROR ADAMS: Yes, sir, daily, hourly.

11 MR. BAXTER: Hourly on the interstate and on state
12 highways everywhere?

13 JUROR ADAMS: Yes, sir.

14 MR. BAXTER: Have you ever seen one of them hit?

15 JUROR ADAMS: I've seen them messed up. You can
16 tell they have been hit. I've not actually seen a car or
17 anything hit one of them personally.

18 MR. BAXTER: Okay. And do you understand, sir,
19 that generally, if, for example, you're coming up to an
20 overpass over, say, an interstate and it's got these
21 concrete pillars that are sitting right there on the side of
22 the road that they'll put these guardrails up to keep us
23 from hitting it?

24 JUROR ADAMS: Yes, sir.

25 MR. BAXTER: Okay. Thank you, sir.

1 Who else is in safety?

2 Yes, sir, in the next row.

3 JUROR JOHNSON: Good morning, sir. My name is
4 Kevin Johnson. I'm a fireman paramedic for U.S. Steel out
5 of Lone Star. Our actual title there is called loss
6 prevention tech. That's what our actual position is. And
7 we go around and we ensure that the fire extinguishers are
8 working properly, that PPE is being worn effectively. And
9 we help to assist with safe day-to-day operations there at
10 U.S. Steel.

11 MR. BAXTER: All right, sir. And I know that
12 you're at U.S. Steel now, but I think you said when you
13 stood up a while ago that you had worked for Good
14 Shepherd --

15 JUROR JOHNSON: Yes, sir.

16 MR. BAXTER: -- for a number of years.

17 JUROR JOHNSON: I was a street medic for a number
18 of years, yes, sir.

19 MR. BAXTER: And street medic is a new term for
20 me, sir. Tell me what that is.

21 JUROR JOHNSON: Paramedic on an ambulance, yes,
22 sir.

23 MR. BAXTER: Paramedic?

24 JUROR JOHNSON: Yes, sir.

25 MR. BAXTER: Okay. You were driving an ambulance?

1 JUROR JOHNSON: Actually, I was in the back.

2 MR. BAXTER: Okay. You were back there trying to
3 save somebody's life?

4 JUROR JOHNSON: Yes, sir.

5 MR. BAXTER: Have you ever been to an accident
6 where these -- somebody's hit one of these guardrails?

7 JUROR JOHNSON: Yes, sir, I have.

8 MR. BAXTER: Have you? Do you know anything about
9 how they work or --

10 JUROR JOHNSON: How the guardrail is supposed to
11 work?

12 MR. BAXTER: Right.

13 JUROR JOHNSON: I've got a general idea. I mean,
14 just what I've read about it.

15 MR. BAXTER: Okay.

16 JUROR JOHNSON: I don't know anything in
17 particular.

18 MR. BAXTER: Did you see any accidents like I
19 showed the car awhile ago where the guardrail had actually
20 entered the passenger compartment? Did you see --

21 JUROR JOHNSON: No, sir, I haven't seen any
22 penetrating guardrails, but I have worked accidents where
23 the guardrail was hit at a glance. It wasn't actually hit
24 head-on.

25 MR. BAXTER: Okay. All right. Ever see anybody

1 injured by one of these guardrails?

2 JUROR JOHNSON: Yes, sir.

3 MR. BAXTER: Thank you, sir. I appreciate it.

4 Now, behind Mr. Johnson, was there somebody else
5 in the safety business?

6 Yes, sir, the very last juror, No. 44.

7 JUROR HART: I'm actually part of -- I'm the
8 leader of our behavioral base safety group at CenterPoint
9 Energy for the Longview District, and what we do is we
10 encourage our co-workers to stop at risk behaviors. And if
11 you see somebody doing something wrong, then try to help
12 them out, you know, explain to them. Be your brother's
13 keeper, basically.

14 MR. BAXTER: Okay. And do you expect the
15 equipment that you have and they have to work, sir?

16 JUROR HART: Yes, sir.

17 MR. BAXTER: Okay. Thank you very much.
18 Anybody else?

19 All right. Let me get into your driving habits
20 just a moment besides our truck driver in the back back
21 here.

22 Who owns a car that is not this car, but generally
23 looks like this? That is, a small car. I think the first
24 time I ever saw a car like this, I was at a circus and
25 clowns started piling out of it. In any case, this one

1 happens to be a small Chevrolet that was in production and
2 on the roads in 1995.

3 But does anybody on the jury panel drive a
4 particularly small car? Who does? Raise your hand. Or
5 family members do? Anybody?

6 Yes, sir, No. 23.

7 JUROR KERNAN: I drive a smart car.

8 MR. BAXTER: A smart car.

9 THE COURT: Let's wait until we get the
10 microphone, please. Go ahead.

11 JUROR KERNAN: Smart car.

12 MR. BAXTER: Well, tell me what a smart car is,
13 because obviously I need one.

14 JUROR KERNAN: It's -- well, you can park three of
15 them in a standard parking space.

16 MR. BAXTER: All right. Is it gas or electric?

17 JUROR KERNAN: It's gas.

18 MR. BAXTER: Okay. And it's just highly
19 efficient? It doesn't use very much gas. Is that sort of
20 the advantage of it?

21 JUROR KERNAN: Yes, sir. That's what they
22 advertised.

23 MR. BAXTER: Okay. Didn't necessarily pan out to
24 be true?

25 JUROR KERNAN: No.

1 MR. BAXTER: All right. Have you ever had an
2 accident in that car?

3 JUROR KERNAN: No, sir.

4 MR. BAXTER: Do you drive it out on the
5 interstate?

6 JUROR KERNAN: (Witness nods head affirmatively.)

7 MR. BAXTER: Give you any pause out there?

8 JUROR KERNAN: No.

9 MR. BAXTER: Okay. All right. Anybody else got a
10 car like -- thank you, sir. I appreciate it.

11 Anybody else have a car like this?

12 Oh, I'm sorry. I looked right past you. Yes,
13 ma'am, Ms. Maris?

14 JUROR MARIS: It's not my car, but my husband has
15 a small car like that.

16 MR. BAXTER: Okay.

17 JUROR MARIS: I think it's a Cavalier.

18 MR. BAXTER: Chevrolet?

19 JUROR MARIS: Yes.

20 MR. BAXTER: How long has he had that? Long time?

21 JUROR MARIS: 10 years.

22 MR. BAXTER: Okay. Has he ever had an accident in
23 it?

24 JUROR MARIS: No.

25 MR. BAXTER: Okay. Anybody else have a car like

1 this or their children have a car like this?

2 Let me see the next one, Mr. Diaz.

3 I'm going -- I'm going to get some more hands.

4 Who's got a pickup truck on this jury? I'm not
5 even going to ask you. A lot of you do have pickup trucks.

6 Do you -- for those that have those pickup trucks,
7 show me the hands that use it to -- to work with. How many
8 have a pickup truck and just haul things in it or you got it
9 for the horses or cows or whatever, who -- who does that?

10 All right. Okay.

11 Anybody sort of think that pickup trucks aren't
12 one of the predominant vehicles in -- in this neck of the
13 woods?

14 All right. Does anybody have children -- well,
15 let me see the next one. I -- I can't help myself. Who's
16 got an SUV on this panel? Okay.

17 How many of you haul kids in that SUV going to
18 soccer practice or baseball practice or whatever?

19 All right. Is there anybody that has a teenage
20 driver on this jury panel, besides myself?

21 Okay. Are your rates like my rates? They are?
22 Okay.

23 Is there anybody on the jury panel that thinks
24 that safety devices ought to work just part of the time?

25 If, for example, let's suppose that when you had

1 younger children, you bought them a car seat and you put
2 them in that car seat and you buckle them in the front and
3 you buckle them in the back, is there anybody that thought
4 that when you bought that car seat, it only ought to work
5 about three quarters of the time and the rest of the time
6 you and the baby were on your own? Anybody feel that way?

7 Does everybody feel that if you buy a safety
8 product or you are exposed to a safety product, it's
9 supposed to work? Does everybody feel that way?

10 All right. Is there anybody on the jury panel
11 that works for a company that is regulated by the State of
12 Texas or the federal government? Anybody in the jury box,
13 your company is regulated not just in a general way but
14 specifically by a state agency or a federal agency? Anybody
15 at all?

16 Yes, sir, No. 7. And that's Mr. Ferrell.

17 JUROR FERRELL: Yes, sir. Working for the housing
18 authority, we are under a lot of guidelines of -- you know,
19 the HUD agency. That's a form of, you know, the United
20 States Government.

21 MR. BAXTER: Yes, sir. And I know that you said
22 you did maintenance --

23 JUROR FERRELL: Yes, sir.

24 MR. BAXTER: -- out there?

25 JUROR FERRELL: Yes, sir.

1 MR. BAXTER: Do you ever have to fill out any
2 forms that get sent into the government, sir?

3 JUROR FERRELL: No, sir, I personally don't. All
4 of that stuff is done by our maintenance foreman.

5 MR. BAXTER: Okay. Does he have to fill out forms
6 and you have to tell him --

7 JUROR FERRELL: Yes, sir.

8 MR. BAXTER: -- for example, what you've done and
9 if you've got to requisition supplies or --

10 JUROR FERRELL: Yes, sir.

11 MR. BAXTER: -- you've got to fix -- you've got to
12 fill those forms out?

13 JUROR FERRELL: Yes, sir.

14 MR. BAXTER: And send them in to the federal
15 government?

16 JUROR FERRELL: He does. They send down a -- an
17 inspector to check that stuff.

18 MR. BAXTER: Okay. Do they expect you, when you
19 do it, to you tell the truth of what's on those forms?

20 JUROR FERRELL: Yes, sir.

21 MR. BAXTER: Do they expect complete and full
22 disclosure?

23 JUROR FERRELL: Yes, sir.

24 MR. BAXTER: Is that what you try to do at the
25 Gilmer Housing Authority?

1 JUROR FERRELL: Yes, sir, I -- yes, sir.

2 MR. BAXTER: All right. Thank you very much.

3 Anybody else? We've got some more hands, Mr.

4 McAteer. I do want to talk to them.

5 Yes, ma'am, Ms. Hagerty?

6 JUROR HAGERTY: Yes.

7 MR. BAXTER: What do you fill out for the
8 government and what do you -- you're in banking, aren't you?

9 JUROR HAGERTY: Yes. We have to fill out like
10 CTRs.

11 MR. BAXTER: Yeah, the FDIC is all over you, isn't
12 it?

13 JUROR HAGERTY: Yes.

14 MR. BAXTER: Okay. Do you fill any of those forms
15 out?

16 JUROR HAGERTY: I used to, yes.

17 MR. BAXTER: Okay. And are those submitted to the
18 government?

19 JUROR HAGERTY: Yes.

20 MR. BAXTER: And it has to do with whether or not
21 your bank is complying with the regulations?

22 JUROR HAGERTY: Yes.

23 MR. BAXTER: Do they expect you to be accurate?

24 JUROR HAGERTY: Yes.

25 MR. BAXTER: Do they expect you to tell the truth?

1 JUROR HAGERTY: Yes.

2 MR. BAXTER: Okay. Thank you, ma'am.

3 JUROR HAGERTY: Thank you.

4 MR. BAXTER: Who's next? Back here, No. 25, I
5 think, McAteer.

6 Yes, sir?

7 JUROR ADAMS: Yes, sir.

8 MR. BAXTER: What kind of regulations --

9 JUROR ADAMS: We're controlled by the FMCSA,
10 Federal Motor Carrier Safety Association. We have to do
11 daily logs, daily vehicle inspection reports, stuff like
12 that.

13 MR. BAXTER: In fact, if you're on the road, you
14 got to fill out reports about hours on duty and --

15 JUROR ADAMS: Hours on duty, off duty, sleepy
16 birth, whatever -- what -- everything we do we have to
17 account for the time, and then we -- daily we have to fill
18 out a daily vehicle inspection report saying that the
19 vehicles, truck and trailer, are safe to be on the highway.

20 MR. BAXTER: They expect you to be accurate and
21 honest?

22 JUROR ADAMS: Yes, sir.

23 MR. BAXTER: All right. Thank you, sir.

24 Who's the next one? Oh, No. 18. I skipped him.

25 JUROR YOUNG: I didn't have my hand raised.

1 MR. BAXTER: Oh, I'm sorry. I -- I didn't skip
2 him.

3 JUROR YOUNG: I apologize. I really didn't --
4 until he said something, the DOT. I do work for, you know,
5 Key Energy. We do have the big trucks, and we have to be
6 DOT compliant. We do fill out the vehicle inspection
7 reports, daily logs, and everything. I don't have anything
8 to do with that. One thing I do have, we hired a
9 third-party company, True North, to be compliant with the C
10 -- you know, make sure all our CDL drivers, but that has --
11 that's not really the government, but the DOT part is.

12 MR. BAXTER: Okay.

13 JUROR YOUNG: They have to fill out forms.

14 MR. BAXTER: They have to fill out those forms.
15 Are they supposed to be right?

16 JUROR YOUNG: Yes, sir.

17 MR. BAXTER: Okay. Thank you, sir.

18 Who's next?

19 No. 30.

20 JUROR BERRY: Yes, sir.

21 MR. BAXTER: And what sort of regulations do you
22 comply with, Mr. Berry?

23 JUROR BERRY: Of course, I'm retired now, but by
24 working with Upshur Rural Electric, I was in charge of the
25 Staking Department.

1 MR. BAXTER: Yeah.

2 JUROR BERRY: So we have the spec book that used
3 to be put out by REA. And just before I retired, we had a
4 new administration come in and it was called RUS now.

5 MR. BAXTER: Did you have to fill out forms,
6 Mr. Berry?

7 JUROR BERRY: I filled out construction work
8 orders.

9 MR. BAXTER: Okay, sir. They expect you to do it
10 right?

11 JUROR BERRY: Yes, sir.

12 MR. BAXTER: Okay. Thank you, sir.

13 Who's next? Right next to you, Mr. Johnson.

14 JUROR JOHNSON: Yes, sir, my name is Kevin
15 Johnson. Obviously, a fireman, I've got NFPA standards that
16 I have to follow. As a paramedic, I have to follow patient
17 care reports that I report to the state, and I have to be
18 accurate and honest on all my patient care reports.

19 MR. BAXTER: And that's real important, isn't it?

20 JUROR JOHNSON: Yes, sir.

21 MR. BAXTER: And so you're -- if -- heaven forbid,
22 you're doing something wrong. You at least want somebody to
23 tell you that's not right?

24 JUROR JOHNSON: Yes, sir.

25 MR. BAXTER: Okay. All right. Thank you.

1 Who beside Mr. Johnson?

2 Yes, ma'am, Ms. Parker?

3 JUROR PARKER: Previously, I was the education
4 specialist for Northeast Texas Head Start.

5 MR. BAXTER: Okay.

6 JUROR PARKER: So safety was always a big issue,
7 especially in the Transportation Department with children
8 and so there's lots of reports.

9 MR. BAXTER: So you had the four-year-olds and --

10 JUROR PARKER: I didn't have to do the reports or
11 any of that type thing, but I had to be aware of those
12 things.

13 MR. BAXTER: Okay. Thank you, ma'am.

14 What else on the jury panel? I know our very last
15 juror again, Mr. McAteer.

16 JUROR HART: We -- working for CenterPoint, we
17 have to do railroad audits, spontaneous railroad audits
18 where they call and tell us what systems they want to check
19 and we have to pull all the information from the past
20 history of those systems.

21 MR. BAXTER: All right. Thank you, sir.

22 Ladies and gentlemen, in this case, you're going
23 to hear a lot about the Federal Highway Administration,
24 which Judge Gilstrap told you we're going to probably refer
25 to by initials, and it's -- it's the FHWA. And you'll hear

1 that a lot. And, of course, they've got a lot of folks
2 working in that bureaucracy.

3 Is there anybody believes that folks working in a
4 federal administration that a bureaucrat can't make a
5 mistake? Anybody feel that way?

6 Okay. Is there anybody believes that sometimes
7 those bureaucrats can be subject to outside pressures,
8 political or otherwise? Anybody feel that way? Is there
9 anybody doesn't feel that way? Maybe that's the way for me
10 to ask it.

11 All right. Now, who believes that if one of those
12 bureaucrats makes a mistake, he's more likely to try to
13 sweep it under the rug than he is to come forward and admit
14 it? Anybody feel that way? Raise your hand if you do.

15 Anybody have any experience with bureaucrats
16 making mistakes and being the very first one that said, I
17 messed it up, made a mistake, and I'll fix it? Anybody seen
18 that happen?

19 All right. If, in fact, someone works for a
20 company and they're testing a product -- testing a product,
21 and it fails, it flunks the test, who -- who thinks that if
22 you've got to report to an agency or I guess your
23 supervisors, that you have a duty to say, hey, I tested
24 Product X and it flunked, you might want to take that into
25 consideration before you say it's a great product? How many

1 people think that's the thing to do? How many people think
2 you ought to just be quiet and let it flunk and there'd be a
3 lot of problems if you report it and you just ignore it?
4 How many think that?

5 Okay. Do you think that if you've got to report
6 to these regulatory agencies -- I'm going to ask the panel
7 as a whole -- that, in fact, you've got to tell them the
8 truth? I mean, probably the most famous that we've all
9 heard of is the FDA, the Federal Drug Administration. And
10 it's the one that approves the medications that we take.
11 And if a company has done some trials on medication, do you
12 think -- do you think that company ought to be full and
13 forthcoming with all the information and just not part of
14 the information? Does everybody feel that way? If you
15 don't feel that way, raise your hand.

16 All right. Now, as I told you, one of the
17 institutions you're going to hear a lot about is called TTI.
18 They are not, I repeat, not a defendant in this case. But
19 they -- but they've got their lawyer here. It's Mr. Brown.
20 And you're going to hear a lot about them, and we're going
21 to see some of those folks.

22 Now, the T used to stand for Texas, but they
23 changed their name sometime ago to Texas A&M because that's
24 kind of where their headquarter is.

25 Now, TTI or the Texas A&M Transport Institute is

1 actually a state agency. It's been charted by the state,
2 and they go to the legislature and get funds just like the
3 -- anybody else that's a state agency does. But they're at
4 A&M, and they've got A&M in their name so I kind of feel
5 duty bound to see if we have any A&M graduates on the jury.

6 Anybody go to school at A&M? Anybody have
7 children or relatives at A&M?

8 Yes, ma'am? You do? Who is that, Ms. McPherson?

9 JUROR MCPHERSON: My daughter graduated from A&M.

10 MR. BAXTER: Okay. Do you know what her degree
11 was in, ma'am?

12 JUROR MCPHERSON: Animal husbandry.

13 MR. BAXTER: Okay. And does she still go down to
14 some of the -- either ball games or meetings or anything?

15 JUROR MCPHERSON: Not lately.

16 MR. BAXTER: Okay. Is there anything about that
17 if they're a portion of this case, not defendants, but
18 you're going to hear from people at A&M, is there anything
19 about that that's going to pose you a problem?

20 JUROR MCPHERSON: No.

21 MR. BAXTER: Make you lean one way or another?

22 JUROR MCPHERSON: No.

23 MR. BAXTER: Okay. Thank you, ma'am.

24 Anybody else on the -- on this short row here?

25 Mr. Horton?

1 THE COURT: 17.

2 MR. BAXTER: 17, yes.

3 JUROR HORTON: I have a daughter and a son-in-law
4 that graduated from A&M.

5 MR. BAXTER: They -- they big ex-students, Mr.
6 Horton?

7 JUROR HORTON: Yes, sir.

8 MR. BAXTER: They go down to that game Saturday?

9 JUROR HORTON: Yes, sir.

10 MR. BAXTER: Well, I'm sorry. But, you know, my
11 team was in Dallas getting itself beat, too, so I feel your
12 pain. Anything about that, Mr. Horton, going to be a
13 problem if you sit on this jury and if some of their actions
14 come into question?

15 JUROR HORTON: Not for me, sir.

16 MR. BAXTER: Okay. Did -- did you attend A&M at
17 all?

18 JUROR HORTON: No, sir.

19 MR. BAXTER: Okay. Any competing college?

20 JUROR HORTON: No, sir.

21 MR. BAXTER: All right. Thank you, Mr. Horton.
22 Anybody else affiliated with A&M back on the -- way in the
23 back? Then we're going to come back -- come back to you.

24 JUROR RITTER: My brother works for A&M.

25 MR. BAXTER: What does he do?

1 JUROR RITTER: He's in the Maintenance Department
2 for the buses.

3 MR. BAXTER: Okay. Does he work down at College
4 Station?

5 JUROR RITTER: Yes, sir.

6 MR. BAXTER: If you're on this jury and if A&M
7 gets mentioned a whole bunch, is that going to be a problem
8 for you?

9 JUROR RITTER: No, sir.

10 MR. BAXTER: All right. And then the very last
11 juror?

12 JUROR HART: My brother-in-law graduated from A&M
13 last May.

14 MR. BAXTER: Anything about that -- he's still --
15 he's still part of that Aggieland spirit, isn't he?

16 JUROR HART: Yes, sir.

17 MR. BAXTER: Anything about that that'd give you a
18 problem?

19 JUROR HART: No, sir.

20 MR. BAXTER: All right. Thank you.

21 And then I believe we're back up front with
22 Ms. Jones. Is that right, Ms. Jones?

23 JUROR JONES: My son-in-law graduated from A&M,
24 and he's an avid A&M fan. He went to the game.

25 MR. BAXTER: Does -- does that rub off on you --

1 JUROR JONES: No, sir.

2 MR. BAXTER: -- Ms. Jones?

3 JUROR JONES: Not at all.

4 MR. BAXTER: Any -- any problem at all, Ms. Jones,
5 if you're on this jury?

6 JUROR JONES: No.

7 MR. BAXTER: And you -- you went to college
8 someplace else?

9 JUROR JONES: Yes.

10 MR. BAXTER: Where did you go?

11 JUROR JONES: North Texas.

12 MR. BAXTER: Okay. All right. The Mean Green?

13 JUROR JONES: Right.

14 MR. BAXTER: All right. Thank you, ma'am.

15 Anybody else affiliated with A&M? We missed one,
16 Mr. McAteer. You're going to get your exercise today.
17 Yes, ma'am?

18 JUROR PARKER: I didn't graduate from A&M at -- at
19 College Station, but I'm in -- I've graduated from the
20 network of A&M, the Texarkana.

21 MR. BAXTER: In Texarkana? Anything about that
22 that'd cause you a problem?

23 JUROR PARKER: No.

24 MR. BAXTER: Okay. Thank you.

25 Anybody else?

1 All right. Now, let me ask you sort of about
2 advertising just a moment. Quite often, companies that have
3 a new product out or a different product or an improved
4 product will advertise that product. Is there anybody that
5 hasn't seen an advertisement on TV or in the paper or in
6 your magazines that didn't say new and improved, which I
7 always thought was a contradictory, but at least it's
8 improved? Has anybody -- has everybody seen that?

9 Do you know of any instance in which a company, in
10 fact, has made dramatic -- what they claim later on to be
11 dramatic improvements to a product but kept it a secret when
12 they did it and didn't tell anybody? Anybody know -- ever
13 seen that happen before where you said I've got a new and
14 improved product, but by the way, it's a secret, I'm not
15 going to tell you?

16 Anybody ever run what I'm going to call a
17 simulation program at work? And that is a computer program
18 in which you can put in variables and test something or find
19 out what happens if you put in these variables? Anybody
20 done that at work -- yes, sir?

21 You have, and you're the software engineer, aren't
22 you? Okay. Mr. Ball, what have you done in simulations,
23 sir?

24 JUROR BALL: When you're developing a medical
25 device that's going to be implanted in a human body, you do

1 a whole lot of that -- you want to -- to make sure that
2 it's -- it's good before we -- before we submit information
3 to the FDA.

4 MR. BAXTER: Okay.

5 JUROR BALL: And so I designed them. I ran them.

6 MR. BAXTER: Do you remember any of the devices
7 that you've worked on particularly?

8 JUROR BALL: Sure.

9 MR. BAXTER: Tell me.

10 JUROR BALL: Okay. If you know what a
11 defibrillator is.

12 MR. BAXTER: Yes, sir. At my age you better know
13 what one of them is.

14 JUROR BALL: Now, so -- an implantable
15 defibrillator, for example, if it goes off inadvertently,
16 patients -- what they say is it ranges -- well, what one
17 physician told me was his patients where he had to on
18 purpose set it off, it ranges from, Doctor, that hurt very
19 much, to, Doctor, if you do that again, I'm going to kill
20 you. And so -- so certainly the -- the first and foremost
21 -- the easiest, most cost effective thing before you start
22 animal trials and human trials is to -- to do it on the
23 bench, to run simulation, to take recorded EKGs, run that to
24 see how your device works with normal stuff, abnormal stuff,
25 stuff where it shouldn't go off where the algorithm should

1 work, and so there's a whole lot of that going on.

2 MR. BAXTER: Okay. And you wrote those programs?
3 You ran those programs? Those were yours?

4 JUROR BALL: Yeah.

5 MR. BAXTER: Okay.

6 JUROR BALL: Yeah, me and the folks that I -- I
7 supervise.

8 MR. BAXTER: Okay. Thank you, Mr. Ball. I
9 appreciate it.

10 Does anybody think that if Mr. Ball ran one of
11 those programs and the product kept failing, that he or his
12 company ought to be raising their hand and saying we've got
13 a problem, Houston? Does anybody agree with that?

14 All right. Now, Judge Gilstrap told you something
15 about a legal term called the burden of proof, and he -- he
16 mentioned the -- the statue up here of Lady Justice. And I
17 think that he's already told you, and I think he's going to
18 tell you again, probably multiple times, that preponderance
19 of the evidence means you must be persuaded by the evidence
20 that the claim or the defense, which is theirs, is more
21 probably true than not. And he talked about tipping the
22 Scales of Justice, and then he -- I think he used the words
23 even ever so slightly, that that's the burden of proof.

24 Now, I tell you that because in this case, as I
25 told you, I represented Mr. Harman. And we -- we -- we've

1 got the burden of proof. The Judge will tell you we do. On
2 our issues that we're trying to prove, we've got the burden
3 of proof, and I want you to hold me to that burden, and Mr.
4 Harman to that burden. If we don't do it, then we don't
5 deserve to win.

6 But if we do it by a preponderance of the
7 evidence, not some other standard that's -- that Judge
8 Gilstrap could have told you about, which is clear and
9 convincing, and the one that he did tell you about which is
10 beyond a reasonable doubt, we're not held to those
11 standards.

12 And does everybody understand that? Is there
13 anybody has a problem applying the burden of proof where it
14 belongs?

15 Now, if it's an affirmative issue, that's their
16 issue, not mine. But if it's our issue as part of our case,
17 we accept that burden gladly. But it's the burden of the
18 preponderance of the evidence.

19 Is there anybody that has a problem with that or
20 thinks there ought to be a different burden or it ought to
21 be reasonable doubt or I can't have the question in my mind?
22 Anybody feel that way?

23 All right. He also told you about your job as
24 jurors. And you -- you've already seen former Justice, I
25 believe, O'Connor talk to you about jury service, and Judge

1 Gilstrap's words ring true that this is the only place in
2 the world that this happens, and so the liberty is great but
3 the responsibility is great, too.

4 And one of the jobs you're going to have is to
5 judge the credibility of the witnesses. And I think Judge
6 Gilstrap is going to tell you something like this -- I don't
7 want to put words in his mouth, but I -- it's not my first
8 rodeo. And so I've seen him do this before, where he says
9 that you and you alone are to decide the credibility and the
10 believability to allocate to each of the witnesses and to
11 the evidence, which means you're going to be the judge of
12 the facts.

13 Is there anybody that has any problem about that?
14 Every witness that hits the stand is going to have to be
15 judged on their own credibility and their own facts. Is
16 there anybody that says, well, if they come in with a Ph.D.,
17 I must have to believe them because they've got a Ph.D.?

18 THE COURT: You have five minutes remaining,
19 Counsel.

20 MR. BAXTER: Thank you, Your Honor.

21 No matter kind of what they're saying or how
22 believable it is or how incredible it is? Is there anybody
23 going to be dazzled by titles, or will you listen to what
24 they say and how they say it and how they react on
25 cross-examination before you make up your mind about how to

1 judge their testimony? Can everybody do that? Anybody that
2 can't, say that credibility stuff, I'm going to pass on
3 that?

4 All right. I want to talk to you just a moment
5 about damages because as we've told you, at the end of this
6 trial, we're going to ask that you award damages to the
7 United States of America, which I told you are going to get
8 split basically 70 -- or 70 percent to the taxpayers and the
9 rest to Mr. Harman.

10 But here's the -- the issue I want to talk to you
11 about, damages. I want you to assume just a moment that
12 this land is your land, and these trees are yours. Is there
13 anybody, by the way, that's got some timber property or live
14 out in the country and you got some pine trees planted? All
15 right. Good. You -- you got these trees or your pine trees
16 and you decide to take a two-week vacation and you come back
17 and here's what you find. They're gone. You didn't tell
18 anybody to cut them. And somebody came on your property and
19 took them, and they took them wrongfully. And so now you
20 go to -- you find out who that is and you go to them and
21 they say, oh, gosh, sorry, I made a mistake. Our map must
22 have been wrong. Yeah, we took them, we cut them all up,
23 and we sold them. And you say, well, you know, I was kind
24 of attached to my forest, but at minimum, you're going to
25 have to pay me for my trees. And they say, tell you what

1 I'll do, I'll pay you for every other tree, how about that?

2 Who's going to say, okay, that's a deal, you only
3 have to pay me for half the trees you took? Anybody going
4 to say that?

5 What about if they were to pay you for 75 percent
6 of the trees and they keep a quarter of them? Anybody think
7 that's right?

8 My point is this, is that when it comes to
9 damages, the jury's going to have to consider it, but they
10 have to consider whether or not they will give full damages.

11 Now, in this case, we think the evidence is going
12 to be that the Defendants have filed false claims in excess
13 of \$200 million with the federal government and been paid
14 when they should not have been paid because the claims they
15 filed were false.

16 Now, if we prove that, if that's true, is there
17 anybody that would hesitate to write that number down, 218,
18 219, 220, whatever it is? Hundreds of millions of dollars
19 if, in fact, that's the evidence, or is there anybody that's
20 going to say, well, that's a lot of money, maybe I'll cut it
21 in half and pay them for every other tree? Anybody going to
22 say that? Can I count on everybody, if you find that the
23 Plaintiff's right and the Defendants' wrong and the Judge
24 asks you a damage question to give full damages for that, is
25 there anybody that can't do it? Anybody just says that's

1 too much money?

2 Is there anybody that's just anti-lawsuit? There
3 are some folks and there are some folks that work with
4 companies in which they try to educate you that lawsuits are
5 bad. I frankly don't know any way, other than combat, to
6 resolve some of these differences.

7 THE COURT: One minute remaining, Counsel.

8 MR. BAXTER: Thank you, Your Honor.

9 So anybody that feels that way?

10 Is there anything that I haven't asked you that I
11 should have asked you in my time up here that says I really
12 need to tell the Judge this or to tell these lawyers this
13 because it might impact my jury service besides the fact
14 that you might be out of town? Anything that I've missed or
15 anything that you ought to tell me?

16 If not, ladies and gentlemen, we look very much
17 forward to bringing this case to you. I think you're going
18 to find it to be very interesting. And we'll be delighted
19 to bring the evidence to you.

20 Thank you, Your Honor. I appreciate your time.

21 THE COURT: All right. Mr. Mann, you may address
22 the panel on behalf of the Defendants.

23 MR. MANN: Thank you, Your Honor.

24 THE COURT: Would you like a warning on your time?

25 MR. MANN: Yes, sir. If you -- if you could give

1 me five minutes and one minute, also? Thank you.

2 THE COURT: Will do.

3 MR. MANN: Thank you, Your Honor, and may it
4 please the Court.

5 And ladies and gentlemen, I feel obligated to just
6 step forward and give you a little bit of my background,
7 too. Seems like that's part of how we're starting today. I
8 am from Henderson, and I grew up there. I am married. I
9 have four children. Three quarter horses, one Tennessee
10 Walker, one lab, one cat, a really good wife, and I --
11 that's real important to me, and it may be important to you.
12 And I look forward to talking to you about it when this case
13 is over. But if you would allow me, I'd like to spend a
14 little bit of time talking to you about this case.

15 This case with my co-counsel that we'll be putting
16 on, we are going to bring you evidence that Trinity and
17 Trinity Highway Products told the truth. Trinity Highway
18 Products and Trinity provided everything that the Federal
19 Highway Administration wanted in order to approve this
20 product.

21 The product, Mr. Hernandez, is it up? Can we
22 switch that?

23 This is a little bit closer view of what -- what
24 the product is we're talking about. And -- and His Honor
25 has given me about three minutes to talk to you about the

1 facts of the case, kind of at a high level.

2 But before I start that, let me just ask every one
3 of you, has anybody here -- does anybody here believe
4 they've already formed an opinion about who is right and who
5 is wrong in this case already? Just show me your hand. You
6 don't have to tell me what your thoughts are or who you're
7 for or against. But has anybody already formed an opinion?
8 Nobody?

9 So first row, I'm -- I can depend on you that
10 you've not formed an opinion?

11 Second row, back here? Everybody? Third, fourth,
12 fifth, everybody? Thank you very much because you are
13 providing -- you're doing your duty. And the reason is, and
14 I think it's part of this, I've always grown up and heard,
15 you've probably used it, I've heard people use it, there's
16 always two sides to a coin, right? Everybody heard of that?
17 I -- I believe that, too, and I want to give you the other
18 side of the story.

19 Now, first, the important information that was
20 needed by the Federal Highway Administration was given to
21 them. Testing was done by Texas A&M. Over a 70-page report
22 was sent to the Federal Highway Administration showing that
23 this product that you see on the screen met crash standards
24 that have been set out by the Federal Highway
25 Administration.

1 No. 2 is and what you need to know is the testing
2 was done by Texas A&M -- Texas Transportation Institute.
3 It's Texas A&M. The inventor of this product is Texas A&M.
4 They hold the patent for this product. They licensed it --
5 gave the right to Trinity -- Texas -- Trinity Highway
6 Products to produce this product. Trinity only makes the
7 product. They bend the steel, put the steel together, put
8 the system -- it's about a 50-part system. And then state
9 highway departments buy them and put them out on the
10 highways and they're reimbursed for that.

11 Second, the Federal Highway Administration has
12 listened to Mr. Harman's complaints. They've listened to
13 them all, and they still approve the system. You will only
14 hear Mr. Harman and his paid experts complain about this
15 product.

16 The Federal Highway Administration is not asking
17 for money, has not said that Trinity or Texas A&M has done
18 anything wrong.

19 What you're going to -- to hear in the end of this
20 case is that under oath, Mr. Harman said the chief regulator
21 for highway safety products for the United States Government
22 is aware of all the facts and claims that Mr. Harman is
23 asserting. And I can tell you, after they've heard that,
24 they've gone to their lawyer's office in New York and looked
25 at the products, measured them, reviewed them, looked at all

1 the complaints, they still find that they meet crash
2 standards that are appropriate for this product.

3 What you will hear and what they want to try in
4 this case is a different case from what we're trying,
5 because the question you'll be asked in the end is did
6 Trinity lie to the government in order to obtain federal
7 funding to the states to pay for these products? That's
8 what the case will be about, not about this gruesome picture
9 that's horrible for some family that was involved in an
10 accident because we don't know speeds or how that happened
11 or when it happened and those issues.

12 Now, can I ask you some questions, and if you'll
13 please talk to me a bit because if you can understand that
14 what I want to do and what I'm sure you want to do is to
15 tell me whether you can be fair and impartial in this case.

16 Can you make the decision, call the balls and
17 strikes based on the evidence that you hear? So can I ask
18 you some questions first about burden of proof?

19 Right now, what you've heard is accusations.
20 You've heard accusations from Mr. Baxter for his client,
21 accusations that they feel if they prove it, that Mr. Harman
22 stands to make about 50 or \$60 million in this case. And
23 you'll hear all that evidence as we go on in the case.

24 But what I want to talk to you about is burden of
25 proof. It's their burden, as we've talked about. Can each

1 of you promise me that you'll hold Mr. Harman and his team
2 of lawyers and experts to their burden of proof to prove
3 their case that Trinity lied to obtain federal funding?

4 That's what the case is about, intentionally
5 lying. Can each of you do that? Can I get a shake of the
6 head, raise your hand, say yes, I can do that?

7 Can you raise your hand if you say I -- I can't do
8 that? I think I've already made up my mind, anybody?

9 Okay. Now, do any of you believe because we're
10 here today that somehow or another Trinity must have done
11 something wrong? Anybody believe that? Because we're here
12 today, a lawsuit's been filed, they make an accusation, do
13 you believe, well, they must have done something wrong?
14 Anybody? Raise your hand. And I can promise you, if that's
15 what you believe, that's not a wrong answer, but I need to
16 know that for my client. You can understand that, can't
17 you?

18 You can understand if you were here -- up here in
19 trial defending yourself because somebody accused you of
20 something, that you want to know, well, does somebody
21 already believe that and do I get a chance to say what I
22 need to say to defend myself? Can you all agree that if
23 somebody's accused you of something, you ought to be able to
24 defend yourself? Everybody agree with that?

25 Anybody disagree with that? Can you raise your

1 hand if you disagree with that?

2 Okay. Our legal system also says -- and it's kind
3 of human nature, that when you've been accused of something,
4 as in this case, it's the other side's burden to prove their
5 case. You don't have to do anything to defend your case.
6 If the other side doesn't prove their case, you don't have
7 to do anything.

8 But let -- let's just ask -- I want to talk to Mr.
9 Kirkland. If somebody accused you of something and you go I
10 didn't do that, do you feel like you'd want to stand up and
11 say, let me tell you what the true facts are?

12 JUROR KIRKLAND: I certainly would.

13 MR. MANN: And do you believe that's a right that
14 every defendant should have?

15 JUROR KIRKLAND: Yes.

16 MR. MANN: Okay. Thank you, Mr. Kirkland.

17 That's kind of our human nature. Even though we
18 don't have to bring you evidence, we're going to. You will
19 have plenty of evidence to find that Trinity didn't lie.
20 Trinity did not lie. Trinity told the truth and provided
21 the FHWA everything they asked for.

22 Now, have you or any -- I need to know from each
23 one of you, have you or one of your family members, even a
24 close friend, have you ever made a complaint about a
25 defective product, whether it be file a lawsuit, send a

1 letter, call them up and say, something's wrong with this
2 product? Anybody on the -- let's take in the jury box, the
3 first two rows, anybody ever done that?

4 Yes, sir, Mr. Ball?

5 JUROR BALL: Absolutely, yeah. But just -- I
6 resolved it by email and -- and so I got satisfaction. I
7 got a new product for the defective one.

8 MR. MANN: Okay. And was that a medical product?

9 JUROR BALL: No.

10 MR. MANN: Can you give me a little detail on it?

11 JUROR BALL: Sure, sure. It was a router and --

12 MR. MANN: So it was -- in other words, it wasn't
13 every router was something wrong with it? It was your
14 router, something was wrong with it?

15 JUROR BALL: Yeah, I can't speak to every router.
16 I can only speak to the one I had.

17 MR. MANN: Okay. Did they give you the same --
18 same type back?

19 JUROR BALL: Not exactly. Similar.

20 MR. MANN: Okay. All right. Thank you, sir. I
21 appreciate it.

22 Anybody else done the same thing?

23 Yes, ma'am, Ms. Harvey?

24 JUROR HARVEY: When the Sonicare toothbrushes
25 first came out, I don't know if anybody uses those. We do.

1 But we were using a toothpaste that had baking soda in it --

2 MR. MANN: Right.

3 JUROR HARVEY: -- and they apparently had not run
4 enough tests to see that it would fail. Well, they replaced
5 it for us.

6 MR. MANN: Okay.

7 JUROR HARVEY: And actually, a couple after that,
8 even though they knew that was a problem.

9 MR. MANN: Okay. So the baking soda was the
10 problem with the Sonicare?

11 JUROR HARVEY: Yes.

12 MR. MANN: All right. Thank you. Appreciate you
13 bringing that.

14 Anybody else?

15 Yes, sir, Mr. Ferrell? Mr. Ferrell, you got any
16 kinfolks over in Rusk County?

17 JUROR FERRELL: No, sir, I don't.

18 MR. MANN: Okay.

19 JUROR FERRELL: No. Actually, I was in a car
20 wreck back in 2006. I was in a Dodge pickup and the seat
21 came unbolted from the floor and flipped me into the dash
22 and caused many injuries, and -- but, you know, I -- I
23 actually -- I drive a Dodge pickup now. That's -- that's
24 what I have. So...

25 MR. MANN: Okay.

1 JUROR FERRELL: And there's -- you know, I have no
2 problems with it.

3 MR. MANN: Okay. So was there something -- did
4 you make a claim for a defective product?

5 JUROR FERRELL: Yes, sir.

6 MR. MANN: Okay. Did -- did you actually file a
7 lawsuit?

8 JUROR FERRELL: Yes, sir, there was one filed.

9 MR. MANN: Okay. And did you get satisfaction in
10 the end?

11 JUROR FERRELL: Yes, sir.

12 MR. MANN: And -- and then you still continue to
13 use the product?

14 JUROR FERRELL: Yes, sir. Yes, sir, I drive a
15 white Dodge truck sitting out there right now.

16 MR. MANN: All right. Thank you -- thank you, Mr.
17 Ferrell.

18 Yes, ma'am -- I think Ms. Jones?

19 JUROR JONES: Well, I had purchased a
20 refrigerator, and after three calls on it to come for
21 repairs, we finally decided it was a lemon and they issued
22 another refrigerator to us.

23 MR. MANN: Okay. Lemon law applies there. Three
24 times and you're out so...

25 Anybody else?

1 Yes, ma'am? You're Ms. Beasley, correct?

2 JUROR BEASLEY: Yes.

3 MR. MANN: Okay. Thank you, Ms. Beasley.

4 JUROR BEASLEY: I had an issue with a Ford Edge,
5 and it took about nine months to resolve. They finally
6 replace -- lemon law. I did not have to go to court, thank
7 God.

8 MR. MANN: Okay.

9 JUROR BEASLEY: Will I buy another Ford? No.

10 MR. MANN: Okay. All right. So you believe in
11 that found on road dead is -- applies, F-o-r-d?

12 Anybody else?

13 Yes, sir? Mr. Rogers?

14 JUROR WILSON: Wilson.

15 MR. MANN: Wilson. Okay.

16 JUROR WILSON: We had a refrigerator that -- like
17 they said, had three service calls and the problem wasn't
18 fixed and they immediately recalled it and replaced it.

19 MR. MANN: All right.

20 JUROR WILSON: I also had an antenna that had a
21 locking device that would turn the interior and it would
22 just keep sweeping, instead locking on the station and they
23 replaced it.

24 MR. MANN: All right. You got satisfaction then?

25 JUROR WILSON: Yes.

1 MR. MANN: All right. Thank you, sir.

2 Anybody else?

3 JUROR PARKER: In 1980, my dad died of asbestosis
4 lung cancer --

5 MR. MANN: Okay.

6 JUROR PARKER: -- and so we were part of the class
7 action suit to -- about from the -- to sue the major
8 asbestos corporations in the United States.

9 MR. MANN: Thank you, Ms. Parker. Was that -- was
10 that case actually filed here, Ms. Parker?

11 JUROR PARKER: Our attorneys were from Houston,
12 and it was in Beaumont.

13 MR. MANN: Okay. All right. Thank you.

14 Anybody else? I don't want to leave anybody out.

15 Okay. One thing I need to ask each one of you to -- to
16 search in your heart is -- and one thing that concerns me
17 any time when I would be here representing somebody that --
18 representing a large company that makes lots of money, okay?
19 I need to know if you believe because this is a large
20 company that makes lots of money, that they -- you could not
21 let them start out even with Mr. Harman who seeks lots of
22 money.

23 Anybody have that feeling? You just say, look,
24 you know, if it's a close call and I really kind of -- it's
25 kind of on the fence, I -- I think I'll go with them instead

1 of your company because it's a large company and they've got
2 lots of money and they can take care of this? Anybody have
3 that feeling? And I'm not asking you in a cynical way at
4 all. I -- I really do want to know that if that's truly
5 what you believe. Anybody? I see no hands.

6 So when I go talk to the president of the company
7 during this trial, I can say that each one of you feels in
8 your heart that you can be fair and impartial and you're not
9 going to hold it against them? You're going to do like this
10 Scale of Justice and have blinders on and say I'm just
11 listening to the evidence? Is that true? Raise your hand
12 if that's true. Give -- give me an affirmative answer.

13 Thank you. I appreciate that.

14 Now, have any of you ever -- and this is aside
15 from the answers that were given just a moment ago. Have
16 any of you ever boycotted a product? You have boycotted a
17 service? And -- and the best thing that came to mind to me
18 was -- and it was kind of silly years ago, but maybe you
19 didn't think it was silly. Remember when they had the
20 controversy over French fries and they said we're going to
21 call them freedom fries instead of French fries? And you
22 had people marching around, saying, I'm not going to eat
23 French fries, but I'll eat freedom fries. And you may have
24 been a part of that, and I'm certainly not making fun of
25 you, but if you have ever boycotted a product -- and it

1 doesn't have to be French fries -- I need to know if you
2 have done that you or a close family member? Anybody?
3 Mr. Ball? It wasn't French fries, was it?

4 JUROR BALL: No. I had a series of unfortunate
5 experiences with Sears, ordered a part. They send me a part
6 that didn't resemble the part I ordered. Asked for repair.
7 They went down the street, repaired the neighbor's machine
8 that didn't need repair. They -- and I had a couple of -- I
9 think it was -- you know, I say it was one part, I think it
10 was actually three parts -- three different things I'd
11 ordered over a period of time. Just didn't work out for me.
12 And said, no thanks, I'm done.

13 MR. MANN: Right. And I don't blame you. Thank
14 you, Mr. Ball.

15 Now, anybody else have boycotted a product?

16 Let me ask you. Have any of you -- I've seen --
17 listened to you, seen your questionnaire, looked at them.
18 Have any of you -- do you or a family member work in a
19 manufacturing process where you mold, weld, or press parts?
20 Anybody? If you'd raise your hand and let me know? You or
21 your husband, wife, child molds or welds parts?

22 Yes, sir?

23 JUROR WARD: I work for Ledwell & Son Enterprises
24 out of Texarkana which is probably one of the largest
25 fabrication companies in this part of the world.

1 MR. MANN: And I -- I appreciate you standing up
2 because I had circled earlier and I wanted to ask you about
3 that, Mr. Ward. Mr. Ward, right?

4 JUROR WARD: Yes, sir.

5 MR. MANN: All right. Mr. Ward, do you have any
6 special expertise in -- in welding?

7 JUROR WARD: No, sir.

8 MR. MANN: Okay. All right. Thank you.

9 Anybody else have any special expertise in
10 welding? Anybody on the panel?

11 Mr. Horton, I -- I thought I -- I know you worked
12 in the school, and did you used to teach industrial work, I
13 think, maybe?

14 JUROR HORTON: I still do. I'm an old shop
15 teacher.

16 MR. MANN: All right. Did you -- do you teach
17 welding in school?

18 JUROR HORTON: No, sir.

19 MR. MANN: Never did?

20 JUROR HORTON: No, sir.

21 MR. MANN: Okay. All right. What -- well, tell
22 me what you did do with that -- with the job.

23 JUROR HORTON: Well, I still teach woodworking.

24 MR. MANN: Okay.

25 JUROR HORTON: Cabinet making.

1 MR. MANN: Okay.

2 JUROR HORTON: Furniture making.

3 MR. MANN: Okay. All right. Thank you, sir.
4 Appreciate that.

5 JUROR HORTON: Yes, sir.

6 MR. MANN: I need to know if you know any of these
7 lawyers, and I'm going to name them -- several of them.
8 There's 12 of them that Mr. Harman has hired. And they are
9 Sam Baxter, who spoke to you earlier; John Ward, who he
10 mentioned; Kurt Truelove, who's from Marshall, and -- okay.
11 I'm going to let you raise your hands all at one time, and
12 I'll take you each, okay? If that's okay? Is that all
13 right?

14 Kurt Truelove, Jennifer Truelove, Josh Maness,
15 George Carpinello, Karen Dyer, Teresa Monroe, Nick Gravante,
16 Steve Lawrence, Jeff Shelly, Wyatt Durette.

17 Now, and when I'm talking about them, I'm talking
18 about people that you know work for them, their husbands or
19 wives, their children, you know them, that's what I need to
20 know. And can I go row by row? Did anybody know any of
21 those lawyers on the first row?

22 Second row?

23 Yes, ma'am, Ms. Hagerty?

24 JUROR HAGERTY: I graduated with Kurt Truelove.

25 MR. MANN: Okay. And do I need to be concerned --

1 does my client need to be concerned about that?

2 JUROR HAGERTY: No.

3 MR. MANN: Can we start out even --

4 JUROR HAGERTY: Yeah.

5 MR. MANN: -- in this case? And do you socialize
6 with him still, or you were classmates?

7 JUROR HAGERTY: No. We were classmates. We're
8 friends on Facebook.

9 MR. MANN: Okay. All right. And -- and so I
10 don't -- my client doesn't need to be concerned about that?

11 JUROR HAGERTY: No.

12 MR. MANN: All right. Thank you very much,
13 Ms. Hagerty.

14 Anybody else know any of those lawyers?

15 Let's call it third row, this front row here,
16 anybody know those lawyers?

17 Fourth row, starting with Mr. Toon?

18 JUROR TOON: Yes. I think Sam was the DA when I
19 first went to work over at the Sheriff's Department and
20 Jennifer, Josh --

21 MR. MANN: Okay.

22 JUROR TOON: -- from over there.

23 MR. MANN: All right. So you know the drill. I'm
24 going to ask you, can I -- can I tell my client you're going
25 to be fair --

1 JUROR TOON: Yes.

2 MR. MANN: -- and do you believe you can be fair?
3 Are there other cases you think it would be better that
4 you'd be on, or you're fine with what you're hearing in this
5 case?

6 JUROR TOON: I'm fine.

7 MR. MANN: All right. Thank you, Mr. Toon.
8 Anybody else on that row?

9 All right. Mr. Morgan's row? Anybody on that row
10 with Mr. Morgan?

11 Next row, Mr. Lewis, your -- your row? Anybody on
12 that row?

13 Next row, Ms. Parker's row?

14 And, yes, sir, we got to you.

15 Mr. Warren's row?

16 JUROR CLYNCH: I know the Trueloves.

17 MR. MANN: Okay. Mr. Clynch, should that be a
18 concern that we have that we would start off behind them?
19 Are you close enough with them where you go, hey, I don't
20 know you, Mark Mann, and I know them and so I -- I put more
21 credence in what they say than what you would say?

22 JUROR CLYNCH: No, sir.

23 MR. MANN: Okay. So, again, I can tell my client
24 that everything's fine, that you can be fair and impartial
25 and we start off even?

1 JUROR CLYNCH: Sure.

2 MR. MANN: Thank you. Thank you, Mr. Clynch.

3 Have any of you ever -- and this may cover a
4 little bit of what I asked earlier. Have any of you ever
5 written letters to a company to complain about a product?
6 Have any of you ever written letters, actually have sat down
7 and wrote the letter?

8 Yes, ma'am, Ms. Harvey?

9 JUROR HARVEY: A hotel chain.

10 MR. MANN: No. 1, I'm sorry.

11 JUROR HARVEY: Actually twice when we had bad
12 service at a hotel, and they reimbursed us with a free
13 night's stay, both of them.

14 MR. MANN: Which hotel?

15 JUROR HARVEY: Hampton Inn.

16 MR. MANN: Okay. Gosh, we're staying over there
17 today.

18 JUROR HARVEY: Well, if they're bad, you may agree
19 with me.

20 MR. MANN: Okay. Mr. Toon, your row.

21 Yes, ma'am, Ms. Beasley?

22 THE COURT: Let's get the microphone and stand up
23 if you would, Ms. Beasley. Thank you.

24 JUROR BEASLEY: Just Ford.

25 MR. MANN: Same thing, the Ford product?

1 JUROR BEASLEY: Yeah.

2 MR. MANN: Okay. Thank you.

3 You were asked early -- did I miss anybody? You
4 were asked early about -- earlier about media coverage.
5 And, yes, this has been in the media. And you may -- some
6 of you raised your hand and said that you knew something
7 about it. What I really need to know is have any of you by
8 either having media coverage, Internet, newspaper, whatever
9 that might be, have any of you formed an opinion in this
10 case about who's right and who's wrong? Have any of you?
11 Would you raise your hand if you have?

12 Okay. Can I just go row by row because I -- I
13 wrote your numbers down earlier who had heard some media.
14 But did anybody on the front row raise your hand earlier?

15 Mr. Taylor, did you? Mr. Taylor -- could I get
16 the microphone to Mr. Taylor, No. 5?

17 Mr. Taylor, was it TV, radio, what?

18 JUROR TAYLOR: Television.

19 MR. MANN: Television. And -- and by seeing that,
20 did you form some opinions by listening to that?

21 JUROR TAYLOR: No. It was just interesting.

22 MR. MANN: Okay.

23 JUROR TAYLOR: Not a problem.

24 MR. MANN: And -- and do you think that now that
25 you're here and that you're going to see evidence in this

1 case, that you can treat that fairly, or do you think that
2 that would influence you in the case?

3 JUROR TAYLOR: Yes, sir, I think I can treat it
4 fairly.

5 MR. MANN: Okay. Thank you, Mr. Taylor.

6 Hold on to that just a minute. You can sit down,
7 but just hold on to the microphone.

8 Anybody on the second row, did you have your hands
9 raised earlier about the media coverage? So nobody on the
10 second row has heard -- knows anything about this case,
11 except for what we've told you today; is that correct? All
12 right.

13 Third row?

14 Yes, sir? Mr. Horton. My question will be what
15 did you hear -- I mean, not what, but what, television,
16 radio, Internet?

17 JUROR HORTON: Television news stories and also
18 some consumer reports.

19 MR. MANN: Okay. And did you -- did you form an
20 opinion then?

21 JUROR HORTON: Only to the fact that I didn't know
22 what was causing the problem.

23 MR. MANN: Okay.

24 JUROR HORTON: Somebody said there was a problem.

25 MR. MANN: Okay.

1 JUROR HORTON: I couldn't figure out what they
2 were talking about.

3 MR. MANN: Okay. And do -- do we start off even
4 in this case?

5 JUROR HORTON: Yes, sir.

6 MR. MANN: I mean, you're going to listen to the
7 evidence? Will that influence you, what you heard?

8 JUROR HORTON: No, sir.

9 MR. MANN: Okay. Thank you, Mr. Horton.
10 Who else in the next row?

11 Ms. Beasley?

12 JUROR KERNAN: I read about it on the Internet and
13 the newspaper. I didn't form an opinion one way or the
14 other. They wasn't real specific about what all it was
15 about.

16 MR. MANN: Okay. Mr. Kernan, so same question.
17 The only thing -- the thing that concerns me always, as you
18 would all expect if this was your case on either side, is
19 can -- can you be fair? Can you?

20 JUROR KERNAN: I just have further questions about
21 it.

22 MR. MANN: All right. And so you're going to wait
23 and listen to form those questions and hopefully get those
24 answers in this trial?

25 JUROR KERNAN: Exactly.

1 MR. MANN: Yeah. Thank you.

2 Ms. Beasley, I think you raised your hand?

3 JUROR BEASLEY: Through the news and the media,
4 not enough information to form an opinion.

5 MR. MANN: Okay. Thank you, Ms. Beasley. You
6 anticipated my question.

7 Anybody else? I know there were maybe a few more
8 hands. Yeah.

9 Ms. Rogers?

10 JUROR ROGERS: Saw it on television, and I'm
11 interesting in hearing the case.

12 MR. MANN: Okay. And what I would ask you is from
13 what you've heard now, discount anything you've heard here
14 today because you haven't heard any evidence, but from that
15 television program, did you form any opinion in this case?

16 JUROR ROGERS: No, but I'd like to hear about it
17 -- hear about the case and, you know --

18 MR. MANN: Right.

19 JUROR ROGERS: But I'd like to -- hear about it --
20 hear about the case and, you know --

21 MR. MANN: Right.

22 JUROR ROGERS: -- but I have no opinion on it.
23 I'm open.

24 MR. MANN: Okay. You're open to both sides?

25 JUROR ROGERS: Ready to listen if I'm chosen.

1 MR. MANN: Okay. Thank -- thank you, Ms. Rogers.
2 And Mr. Wilson?

3 JUROR WILSON: Yes, I saw it on a television
4 program, but I did not form an opinion.

5 MR. MANN: Okay. So you -- you feel comfortable
6 that you can sit and call balls and strikes in this case?

7 JUROR WILSON: Yes, sir.

8 MR. MANN: All right. Anybody else?

9 Mr. Adams?

10 JUROR KENNETH ADAMS: I saw it on 20/20 and Good
11 Morning America.

12 MR. MANN: Okay.

13 JUROR KENNETH ADAMS: And plus, I'm a bus driver,
14 and I -- driving around rural routes and stuff, I'm seeing
15 these barriers up --

16 MR. MANN: Okay.

17 JUROR KENNETH ADAMS: -- and seen a couple of them
18 -- I think I heard someone earlier say something about they
19 saw one -- had seen one that had been glanced --

20 MR. MANN: Right.

21 JUROR KENNETH ADAMS: -- not the head-on, but I --
22 I haven't formed an opinion on it.

23 MR. MANN: Okay. Thank you, Mr. Rogers -- Adams,
24 I'm sorry.

25 JUROR KENNETH ADAMS: That's okay.

1 MR. MANN: Anybody else? Mr. Bryan?

2 JUROR GRAHAM: Graham.

3 MR. MANN: Graham. Okay.

4 JUROR GRAHAM: Yes, I saw it on television. But
5 I'm looking at it a little bit different angle. We heard
6 about a lot of car recalls, and having heard about some of
7 these recalls, people trying to save 10 cents or whatever it
8 might be on a part that's caused devastation, car wrecks, or
9 what have you, I have a concern about that. And I guess I
10 do have a little bit of opinion because I wondered if it was
11 somebody saving money, putting lives in jeopardy for the
12 bottom line, which is a dollar figure.

13 MR. MANN: Okay. All right. So besides
14 wondering, have you formed an opinion on that?

15 JUROR GRAHAM: I don't know.

16 MR. MANN: Okay. All right. Thank you. Thank
17 you.

18 Anybody else? Now, do any of you feel like it's a
19 good or bad idea that the Federal Highway Administration
20 sets guidelines for safety products going out onto our
21 roads? Anybody believe because we've got an agency that
22 says we're going to have these guidelines and you have to
23 meet these guidelines if you're going to put a product out
24 on the road? Anybody believe -- I'm not -- I don't buy that
25 because I just don't believe the federal government is

1 competent to do that? Anybody? I don't see anybody raising
2 their hands.

3 Let me ask you, who would you propose would set
4 guidelines for our federal highways if the Federal Highway
5 Administration doesn't do it? Can I call on Mr. -- is it
6 Behr?

7 JUROR BEHR: Yes.

8 MR. MANN: Mr. Behr. First -- first let's -- let
9 me ask you just individually, is it okay -- do you think
10 that's fine that the Federal Highway Administration sets
11 standards for what goes out on the road?

12 JUROR BEHR: I do.

13 MR. MANN: All right. So if that wasn't true,
14 who -- who would set those standards?

15 JUROR BEHR: I don't know that I'd be comfortable
16 with anyone else setting the standard at this point.

17 MR. MANN: Okay. And let me just ask you, just on
18 a personal level, are -- do you believe our federal
19 government has a beneficial value to it, or would you --
20 would you kind of be in that camp that, okay, federal
21 government does some things good, doesn't do some things
22 good? Would that be your camp?

23 JUROR BEHR: I would -- yeah, I would fully agree
24 with that.

25 MR. MANN: All right. But you would say the

1 Federal Highway Administration, you're fine with them
2 setting standards?

3 JUROR BEHR: In that category, I am.

4 MR. MANN: And I think that if I'm not wrong -- I
5 mean, you work at a company or a campus where you're doing
6 safety-type issues?

7 JUROR BEHR: Absolutely.

8 MR. MANN: All right. All right. Thank you very
9 much for being my guinea pig, Mr. Behr.

10 Anybody here -- you were asked by Mr. Baxter a few
11 questions about Texas A&M, and I -- I really don't want to
12 get into the football analogy, because I got an Aggie, I've
13 got a Baylor Bear, I've got a UT Longhorn, I got a -- I got
14 several -- I got four kids. But what I do want to ask you
15 is the serious question, and that is does anybody here
16 believe that Texas A&M would invent a product and put it out
17 on the road that they knew hurt somebody? Anybody?

18 Now, does anybody believe -- you may be -- you
19 know what a conspiracy theorist is? You know, like there's
20 always a conspiracy going on on everything, somebody is
21 trying to do something behind the scenes, kind of a book or
22 a novel or a movie.

23 In this case, what the Plaintiffs are trying to
24 tell you is that Texas A&M, Trinity, and the federal
25 government got together to try to pull the wool over

1 everybody's eyes to put a product out on the road that's not
2 safe intentionally.

3 Now, you may be somebody -- and I'm -- and I would
4 not be critical, I can promise you, because I am a little
5 bit of a conspiracy theorist. But I want to know if you
6 believe or does it make sense to you that Texas A&M and
7 Trinity and the United States agency for the safety of
8 products on our highways got together and decided, we're
9 just going to give this a pass because that's just what
10 we're going to do? Anybody?

11 What about those of you that said I've seen some
12 media coverage on it? Anybody believe that after seeing
13 that, yeah, now I get it, they all got together and decided
14 they're going to pull this off? Anybody?

15 Yes, sir? Mr. Berry? Mr. Berry.

16 JUROR BERRY: Yes.

17 MR. MANN: I -- I don't need to hear what you
18 believe, but I need to hear from you do you believe that
19 that's something that you would buy into?

20 JUROR BERRY: I have one question for you though.

21 MR. MANN: Okay.

22 JUROR BERRY: What percent of the time --

23 MR. MANN: What percent --

24 JUROR BERRY: -- 100 percent of the time or 90
25 percent of the time these items are safe?

1 MR. MANN: That's a very good question.

2 JUROR BERRY: Now, I do believe that, you know,
3 products are put on the market with a margin of errors.

4 MR. MANN: That is a very good point, and you
5 stole my like eighth question down here. So I'm going to go
6 on to it, okay? You mind handing it back, and then if you
7 have another question, I'll answer it, okay?

8 What -- what you need to understand is when this
9 product's put out on the road is that it goes on an end
10 terminal. And these terminals -- these end terminals that
11 you're seeing on this screen, they don't even get used --
12 they don't cause an accident. Typically, somebody that's in
13 an accident, driving fast, lose control of their car, get
14 hit and pushed over there. There's all types of scenarios.
15 But this product, you're going to hear evidence, was made to
16 work when something hits head-on at 62 miles per hour or
17 less, and in certain conditions. Because I want to -- I
18 want to ask because I've got Mr. Kirkland here who's -- I
19 know is an electrical engineer.

20 Mr. Kirkland, do you know of any product that you
21 could think of that's a safety product, and -- and you may
22 be able to come up with one -- that works a hundred percent
23 of the time, all the time in every single circumstance that
24 you can come up with?

25 JUROR KIRKLAND: No, I don't.

1 MR. MANN: All right. That's a short answer.
2 That's what I needed.

3 Let me -- let -- let me tell you, this product was
4 made to work to prevent worse accidents from happening. And
5 the fact is, they can -- they will show you an accident here
6 or an accident there because the fact is it's out of
7 criteria. You'll hear evidence of that. And it's very,
8 very unfortunate because obviously, I don't think Texas A&M,
9 nor Trinity, nor our Federal Highway Administration would
10 decide that we're going to put something out there we know
11 is going to hurt somebody. But they do know --

12 THE COURT: Let's move on to questions, Counsel.

13 MR. MANN: Thank you.

14 Can you understand that these groups know that
15 probably it will not work in a hundred percent of the
16 circumstances that Mr. Berry brought up? You understand
17 that?

18 Can everybody take that into account when you're
19 listening to the evidence in this case about how this
20 product works and listen to the engineers? Can each of you
21 do that?

22 Yes, ma'am? Did you have a question, Ms. Jones?

23 JUROR JONES: No.

24 MR. MANN: Okay.

25 JUROR JONES: Just agreeing with you.

1 MR. MANN: Okay. Thank you, ma'am.

2 Now, I need to know, do any of you have any
3 special skills in drafting, that you -- you draft?
4 I suspect, Mr. Kirkland, do you -- you probably draft some?

5 JUROR KIRKLAND: Yes.

6 MR. MANN: You can give me a shake of the head.
7 Anybody else do drafting?

8 Yes, sir, Mr. Horton.

9 JUROR HORTON: Well, I've taught drafting, and we
10 have to use drafting when we build things in the shop.

11 MR. MANN: Right. Right.

12 Okay. Anybody else have special training in
13 drafting? You do that, Mr. Berry? You can just -- we can
14 save you, Mr. McIntire (sic).

15 I just want to -- you do that on a regular basis?

16 JUROR BERRY: That was my entire life.

17 MR. MANN: Okay.

18 JUROR BERRY: Drawing was my life.

19 MR. MANN: Okay. Thank you, Mr. Berry.

20 How many of you work for or have worked for a
21 government agency? You, your husband, or your wife, work
22 for a government agency? And let's just take -- first row,
23 nobody's got their hands up.

24 Yes, sir, Mr. Loyd?

25 JUROR LOYD: My wife works for Louisiana State.

1 MR. MANN: That's right. Is she a nurse?

2 JUROR LOYD: Research.

3 MR. MANN: Research?

4 JUROR LOYD: Uh-huh.

5 MR. MANN: Do you believe -- is it in your belief
6 that people who work in government should be treated
7 differently than people who don't work in government?

8 JUROR LOYD: No.

9 MR. MANN: Okay. Now, I know if you and I were to
10 meet on the street and talk, we could probably find
11 something to complain about, the IRS or what -- whatever the
12 agency is that each of you may have a complaint about. But
13 do you believe that people just because they work in
14 government that they're bad people or have bad thoughts or
15 want to do something any different than any other person?

16 JUROR LOYD: No.

17 MR. MANN: Thank you, sir.

18 Does anybody else believe that? Anybody believe
19 that because you work in government that somehow or another
20 you should not be treated -- your -- your thought process,
21 your opinions should not be -- should be treated any
22 differently than somebody that's not in government? Anybody
23 believe that?

24 Yes, ma'am? It's Ms. Holder; is that right?

25 JUROR Holder: Yes, Ms. Holder. I do just because

1 I'm a veteran, so I think of the Government a little bit
2 differently than people who have never been in the military.
3 So that's just my point of view.

4 MR. MANN: And explain that a little further for
5 me. I mean, are you -- because I'm not sure I understand.
6 Are you telling me you think, yeah, people that are in
7 government are different, or are you saying -- tell me what
8 you're thinking.

9 JUROR HOLDER: I think that people in the
10 government are -- we think differently than people who have
11 never been in the military or worked for a government
12 agency.

13 MR. MANN: And explain that to me. Tell me what
14 you mean a little bit.

15 JUROR Holder: Well, as a government employee, as
16 military, I've done things that most people have never done
17 before. So I just -- I have a different point of view, I
18 guess, and a different mindset than most people would have.

19 MR. MANN: Okay. And do you think that's a good
20 thing?

21 JUROR Holder: I think so. I think I'm pretty
22 worldly.

23 MR. MANN: Okay. All right. Thank you,
24 Ms. Holder. Thank you for speaking up.

25 Do -- does anybody have any problem with our

1 federal tax dollars going to states to use this particular
2 product or any roadway safety product? You just go, look, I
3 don't believe federal government ought to be paying the
4 states for using safety products on the road. Does anybody
5 have that feeling?

6 Does everybody agree that whether you like paying
7 federal taxes or not, that that is a good use of your money?

8 Does everybody -- can everybody agree with this,
9 or does anybody disagree and say you shouldn't be doing
10 that? Anybody disagree on the first row?

11 You understand what I'm saying is that your
12 federal tax dollars go to states to use this product just
13 like other safety products. In other words, they're
14 approved by the FHWA, and then the FHWA tells these folks,
15 the Federal Highway Administration tells these states, if
16 you use this product, you can get federally reimbursed for
17 using these products, okay?

18 Is everybody okay with that on the first row?

19 Second row, everybody okay; have a problem with
20 that?

21 Third row?

22 Fourth row?

23 Mr. Toon's row?

24 Fifth? Let me just take everybody. Everybody
25 agree with that?

1 Now, nobody's agreeing with me just because
2 everybody else is agreeing, are you? You're -- you're
3 being -- you're telling me the facts?

4 Okay. All right. Thank you. I kind of asked you
5 this earlier, but does anybody just on its face believe that
6 if you're listening to a Federal Highway Administration
7 official --

8 THE COURT: You have five minutes, Counsel.

9 MR. MANN: Thank you, Your Honor.

10 That somehow that that person, because they're the
11 agency overlooking this, should somehow be believed less
12 than anybody else; that they'd have some motivation for --
13 for not telling you the truth? Anybody?

14 Ladies and gentlemen, clearly in this case -- and
15 you're going to have some -- some of these heads rolled in,
16 you're going to be able to see the -- the change that was
17 made to this product that Texas A&M, the holders of the
18 inventor -- the holders of the patent said should be done.
19 And what the other side is going to try to tell you is that
20 somehow or another the FHWA who's in charge of these
21 products had no idea this change was made. It was on video;
22 there were pictures; there were reports.

23 Okay. What I want to ask you, do you -- do you
24 believe that somebody in Government or Texas A&M or Trinity,
25 knowing that there were pictures, videos, test reports,

1 could pull up the wool over a safety expert's eyes, the
2 chief investigator for the whole United States, who is an
3 engineer? Anybody believe that?

4 Thank you.

5 Now, let me ask you some individual questions, if
6 it's okay, and I will be finished.

7 Mr. Taylor, No. 5, Mr. Taylor, I -- and I checked
8 you out, and I found I think that maybe you sat or were
9 picked or in -- have you been on a jury before like Burke
10 versus Chesapeake? Have you been in this courtroom before?

11 JUROR TAYLOR: No, sir. I'm always down at the
12 other courthouse.

13 MR. MANN: In the state courthouse? So that must
14 have been a case over at the state courthouse.

15 JUROR TAYLOR: Yes.

16 MR. MANN: And that's the civil case that you sat
17 on?

18 JUROR TAYLOR: Yes, it is.

19 MR. MANN: Did y'all reach a verdict in that case,
20 make a decision in the case?

21 JUROR TAYLOR: Yes, we did.

22 MR. MANN: Okay. And do you remember who -- was
23 it for the Plaintiff --

24 THE COURT: Can you use that microphone a little
25 bit, Mr. Taylor?

1 JUROR TAYLOR: Oh, I'm sorry.

2 THE COURT: Thank you.

3 JUROR TAYLOR: It was -- it was -- well, the case
4 was, I think, the Plaintiff won that.

5 MR. MANN: Okay. All right. Thank you. Thank
6 you, Mr. Taylor. Thank you very much.

7 Ms. Carwile, can I talk to you just a moment. I
8 know your partner -- is she an RN?

9 JUROR CARWILE: Yes.

10 MR. MANN: I think you said that earlier.

11 JUROR CARWILE: Yes.

12 MR. MANN: I know y'all probably talk shop when
13 you're at home. Do you think you know a little bit more
14 than the ordinary person on the street about medicine and
15 those things?

16 JUROR CARWILE: Yes. She's a hospice nurse so
17 yes.

18 MR. MANN: Hospice. Okay. And has she been a
19 nurse in a hospital setting, too?

20 JUROR CARWILE: Yes.

21 MR. MANN: Okay. All right. And so the answer
22 would be you probably know a little more than I know about
23 it, but you wouldn't consider yourself to be a nurse, would
24 you?

25 JUROR CARWILE: No.

1 MR. MANN: All right. Thank you. Appreciate it.

2 Mr. Loyd? Mr. Loyd, while he's walking over, did
3 you -- were you picked on a jury in this particular
4 courtroom before? Have you been picked on a jury before?

5 JUROR LOYD: No.

6 MR. MANN: Okay. There was -- there was a case
7 over here tried or settled several years ago that was a
8 seatbelt case.

9 THE COURT: You have one minute, Counsel.

10 MR. MANN: Thank you, Your Honor.

11 JUROR LOYD: I came in for some -- I never was
12 selected.

13 MR. MANN: Okay. That's probably what it was.
14 You were in the panel in this -- in this courtroom?

15 JUROR LOYD: A setting like this, yes.

16

17 MR. MANN: Okay. Thank you, sir. Thank you very
18 much.

19 I'm running out of time. I really just need to
20 ask each one of you to think about this: You know, you've
21 heard from Mr. Baxter; you've heard from my side.

22 You haven't heard any evidence yet, but you're
23 going to, but I'm telling you right now that what I've told
24 you I expect to be the truth. It'd better be.

25 But I need to know from each one of you, if you

1 were in my situation where I'm -- you're trying to decide
2 whether somebody can be fair and impartial.

3 Are -- each one of you jurors, do you think I've
4 got a clear slate in this case; I can make a fair and
5 impartial decision; treat both sides fairly, because that's
6 what you're expected to do?

7 Any reason why any of you would raise your hand
8 and say, look, Mr. Mann, these other -- there's probably
9 other cases I'd be better in; this is one I probably
10 shouldn't sit in because I've kind of already made my mind
11 up where I think this ought to go? Anybody?

12 THE COURT: Your time is up, Counsel.

13 MR. MANN: Thank you, Your Honor. I appreciate
14 it. I look forward to putting on the case for you.

15 THE COURT: Counsel, approach the bench, please.

16 (Bench conference.)

17 THE COURT: Does the Plaintiff have any challenges
18 for cause?

19 MR. BAXTER: No, Your Honor.

20 THE COURT: Does the Defendant have any challenges
21 for cause?

22 MR. MANN: We -- we -- we do. We do have No. 5,
23 Your Honor.

24 THE COURT: For cause?

25 MR. MANN: Yes.

1 THE COURT: What's the basis of it?

2 MR. MANN: The media questions. We'd like to talk
3 a little bit more about the media.

4 THE COURT: You don't get to extend the voir dire.
5 If you've got a reasonable basis to challenge him for cause,
6 I'll bring him up here.

7 MR. MANN: Well, reasonable basis for challenge
8 for cause is that he -- he said that he's listened to the
9 information, and he didn't raise his hand. And I think,
10 Your Honor, I'd like to be able to ask him questions outside
11 where I don't poison the rest of the jury about the facts of
12 the media.

13 THE COURT: I'm not going to call everybody up
14 here who's raised their hand that they've listened to the
15 media just because they raised their hand.

16 MR. MANN: I understand.

17 THE COURT: If you want to challenge him for
18 cause, we'll challenge him for cause.

19 MR. MANN: I do.

20 THE COURT: Do you have any others?

21 MR. MANN: Yes, Your Honor. We have No. 8.

22 THE COURT: Ms. Hagerty?

23 MR. MANN: Graduated with Kurt -- with Truelove.
24 So she knows one of the counsel.

25 THE COURT: Okay.

1 MR. MANN: No. 17, that's media, media issue.
2 No. 22. And I don't think we'll go past there probably.

3 THE COURT: What's the basis to challenge?

4 MR. MANN: Media, media question.

5 THE COURT: Did she say something in your voir
6 dire that indicated you believed that she's already got her
7 mind made up because of the media?

8 MR. MANN: Your Honor, I purposely did not go
9 into, well, what did you hear and what -- those issues for
10 that reason, because --

11 THE COURT: All right. Mr. Mann, I'll bring her
12 up. Do you have any other challenges for cause?

13 MR. MANN: Can I talk to my co-counsel just a
14 moment --

15 THE COURT: You may.

16 MR. MANN: -- because I haven't even had a chance
17 to do that.

18 (Pause in proceeding.)

19 MR. MANN: Okay. Your Honor, we can -- we are
20 withdrawing our challenges for cause for 5 and 17, and we're
21 just challenging No. 8.

22 THE COURT: 5 and 17 you're withdrawing your
23 challenge for cause. What about No. 8?

24 MR. MANN: 8 was the --

25 THE COURT: Keep that?

1 MR. MANN: Yes, sir.

2 THE COURT: Okay. You have any challenges for
3 cause you haven't told me about?

4 MR. MANN: I don't think so, Your Honor.

5 THE COURT: Okay. Then I'm going to excuse the
6 panel for recess, except No. 5, and we'll talk about his
7 schedule with him. No. 8 you've challenged her for cause.
8 No. 9 has a scheduling issue. No. 10 does. No. 13, No. 15,
9 No. 20.

10 Are you maintaining your challenge for cause on
11 22, Ms. Beasley, or withdraw?

12 MR. MANN: I don't think we'll go that far, Your
13 Honor.

14 THE COURT: You don't? You'll withdraw. Okay.

15 MR. MANN: The only reason I would is if we go
16 that far, but I don't -- if you were to get rid of -- let
17 some of these go that have said they have a conflict, I
18 still don't think we'll reach that.

19 THE COURT: That puts us through the mid-20s,
20 and --

21 MR. SHAW: She's 22.

22 MR. MANN: She's 22.

23 MR. SHAW: I think we're going to withdraw it for
24 cause for her anyway, Judge. I haven't heard anything out
25 there.

1 THE COURT: Okay. So I show the only maintained
2 challenge for cause you have is No. 8; is that right?

3 MR. MANN: Yes, sir. Yes, sir.

4 THE COURT: Y'all have a seat.

5 (Bench conference concluded.)

6 THE COURT: All right. Ladies and gentlemen, I'm
7 going to excuse the majority of the panel for a recess. I'm
8 going to keep some of you in your places and bring you up
9 one at a time and discuss some things with you here at the
10 bench.

11 If you are not excused, just stay where you are.
12 If you need to step out of the way to let somebody else get
13 by you that has been excused, that's fine, but be -- stay at
14 your seat.

15 Those of you that I am excusing for recess, I'm
16 going to ask you to exit the double doors in the back of the
17 courtroom. I'm going to ask you to stay in the building. I
18 don't think with today's weather that should be a real risk,
19 but I don't want you to go far. You'll find to the left as
20 you go out the double doors around the corner, there are
21 water fountains and there are restrooms. You can certainly
22 avail yourself of those.

23 I'm instructing you during this recess don't
24 discuss anything you've heard in the courtroom. And I will
25 tell you, you have not heard any evidence in this case.

1 What the lawyers tell you is not evidence. But
2 that being -- that notwithstanding, don't discuss what's
3 happened in the courtroom. Talk about the weather; talk
4 about football this weekend, and that great come-behind
5 victory by Baylor over TCU, but don't talk about anything
6 you've heard in the courtroom.

7 And then we'll have you back here in shortly and
8 proceed. And those that I keep in the courtroom will be
9 coming out to join you one at a time. And, of course,
10 they're not to discuss anything about what happened in the
11 courtroom as well.

12 So with those instructions, the following people
13 I'm going to ask to stay behind, the rest of the panel I'll
14 excuse. Mr. Taylor, if you would stay behind. Ms. Hagerty.
15 If you would. Mr. Loyd, No. 9; Mr. Ball, No. 10;
16 Ms. McPherson, No. 13; Ms. Vincent, No. 15; Ms. Benge, No.
17 20; Mr. Small, No. 35; and Mr. Adams, No. 38.

18 If I haven't called your name or number, then
19 you're excused at this time. If you'll stay close, get a
20 drink of water, visit the restroom. Don't discuss anything
21 that's happened in the courtroom. You're excused at this
22 time for recess.

23 (Jury panel out.)

24 THE COURT: All right. Be seated, please.

25 Counsel, if you'd approach the bench.

1 Mr. Taylor, if you'd come up here and come around
2 over on this side and let me visit with you.

3 (Bench conference.)

4 THE COURT: And this is our microphone, if you'll
5 kind of talk quietly into that.

6 JUROR TAYLOR: Okay.

7 THE COURT: Mr. Taylor, early on in the process,
8 you indicated to me that you might have a scheduling problem
9 being available throughout the trial.

10 JUROR TAYLOR: Yes.

11 THE COURT: I think, my best guess, should be
12 ending Monday of next week. Tell me about that scheduling
13 problem.

14 JUROR TAYLOR: I've been waiting for two months on
15 the VA to have a procedure done, and it will be done on the
16 16th.

17 THE COURT: Okay.

18 JUROR TAYLOR: So --

19 THE COURT: You're scheduled to have that on the
20 16th?

21 JUROR TAYLOR: Yes, sir. Colonoscopy.

22 THE COURT: Okay.

23 JUROR TAYLOR: So I didn't think that it was going
24 to last that long is the reason I didn't put it on there.

25 THE COURT: All right, sir. Well, let me just ask

1 you this: If the choice was to go have it on the 16th or to
2 reschedule, what would you prefer to do?

3 JUROR TAYLOR: Well, you know how the VA is. If
4 you reschedule something now, it may be two or three more
5 months.

6 THE COURT: Okay. Okay.

7 JUROR TAYLOR: Before they --

8 THE COURT: How long have you been waiting to get
9 this scheduled?

10 JUROR TAYLOR: Oh, I've been waiting over two
11 months for this.

12 THE COURT: Okay.

13 JUROR TAYLOR: Yes, sir.

14 THE COURT: All right. Counsel, do you have any
15 questions of Mr. Taylor?

16 MR. BAXTER: No, sir.

17 MR. MANN: No, Your Honor.

18 THE COURT: Mr. Taylor, I'm going to let you join
19 everybody else outside. Just don't discuss anything that's
20 happened in the courtroom.

21 JUROR TAYLOR: Yes, sir.

22 THE COURT: Thank you.

23 (Juror Taylor out.)

24 THE COURT: I'm going to excuse Mr. Taylor.

25 (Bench conference concluded.)

1 THE COURT: Ms. Hagerty, would you come forward,
2 please?

3 (Bench conference.)

4 THE COURT: How are you, Ms. Hagerty? If you'd
5 speak quietly into this little microphone.

6 JUROR HAGERTY: I will.

7 THE COURT: During the questioning, you indicated
8 you had seen some of the media coverage.

9 JUROR HAGERTY: No.

10 THE COURT: You haven't?

11 JUROR HAGERTY: No.

12 THE COURT: Okay. Well, that makes that clear.

13 JUROR HAGERTY: No, I haven't seen any of it.

14 THE COURT: All right.

15 MR. BAXTER: Truelove, Your Honor.

16 THE COURT: Oh, okay. You also indicated you
17 were a classmate in high school with Kurt Truelove.

18 JUROR HAGERTY: Yes. Well, I knew him when I was
19 younger, too. He lived around the corner from me growing
20 up.

21 THE COURT: Okay. Is there anything about that
22 that would cause you to favor either side of the case that
23 he's on?

24 JUROR HAGERTY: No.

25 THE COURT: Once you-all got out of high school,

1 did you continue to interact or see each other on a regular
2 basis?

3 JUROR HAGERTY: No. I saw him for the first time
4 at a funeral recently.

5 THE COURT: And when you say for the first time,
6 how long has it been?

7 JUROR HAGERTY: Over 20 years.

8 THE COURT: Okay. Okay. So you're not worried
9 that anything about playing as children together or going to
10 high school would cause you to be unfair?

11 JUROR HAGERTY: No.

12 THE COURT: And if you're selected, whatever that
13 prior exposure with Mr. Kurt -- Mr. Truelove was, you can
14 put that out of your mind and make your decision solely on
15 the evidence?

16 JUROR HAGERTY: Yes, sir.

17 THE COURT: You have any doubts about that?

18 JUROR HAGERTY: Uh-huh.

19 THE COURT: Mr. Mann, do you have any questions?

20 MR. MANN: No, sir.

21 MR. BAXTER: No, Your Honor.

22 THE COURT: Mr. Baxter?

23 Okay. Ms. Hagerty, I'm going to let you join the
24 rest of the group outside.

25 JUROR HAGERTY: Okay.

1 THE COURT: Just don't discuss anything that's
2 happened in here.

3 JUROR HAGERTY: Okay.

4 THE COURT: Thank you.

5 (Juror Hagerty out.)

6 THE COURT: Okay. Challenge for cause regarding
7 Ms. Hagerty is overruled. She's not excused.

8 (Bench conference concluded.)

9 THE COURT: Mr. Loyd, would you come up, please?

10 (Bench conference.)

11 THE COURT: Mr. Loyd, early on you mentioned that
12 you might have some scheduling problem with being able to be
13 here through the 20th.

14 JUROR LOYD: Yes, sir.

15 THE COURT: Tell me about that.

16 JUROR LOYD: We have a training that's been paid
17 for in Houston, Cisco training, that my work's paid for that
18 I'm supposed to leave Sunday to go to.

19 THE COURT: How long would that last?

20 JUROR LOYD: It's Monday through Friday of next
21 week.

22 THE COURT: Okay. And you're part of the group
23 that's being trained; is that right?

24 JUROR LOYD: Yes, sir.

25 THE COURT: Okay.

1 JUROR LOYD: That's where I was going.

2 THE COURT: How many people from your work are
3 going down there to be trained?

4 JUROR LOYD: Four. I'm the only one from my area.

5 THE COURT: Okay. Is that something you could
6 join late since that's Monday of next week, or is that
7 something you need to be there at the very beginning of?

8 JUROR LOYD: I need to be there at the beginning.

9 THE COURT: Okay. Counsel, any questions for Mr.
10 Loyd?

11 MR. BAXTER: No, Your Honor.

12 MR. MANN: No, sir.

13 THE COURT: Mr. Loyd, I'll let you join the rest
14 of the group outside. Just don't discuss anything that's
15 happened in here.

16 (Juror Loyd out.)

17 THE COURT: I'm going to excuse Mr. Loyd.

18 (Bench conference concluded.)

19 THE COURT: Mr. Ball?

20 (Bench conference.)

21 THE COURT: Mr. Ball, if you'll just talk quietly
22 into this microphone.

23 Early on, you mentioned that you might have a
24 scheduling problem with being able to be here for the entire
25 trial. Can you tell me about that?

1 JUROR BALL: Yes. My 91-year-old mother, she had
2 some medical issues. She ended up in Good Shepherd. Now,
3 she's in a skilled nursing facility. I'm her only heir. I
4 have medical power of attorney. Tomorrow at 11:30, there's
5 a doctor's appointment. Wednesday, at 1:30, there's a -- a
6 meeting with the skilled nursing facility to determine her
7 care.

8 I have medical power of attorney, and she can't
9 communicate well, so sadly these decisions I need to make
10 for her. And this is a -- a recent thing, and so here I am.

11 THE COURT: Just for my information, are -- are
12 you the only child?

13 JUROR BALL: Yes.

14 THE COURT: Are there other family that will be
15 there?

16 JUROR BALL: No. My wife who is an RN who could
17 have done this, she's in Iowa with her brother who's dying.

18 THE COURT: Okay.

19 JUROR BALL: So I'm it.

20 THE COURT: All right, Mr. Ball. Well, that
21 answers my questions.

22 Counsel, any questions of Mr. Ball?

23 MR. MANN: No, Your Honor.

24 MR. BAXTER: No, sir.

25 THE COURT: I'm going to allow you to join the

1 rest of the panel outside. Just don't discuss anything
2 that's happened in here.

3 (Juror Ball out.)

4 THE COURT: I'm going to excuse Mr. Ball.

5 (Bench conference concluded.)

6 THE COURT: Ms. McPherson?

7 (Bench conference.)

8 THE COURT: Ms. McPherson, you indicated early on
9 that you might have a scheduling problem being here through
10 the week and into maybe Monday of next week. Tell me about
11 that.

12 JUROR MCPHERSON: I should go this week to take a
13 blood test for my thyroid to see if they have gone out of
14 whack again, so --

15 THE COURT: Is that something you could schedule
16 for the week after?

17 JUROR MCPHERSON: I could.

18 THE COURT: Okay. Is there any other reason why
19 you have a problem with potentially being here for jury
20 service, if you're selected?

21 JUROR MCPHERSON: My blood pressure is up, and
22 it's been up a couple of weeks, and I thought I might need
23 to see a doctor.

24 THE COURT: Okay. You don't have a doctor's
25 appointment right now?

1 JUROR MCPHERSON: No.

2 THE COURT: And the blood test for your thyroid,
3 when is that scheduled?

4 JUROR MCPHERSON: This week.

5 THE COURT: You do that at the doctor's office or
6 you go by the hospital, or where do you have that done?

7 JUROR MCPHERSON: It's at the -- it's a clinic on
8 Good Shepherd Medical thing on 280 where my doctor --

9 THE COURT: Okay.

10 JUROR MCPHERSON: Thyroid doctor is. I get it
11 there.

12 THE COURT: You go in and they take some blood?

13 JUROR MCPHERSON: Yes.

14 THE COURT: Okay. If you needed to reschedule
15 that, if I needed you to serve, could you do that?

16 JUROR MCPHERSON: Yes, I could.

17 THE COURT: Other than what we've talked about, is
18 there any other reason you couldn't be a juror?

19 JUROR MCPHERSON: No.

20 THE COURT: Okay. I'm going to let you join the
21 rest of the group outside. Don't discuss anything about
22 what we've talked about in here.

23 JUROR MCPHERSON: Okay.

24 THE COURT: Thank you, ma'am.

25 (Juror McPherson out.)

1 THE COURT: I'm not going to excuse Ms. McPherson.
2 That's easily rescheduled.

3 (Bench conference concluded.)

4 THE COURT: Ms. Vincent, would you come up,
5 please.

6 (Bench conference.)

7 THE COURT: Early on, Ms. Vincent, you indicated
8 you might have a scheduling problem being able to be here
9 for the whole trial. Tell me about that.

10 JUROR VINCENT: Well, I got up at 8:00 o'clock
11 this morning and came over here, and I've been sitting here
12 dozing in and out on all this. And I just don't think I can
13 do it. Plus, I have to go back at 8:00 o'clock tonight and
14 work a 12-hour shift. I'm not guaranteed to get off at 8:00
15 o'clock in the morning, because if we have someone that
16 doesn't show up, somebody has to stay.

17 THE COURT: You understand if you're selecting for
18 jury service, you don't go to work and the Sheriff's
19 Department has to replace you. You don't have to work all
20 day as a juror and then work all night at the jail.

21 JUROR VINCENT: I understand that, but we're very
22 short-staffed. They just sent four of them to school that
23 work on first shifts.

24 THE COURT: Okay. Let me ask it this way. What
25 you're telling me, as I understand it, is that it's

1 work-related with your responsibilities at the jail?

2 JUROR VINCENT: Yes, sir.

3 THE COURT: Is there some other thing besides your
4 jail-related responsibilities that would cause you not to be
5 able to serve, if you were selected?

6 JUROR VINCENT: No, sir.

7 THE COURT: Okay. Any questions for Ms. Vincent?

8 MR. BAXTER: No, Your Honor.

9 MR. MANN: No.

10 THE COURT: Okay. I'm going to let you join the
11 rest of the group outside, Ms. Vincent. Don't discuss
12 anything about what's happening here?

13 JUROR VINCENT: Can I put my umbrella and stuff in
14 the truck?

15 THE COURT: We'll break in just a minute. If you
16 can just wait a little bit, but go ahead and join them
17 outside.

18 (Juror Vincent out.)

19 THE COURT: I'm not going to excuse Ms. Vincent.
20 That's the Sheriff's problem, not her problem. I've heard
21 that story too many times, but usually from the Sheriff.
22 All right. No. 20.

23 (Bench conference concluded.)

24 THE COURT: Ms. Benge, would you come forward,
25 please?

1 (Bench conference.)

2 THE COURT: Let me start off by telling you I
3 apologize for mispronouncing your name.

4 JUROR BENGES: That's okay.

5 THE COURT: My name has been mispronounced in more
6 ways than I can count, and I don't like to do it with other
7 people.

8 You indicated earlier in the process today that
9 you might have a problem being available to serve the entire
10 week.

11 JUROR BENGES: I stay with my granddaughter in the
12 mornings after her mother goes to school and get her ready
13 and take her to school.

14 THE COURT: And where does your granddaughter go
15 to school?

16 JUROR BENGES: Gladewater.

17 THE COURT: Okay. And what time is she at school
18 each morning?

19 JUROR BENGES: I usually take her at 7:30.

20 THE COURT: Okay. Now, we're going to start the
21 trial about 8:30 each morning. If you drop her off in
22 Gladewater at 7:30, do you think you can get here by 8:30?

23 JUROR BENGES: I don't know.

24 THE COURT: All right. Let me --

25 JUROR BENGES: It took me an hour and 15 minutes

1 this morning. Of course, it was raining.

2 THE COURT: Right. Right. The weather is
3 supposed to clear up after today. Other than that travel
4 time and your responsibility with your granddaughter, is
5 there any other reason you couldn't serve, if you were
6 selected?

7 JUROR BENGE: Okay.

8 THE COURT: Do either counsel have any question
9 for this juror?

10 MR. BAXTER: No, Your Honor.

11 MR. MANN: No, Your Honor.

12 THE COURT: I'm going to let you join the rest of
13 the group outside. Just don't discuss anything that's
14 happened in here.

15 JUROR BENGE: Okay.

16 THE COURT: Thank you, ma'am.

17 JUROR BENGE: Thank you.

18 (Juror Benge out.)

19 THE COURT: I'm not going to excuse Ms. Benge.

20 All right. Next is Mr. Small. Let's look at what
21 I've done so far. I've given one, two, three excuses. And
22 Mr. --

23 MR. MANN: We're up to 19, Your Honor.

24 THE COURT: And Mr. Small is 35. There's not any
25 way he's going to be reached.

1 MR. MANN: Just go through 19.

2 THE COURT: Okay. I'm going to tell these last
3 two gentlemen they can join the rest of the group outside.
4 Before I do that, how long do y'all need to strike this
5 panel?

6 MR. BAXTER: 20 minutes, Judge.

7 MR. MANN: That's fine.

8 MR. WARD: Can we have an extra two minutes for a
9 bathroom break?

10 MR. MANN: Y'all quit complaining about being old.

11 MR. WARD: It's just hard.

12 THE COURT: Let's have you back in here at 5
13 minutes to 12:00 -- 5 minutes until 1:00.

14 MR. BAXTER: All right. Thank you, Your Honor.

15 (Bench conference concluded.)

16 THE COURT: You last two gentlemen, we're not
17 going to reach you so you can join the rest of the panel
18 outside. Just don't discuss anything that's happened in the
19 courtroom today. Thank you, gentlemen, No. 35 and No. 38.

20 And, counsel, you have until 11 -- excuse me --
21 12:55 to strike your list. We'll stand in recess until
22 then.

23 COURT SECURITY OFFICER: All rise.

24 (Recess.)

25 (Jury out.)

1 COURT SECURITY OFFICER: All rise.

2 THE COURT: Be seated, please.

3 Ms. Martin, are you going to bring the panel into
4 the courtroom?

5 (Jury panel in.)

6 THE COURT: If you're on the jury panel, you need
7 to be seated on the left-hand side of the room facing me, or
8 facing the back door on the right-hand side of the room. If
9 you're a jury panel member, find a seat on the left-hand
10 side of the room where everybody else is seated -- sitting
11 down.

12 Mr. Loyd, you're on the wrong side of the room.
13 If you'll come up to the front with the Court Security
14 Officer, any of you on that back row.

15 MS. MARTIN: There are six -- six of them back
16 here.

17 THE COURT: Bring them forward, please. Just any
18 place behind there you can find, gentlemen.

19 All right. Everybody else have a seat, please.

20 All right. Ladies and gentlemen, if you'll listen
21 carefully when your name is called, I'll ask you to come
22 forward and have a seat in the jury box. Before we call the
23 names, we're going to seat eight jurors to comprise this
24 jury. The first four of you, I would ask to sit on the
25 front row of the jury box. To make sure that you're

1 centered on that row, I'm going to ask the first juror on
2 Row 1 as you walk into the box to leave the last two seats
3 vacant. So stand at the third seat and when everybody has
4 been called, everybody's in the box, I'll seat you all at
5 one time. That will give us the first four on the front row
6 and the second four behind them on the second row.

7 So with those instructions, Ms. Schroeder will
8 call the names of the members of the panel who have been
9 selected to serve as our jury.

10 COURTROOM DEPUTY: Mary Maris.

11 THE COURT: If you'll come forward when your name
12 is called.

13 COURTROOM DEPUTY: Jack Kirkland, Kristy Carwile,
14 Pauli McPherson, Tammy Vincent, Phillip Horton, Michael
15 Young. Did I call Deborah Jones? I'm sorry. She goes
16 after Ms. McPherson.

17 THE COURT: All right. Ms. Jones, you're the
18 first one on the second row.

19 COURTROOM DEPUTY: And then Ms. Vincent.

20 THE COURT: All right. Be seated, please.

21 For all of you on the jury panel who were not selected to
22 serve in this case as members of the jury, I'm about to
23 excuse you. It's been a long morning.

24 I want to sincerely tell you how much the Court
25 appreciates your being here. The time you spent this

1 morning as a part of this jury panel, we could not have
2 selected this jury or be prepared to go forward with the
3 trial of this case without you being here. You have the
4 Court's sincere appreciation. And even though you weren't
5 selected, you have rendered a valuable public service by
6 being here. I know that every one of you had somewhere else
7 to be today and that you had other things that were equally
8 as important to do. That's not lost on the Court. And I
9 sincerely, for myself and all the members of the Court,
10 appreciate your being here. I only ask when you're called
11 to serve again, that you'll come back and come with the same
12 positive attitude that you've exhibited this morning.

13 If you need anything for your place of work, an
14 excuse, or anything else, if you'll see Ms. Martin in the
15 clerk's office on the way out, she'll collect your -- your
16 numbers and your badges and anything else that you have. If
17 you have any questions about your service, take those up
18 with Ms. Martin.

19 Again, thank you, each one, for being here.
20 Travel safely as you go about your business, and you are
21 excused at this time.

22 COURT SECURITY OFFICER: All rise.

23 (Jury panel out.)

24 THE COURT: All right. If everybody but the
25 members of the jury would be seated, please.

1 I'm going to ask Ms. Schroeder to administer the
2 oath to the members of the jury at this time.

3 (Jurors sworn.)

4 THE COURT: Please have a seat, ladies and
5 gentlemen.

6 We're about to excuse you for lunch. After lunch,
7 we will begin with opening statements and my preliminary
8 instructions to you. And then after those are complete,
9 we'll hear from the first witness in the case. Because of
10 the bad weather and because of the delays we've had this
11 morning, the clerk's office has provided lunch for you in
12 the jury room. So as soon as I'm through with these last
13 few instructions, you'll go right in here to the jury room
14 and your lunch should be waiting on you. Don't count on
15 that every day, but we're going to do that today because of
16 the extenuating circumstances.

17 Also, I think during the lunch hour it would be
18 good to make sure that Ms. Martin has your personal cell
19 phone numbers so that if anything should happen overnight
20 during the different days of the trial and you needed to be
21 reached for anything, she would have those numbers to reach
22 you.

23 Also, when you come back in after lunch, please
24 leave any cell phones you have in your car or somewhere
25 other than in the courtroom. I'm going to ask you not to

1 bring cell phones or any other electronic devices with you
2 in the courtroom from this point forward.

3 Now, before I excuse you for lunch, I have a
4 couple instructions and they are important and I want to
5 give them to you at this time.

6 First of all, do not discuss this case with
7 anyone, and that includes with yourselves. If someone asks
8 you about this case, simply tell them that the Judge has
9 instructed you not to discuss the case at all. Blame it on
10 me. After we're finished with today and you leave and go to
11 your respective homes this evening, whoever is there to
12 greet you, the first question they're going to ask you is
13 tell me about what happened in federal court in Marshall
14 today. Don't even try to answer that question. Because if
15 you do, it will be almost impossible for you not to violate
16 my instruction to you. Blame it on me. That's what I'm
17 here for.

18 Also, you are not to discuss the case among
19 yourselves. Only after all the evidence has been heard and
20 I have directed that you retire to deliberate and reach a
21 verdict, only then may you discuss the case and any of the
22 evidence in the case among yourselves. So until that time,
23 don't discuss it with anyone, and that includes the eight of
24 you that comprise the jury, among yourselves.

25 Also, when I say don't discuss the case, that

1 means any communication of any form. I know that several of
2 you probably are participants in various forms of social
3 media. That means don't post anything on Facebook, don't
4 tweet on Twitter, don't do anything on any of those other
5 social media sites. Do not communicate about the case in
6 any way from you or allow anybody else to communicate about
7 the case with you.

8 It is absolutely critical that your decisions as
9 jurors in this case be based solely and only on the sworn
10 testimony that comes in during this trial from the witnesses
11 on the witness stand and the other evidence that the Court
12 expressly admits into evidence. Those should be the only
13 sources of any information that comes to you and is taken
14 into account as you prepare to answer the questions I will
15 give you that will comprise your verdict in this case.
16 And if that instruction is violated in any way, then it
17 risks us losing all the time and effort that have gone into
18 this. So it's very, very important. It's my first
19 instruction to you, and I promise, ladies and gentlemen,
20 before this trial is over, you're going to hear that from me
21 again so many times, you're going to be very, very tired of
22 it. Probably every time you get up out of those chairs to
23 move somewhere, you're going to hear that instruction from
24 me. And I say that because it is absolutely critical. It
25 is absolutely vital that there never -- that there be no

1 communication of any kind by you with anyone, including
2 yourselves, until all the evidence is in and I direct you to
3 retire and deliberate on your verdict. And only then can
4 you discuss it among yourselves. That's absolutely
5 critical. And I can't -- I can't stress that enough.

6 Also, I'm instructing you not to try and research
7 anything about this case. When you are at home, by
8 yourselves, don't go on the Internet, don't go and Google
9 Mr. Harman or Trinity or Texas A&M Transportation Institute
10 or guardrail end terminals or anything. Don't go to the
11 library. Don't make any efforts to research anything about
12 this case.

13 Again, there are to be no outside influences, no
14 outside sources of information. The sole and only source of
15 information you must base your verdict on is the sworn
16 testimony that comes in from the witnesses and the evidence
17 and exhibits that I admit into the evidence during the
18 trial. It's got to be limited to that and that only. So
19 don't attempt to do any research or investigation, and that
20 means not only about the case. Don't try to look up the
21 lawyers. Don't try to look up anybody or anything related
22 to this lawsuit.

23 Also, I don't think this will happen, but now that
24 you are the sworn jury in this case, and this is an
25 important case. Both sides view this as a very important

1 case, and the Court does, too. It is possible that
2 somebody -- some third party might attempt to approach you
3 and influence you or try to communicate with you improperly,
4 trying to cause you to vote one way or favor one side or
5 influence your participation as jurors. That is absolutely
6 improper in all respects. It may well be criminal. But I
7 don't think it will happen, but it is possible, and I want
8 you to put -- I want to put you on notice that it is a
9 possibility.

10 If at any time before the verdict's rendered and
11 I've excused you and discharged you as jurors, if anybody
12 attempts to communicate with you in any way that you have
13 the slightest hint is improper or out of order, then you are
14 to advise Ms. Martin immediately, she will let me know, and
15 I will deal with it. Again, I don't think it's likely, but
16 I do want you to know it's within the realm of possibility.

17 And lastly, ladies and gentlemen, I want you to
18 understand that during the course of this trial, we're in a
19 small courthouse with one district court. And it is
20 inevitable that you are going to pass coming in, going out
21 in the hallway during recess at various places, you're going
22 to pass the lawyers in this case, the witnesses in this
23 case, the parties in this case, and their representatives.
24 I want you to understand, my instruction to them is they are
25 not to talk to you. They are not to communicate with you.

1 So if you pass by one of the lawyers coming up the steps one
2 morning and they don't say hello, good morning, how are you,
3 don't hold that against them. Don't think they're being
4 rude or impolite. They are simply following my
5 instructions, and you need to know that and take that into
6 account.

7 All right. Ladies and gentlemen, I'm going to
8 excuse you for lunch at this time. And we're going to try
9 to start as soon after 2:00 o'clock as we can. I will check
10 with you to make sure you've finished your lunch, but you're
11 right next door, and you should have no delays.

12 I know that the parties are anxious to get the
13 evidence started, so we'll try to start as soon after 2:00
14 o'clock as we can. I'm going to excuse you for lunch at
15 this time, which I indicated is awaiting you in the jury
16 room. Don't discuss the case. And you haven't heard any
17 evidence at this point. You've heard absolutely no
18 evidence. And what the lawyers tell you in the case is not
19 evidence. But even so, don't discuss anything about what's
20 happened this morning.

21 With those instructions, you are excused for lunch
22 at this time.

23 COURT SECURITY OFFICER: All rise.

24 (Jury out.)

25 THE COURT: Counsel, you are excused for lunch.

1 I would hope to start with my preliminary instructions about
2 2:00 o'clock or 2:15. We'll try to make this a short lunch
3 break so we can get started. But you stand in recess until
4 that time.

5 MR. BAXTER: Your Honor, before we recess, can I
6 take up one matter with the Court, maybe two?

7 THE COURT: If it's necessary, Mr. Baxter. We're
8 trying to stay on a tight time.

9 MR. BAXTER: I know. I just want to make sure
10 that we don't have these problems again. I think during
11 Mr. Mann's voir dire, and I'm sure inadvertently he violated
12 at least two and probably three of the motions in limine.

13 One of them has to do with my co-counsel being
14 from New York and Boise Schiller, and that clearly came out.
15 It was Motion in Limine No. 10 about that. I just don't
16 want it to happen again, if the Court please.

17 In that connection, Your Honor, in the opening, I
18 believe, they're intent on using some documents --

19 THE COURT: Y'all may be seated.

20 MR. BAXTER: -- that references Boise Schiller &
21 Flexner. It has to do with this document that we say we
22 didn't have anything to do with. It's some sort of
23 financial plan that they're planning on showing. We would
24 ask that at least references to the law firm be redacted
25 from -- from those documents.

1 THE COURT: All right. I'm going to direct that
2 you meet and consult over the lunch break with opposing
3 counsel. If there's a problem, let me know before we come
4 back in.

5 MR. BAXTER: Second, Your Honor, is I believe
6 Mr. Mann also told them that the FHWA didn't come into court
7 with Mr. Harman, which is also a violation of the motion in
8 limine, that the government hadn't come into the case, and
9 we'd at least like that not to happen again.

10 THE COURT: Well --

11 MR. BAXTER: And the third, Your Honor --

12 THE COURT: -- let me hear everything from you and
13 then I'll respond.

14 MR. BAXTER: And then the third, Your Honor, is on
15 at least on three occasions, he voir dired the jury that
16 this is a real big company that makes a lot of money. And
17 we think that opened the door to at least to us commenting
18 on their money making ability and how much money they've
19 made. We stayed away from that, but he said it at least
20 three times.

21 And the last issue, Your Honor, would be just
22 logistics on getting the heads in, which we'd like to do on
23 our lunch hour.

24 THE COURT: Well, you may do that over the lunch
25 hour.

1 As to the other matters, I'm going to hold you to
2 my prior limine ruling about mentioning the profitability
3 and financial condition of the Defendants. If you want to
4 approach and urge that the door's been opened at a later
5 date, you may do that, but I'm not going to grant anything
6 on that now.

7 MR. BAXTER: All right, sir.

8 THE COURT: With regard to the limines, Mr. Mann,
9 you did get very, very close if not slightly across the
10 line. I made a note of that during voir dire. I'm simply
11 going to instruct at this point that my limine orders be
12 followed scrupulously and without exception. And if there
13 are future similar incursions, I will probably take curative
14 action at that time, but I'm not going to impose any
15 curative action at this point.

16 MR. BAXTER: And I understand, Your Honor.

17 THE COURT: All right.

18 MR. BAXTER: Thank you.

19 THE COURT: We stand in recess for lunch.

20 COURT SECURITY OFFICER: All rise.

21 (Recess.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/_Shelly Holmes_____
SHELLY HOLMES, CSR, TCRR
Official Court Reporter
State of Texas No.: 7804
Expiration Date 12/31/14

10/13/14
Date

/s/_Susan Simmons_____
SUSAN SIMMONS, CSR
Deputy Court Reporter
State of Texas No.: 267
Expiration Date 12/31/14

10/13/14
Date

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

UNITED STATES OF AMERICA * Civil Docket No.
EX REL JOSHUA HARMAN *
VS. * 2:12-CV-89
* Marshall, Texas
*
* October 13, 2014
*
TRINITY INDUSTRIES, INC. & *
TRINITY HIGHWAY *
PRODUCTS, LLC * 2:15 P.M.

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE RODNEY GILSTRAP
UNITED STATES DISTRICT JUDGE

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13 *****

14 P R O C E E D I N G S

15
16 (Jury out.)

17 COURT SECURITY OFFICER: All rise.

18 THE COURT: Be seated, please.

19 Counsel, before we bring the jury in, I understand
20 there's a dispute about the application of one of the
21 Court's orders in limine with regard to the lack of
22 participation in this trial by the FHWA or any other
23 governmental agency.

24 MR. WARD: Yes, Your Honor. John Ward on behalf
25 of the Plaintiff.

1 Mr. Shaw correctly -- I mean, appropriately
2 approached me about that he wanted to -- planned to say in
3 openings that the jury will not hear the Federal Highway
4 Administration in here asking for their money back, or words
5 to that effect. And I understood that what the Court had
6 ordered that you'd pointed out that the Federal Highway
7 Administration didn't have any -- in a motion in limine that
8 had been argued, and you'd expressly said that -- that you
9 couldn't talk about the lack of their participation in this
10 trial. That's what I understood you to tell us.

11 THE COURT: Mr. Shaw, you want to respond briefly?

12 MR. SHAW: Yes, certainly, Your Honor. Your
13 Honor, I certainly wanted to be clear, given what happened
14 with Mr. Baxter and Mr. Mann earlier, and I interpreted Mr.
15 Baxter's objection to focus on that particular issue.

16 Our understanding of the motion in limine was we
17 could not comment about the failure of the United States
18 Government to intervene in this particular matter, which is
19 what we have -- we understand the motion in limine to be.
20 It's an abundance of caution, Judge, to avoid a problem. I
21 did preview with Mr. Ward to try to get his opinion, of
22 which he and I respectfully disagree. I believe that the
23 motion in limine rulings from this Court in the past trial
24 and in this particular trial allow us to make the statement
25 along the lines of what Mr. Ward said he anticipated that I

1 would say, which was you're not going to hear from the FHWA
2 seeking their money back; you're not going to hear them
3 seeking to recall the product; those types of statements,
4 Your Honor.

5 I wanted to clear it so we're not in violation of
6 this Court's order. And I hope you understand that the --
7 the respect in which we come about that.

8 THE COURT: I do. And let me give you -- all
9 counsel some guidance on this. This would be Plaintiff's
10 Motion in Limine No. 4, which the Court granted. The entire
11 purpose of granting the limine was to avoid the unfair
12 prejudice of characterizing the Plaintiff as being less than
13 it -- he should be because the Government had opted not to
14 come into this lawsuit and participate actively.

15 So whether you say the Government didn't exercise
16 its right to come in and participate actively or whether you
17 say you won't hear from the Government this that or the
18 other, those are all within the scope of the order in
19 limine. We're not going to talk about the fact the
20 Government is not here; the Government is not asking for
21 their money back; the Government's not participating. Those
22 are all within the scope of what I've limined out of the
23 case.

24 If you think there's some basis that I should
25 grant leave or the door's been opened, you need to approach

1 the bench and request leave before you go into it.

2 MR. SHAW: Yes, Your Honor. Thank you. We
3 understand.

4 THE COURT: All right. Are there any other
5 late-breaking issues before we bring the jury in?

6 MR. SHAW: Judge, I have two heads that, per your
7 previous ruling, are outside.

8 THE COURT: I thought those were going to be
9 brought in over the lunch hour.

10 MR. SHAW: I did not know that, but they're
11 right -- they're here. We can roll them in. I didn't know
12 if you wanted to wait until after Mr. Ward's opening and
13 disrupt the flow and I bring them in for mine or do it now
14 or perhaps the Court's previous ruling, which I wasn't aware
15 of, was to do it already.

16 THE COURT: I thought Mr. Baxter talked about it
17 when we broke for lunch, and I said bring them in here over
18 the lunch hour. I don't want -- I want to minimize the
19 disruption in the trial as much as we can. If they can be
20 rolled in and pushed out of the way until Defendant is ready
21 for its opening, that's fine.

22 MR. SHAW: May we do that right now?

23 THE COURT: Let's get it -- let's get it done.

24 MR. SHAW: Thank you.

25 Judge, one last thing, Your Honor, that they're

1 reminding me of. While they're rolling the heads in, we
2 would inquire respectfully what the Court's intentions were
3 about instructing the jury concerning the memorandum in
4 June. They were -- similar to last time, we would ask to be
5 afforded an opportunity to just place an objection on the
6 record.

7 THE COURT: I'm not following your question,
8 Mr. Shaw.

9 MR. SHAW: As I remember the last trial, Your
10 Honor, you instructed the jury concerning the probative
11 value and other matters concerning the June 17th memorandum.

12 We, you might guess from the last trial, objected
13 to that. We need to make sure that we object to that again,
14 if you intend to do that in this particular case.

15 And we know now that it's coming up, and I didn't
16 know if it was appropriate to do it -- we didn't want to do
17 it in front of the jury obviously.

18 THE COURT: I don't want my preliminary
19 instructions interrupted with objections. You filed a
20 motion which I'm carrying. I'm aware of your areas of
21 concern. I don't consider you've waived any objections, but
22 I don't want my preliminary instructions objected to.
23 You'll find that my preliminary instructions are not
24 identical to what they were in the last trial. You need to
25 wait until you hear them.

1 MR. SHAW: Yeah, that was kind of my point, Your
2 Honor.

3 THE COURT: If during -- if during a later recess
4 you want to urge an objection on the record for record
5 purposes, after the fact, you can do that.

6 MR. SHAW: Thank you.

7 THE COURT: All right. Let's get those out of the
8 way or...

9 (Pause in proceeding.)

10 THE COURT: Do you intend to use these during your
11 opening, Mr. Ward?

12 MR. WARD: I was going to refer to them, yes, Your
13 Honor.

14 THE COURT: Are they where you want them to be for
15 your opening?

16 MR. WARD: Yes, Your Honor. Yes, sir.

17 THE COURT: All right. Let's be seated, Counsel.
18 Let's bring in the jury, please, Mr. McAteer.

19 (Jury in.)

20 THE COURT: Please be seated.

21 Ladies and Gentlemen of the Jury, welcome back. I
22 want to thank you for being ready to go. As I indicated,
23 we'd try to get started as soon after 2:00 o'clock as we
24 could. I'm going to do my best to keep this case running on
25 a good timeline so that we can try to keep within the

1 timeframe I gave you an indication of during jury selection.
2 I now need to give you some preliminary instructions before
3 we get started with the opening statements from the lawyers
4 and then get on to the evidence in the case.

5 You've now been sworn as the jurors in this case,
6 and as the jury, you are the sole judges of the facts. You
7 will decide and determine what all of the facts are in this
8 case. As the Judge, I will give you instructions on the
9 law, decide questions of law and evidence that arise during
10 the trial, handle matters of procedure, and I'm also
11 responsible for maintaining the flow of the trial and
12 maintaining the decorum of the courtroom.

13 At the end of the evidence, I will give you
14 detailed instructions about the law that you should apply in
15 deciding this case, and I will then give you a list of
16 questions that you are to answer. This list of questions is
17 called the verdict form. Your answers to those questions
18 will need to be unanimous, and those answers will constitute
19 your verdict in this case.

20 Now, I want to briefly tell you what this case is
21 about. This case was filed by Joshua Harman under the
22 federal False Claims Act against Defendants Trinity
23 Industries, Inc., and Trinity Highway Products, LLC.

24 The False Claims Act permits private parties to
25 file lawsuits in the name of the United States Government,

1 without the United States being directly involved in the
2 litigation.

3 Such a person is often known as a relator. To
4 simplify things, however, I've instructed counsel and the
5 witnesses in this case to refer to Mr. Harman, who is the
6 relator in this case, as the Plaintiff or simply as Mr.
7 Harman.

8 If any amount is awarded in this case, the United
9 States Government will be entitled to between 70 and 75
10 percent of the award. Mr. Harman will be entitled to the
11 remaining 25 to 30 percent. The Defendants are Trinity
12 Industries and Trinity Highway Products, LLC, and will often
13 be referred to collectively or jointly as simply Trinity or
14 the Defendants.

15 Under the False Claims Act, any person, including
16 a corporation, who knowingly presents or causes to be
17 presented to an officer or employee of the United States
18 Government a false or fraudulent claim for payment or
19 approval, or who knowingly makes, uses, or causes to be made
20 or used a false record or statement to get a false or
21 fraudulent claim paid or approved by the United States
22 Government is liable to the United States Government for a
23 civil penalty plus damages sustained by the Government.

24 The False Claims Act is to be read broadly, and
25 its reach is beyond claims that might be legally enforced to

1 all fraudulent attempts to cause the Government to pay out
2 sums of money.

3 Having explained the False Claims Act, I now want
4 to talk with you about the Plaintiff's specific allegations
5 in this case.

6 The Defendants are in the business of
7 manufacturing, among other things, various highway safety
8 products and construction products for use across the United
9 States on its highways and roadways. In particular, Trinity
10 Highway Products manufactures a guardrail system, which it
11 calls the ET-Plus guardrail end terminal. This product is
12 designed to reduce the severity of car crashes involving
13 impacts with highway guardrails.

14 The Federal Government reimburses state highway
15 authorities for a portion of the cost of certain highway
16 safety equipment. The Federal Government will only
17 reimburse states for equipment that has been tested and
18 found to be crashworthy. The United States Federal Highway
19 Administration, sometimes simply called the FHWA, reviews
20 crash test data to ensure that highway safety products meet
21 its standards for crashworthiness. It maintains a list of
22 approved products that are eligible for reimbursement.

23 In 2005, the Federal Highway Administration issued
24 an approval letter for the ET-Plus. Mr. Harman alleges that
25 Trinity violated the False Claims Act by inducing the United

1 States Government to reimburse states for ET-Plus guardrail
2 end terminals that were substantially different from the
3 ones that had been approved by the Federal Highway
4 Administration.

5 He alleges that Trinity falsely certified to
6 states that the ET-Plus terminal heads for which the states
7 sought federal reimbursement were the same end terminals
8 that were crash-tested in 2005 and accepted for use by the
9 FHWA.

10 He alleges that the Government did, in fact,
11 reimburse states for purchases of falsely certified
12 ET-Pluses.

13 Trinity denies Harman's allegations. Trinity
14 asserts that the ET-Pluses it has sold since 2005 have been
15 essentially the same as the version that was approved by the
16 Federal Highway Administration, and that any changes to the
17 design of the ET-Plus since that time have been
18 insubstantial and have not required Trinity to seek new
19 approvals from the FHWA.

20 Trinity, therefore, asserts that it never
21 knowingly made any false representations about the ET-Plus'
22 acceptance for federal reimbursement. Trinity also asserts
23 that the Government has suffered no harm or damages.

24 Your job is to decide whether Trinity violated the
25 False Claims Act, and if so, how much the Government

1 suffered in damages.

2 My job in this case is to tell you what the law
3 is, handle the procedure, and oversee the conduct of the
4 trial as efficiently and effectively as possible.

5 Now, you're going to be hearing from a number of
6 witnesses in this case, and I want you to keep an open mind
7 while you're listening to the evidence and not decide any
8 facts until you heard all the evidence. While the witnesses
9 are testifying, remember that you and you alone will have to
10 decide the degree of credibility and believability to
11 allocate to the witnesses and the evidence.

12 So while they're testifying, you should be asking
13 yourself as regards to the witnesses: Does this witness
14 impress you as being truthful?

15 Does he or she have a reason not to tell the
16 truth?

17 Does he or she have any personal interest in the
18 outcome of the case?

19 Does the witness seem to have a good memory?

20 Did he or she have an opportunity and ability to
21 observe accurately the things they testified about?

22 Did the witness appear to understand the questions
23 clearly and answer them directly?

24 And, of course, does the witness' testimony differ
25 from that of any other witness; and if it does, how does it

1 differ?

2 These are some of the kinds of things that you
3 should be thinking about while you're listening to each
4 witness.

5 The court reporter here is taking down everything
6 that's said, but a complete transcript of everything that's
7 said will not be ready for your use during your
8 deliberations. It's prepared in case there is an appeal to
9 an appellate court after this trial. So you're going to
10 have to rely on your memories in this case, ladies and
11 gentlemen.

12 In a moment, you're each going to be given a juror
13 notebook. One of the things in the back of that notebook is
14 a legal pad with blank pages on it for your use in taking
15 notes. It's up to each of you to decide whether or not you
16 want to take notes and how detailed you'll want -- you want
17 your notes to be. But remember, those notes are for your
18 own personal use. You have to rely on your memory of the
19 evidence, which is why you should pay close attention to the
20 testimony of each and every witness.

21 You should not abandon your own recollection
22 because somebody else's notes indicate something
23 differently. Your notes are to refresh your recollection,
24 and that's the only reason that you should be keeping them.

25 I'm now going to ask Mr. McAteer to pass out to

1 each of the members of the jury a juror notebook.

2 In those notebooks, you'll see that you each have
3 pages with witness photographs and names for the witnesses.
4 It's possible that there may be witnesses whose photographs
5 and pages are not in there. And if they are, we will add
6 them as we go along.

7 Whenever you leave the courtroom at the end of
8 each day, you should take those notebooks and leave them on
9 the table in the jury room. They should either be with you
10 in the courtroom or on the table in the jury room.

11 Now, there may be an exception where we're going
12 to take a very brief recess, and I will tell you that you
13 may leave your notebooks in your chairs, if you'd like, but
14 unless I tell you you may leave them in your chairs, then
15 you should either have them in your own possession while
16 we're in court or they should be on the table in the jury
17 room and not anywhere else.

18 You'll also note, as I mentioned, in the back of
19 those, there's a legal pad that you may use to take notes.

20 And if you'll close those for just a minute,
21 you're going to have plenty of time to look at those as we
22 go forward. But I want to give you my final instructions
23 before we hear the opening statements from the lawyers.

24 Each side is going to make an opening statement in
25 just a moment. You need to understand, ladies and

1 gentlemen, that each side's opening statement is not
2 evidence. What the lawyers tell you is not evidence. It's
3 simply their explanation of what they hope and expect the
4 evidence will show.

5 The evidence in this case is the sworn testimony
6 of the witnesses, together with the exhibits that are
7 admitted into evidence by the Court for your consideration.
8 That is the evidence in this case. As the jury, you're --
9 you are to apply the burden of proof to that evidence known
10 as the preponderance of the evidence.

11 Let me instruct you again that when a party has
12 the burden of proof on any claim or affirmative defense by a
13 preponderance of the evidence, it means that you the jury
14 must be persuaded by the credible or believable evidence
15 that the claim or defense is more likely true than not true.
16 I'll say that again, more likely true than not true.

17 Sometimes this is talked about as being the
18 greater weight and degree of credible testimony. I gave you
19 an illustration with the statue of the Lady of Justice and
20 the balanced scales during jury selection. That was so
21 recent, I'm not going to go over that again, but those same
22 illustrations and examples apply. And you are to apply the
23 burden of proof known as a preponderance of the evidence in
24 this case.

25 Again, do not confuse the burden of proof in this

1 case with beyond a reasonable doubt. That's only used in
2 criminal cases. It has no application here.

3 The only burden of proof that has application in
4 this case is a preponderance of the evidence.

5 Now, I want to talk with you briefly about expert
6 witnesses. When knowledge of a technical subject matter may
7 be helpful to you as the jury, a person who has special
8 training or experience in that particular technical field --
9 we refer to them as an expert witness -- is permitted to
10 testify to you about his or her opinions on technical
11 matters. However, you're not required to accept those
12 opinions at all. It's up to you to decide whether you
13 believe that an expert witness or any witness, for that
14 matter, is correct or incorrect or whether you want to
15 believe what they say.

16 I anticipate that there will be expert witnesses
17 testifying in support of each side in this case, but it will
18 be up to you to listen to their qualifications. And when
19 they give you an opinion and explain the basis for it, you
20 will have to evaluate what they say and whether you believe
21 it. And if you do believe it, to what degree you believe it
22 and want to give it any weight.

23 Now, during the trial, I also anticipate that
24 testimony will be presented to you by what are called
25 depositions. In trials such as this, it's tough, if not

1 impossible, to get every witness here at the same time. So
2 lawyers from each side, before the trial, take the
3 depositions of witnesses. In a deposition, there's a court
4 reporter present, the witness is sworn and under oath just
5 like they are here, and the parties ask them questions, and
6 their answers to those questions are recorded. Portions of
7 those video recordings of those depositions -- of the
8 questions and the answers may be played back to you as a
9 part of the trial so you can see the witness and hear the
10 testimony. That deposition testimony is entitled to the
11 same consideration, and insofar as possible, is to be judged
12 as to credibility, weighed, and otherwise considered by the
13 jury in the same way as if the witness had been present and
14 giving the testimony under oath from the witness stand in
15 open court.

16 Now, during the trial of this case, it's possible
17 that the lawyers will make objections, and I will offer
18 rulings on those objections. It's the duty of an attorney
19 for each side to object when they believe the other side
20 offers testimony or other evidence which the attorney
21 believes is not proper. I want you to understand that upon
22 allowing testimony or other evidence to be introduced over
23 the objection of an attorney, the Court does not, unless
24 expressly stated, indicate an opinion as to the weight or
25 effect of such evidence.

1 As I've stated before, you the jury are the sole
2 judges of the credibility of all the witnesses and the
3 weight and effect of all of the evidence.

4 I want to compliment the parties in this case.
5 Though you're not aware of this, over many days before you
6 appeared today the parties offered various exhibits before
7 the Court. The Court considered those and arguments as to
8 their admissibility and ruled on those. And those
9 pre-admitted exhibits, which can be now used as the parties
10 choose during the course of the trial, are ready to go, and
11 that has saved you a lot of time listening to objections and
12 arguments and hearing me rule on those. So they are to be
13 commended, and the Court appreciates their -- their hard
14 work in working through all of those before the trial
15 begins.

16 That means, ladies and gentlemen, if the parties
17 show you an exhibit, it means I've already ruled on the
18 admissibility of that exhibit. And they'll just ask
19 questions and put it into context as they choose. But both
20 sides have worked hard to stream that -- streamline that and
21 that's worthy of mention.

22 Now, I want to spec -- specifically address with
23 you one of these exhibits. Among the many exhibits that
24 have been pre-admitted into evidence by the Court is a
25 letter dated June the 17th, 2014, from the Federal Highway

1 Administration. The Federal Highway Administration, as I've
2 told you, is a part of the United States Department of
3 Transportation. This letter is to various offices at the
4 state and regional letter -- level, addressing the status of
5 the ET-Plus guardrail end terminals manufactured by the
6 Defendants as being in compliance with FHWA standards and
7 being authorized to be properly reimbursed with federal
8 funds when used on the national highway system. If I'm not
9 mistaken, this letter has been marked as Defendants' Exhibit
10 No. 2.

11 A central question in this trial will be whether
12 the ET-Plus end terminal systems that the Defendants sold
13 were substantially different than or essentially the same as
14 the ones the FHWA approved in 2005. You may consider the
15 FHWA's letter to be some evidence that the changes were not
16 so substantial as to make the Defendants' ET-Plus end
17 terminal systems a different product than the ones the FHWA
18 approved.

19 Further, and if you find that the Defendants did
20 violate the False Claims Act, you'll be required to
21 determine how much those false claims the government of the
22 United States.

23 In this case, the measure of damages is the amount
24 the United States Government paid or reimbursed for the
25 ET-Plus end terminal systems, minus the actual value of the

1 ET-Plus end terminal systems which were delivered. The
2 Federal Highway Administration's letter is some evidence but
3 not necessarily conclusive evidence of the value of the
4 ET-Plus end terminal systems that were actually delivered.

5 Again, if you find the Defendants are liable, you
6 will be the final judge of the damages due, including
7 whether the ET-Plus end terminal systems delivered were
8 worth less, more, or the same as the ET-Plus end terminal
9 systems which were contracted for by the states and their
10 construction companies.

11 One of the most important duties that you as the
12 jury must carry out is to weigh all of the evidence in this
13 case and to determine how much importance and weight, if
14 any, is to be properly allocated to each and every exhibit
15 and each and every witness's testimony, as a part -- as a
16 part of reaching your verdict in this case.

17 I'm giving you this specific and limiting
18 instruction in this case because of the very different
19 levels of importance each side will ascribe to this letter
20 and the very different arguments that I'm confident they
21 will present to you in this regard. You must keep this
22 instruction in mind and follow my directives as to the
23 consideration of this letter in your deliberations.

24 Were this not a very important point, I would not
25 have singled it out for this explanation.

1 Also, these same instructions apply to any other
2 of the similar letters from the Federal Highway
3 Administration, in addition to the one from June the 17th,
4 2014, that are also admitted as exhibits in this trial and
5 which appear to grant approval or certification of the
6 ET-Plus end terminal systems sold by Defendants and which
7 were paid for or reimbursed by the Federal Highway
8 Administration prior to the dates of those letters.

9 Despite all the work that's been done to
10 streamline the trial in advance of your selection as jurors,
11 I want you to know that it's still possible that objections
12 are going to arise during the trial. And if I sustain an
13 objection to a question addressed to a witness, then you
14 must disregard the question entirely and may draw no
15 inference from the wording of it or speculate what the
16 witness would have said if I had permitted the witness to
17 answer the question. If I overrule an objection, on the
18 other hand, you should consider the question and the answer
19 just as if no objection had been made.

20 Ladies and gentlemen, the law of the United States
21 permits a judge in a United States District Court to comment
22 to the jury on the evidence in the case, but such comments
23 from the Judge on the evidence are only an expression of the
24 Judge's opinion as to the facts, and the jury can disregard
25 those comments in their entirety because as I've told you

1 several times, you the jury are the sole judges of the
2 facts, the credibility of the witness, and how much weight
3 is to be given to each witness's testimony. That's not my
4 job. That's your job.

5 And in that respect, sometimes juries have been
6 called the Supreme Court of the facts. That's your job, the
7 sole determiner of what the facts are in this case. Because
8 of that, and even though the law permits me to comment on
9 the evidence, I am going to do my very best so that you have
10 no idea what I think about the evidence in this case,
11 because as I've said, that is your job to evaluate it, and
12 from the evidence, determine the facts, not mine.

13 If, ladies and gentlemen, there is any publicity
14 about this trial, you must ignore it. You must decide this
15 case only from the evidence presented in the courtroom
16 during the trial. Don't read anything in print, don't look
17 for anything on the Internet, listen to any radio,
18 television, or other public media coverage about the case.

19 As I indicated during jury selection, do not
20 attempt to do any research into this case. Do not Google or
21 search any of the parties, the issues, the lawyers, anything
22 about this case. No research of outside sources is
23 permitted.

24 Again, it is critical that your determination be
25 based solely and only on the evidence that's produced under

1 oath in this courtroom subject to cross-examination and the
2 exhibits that the Court admits into evidence.

3 Also, do not let bias, prejudice, or sympathy play
4 any part in your determinations. A corporation and all
5 persons are equal before the law and must be treated as
6 equals in a court of justice such as this.

7 We're going to start with opening statements in
8 just a few minutes, but I want to give you a brief roadmap
9 of how the trial is going to be structured.

10 After the opening statements, the Plaintiff will
11 present his evidence in the case and his contentions that
12 Trinity has violated the False Claims Act. To prove his
13 case, the Plaintiff must convince you that it's more likely
14 true than not that the Defendants violated the False Claim
15 Act. The Plaintiff will also put on proof of what they
16 allege the damages to be in this case.

17 After the Plaintiff has put on all of his evidence
18 and rested, then the Defendants will put on their case
19 responding to the Plaintiff's evidence. And they will then
20 rest after the Defendants have put on all of their evidence
21 in the case.

22 After the Defendants rest, the Plaintiffs may then
23 put on additional evidence rebutting the Defendants'
24 evidence. That is called the rebuttal case. After the
25 Plaintiffs put on their rebuttal witnesses, if any, then all

1 of the evidence will be complete. Then I will give you my
2 final instructions on the law, and I will deliver to you a
3 verdict form which you will then take to the jury room with
4 you, deliberate on the evidence in this case, and reach your
5 verdict.

6 That's the timeline -- a structure, if you will,
7 of how the Court is going to go forward during the trial.

8 Also, I want to repeat my earlier instructions not
9 to discuss the case among yourselves during the trial. Only
10 when you retire to deliberate and after all of the evidence
11 is in may you discuss the case among yourselves.

12 All right. Ladies and gentlemen, I will call for
13 announcements on the record of this case. This is the case
14 of United States of America ex rel. Joshua Harman versus
15 Trinity Industries, Inc., and Trinity Highway Products, LLC,
16 Case No. 2:12-CV-0089.

17 What says the Plaintiff?

18 MR. BAXTER: Good afternoon, Your Honor. Sam
19 Baxter on behalf of the Plaintiff, along with my colleagues,
20 and we're ready, Your Honor.

21 THE COURT: What says the Defendants?

22 MR. SHAW: Your Honor, Ethan Shaw on behalf of
23 Trinity Industries and Trinity Highway Products, and along
24 with my colleagues, we are ready to proceed.

25 THE COURT: All right. Counsel, if there are

1 witnesses present in Court that you know will testify in
2 this case, I'd like all of the witnesses that are going to
3 testify to come forward together. We'll have them sworn by
4 the courtroom deputy, and that will save us some time as we
5 go forward in the trial. If you're present in the courtroom
6 and you know that you're going to testify as a witness,
7 please come forward and be sworn at this time.

8 All right. Ms. Schroeder.

9 (Witnesses sworn.)

10 THE COURT: Thank you, gentlemen. You may return
11 to your seats.

12 Does either party wish to invoke the rule?

13 MR. BAXTER: Yes, Your Honor.

14 THE COURT: Is this to include experts or to
15 exclude experts, Mr. Baxter?

16 MR. BAXTER: Exclude experts.

17 THE COURT: Exclude?

18 MR. BAXTER: Yes, sir.

19 THE COURT: All right. Ladies and gentlemen, the
20 rule has been invoked. That means that if you are a witness
21 in this case, unless you are an expert witness or unless you
22 are a representative of one of the parties in this case, or
23 in Mr. Harman's case, the party itself, you are to excuse
24 yourself from the courtroom and you must remain outside the
25 courtroom until you're called to testify.

1 If you are not a party or party representative or
2 an expert witness and you're present in the courtroom, you
3 should excuse yourself from the courtroom at this time, as
4 the rule has been invoked.

5 All right. With those instructions, we'll proceed
6 with opening statements.

7 Mr. Ward, you may proceed to present your opening
8 statement.

9 MR. WARD: One brief matter we need to approach
10 the bench on.

11 MR. BAXTER: Could we approach the bench?

12 THE COURT: Approach the bench, Counsel.

13 (Bench conference.)

14 MR. WARD: Your Honor, I believe we all heard you
15 say -- that you misspoke and said that it was -- would not
16 be essentially the same or substantially different as the
17 one manufactured in 2005. It's different from the one in
18 2000.

19 THE COURT: 2005 is when the approval was given.

20 MR. SHAW: You're right.

21 MR. WARD: I know, but it has to be
22 substantially -- substantially different from the one in
23 2000. The one manufactured in 2005 is the one that has to
24 be substantially different from the 2000 one.

25 MR. SHAW: That's the one we certified --

1 MR. WARD: Certified that it was the 2000 one.
2 It was the ET-Plus in 2000.

3 MR. SHAW: I think the Judge is correct under
4 his -- under his instruction that he gave.

5 MR. WARD: The one in 2005 has to be substantially
6 different than the one in 2000, and he just said it had to
7 be substantially different than the one in 2005.

8 THE COURT: The one that was approved in 2005. I
9 didn't say which one was approved.

10 MR. WARD: Okay. All right. That's fine.

11 THE COURT: We're not going to redo the
12 instruction.

13 MR. WARD: Thank you. Thank you.

14 THE COURT: Let's proceed.

15 MR. WARD: Thank you. Proceed to the podium?

16 THE COURT: Yes.

17 (Bench conference concluded.)

18 THE COURT: All right. We'll now proceed with
19 opening statements. We'll hear first from the Plaintiff.

20 Mr. Ward, would you like a warning on your time?

21 MR. WARD: Yes, Your Honor. If you'd give me a
22 warning at two minutes.

23 THE COURT: I will. You may proceed.

24 MR. WARD: Good afternoon, ladies and gentlemen.
25 I've been introduced to you by Mr. Baxter. I'm John Ward

1 from over in Longview. And he was correct; I'm the oldest
2 lawyer in this case, so...

3 This case is about secret changes that Trinity
4 made to their safety product called an ET-Plus. It is about
5 Trinity's misrepresentations and their critical information
6 that they withheld about the ET-Plus from the Federal
7 Highway Administration.

8 My client, Josh Harman, has brought suit on behalf
9 of the U.S. Government, because he discovered that Trinity
10 made these representations and withheld critical information
11 from the Federal Highway Administration about this ET-Plus
12 safety device.

13 Now, His Honor has explained that he's suing under
14 what is known as a False Claims Act, and the evidence is
15 going to prove that because of Trinity's false claims, the
16 United States has paid out something in excess of \$218
17 million to reimburse the states for the purchase of
18 thousands of unapproved safety devices that were
19 manufactured by Trinity and sold, and when Trinity said they
20 were approved and they were not actually approved.

21 And you've heard -- His Honor has told you that the
22 Government will recover 70 or more cents out of every dollar
23 that's awarded in this case. Now, Mr. Harman will get the
24 other 25 to 30 percent. The ultimate decision as to the
25 amount will be made by His Honor.

1 Josh Harman is a Plaintiff in this case as what's
2 known as a whistleblower because he blew the whistle under
3 the federal False Claims Act that was adopted over 150 years
4 ago to encourage people to come forward when they discovered
5 that someone was defrauding the Government rather than
6 remain silent.

7 You may wonder why Mr. Harman would be the
8 whistleblower because he's not an employee of Trinity. For
9 one thing, I guess Josh Harman is one of the largest
10 customers of Trinity in the state of Virginia installing
11 this ET-Plus guardrail system throughout the state of
12 Virginia. He's been doing it for over 20 years.

13 And one other thing I'd say about this law. It's
14 no accident that the law was enacted with an understanding
15 that if a whistleblower could -- would come forward and
16 bring -- blow the whistle, he needs to be awarded for his
17 efforts, because it was understood that someone such as Mr.
18 Harman does so with a great risk to his reputation and his
19 financial well-being. And you're going to learn that's true
20 in this case.

21 Now, the Defendant in this case is Trinity
22 Industries and Trinity Highway Products. In fact, Trinity
23 has the exclusive license to manufacture this ET-Plus, and
24 the license is with a group known as TTI which stands for
25 Texas A&M Transportation Institute.

1 Now, Texas A&M Transportation Institute is not a
2 party to this case, but you're going to find out the folks
3 at Texas Transportation Institute and Trinity have a rather
4 close business relationship. And you'll learn that the
5 professors down there in their individual capacity made a
6 lot of money out of this product under their license
7 agreement and the sale of it, and they continue to make a
8 lot of money today out of it.

9 Now, another player is this -- is the government
10 agency that regulates and approved the safety product at
11 issue. The Federal Highway Administration, FH -- FHWA.
12 You'll hear that a lot. You're going to hear from a fellow
13 that's from the FHWA named Nick Artimovich, and you're going
14 to get to judge his actions and the reason the actions
15 that -- the reasons for the actions. That will be up to
16 you.

17 The bottom line is that we believe the evidence is
18 going to show that Trinity lied, withheld critical
19 information to save costs, make more money, and that the
20 lies are a direct cause of over \$200 million in money paid
21 out by the United States Government and worse than that,
22 it's cost of life and limb to the traveling public.

23 Let me go back just a little bit about the
24 development of this -- what was originally known as the
25 ET-2000. In the 1980s, we had a problem that people began

1 to recognize. You had these guardrails put up on the sides
2 of highways and -- that were out there to protect us.

3 But what happened was the car would run off the
4 roadway, and they would get -- that car would be speared or
5 harpooned. It was killing people. Trinity knew about this
6 problem, and made the video that I'm going to show you to
7 illustrate the problem. If you'll just watch this car as it
8 hits this guardrail without anything on it, you will see
9 this harpooning effect as it comes through.

10 And so it's disastrous to the passengers when you
11 have this harpooning effect or the driver, everybody in the
12 compartment.

13 Now, this original product was known -- this sort
14 of bumper-type product was called the ET-2000. This is a
15 picture of it.

16 Now, the -- we have made an animation of how this
17 device works. You'll see it hits the head of that device,
18 and we've opened up the head so -- in this animation so you
19 can see what it's actually -- but the truck goes down that
20 rail just like a train down a track, and you see that
21 guardrail is being extruded out of that chamber. That
22 chamber in there is built so it acts sort of like a press,
23 and it extrudes it out into a ribbon, and it comes out to
24 the side.

25 The Federal Highway Administration accepted this

1 device for installation on the highways, and it worked very
2 well. In fact, it worked so well that Trinity advertised
3 the original ET-2000 as being reusable. Just put the head
4 back on the guardrail system, and after you've been hit
5 head-on, it could be used multiple times, they said. And it
6 could, and that was a major deal, because -- it was a good
7 deal for the state, because the head represents about
8 two-thirds or more of the cost of about a 1200-dollar
9 system.

10 Now, in 1999, you will see that Trinity made some
11 changes to this original ET-2000, and they named it the
12 ET-Plus. That's this product right over here (indicating).
13 You'll see -- you can see some difference just by looking at
14 them, but this is the one that was made in 1999 or was
15 tested in 1999. And they tested with this ET-Plus. They
16 ran a test called a 3-31 test.

17 Now, this is a three-quarter-ton pickup truck,
18 weighs 4409 pounds. You're going to see it referred to as a
19 2000 P kilogram, but that's over 400 pounds.

20 Now, TTI had determined that this was a critical
21 test to show whether or not the device that Trinity
22 manufactured -- and so TTI, on behalf of Trinity, wrote this
23 letter to the Federal Highway Administration, and they said:
24 Test 3-31, the modified ET -- then they were calling it the
25 LET system -- is believed to constitute the most critical

1 impact scenario.

2 And so what did the Federal Highway Administration
3 do?

4 They wrote back in January of 2000, and they said,
5 you know, you stated that the test -- that 200-kilogram
6 (sic) pickup truck was most critical to demonstrate the
7 acceptable performance of the modified extruder head, well,
8 we agree with your conclusion.

9 And so let me show you that 3-31 test. This is
10 the actual crash test video. You watch that ribbon coming
11 out to the side there. You see it spinning out to the side
12 away from the other truck and away from the other traffic.

13 Now, there is no dispute in this case that the '99
14 model ET-Plus worked well. It was accepted by the Federal
15 Highway Administration, installed in highways all over the
16 United States. And there is no evidence that there was any
17 complaints about that ET-Plus that was approved in 2000 by
18 the Federal Highway Administration.

19 We've got to roll the clock forward to 2005. And
20 I want to just say that I know we're all here; we've heard
21 the old adage, if it ain't broke, don't fix it. Well,
22 Trinity did just that. They decided to change this ET-Plus
23 that you see on this side to the one that you see over here
24 on the other side. And they decided to change which set in
25 a pattern of seeking the approval only when Trinity knew

1 they would be accepted by the Federal Highway
2 Administration.

3 Now, we know this is true by looking at a chain of
4 events that occurred -- that occurred in 2005. Trinity made
5 some secret changes that -- to this approved 1999 ET-Plus
6 head. The reasoning is -- the real reason is they were
7 concerned about the bottom line. How do we know that?
8 Because we've got an internal email from this gentlemen, Mr.
9 Steve Brown, who is Trinity's vice president and then
10 president in this timeframe. What does that email tell us?
11 It's in November 9, 2004. They say: If TTI agrees, I'm
12 feeling we can make this change with no announcement.

13 And why? They want to make more money. It would
14 save \$2 a head. That's about \$50,000 a year, a quarter of a
15 million dollars over five years.

16 What else do we do?

17 Now, one of the reasons they want to make it
18 unannounced is because they are afraid that it will not pass
19 the 3-31 critical -- the 3-31 test right up there. That
20 very same afternoon, Rodney Boyd, who was then the vice --
21 who was then the president (sic) -- Mr. Brown was the
22 president -- says you need to start talking to TTI about
23 this. The 8-pound lighter head may give us a problem in
24 travel distance. They're talking about how far it will go
25 down the guardrail before there's a failure. So that's what

1 is said.

2 Now, they've got a problem. They're going to make
3 these changes. How are we going to pass them off on the
4 FHWA?

5 Well, in 2 -- in the timeframe of 2003 to 2005,
6 there were some -- the Midwest states decided they wanted to
7 raise the guardrail. They said it's always been raised --
8 on a guardrail, it's 27 inches off of the ground, but they
9 came out with this 31-inch that was announced. And so in
10 May of 2005 then, in order to get approval for a 31-inch,
11 what happens is that after conversation with the Federal
12 Highway Administration, they say we're going to run two
13 tests.

14 Well, May the 5th, 2005, they run this 3-35 test,
15 and that's with a pickup, but it hits the guardrail about 12
16 to 15 feet down from -- from this and does not impact the
17 terminal.

18 Now, they use this head right here (indicating),
19 the original ET-Plus in 2000, one that had been approved in
20 1999, tested and approved in 2000.

21 Then in about the middle of May, Trinity sends a
22 prototype head. And one of the obvious changes is the
23 5-inch has been changed to a 4-inch. And what happens, in
24 May 27th, 2005, they run it on this 31-inch system with a
25 prototype head that we know has got -- well, we say we know.

1 We believe -- Trinity keeps telling us the 4-inch channel.
2 We really don't know for sure.

3 But somewhere in the middle -- after they've sent
4 them this prototype test, they run the second one. The
5 second test was run on May 27th. It was a 3-30 test. Now,
6 that is a head-on collision with this smaller car that
7 weighs about 820 kilograms. A pickup truck is almost two
8 and a half times as heavy, the three-quarter ton pickup.

9 Now, the Federal Highway Administration, TTI
10 knows, Trinity knows, they all know that what is critical is
11 the pickup test. Trinity doesn't run the pickup test.

12 Trinity hadn't run a 3-31 pickup test on what
13 they've manufactured since September 2005 to this day that
14 they furnished the Federal Highway Administration. No
15 critical test.

16 Now, these changes, the reason we don't know for
17 sure about what was tested, it was a prototype, and there
18 wasn't even a drawing sent with it when it was sent down to
19 TTI. And the head -- the head that was actually hit on May
20 the 27th, 2005, was destroyed. Nobody measured it before it
21 was used. We don't have any record of any measurements.

22 They want to talk about they've got a video of a
23 crash test and you know how fast that happens, but we'll
24 see. But what is interesting is you know how many of these
25 secret changes that they've disclosed to the Federal Highway

1 Administration in this 70-page report? You remember
2 Mr. Mann talked about this 70-page report? Do you know how
3 many times they told them?

4 Zero. It's never mentioned. And worse than that,
5 you're going to see that they not only critically -- they
6 failed to tell them about it. I just wonder if you think
7 it's any coincidence that they wrote a November 9, 2004 memo
8 that says we're going to do this unannounced, and then lo
9 and behold, when they ran the test on this proposal of a
10 4-inch chamber, whatever it was, it was unannounced. It's
11 never mentioned.

12 And I guess we'll talk about that 70-page report.
13 Let's see what they told them they were running in that
14 70-page report. This is what Trinity sent that was written
15 originally by Texas -- TTI. This is it. This is the
16 standard ET-Plus guardrail. They say modified. You'll --
17 we'll read those during -- in evidence. You'll see none of
18 those mention any of these changes. They're talking about
19 what it took to attach the head to the new 31-inch system.
20 There's not one mention anywhere in that report.

21 Now then, that was signed by four different people
22 down at the Texas Transportation Institute. No drawing, no
23 mention, no word. Affirmative misrepresentation that we
24 have said it's a standard test signed by four people, three
25 of them at least -- all of them are professional engineers.

1 Three of them have Ph.D.s.

2 Now, this was sent in by the executives of
3 Trinity. They all knew about this report. They had a
4 chance to read it. They sent it in to them in August, and
5 it was approved in September.

6 Now, let me tell you something else interesting
7 that was going on during this same timeframe, 2005/2006.
8 Trinity was developing a new product called the ET -- the
9 flared ET-Plus. They were using what they were
10 manufacturing, we know, after September 2005, the 4-inch
11 channel with the secret changes in it, and they ran a series
12 of tests. You know, new product, they know they're going to
13 have to have approval by the Federal Highway Administration.
14 You'll see evidence they tried -- they tried to talk the
15 Federal Highway Administration into doing it with -- without
16 doing the 3-31 test. But the Federal Highway Administration
17 said, no, you've got to run it.

18 Well, they ran some tests. They ran five tests,
19 but they were all with a small car, five head-on collisions.
20 They never ran the 3-31. You know how many times that
21 passed the test with a smart car?

22 Zero, folks. Never passed. They never ran it
23 with a 3-31. So they abandoned that project at that point.
24 But they never told the Federal Highway Administration while
25 they were dealing with them, oh, by the way, we ran this

1 very head that we're manufacturing and putting out there.
2 They never told them about those five tests, not once.
3 Secret changes were uncovered by Josh Harman in 2012. He
4 came forward after he -- here is the -- I forgot to tell
5 you. Here's a flared ET-Plus, just one of those test
6 results that failed. What happened is it came through the
7 front of that car and came right out the passenger's side
8 and came right behind the driver's side.

9 Now, Mr. Harman in doing his work out there on the
10 highway, began sometime in 2009, 2010, and somewhere began
11 seeing that there was something wasn't just quite right. So
12 through his own sweat and efforts, he began to determine
13 that these changes, that there was something going on that
14 he didn't know about. And he also knew that he started
15 seeing accidents like this one. And you can see there's
16 another one of those harpooning. And so through his own --
17 what he did, he discovered through his own efforts all these
18 different changes, and there's a number of them. There's
19 about six of them, I believe, that they changed from the
20 height, they changed the length, they changed the width,
21 they changed the inside of the extrude chamber, they made
22 all of these changes, but they never told one of them, not
23 any of them until Mr. Harman came forth in 2012 and he went
24 and talked to Mr. Nick Artimovich at the Federal Highway
25 Administration about them, and he told them what he

1 suspected.

2 And initially, Mr. Artimovich was very concerned.
3 He drafted memorandum, an email. And you will see in that
4 email that he wanted to see the -- he wanted to see the
5 Ted -- head that was tested. He wanted to see drawings that
6 were done at the time. And he would suggest that they
7 serve -- that they conduct an in-service -- in-service
8 evaluation. None of that happened because he didn't send
9 that email. Because they had a change of heart somehow.
10 And you'll see that what Trinity did, they start scurrying
11 around there in 2012 about uh-oh, we've got to do something.

12 I'll tell you what the main thing they did -- what
13 -- things going on behind the scenes that we've discovered
14 in this case, they were lobbying Congress. You will see
15 that they spent that period of time close to 700 and
16 something thousand dollars in their lobbying efforts.

17 I need to flash ahead right now because the
18 Federal Highway Administration in June of this year, they
19 sent a letter that you're going to hear a lot about, June
20 17th. They're going to claim this is their retroactive
21 approval level. After this 700,000-dollar lobbying effort,
22 they -- Mr. Artimovich and his boss do 180 degree turn.
23 They write this, and that's where they wipe their hands
24 clean. And it's Trinity -- really their own defense in this
25 case.

1 The problem is, and this is what you're going to
2 learn, that that letter was based on false information. It
3 was based on critically withheld information, such as those
4 five failures I told you about. And you're going to see
5 that they wrote a letter in 2009 -- May 19th, 2009. You'll
6 see that they're going to tell them they're requesting the
7 ET-Plus, some changes. And they're citing three different
8 tests there. All of those tests were done by this
9 five-inch. They never disclosed that. And that went on and
10 on and on. They had numerous of these letters.

11 And then if you look over between the time of the
12 -- the May 27th, 2005, through, let's say, 2012 there are
13 over 15 changes that they had requested. And they never
14 once told the Federal Highway Administration, oh, this
15 doesn't really apply to what we tell you. They never said
16 this is the new ET-Plus with a four-inch and these other
17 changes. They never disclosed that.

18 As far as the Federal Highway Administration knew,
19 this was the only one -- the only head that had been
20 manufactured at all up until Mr. Harman blew the whistle.

21 Now, truth is Trinity fraud goes on today because
22 they have simply withheld from the Federal Highway
23 Administration critical information that you're going to
24 hear about.

25 I need to talk to you a little bit about damages.

1 I imagine when you folks think about investing in some kind
2 of safety device, you do -- you check on it.

3 THE COURT: Two minutes, counsel.

4 MR. WARD: And take a car seat, for instance. I
5 just wonder who -- I didn't have those when my children were
6 living (sic), but I have -- my children -- investigate on my
7 five grandchildren. I don't believe anybody I know would
8 pay a wooden nickel for something if it hasn't been properly
9 tested and somebody told me it didn't work a majority --
10 more than a great majority of the time, worked all the time.
11 I just don't think you'd do that. I don't think anybody
12 would pay any money for it.

13 We believe that their fraud has cost \$219
14 million -- cost the United States Government that. That's
15 what they need to pay back.

16 What I want to close with is this, ladies and
17 gentlemen, this fraud has gone over a period of about almost
18 10 years, and I've just barely touched on the evidence, but
19 I want you to know that you're the first people in the
20 United States of America that will get to hear the whole
21 story. The Federal Highway Administration has not heard it.
22 No one has heard it. You will get to hear the story. You
23 will get to decide whether fraud is being committed. And
24 you will be the sole judges of it based upon the evidence.

25 And we're going to bring the evidence, and you

1 hold me to this. If I don't prove everything that I told
2 you I was going to prove, you should hold it against me.
3 But the documents are there. And you're going to see them.

4 Thank you very much for your attention.

5 THE COURT: All right. The Defendant may present
6 its opening statement.

7 Mr. Shaw, would you like a warning on your time?

8 MR. SHAW: I would, Your Honor. And if they could
9 just roll those right down here in the front --

10 MR. WARD: Where do you want them?

11 MR. SHAW: Just right here in front. Thank you.

12 Judge, if you could tell me at five and one, I'd
13 appreciate it.

14 THE COURT: All right. All right. Let's return
15 to our places.

16 You may proceed, Mr. Shaw.

17 MR. SHAW: May it please the Court. Counsel.

18 Ladies and gentlemen of the jury, thank you. Let me
19 introduce myself to you personally. I'm Ethan Shaw. I'm
20 from Austin, Texas. I've got the privilege and the
21 responsibility of representing Trinity Industries and
22 Trinity Highway Products in this particular case.

23 We are at the part of the trial that's known as
24 the opening statement, as Judge Gilstrap has told you. It
25 gives me an opportunity really to tell you what we expect

1 the evidence is going to show throughout the course of this
2 trial. I want you to think of this as if you're kind of
3 traveling down the highway and there's billboards and
4 somebody is kind of advertising that something is coming up.
5 And I'm going to try to highlight for you what I think is
6 important in this particular case.

7 I'd like to follow up somewhat with the theme that
8 Mr. Mann started with, that what was really important here
9 is to remember, as the Judge has instructed you, that this
10 is a False Claims Act case.

11 Now, what does that mean in a False Claims Act?

12 Well, what it really means and what this -- the
13 ladies and gentlemen of the jury need to remember is that
14 the question that you're going to be asked at the end of
15 this case, the question you're going to have to handle and
16 find evidence to answer one way or the other is whether or
17 not Trinity deliberately and intentionally lied to the
18 federal government about the ET-Plus so that they can
19 receive federal money. That's the question. That is the
20 question.

21 And I respectfully say, and like Mr. Ward said
22 hold me to what I say, I want you to do the same for me.
23 Hold me to what I say, because I respectfully tell you the
24 answer to that question is no, based upon the evidence in
25 this particular case.

1 Now, let's take a look at a picture of an ET-Plus.
2 You've seen this, and I want to talk to you somewhat about
3 the facts of this case generally, okay? This is an ET-Plus.
4 You probably have driven by these on the way here today or
5 at some time. They're on the highways in this state and
6 other states, every state practically, I believe, in our
7 great nation. I have in front of us here two ET-Pluses.

8 One of these ET-Pluses is a five-inch. This is a
9 four-inch. I'm going to explain to you the difference
10 between these in just a few moments, okay? I want to go
11 through it real quickly with you. This is called the head.
12 This is called the head. The people in the industry who
13 work in this particular field, they're going to tell you
14 that this is the working end, the working end of the head
15 right here. This is the working end of the head.

16 These two heads, the five-inch and the four-inch
17 on the working end of the head, are identical. It is the
18 same working head, okay? Remember that. I want you to
19 remember the evidence will show that the five-inch -- this
20 is -- this piece right here on top is called a guide
21 channel.

22 This four-inch is called a guide channel. The
23 guardrail fits here into this window, the guardrail. It is
24 extruded out of the working end when the car is -- impacts
25 the head, the head goes down the guardrail. The rail comes

1 out the head. I want to try to orient you to that because
2 we're going to be talking about that a lot.

3 Now, as I said, this is a False Claims Act case.
4 What you're going to hear in this particular case is that
5 all the allegations that Mr. Ward has told you in his
6 opening statement, that Mr. Harman has pled in his official
7 papers on file in this particular case have all been looked
8 at by the Federal Highway Administration, the FHWA. They've
9 looked at every bit of what Mr. Harman says. They have
10 taken all of this information into consideration, and they
11 have made a determination that the ET-Plus has been, since
12 its inception into the marketplace throughout today and into
13 the future, as we sit here today, eligible for federal
14 reimbursement. As we sit here today, in theory, ET-Pluses
15 are being sold and purchased by the federal government in
16 light of knowing full well what Mr. Harman's allegations
17 are. I want you to remember that.

18 Mr. Harman, I suspect, is not going to want to
19 talk too much about the false statement. I want you to ask
20 yourself throughout the course of this trial, what is the
21 false statement? What is the false statement? I want you
22 to ask yourself throughout the course of the trial, where is
23 the intent? Where is the knowing misrepresentation to the
24 government that induced the government to pay federal money?
25 I want you to ask yourself that.

1 Mr. Harman, I believe, would rather talk to you
2 about the fact that he believes that the ET-Plus is
3 dangerous, that there is something dangerous about the
4 ET-Plus. He wants to talk to you about accidents. We know
5 that the ET-Plus is not dangerous. We know this -- if we
6 could look at 534.

7 We know that the FHWA has already written about
8 this. And they have said in January 10th of 2013: As a
9 preliminary matter, we have no reliable data indicating that
10 the ET-Plus end terminals are not performing as they were
11 intended to perform.

12 We have other documents, other emails from Nick
13 Artimovich, same Mr. Artimovich that was mentioned to you by
14 Mr. Ward, where he says: When the ET-Plus was tested in
15 2005, the end terminal with the four-inch feeder channel met
16 all crash test safety standards, and FHWA has received no
17 complaints from the states over the past seven years during
18 which the terminal has been used nationwide. Only in early
19 2012 did a competitor of the company that manufactures the
20 device reach out to FHWA and other organizations to allege
21 performance issues.

22 This is important to realize. Contrary to how Mr.
23 Harman has been portrayed here to you as someone who is in
24 the -- in the business of installing guardrail, he's a
25 competitor of Trinity. He was a competitor of Trinity. You

1 also should know that while he was a competitor of Trinity,
2 he also was installing end terminals with four-inch guide
3 channels, the same type of guide channel that you find here
4 on the ET-Plus that I've had brought into the courtroom
5 right in front of you.

6 Mr. Harman doesn't want to focus on that, however.
7 The evidence will be he's going to want to talk about
8 harpooning. He's going to want to talk and show -- like the
9 cartoon that was showed to you in -- earlier today, of cars
10 flipping. He wants to show you pictures of impacts of ET --
11 flared ET devices. He wants to show you cars that had been
12 involved in crashes.

13 I want to talk to you about that, and I want to
14 say to you is what my three college age sons say to me, why
15 don't we just get real about it. Let's get real about it.
16 Accidents in this country happen on this -- on the nation's
17 highways. We know, and I suspect that you know, that you're
18 not going to be impacting an ET-Plus end terminal device
19 unless you have left the roadway.

20 We need to recognize what the ET-Plus is and what
21 the ET-Plus is not. The ET-Plus is a device that is there
22 not to prevent all accidents. Rather, it is a device that
23 is there to try to make an accident that's already happening
24 somewhat better. As I believe either Mr. Baxter or Mr. Ward
25 said, to prevent you from hitting a tree or to prevent you

1 from going into the ravine, prevent you from going into the
2 ditch. That's the purpose of the ET-Plus. We know this.

3 In fact, if we'll look at D 256, we know this from
4 the DOTs that are across this country that utilize the
5 ET-Plus. From Terry Hale in New York DOT where he says:
6 Yes, we definitely use the ET-Plus. As with any terminal,
7 there will be certain accidents that do not have desirable
8 outcomes. All indications are that the ET-Plus is actually
9 one of the better performers.

10 We know from the Georgia DOT, other evidence that
11 you will see in this particular case. These devices are not
12 tested for strikes of this type.

13 What does that mean? That means, ladies and
14 gentlemen, that these devices are tested pursuant to a
15 testing protocol called NCHRP 350. That testing protocol
16 sets the standards from the FHWA, and these devices are
17 crash tested pursuant to those protocols and those
18 standards. They're not designed to prevent as a safety net
19 every accident that happens.

20 There are certain parameters -- you're going to
21 hear this throughout the trial called in criteria. And
22 you've already heard it once, whether or not it was an in
23 criteria impact.

24 Those standards try to encompass as many different
25 ways that this may be impacted to try to protect as large

1 amount of the population as they can. So when you're
2 looking at pictures of accidents and you're looking at these
3 accidents that admittedly are horrible and tragic, you have
4 to ask yourself, how did this accident happen? Was this a
5 head-on collision? Was this an off angle impact? How fast
6 was that car going? Why did that car leave the road? How
7 do I know how this ET-Plus that they're showing me in this
8 particular photograph was installed? How do you know that?
9 Because there will be no evidence of that. Remember that
10 when you're keeping the Plaintiff and holding them to their
11 burden of proof in this particular case.

12 Remember, ladies and gentlemen, that pictures of
13 accidents, no matter how horrific and tragic they may be,
14 are simply pictures of accidents. They're not evidence of
15 false statements. They're not evidence of an intent to
16 induce the federal government to pay federal money. That is
17 for another day. But that is not what this particular case
18 is about as we sit here.

19 So what is the false statement? As best that I
20 can tell listening and -- and being involved in this case,
21 Mr. Harman claims that this particular product, the ET-Plus,
22 is not 350 compliant. That's the standards that we talk
23 about.

24 If we'll look at P 1146.

25 With the shipment of these particular products to

1 contractors and sometimes state DOTs to be installed in this
2 particular country, you will see a statement here that says
3 NCHRP Report 350 compliant, the top statement on the board
4 in front of you. As I understand it, Mr. Harman is saying
5 that that is a false statement.

6 Ask yourself, as we go throughout this particular
7 trial, if indeed that is a false statement. I will
8 respectfully submit to you that it's not.

9 Now, how do we know that? We know that because if
10 we take a look at Defendants' Exhibit No. 2, who's also
11 the --

12 Pull up the entire exhibit for me, Defendants'
13 Exhibit No. 2.

14 We know that the FHWA has looked into Mr. Harman's
15 allegations, and they have issued to us a memorandum. This
16 is the memorandum that the Judge was instructing you about
17 in his preliminary instructions before the opening
18 statement.

19
20 On June 17th of 2014, the FHWA issued this as the
21 official policy of the -- of the FHWA, the Federal Highway
22 Department. This is from Mr. Michael S. Griffith, the
23 director of Office of Safety Technologies. And what he says
24 here is that the Office of Safety has received inquiries
25 from FHWA division offices and state DOTs regarding the

1 federal aid eligibility of the ET-Plus w-beam guardrail end
2 terminal manufactured by Trinity Highway Products.

3 He says to you in this particular memorandum as he
4 says to every DOT, as he says to everybody in this nation as
5 it's posted on their website: The ET-Plus w-beam guardrail
6 became eligible on that date, September 2nd, 2005, and
7 continues to be eligible for federal aid reimbursement.

8 He goes on to describe the background of what he
9 has done in this particular case. He goes on to talk, and
10 as you will see throughout the trial, the length of the
11 investigation. He goes on in the last and he concludes as
12 the official statement: An unbroken chain of eligibility
13 for federal aid reimbursement has existed since September
14 2nd, 2005, and the ET-Plus continues to be eligible today.

15 Ask yourself throughout this particular trial, how
16 can the agency that Mr. Harman is on behalf of, the agency
17 that he says has been defrauded, the agency that he says has
18 been lied to and tricked, somehow or another, by a
19 combination of Trinity and Texas A&M, how can that be, when
20 they are sitting there saying to you less than two or three
21 months or so ago that they know of Mr. Harman's allegations,
22 and it remains eligible to this very day.

23 How do we know that they know about Mr. Harman's
24 allegations?

25 Because as early as 2012, Mr. Harman began making

1 these allegations, and he met with the people at the FHWA.

2 You will learn during the course of this
3 particular trial that Mr. Harman met with the people at the
4 FHWA, and he brought to them over a hundred-page PowerPoint
5 presentation showing to them -- his own PowerPoint
6 presentation showing to them pictures of accidents,
7 measurements that he had compiled through his travels
8 throughout this country looking at ET-Pluses and other
9 end-terminal devices.

10 He told them all of the allegations that he is
11 telling you here today that I anticipate that he will tell
12 you throughout this trial. He met with the FHWA at his
13 lawyer's offices. He brought to the people at FHWA
14 end-terminal devices just like the ones that I have in front
15 of me to try to make his point to the FHWA. And knowing all
16 of that information, knowing the stakes that are involved,
17 the FHWA issued the opinion letter, the official statement
18 letter that I just read for you there.

19 You should also recognize that that official
20 position paper wasn't the first time that the FHWA had spoke
21 on this. In fact -- if we could see the timeline.

22 In fact, if we go through a timeline to help try
23 to put this in some type of chronology, you'll see that in
24 September of '05, the FHWA issues its first acceptance
25 letter of the ET-Plus at the 31-inch guardrail height as

1 Mr. Ward mentioned in his opening statement.

2 We know in 2012, Harman -- Mr. Harman meets with
3 the FHWA, and he provides a copy of his SPIG presentation.
4 And SPIG, as you will learn, is Mr. Harman's company that's
5 also involved in end terminals and manufacturing end
6 terminals. He provides to them physical heads for them to
7 examine at FHWA.

8 In October of 2012, the FHWA, after meeting with
9 Mr. Harman, issues statements confirming the ET eligibility
10 to Illinois and South Carolina and New Hampshire DOTs. At
11 that time, for example, we see these types of letters that
12 you will have an opportunity to review from Daniel Hinton
13 where the South -- South Carolina DOT asked a question
14 regarding the ET-Plus terminal for use on the National
15 Highway system. Their question concerns the national chute.
16 The answer that we get back from Mr. Artimovich, here is our
17 response to your inquiry: The ET-Plus end terminal with
18 4-inch guide channel is eligible for federal reimbursement.
19 You see this particular chronology.

20 If we can go back to the timeline, please.

21 We see this continue throughout as -- as the FHWA
22 makes that same reaffirmation to the Maryland DOT and to the
23 Iowa DOT upon their inquiries about the ET-Plus.

24 Now, you heard about the changes to the ET-Plus.
25 Mr. Ward talked to you about those. What he didn't mention

1 to you is that in this relationship between Texas A&M and
2 Trinity, Texas A&M is the designer/inventor of this
3 particular product. They have the exclusive right to change
4 the product. It does not belong to Trinity. Trinity makes
5 it. They put it together.

6 Stated simply, they cut this steel out in a
7 pattern, and they weld it together pursuant to the design
8 put together by Texas A&M and their engineers. That's what
9 happens. As early as 2003, Texas A&M began asking questions
10 as to whether or not this guide channel, this 5-inch guide
11 channel, could be reduced to 4 inches. Why did they want to
12 reduce it?

13 Because as you will see throughout the trial --

14 THE COURT: Five minutes, Counsel.

15 MR. SHAW: Thank you, Your Honor.

16 They felt like that the w-beam guardrail wobbled
17 around, and they wanted to take the slack out of it.
18 Talked about changes. What are the changes? 5 to 4.
19 Inserted three-quarters of an inch here with a -- with a
20 fillet weld as opposed to a butt weld here (indicating).
21 Those are the changes that came -- was a result all from
22 changing the 5 to 4.

23 They talk about we didn't tell the FHWA. Trinity
24 didn't crash-test it. Texas A&M crash-tested it in 2005 and
25 2010. You will find out that once these allegations from

1 Mr. Harman came true, came to light, FHWA contacted Trinity.
2 They contacted Texas A&M.

3 You will hear throughout the trial the full
4 cooperation that Texas A&M and Trinity did. You will hear
5 from the Texas A&M engineers, Dr. Buth and Dr. Bligh. They
6 will confirm to you that this is their product. These are
7 their changes that this product is crashworthy; that this
8 product is and always has been eligible for federal
9 reimbursement.

10 So why are we here in this particular case, ladies
11 and gentlemen? Why are we here?

12 I believe the reason that we are here is because
13 Mr. Harman has a plan. Mr. Harman has a plan. He hopes to
14 convince you to provide to him money so that he can
15 recapitalize his failed end-terminal business. You will see
16 documents -- D-82, please.

17 You will hear document -- you will see documents
18 in which Mr. Harman and his past company -- and his company
19 that was -- recently had been in bankruptcy was seeking
20 investors, and in this, they sent out proposals to investors
21 on their behalf in which SPIG, Mr. Harman's company, has the
22 unique right to sell the popular end-terminal design to
23 continue its rapid growth and to take market share away from
24 an exposed Trinity.

25 You will hear about official sworn statements that

1 were given in bankruptcy proceedings in which the hope of
2 Mr. Harman and his brother at SPIG, the company in Virginia
3 that they at one time operated for end terminals, was to
4 somehow or another use the proceeds from the jury here in
5 Marshall, Texas, to go into business against Trinity, and
6 that that was their plan for emerging from bankruptcy.

7 You heard Mr. Ward talk to you about lobbying in
8 this particular case. You understand, and hold me to this,
9 Trinity does have lobbyists and they do make contributions,
10 but there will be no evidence that there is any connection
11 at all, any evidence between ET-Plus and their lobbying in
12 this particular instance.

13 What we do know, however, from Mr. Harman's own
14 efforts -- if we'll look at 385, please.

15 What we do know is that Mr. Harman has
16 specifically hired lobbying companies with official
17 paperwork on K Street in Washington D.C., lobbyists who are
18 there for the express purpose as they say in their official
19 documents, promote the removal and replacement of faulty
20 crash heads.

21 Look at 405, please.

22 THE COURT: One minute remaining, Counsel.

23 MR. SHAW: Thank you, Your Honor.

24 In January of 2 -- 25, 2013, HBW, another lobbying
25 firm, will assist Selco's governmental relations activities

1 in Washington, D.C., the scope of services, and to promote
2 the removal and replacement of faulty heads.

3 As Mr. Mann told you, there are two sides to every
4 story. We'd like you to keep an open mind. Remember the
5 motivations that are involved in this particular case.

6 Really ask yourself whether or not there is
7 evidence there to promote this grand conspiracy that
8 Mr. Ward and Mr. Harman has alleged in this case that takes
9 place between A&M, Trinity, and the Federal Government.

10 Ask yourself how in the world could that be true.
11 Where is the false statement when, in fact, the Federal
12 Government continues today, next week, and into the future
13 to say that these products are eligible for federal money,
14 the real issue in this particular case.

15 Thank you, Your Honor.

16 THE COURT: All right. Ladies and gentlemen, that
17 completes the opening statements from both Plaintiff and
18 Defendants. Before the Plaintiff calls their first witness,
19 we're going to take a short recess.

20 You may leave your notebooks in your chairs.
21 Don't discuss the case among yourselves. Take this
22 opportunity while you're in the jury room to get a drink of
23 water and stretch your legs. And we'll be back in here to
24 hear from the Plaintiff's first witness shortly. You're
25 excused for recess at this time.

1 COURT SECURITY OFFICER: All rise.

2 (Jury out.)

3 THE COURT: All right. Court stands in recess.

4 (Recess.)

5 (Jury out.)

6 COURT SECURITY OFFICER: All rise.

7 THE COURT: Be seated, please.

8 Counsel, is there a reason why these heads are
9 sticking up right in front of the bench?

10 MR. BAXTER: Because I placed them poorly, Your
11 Honor, is why, and I'm going to use them with Mr. Harman, so
12 I wanted them --

13 THE COURT: Remember, if you're beyond arm's
14 length from the podium, ask for leave.

15 MR. BAXTER: I will, Your Honor. Can I move it
16 right here and it be okay? Is that all right, if I push it
17 back in here?

18 I want to put them where they're not in your way.

19 THE COURT: That's fine. I've been wanting to say
20 that's proof that heads will roll, but I'm trying to avoid
21 humor in this case.

22 All right. Let's bring in the jury. Are you
23 ready to call your first witness, Mr. Baxter?

24 MR. BAXTER: I am, Your Honor.

25 THE COURT: All right. Let's bring in the jury,

1 Mr. McAteer.

2 COURT SECURITY OFFICER: All rise for the jury.

3 (Jury in.)

4 THE COURT: All right. Please be seated, ladies
5 and gentlemen.

6 Plaintiff may call its first witness.

7 MR. BAXTER: Your Honor, I call the Plaintiff,
8 Joshua Harman, to the stand, please.

9 THE COURT: All right. Mr. Harman, if you'll come
10 to the witness stand you've previously been sworn. Have a
11 seat at the witness stand, please, sir.

12 All right. Mr. Baxter, you may proceed.

13 MR. BAXTER: Thank you, Your Honor.

14 JOSHUA HARMAN, PLAINTIFF'S WITNESS, PREVIOUSLY SWORN

15 DIRECT EXAMINATION

16 BY MR. BAXTER:

17 Q. Will you turn to the jury and tell them your name, if
18 you would?

19 A. Joshua Monroe Harman.

20 Q. Where do you live, Mr. Harman?

21 A. I live in Virginia.

22 Q. And you're the Plaintiff in this case?

23 A. Yes, sir, I am.

24 Q. Let me see if I can find a little -- get a little
25 background on you, Mr. Harman.

1 Did you graduate from high school?

2 A. Yes, sir.

3 Q. All right. About how old are you when you got out of
4 high school?

5 A. About 15.

6 Q. Now, that's a little young. How did that happen?

7 A. I was in a private school and I took additional courses
8 that -- and worked as quick as I could.

9 Q. Okay. And you were ready to get out of high school?

10 A. Yes, sir. I was wanting to go to college.

11 Q. All right. And did you go?

12 A. Yes, sir, I did.

13 Q. All right. Where -- where did you go?

14 A. I went to Virginia, Southwest Virginia Community
15 College. I went to some in Arizona and some in Florida.

16 Q. Okay. Did you get a college degree?

17 A. No, sir, just got some course.

18 Q. How come you didn't get a college degree?

19 A. I wanted to start a business.

20 Q. Well, what age were you when you decided you wanted to
21 start a business?

22 A. At 18.

23 Q. That's kind of young. What business did you want to
24 start?

25 A. I started like contract service company.

1 Q. And what kind of services were you going to provide at
2 18 with your company?

3 A. Hydroseeding, fencing, just various different things.
4 It's for -- like federal contracting.

5 Q. Okay. For those of us that don't know what hydroseeding
6 is, what is it?

7 A. Hydroseeding is if you drove along the road and seen the
8 green paste where they're spraying for the grass, it's got
9 fertilizer and lime and different other chemicals sometimes.

10 Q. My guess is, Mr. Harman, you didn't do that on some
11 18-year-old allowance. Where did you get the money to get a
12 business together?

13 A. I went to the bank and borrowed it.

14 Q. All right. And you started your business?

15 A. Yes, sir, I did.

16 Q. Who are you in business with?

17 A. I was in business with my younger brother.

18 Q. All right. Was there a time when you started doing
19 things besides just hydroseeding?

20 A. Yes, sir. We slowly added additional things as we
21 would, you know, grow and we added guardrail.

22 Q. Now, can you just start putting guardrails up, or do you
23 have to know something about it, or how does that work?

24 A. No, sir. You're -- like a guardrail -- certified
25 guardrail installer, you have to be -- you have to be

1 trained.

2 Q. And were you trained?

3 A. Yes, sir.

4 Q. And did you become a certified guardrail installer?

5 A. Yes, sir, I was.

6 Q. Now, who does the guardrail installer company work for?

7 A. They work for the general contractor, which is for --
8 actually, just for the states.

9 Q. And how do you get paid?

10 A. It's comes from the contractor which ultimately comes
11 from the states.

12 Q. So you would enter into a contract to either put up new
13 guardrail -- did it also involve fixing old guardrail?

14 A. The -- the maintenance contracts was directed with the
15 states. So sometimes we got paid directly from the states,
16 and then directly from the contractor also.

17 Q. Did that mean you fixed guardrails?

18 A. Yes, sir.

19 Q. Did you become incredibly familiar with guardrails, how
20 to install them?

21 A. Yes, sir.

22 Q. Did you see them after they failed?

23 A. Yes, sir. After accidents, yes, sir.

24 Q. And did you repair them, or what did you do?

25 A. You repaired them generally. You replaced the guardrail

1 and the broken posts and then reuse the head.

2 Q. You could reuse the head?

3 A. Yes, sir.

4 Q. About what timeframe is this, Mr. Harman? What years
5 are we talking about?

6 A. Early -- late '90s, early 2000.

7 Q. Okay. Did you become a customer of Trinity's?

8 A. Yes, sir.

9 Q. And what were you buying from Trinity?

10 A. A whole host of different products.

11 Q. Did you buy any of these heads from Trinity?

12 A. Oh, yes, sir.

13 Q. Now, we heard from Mr. Ward a while ago that the initial
14 product was called what?

15 A. The original one was the ET-2000.

16 Q. Okay. Now, we don't have one of those in the courtroom,
17 do we?

18 A. No, sir.

19 Q. Are you familiar with the ET-2000?

20 A. Yes, sir.

21 Q. Okay. Now, I'm going to represent to you, Mr. Harman,
22 that this is an ET-Plus with a 5-inch channel. Are you
23 familiar with it?

24 A. Yes, sir.

25 Q. How did it differ, the ET-2000 from the ET-Plus?

1 A. It was a hundred pounds lighter.

2 Q. Which one is lighter?

3 A. The ET-Plus.

4 Q. This one's lighter and the ET-2000 was heavier?

5 A. Yes, sir.

6 Q. Okay. A hundred pounds of steel?

7 A. Yes, sir.

8 Q. What else?

9 A. The impact plate was narrower and higher.

10 Q. Okay.

11 MR. BAXTER: Can I have that first slide,
12 Mr. Diaz, that just shows the product, if we can, sir?

13 Q. (By Mr. Baxter) Now, when you say the impact plate,
14 where are you talking about?

15 A. This --

16 Q. And I don't know if it's marking on the computer or not,
17 but you've got the arrow at least pointed to the impact
18 plate?

19 A. Here we go. Now, I've got a marker. There it is.

20 Q. Okay. That's the impact plate?

21 A. Yes.

22 Q. And the impact plate on the 2000 was what size?

23 A. It was square.

24 Q. Okay. And this one is a rectangle?

25 A. Yes, sir.

1 Q. Any other major differences?

2 A. There's some plating on the sides. That's where they
3 remove those. They weren't really structure parts --
4 structural parts.

5 Q. Okay. Do you know about when -- when were you buying
6 the ET-2000?

7 A. That was in the late '90s.

8 Q. Okay. Do you know about when this ET-Plus came on the
9 market?

10 A. It was at the -- early 2000s.

11 Q. All right. And did you -- were you told that those were
12 approved by the FHWA?

13 A. Yes, sir.

14 Q. And did you later find out they, in fact, were approved?

15 A. Yes, sir.

16 Q. Okay. So this product right here, the 5-inch channel,
17 this product is approved?

18 A. Yes, sir.

19 Q. And it was approved in about 2000?

20 A. Yes, sir.

21 Q. Okay. Still approved today, I take it?

22 A. Yes, sir.

23 Q. All right. Now --

24 THE COURT: Mr. Baxter, I'm happy for you to move
25 as you are.

1 MR. BAXTER: Yes, sir.

2 THE COURT: But when you get away from that
3 microphone, you're going to have to raise your volume.

4 MR. BAXTER: I will, Judge. Thank you.

5 Q. (By Mr. Baxter) Mr. Harman, did you install these
6 ET-Pluses on the highways?

7 A. Yes, sir, I did.

8 Q. Primarily where?

9 A. All over the state of Virginia and other Eastern states.

10 Q. All right, sir. Did you have any trouble installing
11 them?

12 A. No, sir.

13 Q. Did you have -- did you see any trouble with them
14 working?

15 A. No, sir.

16 Q. All right. And did, as far as you could tell, they
17 worked how they're supposed to?

18 A. The original one, yes, sir.

19 Q. Okay. Now, can you explain to the jury how that head,
20 if it's mounted here and it gets hit by a car or by a truck,
21 how it's supposed to work?

22 And let me see if I can show the same animation that
23 Mr. Ward showed today. Now, here we have a truck, and the
24 truck is moving toward the head.

25 MR. BAXTER: If you can stop it there, Mr. Diaz.

1 Q. (By Mr. Baxter) Tell the jury what's happening right
2 about now.

3 A. Right here is just when the guardrail starts to extrude
4 out of the head.

5 Q. And where does it come out?

6 A. It comes out right here (indicating).

7 Q. On the side?

8 A. Yes, on the side.

9 Q. Toward traffic or away from traffic?

10 A. It's coming in behind the guardrail away from traffic,
11 shoulder side.

12 Q. All right. And so what's going to happen next? Before
13 I run the animation, tell us what's going to happen next.

14 MR. SHAW: Excuse me, Mr. Baxter.

15 Objection, Your Honor. Mr. Harman is not an
16 expert on guardrails, on heads or end terminals or
17 animations. It's beyond his expertise. So we would object
18 to that, Your Honor.

19 THE COURT: He's not called for an opinion,
20 Counsel. He's given a factual recital of what happens. I'm
21 going to overrule your objection.

22 Proceed.

23 Q. (By Mr. Baxter) Go ahead, Mr. Harman. What happens
24 next?

25 A. The energy of the vehicle will push the head down the

1 rail.

2 Q. All right.

3 A. As it pushes the head down the rail, it will extrude the
4 -- the rail out the side safely away from the vehicle.

5 Q. Okay.

6 A. The energy is where it flattens the w-beam into a
7 ribbon.

8 Q. Is the w-beam in a w shape?

9 A. Yes, sir, the guardrail.

10 Q. Can we see that right here on the animation?

11 A. It's right here.

12 Q. All right, sir.

13 MR. BAXTER: Can you run the rest of it, Mr. Diaz?

14 Q. (By Mr. Baxter) It hits the striker plate and it starts
15 to extrude; is that right?

16 A. Yes, sir.

17 Q. Okay. And then does it move as Mr. Ward said like a
18 train down the track?

19 MR. SHAW: Objection, Your Honor. Leading. And
20 also, Your Honor, again, it's asking him to give fact
21 testimony of an expert nature of which he's not qualified.

22 THE COURT: I'll sustain as to leading.
23 I'll overrule as to your opinion or expert objection.

24 MR. BAXTER: Thank you, Your Honor.

25 THE COURT: Let's avoid leading, Counsel.

1 MR. BAXTER: I will, Your Honor. Thank you very
2 much.

3 THE COURT: Proceed.

4 Q. (By Mr. Baxter) Well, how does it work going down --
5 going down that barrier?

6 A. It goes down the guardrail like a train down the track
7 and extrudes it out to the side.

8 Q. All right. It -- does it flatten it out when it comes
9 out the side?

10 A. Yes, sir.

11 Q. And where does it get flattened?

12 A. It gets flattened inside the chamber.

13 Q. All right, sir. Are you -- have you cut a lot of these
14 heads apart, Mr. Harman?

15 A. Yes, sir, I have.

16 Q. Are you familiar with the internal workings of the head?

17 A. Yes, sir.

18 Q. If I were to show you sort of a diagram of the internal
19 workings of the head, would you be able to identify them for
20 the jury?

21 A. Yes, sir.

22 Q. Okay.

23 MR. BAXTER: Could I -- could I get, Mr. Diaz, the
24 graphic showing the -- the head?

25 Q. (By Mr. Baxter) Now, we've got them labeled here, Mr.

1 Harman. I want you to talk about the various parts. And
2 the very first thing I want you to talk about, because you
3 heard Mr. Ward talk about 5 inches to 4 inches. What is he
4 talking about?

5 A. It's this part right here (indicating).

6 Q. Does -- is it marking on your computer?

7 A. No, sir, it's not.

8 THE COURT: Let me just tell you, Counsel, the
9 electronics don't mark on the screens as of right now.

10 MR. BAXTER: Okay. I'm sorry, Judge.

11 THE COURT: That -- that feature is on the fritz
12 and it hasn't been fixed. So everybody knows, you can't
13 mark on the screens at least until the people from Tyler get
14 over here and fix it.

15 MR. BAXTER: Okay, Judge. Thank you. I thought I
16 had messed it up somehow.

17 THE COURT: No. You had no way of knowing.
18 That's why I wanted you to know.

19 MR. BAXTER: Thank you, Your Honor.

20 Q. (By Mr. Baxter) All right. Well, Mr. Harman, if we were
21 then just -- I'm going to have you point here in a minute,
22 but if we were to look at this top one, can you tell me the
23 words that are associated with the channel that's 5 inches
24 or 4 inches?

25 A. The feeder chute is -- that's a feeder chute assembly.

1 Q. Okay.

2 A. Yes.

3 Q. The ET-Plus that we have here in the courtroom that has
4 the 5-inch channel, is that channel measured somehow? How
5 is it measured?

6 A. The 5-inch is measured across the top.

7 Q. Okay.

8 MR. BAXTER: I know we're got a tape measure. Can
9 I get this, Your Honor? Excuse me. Can I approach the
10 head?

11 THE COURT: You may.

12 Q. (By Mr. Baxter) So are you talking about measuring this
13 channel right here (indicating)?

14 A. Yes, sir.

15 Q. Okay. And that's 5 inches?

16 A. Yes, sir.

17 Q. Okay. So if I were to click it, it would stop at the
18 5-inch mark? Is this one similar?

19 A. It's the same. They're both identical on that model.

20 Q. Now, this one we've identified as a 4-inch head?

21 A. Yes, sir.

22 Q. Where's the 4 inches?

23 A. It's the same identical location.

24 Q. Right here (indicating)?

25 A. Yes, sir.

1 Q. And the other side is 4 inches?

2 A. Yes, sir.

3 Q. And that's called the feeder chute?

4 A. Yes, sir.

5 Q. Does it turn out one of the things that ends up that
6 there's a complaint about?

7 A. Yes.

8 Q. We'll get to that in a minute.

9 A. Yes, sir.

10 Q. So that's the feeder chute. We've also got a marking of
11 the extruder throat. What is that?

12 A. The extruder throat is this area that you see the red
13 dot on. That is considered the extruder throat.

14 Q. Okay. And what goes in there?

15 A. The extruder throat is what flattens the w-beam, and it
16 extrudes it to the side.

17 Q. Okay. Now, when this thing is installed, where does the
18 w-beam go?

19 A. It -- it goes in lengthways between the two channels?

20 Q. Okay. And the feeder chute and it goes between the
21 channel on the top and the channel at the bottom?

22 A. Yes, sir.

23 Q. Now, here we've got it standing upright, but when it's
24 installed is it sideways?

25 A. Yes, sir, it's horizontal.

1 Q. Okay. You've also got something marked as a post
2 deflector. What is that?

3 A. That's post breaker, post deflector. It -- that is the
4 mechanism that's being marked there. That breaks the post
5 as the head moves down the rail.

6 Q. Okay. Are those posts just ordinary wooden posts?

7 A. No, sir.

8 Q. What's the difference with those posts?

9 A. They're -- they're pre-weakened with a hole at the base
10 of the post so they'll break along the lines of the rail.

11 Q. So you want them weak. They'll hold up the guardrail,
12 but you don't want them impaling the car; is that right?

13 A. They have a strength if it hits in a redirection, but
14 it doesn't have a strength on the down line.

15 Q. Okay. And then you've got something called the exit
16 gap?

17 A. Yes, sir.

18 Q. Where is the exit gap?

19 A. The exit gap has been identified on the screen.

20 Q. All right. And what happens at the exit gap, Mr.
21 Harman?

22 A. The exit gap is where the -- the w-beam is flattened and
23 then it comes around and extrudes out the side of the head.

24 Q. Okay.

25 A. The exit gap has to accommodate the splice bolts.

1 Q. So as the head moves down the rail, the rail comes out
2 there?

3 A. Yes, sir.

4 Q. Does it kind of curl up?

5 A. Yes, sir.

6 Q. Okay. You were installing these, Mr. Harman.

7 MR. BAXTER: And I think I've got one more of the
8 diagrams, Mr. Diaz, and it's got a top view. If I can get
9 that up on the screen.

10 Q. (By Mr. Baxter) I just want to make sure we're all on
11 the same page here, Mr. Harman. And is this a top view of
12 the ET-Plus?

13 A. Yes, sir.

14 Q. And I notice on the top view, we've got five inches.
15 What is that?

16 A. That's the width of the channel. Lets you measure here.

17 Q. And is that what the old ET-Plus had on it?

18 A. Yes, sir.

19 Q. And you've got four inches. What is that?

20 A. That's the width of the current model that you have in
21 the --

22 Q. And that's --

23 A. To your left, yes.

24 Q. -- this model?

25 You're installing these, Mr. Harman. Did there come a

1 time when you started noticing a change out on the highway?

2 A. Yes, sir.

3 Q. And when was that?

4 A. That was somewhere towards near 2008 -- 2011, somewhere
5 in there.

6 Q. And what changes did you notice out on the highway? And
7 by the way, since 2005, are you installing these?

8 A. Yes, sir.

9 Q. These are the four inches?

10 A. Yes, sir.

11 Q. Had you noticed the change?

12 A. When I -- no, sir, not at the time.

13 Q. Okay. And you're -- and you're installing them all over
14 Virginia?

15 A. Yes, sir.

16 Q. At that time, are you the largest installer in Virginia?

17 A. Somewhere along in that period, yes, sir.

18 Q. Okay. So after 2005, when these are being installed on
19 the highways, what difference did you now notice?

20 A. As I started repairing them, I noticed that they weren't
21 working like they were intended.

22 Q. What was different?

23 A. Just they -- they weren't working. They were -- I've
24 seen them -- I'd seen news reports where they harpooned the
25 vehicle and I seen the -- in my industry --

1 MR. SHAW: Objection, Your Honor. It's based on
2 hearsay. He's reciting what he's seeing outside of this
3 Court and asserting it for the truth of the matter asserted.
4 We don't have what he saw to provide his explanation, Your
5 Honor. It's hearsay.

6 THE COURT: What's your response, Mr. Baxter?

7 MR. BAXTER: Your Honor, he's simply reporting
8 what he saw both on television and in person about these
9 wrecks. I'm fixing to show some pictures if that will make
10 anybody feel any better.

11 MR. SHAW: Under Rule 802, it remains hearsay,
12 Your Honor.

13 MR. BAXTER: What he saw is not hearsay, Your
14 Honor.

15 MR. SHAW: It is if he -- if what he -- what he
16 saw on the news, Your Honor, is hearsay. That is people
17 speaking, talking. What he saw on the highway may be
18 different.

19 THE COURT: All right. Counsel, he can testify to
20 what he has personally observed.

21 MR. BAXTER: Okay.

22 THE COURT: And it can be cross-examined as to
23 whether he has any knowledge of the truth of it or not, but
24 to that extent, I'm going to overrule the objection.

25 Q. (By Mr. Baxter) Did you see -- personally observe, Mr.

1 Harman, that these four-inch heads were failing?

2 A. Yes, sir.

3 Q. Okay. Did you start looking at wrecks yourself?

4 A. Some of the time, yes, sir.

5 Q. And can you tell the jury a little bit about what you
6 did to determine or to find these wrecks and where you saw
7 them or how many you saw?

8 A. I started driving the highways and just looking for
9 accidents that was delineated with the barrels. And I drove
10 all the way across the country, all the way to New Mexico
11 from Virginia, back around down through Dallas, just looking
12 for accidents of the actual heads --

13 Q. And did you --

14 A. -- and multiple accidents --

15 Q. -- and did you --

16 A. -- of any model.

17 Q. -- and did you --

18 THE COURT: All right. Gentlemen, let's make sure
19 that we don't talk over each other. When you're both
20 talking at the same time, the jury can't hear and the court
21 reporter can't get it down accurately. So please be careful
22 not to do that.

23 MR. BAXTER: My fault, Judge.

24 Q. (By Mr. Baxter) Did you find them?

25 A. Yes, sir.

1 Q. Okay. Let me show you, Mr. Harman, what has been marked
2 as 1249, No. 1, and ask you if you can identify that?

3 A. Yes, sir.

4 Q. And what is that, Mr. Harman?

5 A. This is a vehicle that had hit the terminal, and the
6 guardrail through the vehicle.

7 Q. All right. Is that with an ET-Plus?

8 A. Yes, sir.

9 Q. Is it with the four-inch ET-Plus?

10 A. Yes, sir.

11 Q. Okay. Did --

12 MR. BAXTER: If we can look at No. 3 in that
13 series, Mr. Diaz?

14 Q. (By Mr. Baxter) Is that the same car?

15 A. Yes, sir.

16 Q. Can we see the guardrail?

17 A. Yes, sir, it's right there.

18 Q. Where is it?

19 A. At the end -- at the rear end of the vehicle.

20 Q. You mean it went into the front of the vehicle and it
21 came all the way out the back?

22 A. Yes, sir.

23 Q. Okay.

24 MR. BAXTER: And if I can see now No. 4, Mr. Diaz?

25 Q. (By Mr. Baxter) Is -- is this the guardrail coming out

1 the back?

2 A. Yes, sir.

3 Q. Had you ever seen anything like that prior to the
4 ET-Plus with the four-inch channel being on the roadway?

5 A. Not on the original model or any of the other models.

6 Q. All right. Did that raise your suspicions --

7 A. Yes, sir.

8 Q. -- Mr. Harman?

9 MR. BAXTER: If I can see Slide No. 886 --
10 Exhibit 886, Mr. Harman (sic). Do you have that one, Mr.
11 Diaz?

12 Q. (By Mr. Baxter) What does this show, Mr. Harman?

13 A. Another accident.

14 Q. Where is the guardrail?

15 A. The guardrail entered the front of the vehicle, and it's
16 up in the driver's seat.

17 Q. Is -- is that an ET-Plus with a four-inch channel?

18 A. Yes, sir.

19 MR. BAXTER: Let me see No. 2 if I could, please,
20 Mr. Diaz.

21 Q. (By Mr. Baxter) Same car?

22 A. Yes, sir.

23 Q. A little closer view?

24 A. Yes, sir.

25 Q. All right, sir. Is -- is the ET-Plus with the four-inch

1 channel and the other secret changes working like it's
2 supposed to?

3 A. No, sir.

4 Q. Is it supposed to do that?

5 A. Absolutely not.

6 Q. All right, sir.

7 MR. BAXTER: Let me see No. 3 if I can, Mr. Diaz,
8 same car.

9 Q. (By Mr. Baxter) Is that just a -- another shot of where
10 the guardrail ended up?

11 A. Yes, sir.

12 Q. Do you want to be sitting in that driver's seat when you
13 hit that ET-Plus with the four-inch channel when it does
14 that?

15 A. No, sir.

16 Q. Did you notice there were fatalities involved with this?

17 A. Yes, sir.

18 Q. And people losing limbs?

19 A. Losing limbs, losing lives, yes, sir.

20 Q. All right, sir.

21 MR. BAXTER: If I can see 1248, Mr. Diaz?

22 Q. (By Mr. Baxter) Ask you if you can identify it, Mr.
23 Harman. Can you identify that, sir?

24 A. Yes, sir.

25 Q. And is that another wreck with an ET-Plus?

1 A. Yes, sir.

2 Q. All right.

3 MR. BAXTER: If I can see 1248-3?

4 Q. (By Mr. Baxter) Now, appears to be the trunk of the
5 car. Is the guardrail coming out?

6 A. Yes, sir.

7 Q. And is that --

8 A. I came out through the -- it went through the car seats
9 and all the way out the back.

10 Q. So you don't want to be in the front and you don't want
11 to be in the back?

12 A. No, sir.

13 Q. All right. And one more if I can.

14 MR. BAXTER: No. 4, Mr. Diaz?

15 Q. (By Mr. Baxter) Same car?

16 A. Yes, sir.

17 Q. Where the guardrail went through the side?

18 A. Yes, sir.

19 Q. All right, sir. Now, Mr. Harman, did you start seeing
20 lots of these accidents, not just a few, not just these
21 three. Did you see lots?

22 A. Yes, sir, multiple.

23 Q. Did you see them all over the states that you were in?

24 A. Yes, sir, I have.

25 Q. Did you travel around and see them elsewhere?

1 A. I seen them in all the states, all 50 states.

2 Q. Okay. And did you -- and have you gone around and
3 looked at them?

4 A. I have drove around, yes, sir, and looked at them.

5 Q. Okay. After you became worried about the accidents --
6 now, Mr. Harman, I got to ask, sir, you're -- you're not an
7 investigator and you're not a safety expert and you're
8 installing guardrails. Why -- why did you take this on?

9 A. I'm in the safety industry. That's what I was trained.
10 This is not supposed to happen.

11 Q. Were -- were they hitting some of the heads that you
12 installed?

13 A. Yes, sir. I had never seen any of them hit in the
14 state, but I'll assure you they're out there.

15 Q. Okay. The -- the heads, did you eventually get some of
16 these heads and take them apart?

17 A. Yes, sir, I did.

18 Q. How many did you cut apart and investigate?

19 A. Several.

20 Q. Okay.

21 A. Six, seven, eight of them -- several of them.

22 Q. Did you -- did you find any other changes just besides
23 this four-inch channel?

24 A. Yes, sir.

25 Q. All right, sir.

1 MR. BAXTER: I want to, if I can, Mr. Diaz, get up
2 the graphic that demonstrates the -- the changes.

3 Q. (By Mr. Baxter) And I want to see, Mr. Harman, if you
4 can tell us what the difference is between this one with --
5 what I'm going to call the five-inch channel head and this
6 one with the four-inch channel, okay?

7 A. Yes, sir.

8 Q. All right. What's the first difference than you found?

9 A. The first difference was the four to five-inch.

10 Q. All right, sir. And that's the width?

11 A. Of the channels.

12 Q. Okay. Now, we heard -- we heard lawyers today talk
13 about wobbles and that wobbles was a problem in the
14 five-inch. Had it been your experience that wobble was a
15 problem in the five-inch?

16 A. No, sir. I've never seen or even heard of anything like
17 that.

18 Q. Okay. Do you even know what wobble is?

19 A. I have no idea what they're referring to.

20 Q. Okay. Had there been this problem, though, with the
21 five-inch not working?

22 A. None that I'm aware of.

23 Q. Okay. So the first change is the width of the feeder
24 channel. How about the height of the feeder channel?

25 A. The height of the feeder channel and the height of the

1 extruder channel itself were changed.

2 Q. All right. So the height in the four-inch, is it
3 greater or smaller than the one in the five-inch?

4 A. It's diminished.

5 Q. Okay. So the guardrail has got to go through here, got
6 to go through what they call the window into the extruder
7 head; is that right?

8 A. That's correct.

9 Q. And the height that it's got to maneuver in here has
10 been diminished?

11 A. Yes, sir.

12 Q. All right. You also said there was a difference about
13 how it was placed in the extruder throat. What is that
14 difference?

15 A. As -- as far as -- the -- the way that it is welded?

16 Q. Yes.

17 A. The way the channels are mounted?

18 Q. Yes, sir.

19 A. The -- the five-inch original model was a butt weld, so
20 it's flush inside. It's just they put the two pieces of
21 metal together and they fuse weld them.

22 Q. Okay.

23 MR. BAXTER: Can I approach that one, Your Honor?

24 THE COURT: You may.

25 Q. (By Mr. Baxter) Is -- is that down here, Mr. Harman?

1 A. I can't --

2 MR. BAXTER: Could I get him to come down here,
3 Your Honor?

4 THE COURT: You can have him stand there where he
5 can look.

6 MR. BAXTER: Okay. Look at them?

7 THE COURT: If you'll come around, Mr. Harman, and
8 use this handheld microphone, please.

9 THE WITNESS: Yes, sir.

10 THE COURT: You can stand right here at the
11 corner, just past the statue. Look over the railing. Just
12 don't get between the jury and Mr. Baxter.

13 THE WITNESS: Yes, sir.

14 Q. (By Mr. Baxter) Okay. Mr. Harman, I'm going to point
15 down here on this five-inch channel.

16 THE COURT: And, Mr. Baxter, you're going to have
17 to speak up away from the mic.

18 Q. (By Mr. Baxter) What is that, Mr. Harman?

19 A. Right there is the -- the butt weld. It's a flush weld.

20 Q. Okay. And does that mean what -- what does that mean?

21 A. That means they just put the two pieces of metal
22 together and then they fuse weld it all the way around.

23 It's flush inside. It does not diminish the height of the
24 chamber whatsoever.

25 Q. Okay. What about this one right here, the four-inch,

1 what's -- what's the difference on that?

2 A. That is inserted three quarters of an inch, so when --
3 when they do that, they diminish the height of the chamber
4 and the feeder chute. And also, you lose the benefit of the
5 taper. As you can see the -- the floor and the -- the
6 ceiling, if it was mounted horizontal, those top plates are
7 tapered. So you lose the ben --

8 Q. Is that the plate right here?

9 A. Those are the side plates. This is the top plate.

10 Q. Inside?

11 A. No, they're on the top.

12 Q. Oh, okay.

13 THE WITNESS: Do you have a pointer?

14 MR. BAXTER: Anybody got a laser pointer? I'll
15 get in the way.

16 THE COURT: And, ladies and gentlemen of the jury,
17 I know that some of this is close to the ground. If you
18 have trouble having a clear line-of-sight, if it helps you
19 to stand up right in front of your chair, you may stand up
20 if you'd like to. You don't have to, but you have that
21 latitude.

22 All right. Let's give him that laser pointer and
23 we'll continue.

24 Q. (By Mr. Baxter) Show me, Mr. Harman.

25 A. All right. This is your top -- this is your top, and

1 this is your bottom plate. It's this here on the bottom.

2 Q. Okay.

3 A. All right. When you -- you lose that benefit of that
4 taper. See how it's tapered?

5 Q. Yes, sir.

6 A. When you insert those channels up inside, you lose that.
7 So they put it in three quarters of an inch, and you lose
8 that complete benefit of that taper.

9 Q. Doesn't seem like three quarters of inch is very much,
10 Mr. Harman?

11 A. But you lose -- the taper, everything matters in these.
12 These are designed and tested a certain way.

13 Q. All right. Now, where is the exit gap on this?

14 A. You have to turn it around.

15 Q. Okay.

16 A. Up underneath here. You can't see it. It's -- when the
17 guardrail comes down the chutes, down through here, it comes
18 out right in here.

19 Q. Comes spitting out this way in here?

20 A. Yes, sir. This is not the exit gap.

21 Q. Okay.

22 A. It's up underneath there. You about have to stick your
23 hand back up underneath there.

24 Q. Inside?

25 A. Yes, sir.

1 Q. And are there any other changes that you noticed?

2 A. The angling of the side plates --

3 Q. What difference --

4 A. -- were changed.

5 Q. -- what difference does that make?

6 A. It's -- it's the mechanism that collapses the w-beam.

7 If you -- if you angle that, it changes the whole working
8 properties.

9 Q. What is the difference between this one and the original
10 ET-Plus?

11 A. Multiple changes.

12 Q. Well, on the angle of the plates?

13 A. Oh, the -- this is less. This is a more steeper angle.

14 Q. Okay. And what does that cause?

15 A. It causes more friction when you're com -- when you're
16 flattening that w-beam. This has an inch and a half or
17 larger exit gate. This is an inch.

18 Q. Okay. Now -- you can haven a seat, Mr. Harman. Thank
19 you.

20 Now, Mr. Harman, as -- as that head moves down the
21 rail, how is the rail put together?

22 A. The rail comes in two different size panels, 12 and a
23 half foot or a 25 foot. And then it's bolted together,
24 overlapped with a -- a pattern of eight splice bolts.

25 Q. All right, sir. I'm going to show you what has been

1 marked as an exhibit in this case which I believe to be --
2 is it 1058? Is this a splice bolt?

3 A. Yes, sir.

4 Q. And that splice bolt is about how far when it has to go
5 in that exit gap?

6 A. Depending on the length of the panel, it could be either
7 12 foot 6 or 25 foot.

8 Q. All right.

9 MR. BAXTER: It's 1255, Your Honor, if I can have
10 reference to that splice bolt.

11 Q. (By Mr. Baxter) Well, about how big are these splice
12 bolts?

13 A. They're right at one and a half inches.

14 Q. About how far in a normal accident is the head going to
15 be pushed down the rail?

16 A. It depends on the size of the vehicle and the speed of
17 the vehicle, but usually 30 feet.

18 Q. Okay. Does that mean that these splice bolts are going
19 to become involved in going through this -- this head?

20 A. Yes, sir.

21 Q. And they've somehow got to squeeze through?

22 A. Yes, sir.

23 Q. And they've got to squeeze through the exit gap?

24 A. Yes, sir.

25 Q. Did you notice any change in the exit gap?

1 A. Yeah, that's -- that's what I was talking about. The
2 four-inch exit gap went to one-inch.

3 Q. Okay. Will this splice bolt, this 1055 go through the
4 -- the ET-Plus -- original ET-Plus? Will it go through that
5 exit gap?

6 A. Yes, sir.

7 Q. If I go over there and drop it, will it go through?

8 A. Yes, sir, it should.

9 Q. Like that?

10 A. Yes, sir.

11 Q. And when it's in a wreck, is it going to go through that
12 on a much easier basis?

13 A. It's just -- it's just going to glide through. There's
14 no restrictions on the splice bolt.

15 Q. It went through so far I've lost it. Retrieved it --
16 What about this one, the four-inch? If I drop it in there,
17 am I going to get the same result?

18 A. No, sir.

19 Q. It's stuck, Mr. Harman. How does it get through that --
20 that inch gap?

21 A. If it does force the bolts through, it will bust the
22 welds and -- and destroy the head.

23 Q. Okay. And did you find that to be true when you
24 examined both the wrecks and the heads itself?

25 A. Yes, sir.

1 Q. All right. Any other changes that you saw, Mr. Harman?

2 A. The length of the feeder channel was also diminished.

3 Q. And is that this, the channel here?

4 A. Yes, sir.

5 Q. What difference does that make?

6 A. It's important when it's -- it's considered knee over.

7 When the -- when the vehicle travels out of the side of the

8 -- the alignment or the rail, the head knees over and allows

9 the vehicle to pass -- pass through safely.

10 Q. Okay. Did all of those changes end up in what you

11 consider to be a changed product?

12 A. All those changes ended up in that product, a complete

13 new product.

14 Q. Did you check to see if they had been approved?

15 A. Yes, sir.

16 Q. And were they?

17 A. No, sir.

18 Q. They were not approved?

19 A. No, sir.

20 Q. The FHWA had never been approving these changes?

21 A. No, sir.

22 Q. Okay. Did -- after taking the heads apart and making

23 the measurements, did you look at the FHWA website to try to

24 find an approval?

25 A. Yes, sir. I went through different various -- that

1 website and went through anything I could find referencing
2 to the ET-Plus approval.

3 Q. And -- and you didn't -- you couldn't find any?

4 A. No, sir. I found other approvals, but not -- nothing
5 with reference to these changes.

6 Q. Okay. Did Trinity -- from 2005, while you were
7 making -- making these go on the highway, did they start
8 advertising they had a new and improved head?

9 A. No, sir.

10 Q. Did Trinity ever put any information out to you
11 installers, hey, you want to use our head and not somebody
12 else's because it's new and improved, and it's got a 4-inch
13 channel and it's got a narrow exit gap and the channel chute
14 has been lessened and the heights been lessened, and now
15 we've stuck it with a fillet weld and it's just so much
16 better; I want you to buy them?

17 A. No, sir.

18 Q. Not once?

19 A. Not once.

20 Q. Was there any word from Trinity to you installers that
21 there was a different head out from the approved ET-Plus?

22 A. No, sir.

23 Q. They -- they kept it a secret?

24 A. Yes, sir.

25 Q. Had it been your experience in the industry that when a

1 company improves something, what did they do?

2 A. They advertised it.

3 Q. Did they come around with salesmen?

4 A. Yes, sir. They demonstrated the safety features,
5 everything.

6 Q. Would the salesmen tout it?

7 A. Yes, sir.

8 Q. Would they give you brochures?

9 A. Yes, sir.

10 Q. Would they tell you a reason to buy their new, improved
11 products over somebody else's?

12 A. Yes, sir.

13 Q. And these folks never, ever did that?

14 A. No, sir.

15 Q. Okay. Had you ever seen that before?

16 A. No, sir.

17 Q. All right. Did you at some juncture go to the Federal
18 Highway Administration?

19 A. Yes, sir, I did.

20 Q. And who did you talk to there?

21 A. That was in the spring of 2012, early January, and that
22 was Nick Artimovich.

23 Q. Okay.

24 MR. BAXTER: Can I -- can I --

25 Q. (By Mr. Baxter) Is this Mr. Artimovich here?

1 A. Yes, sir.

2 Q. Is he high up in the Federal Highway Administration?

3 A. Yes, sir. He's the gentleman that reviews these
4 terminals.

5 Q. All right. And did -- did you lay out your case?

6 A. Yes, sir, I did.

7 Q. Okay. Now, we heard what Mr. Ward said and he promised
8 there was going to be evidence about some other things in
9 this case, and let me see if you knew them when you went and
10 talked to Mr. Artimovich.

11 Did you know, for example, that Trinity was writing
12 emails saying they wanted to make the changes without some
13 sort of announcement?

14 A. No, sir.

15 Q. Did you know that Trinity was worried about the truck,
16 the critical 3-31 truck striking their new device and
17 whether it would pass or fail? Did you know that?

18 A. No, sir.

19 Q. At the time, did you know that even though Trinity and
20 TTI had agreed the 3-31 test with the pickup truck was the
21 critical test that they never ran it?

22 A. No, sir.

23 Q. Okay. Did you know at that time, Mr. Harman, that in
24 2005 and 2006, Trinity ran tests on this head in a flared
25 configuration by hitting it head-on, just like it ordinarily

1 would, with little cars and it failed five times?

2 A. No, sir.

3 Q. Did you know that Trinity had hidden that from the
4 Federal Government?

5 A. No, sir.

6 MR. SHAW: Objection, Your Honor.
7 Mischaracterization of the evidence in this particular case
8 as far as hitting versus not submitting. It's
9 argumentative, Your Honor.

10 THE COURT: He asked him what he knew. It's
11 subject to cross-examination. The objection is overruled.

12 Q. (By Mr. Baxter) Well, let me ask it to you this way:
13 Did you know that they had failed to submit those tests to
14 Mr. Artimovich, and he didn't know anything about them?

15 A. No, sir.

16 Q. What kind of reception did you get from Mr. Artimovich?

17 A. In the beginning, it was, you know, that he agreed that
18 they weren't approved. He couldn't find any approvals of
19 his own, and he was going to have them removed.

20 Q. All right. Did he -- did he follow through on that?

21 A. No, sir.

22 Q. Did you find out that he, in fact, was going to have a
23 meeting with the Trinity president and other executives on
24 February the 14th of 2010? 2012? 2010?

25 A. Yeah, 2012.

1 Q. 2012. I'm sorry; you're right.

2 A. Yes, sir, 2012.

3 Q. And did he tell you he was going to do that?

4 A. He didn't tell me at the time. He told me afterwards.

5 Q. Okay. Well, after that meeting, did he -- did his
6 attitude seem to change?

7 A. Yes, sir, it did.

8 Q. What was his attitude after that meeting with Trinity?

9 A. He didn't seem like -- he didn't think it was that
10 serious.

11 Q. Okay. Had you shown him all the pictures of these
12 accidents?

13 A. I was consistently putting them up, yes, sir, where he
14 could look at them on the website.

15 Q. And if he says he never saw any of these pictures, would
16 that -- would that be right?

17 A. No, sir.

18 Q. Okay. Did he, in fact, follow through and tell Trinity
19 to get them off the roadways or to have more tests or
20 anything of the sort?

21 A. No, sir. He kept representing to me he was evaluating
22 it.

23 Q. All right. And when nothing happened, did you file this
24 lawsuit?

25 A. Yes, sir.

1 Q. Okay. Now, let me ask you this, Mr. Harman: Was that
2 the first time that you and Trinity had been in litigation?

3 A. No, sir.

4 Q. Had there been a previous lawsuit?

5 A. Yes, sir.

6 Q. And when -- what kind of lawsuit was that?

7 A. The defamation?

8 Q. No, no. Was there a patent lawsuit?

9 A. Yes, sir. Yes, sir.

10 Q. Did they sue you?

11 A. Yes, sir.

12 Q. In Virginia?

13 A. Yes, sir.

14 Q. Was that case settled?

15 A. Yes, sir.

16 Q. And was it settled much to your satisfaction?

17 A. Yes, sir.

18 Q. Okay.

19 A. Absolutely.

20 Q. You were happy with the settlement?

21 A. Yes, sir.

22 Q. All right. Was there another time that they sued you?

23 A. Yes, sir.

24 Q. Where was that?

25 A. It was here in Marshall, Texas.

1 Q. This -- this court?

2 A. Yes, sir.

3 Q. What did they sue you for?

4 A. Defamation and disparagement.

5 Q. For disparaging their product, this is Trinity that sued
6 you?

7 A. Yes, sir.

8 Q. Did TTI join that lawsuit?

9 A. Yes, sir.

10 Q. So both of them together sued you here in Marshall for
11 saying things they said wasn't true about their -- about
12 their head, right, and how safe it was?

13 A. Yes, sir.

14 Q. Okay. Well, what did the jury do with that?

15 A. It didn't -- didn't make it to the jury.

16 Q. Well, what happened?

17 A. They voluntarily dismissed their own case.

18 Q. These folks over here?

19 A. Yes, sir.

20 Q. They sued you? They sued you for defamation, and then
21 they dismissed it?

22 A. Yes, sir.

23 Q. About how long did it take them to dismiss it?

24 A. I think it went on almost a year. We got to discovery,
25 and they -- and that's when they moved for a dismissal with

1 prejudice.

2 Q. What does with prejudice mean? Do you have an
3 understanding of that?

4 A. They can't sue me again for those term -- those claims.

5 Q. Okay. Did they sue you someplace else?

6 A. Yes, sir.

7 Q. Where was that?

8 A. They sued me in Georgia.

9 Q. Well, at least you got to present the truth to a Georgia
10 jury. What happened there?

11 A. No, sir. On the last day of the filings, it was on a
12 Friday, if I remember correct, and on a Monday, once it was
13 filed, they moved to dismiss voluntarily that case.

14 Q. So they sued you twice for defamation and both times
15 they abandoned ship --

16 A. Yes, sir.

17 Q. -- before any discovery had been done?

18 A. That's correct.

19 Q. Before anybody got to go look at their documents and see
20 the facts?

21 A. Yes, sir.

22 Q. Okay. Did you sue them in this case just to get back at
23 them for that?

24 A. Absolutely not.

25 Q. Why are you pursuing this case, Mr. Harman?

1 A. These things are failing. People are dying. They're
2 happening very frequently. I'm not seeing nothing like this
3 on any of the other models. It's only this modified
4 ET-Plus.

5 Q. Now, I believe, Mr. Harman, that we've heard about a
6 letter from the FHWA that was written in June, just a couple
7 months ago. Have you seen that letter?

8 A. Yes, sir.

9 Q. And the Defendants who talked about in the opening said,
10 oh, the FHWA has now approved all of our -- our heads. Have
11 you seen that?

12 A. Yes, sir.

13 Q. Okay. And do you think that, in fact, the FHWA knows
14 all the facts?

15 A. Absolutely not.

16 Q. Okay. Why do you think they were able to get that
17 letter?

18 A. That letter was procured by fraud. There's no question
19 in my mind.

20 Q. All right. Now, has there been a recent letter from the
21 FHWA --

22 A. Yes.

23 Q. -- that came out Friday?

24 A. Yes, sir.

25 MR. BAXTER: Can I have 1286 on the -- on the

1 screen?

2 Q. (By Mr. Baxter) Have you seen this, Mr. Harman?

3 A. Yes, sir.

4 Q. This is dated October the 10th of 2014?

5 A. Yes, sir.

6 Q. This isn't from Mr. Artimovich. This is from somebody
7 else. Do you know him, Mr. Tony Furst?

8 A. Yes. He's their safety administrator. He's over the
9 products, if they're safe.

10 Q. All right. And he's sending it to the division
11 administrators and the director of field services for the
12 FHWA?

13 A. Yes, sir.

14 Q. Okay. And he gives them background here.

15 MR. BAXTER: And I want to go down the screen, if
16 I can, Mr. Diaz, to where it says recent developments.

17 Q. (By Mr. Baxter) Can you read that to the jury,
18 Mr. Harman? Can you see it? Can you get your glasses on?

19 A. Yes, sir.

20 The Missouri and Massachusetts Department of
21 Transportation suspended the ET-Plus from their qualified
22 products lists pending further examinations of the field
23 performance of these end terminals.

24 Q. Okay. Let's stop right there.

25 A. Yes, sir.

1 Q. You're talking about Missouri and Massachusetts their
2 DOTs?

3 A. The states of Mississippi and Massachusetts.

4 Q. They've taken these things off of their approved lists?

5 A. Yes, sir.

6 Q. And he notes that in his letter?

7 A. Yes, sir.

8 Q. All right. And what's the next sentence?

9 A. These suspensions are local decisions and not the
10 results of the instructions from the FHWA.

11 Q. Okay. So the FHWA hadn't told them to get them off yet?

12 A. No, sir.

13 Q. Well, what do they say in the next paragraph?

14 A. The FHWA is working with the American Association of
15 State Highway and Transportation officials and the
16 Transportation Research Board to develop and conduct a
17 comprehensive evaluation of different categories of roadside
18 safety hardware end treatments through -- through the
19 National Cooperative Highway Research Program.

20 MR. BAXTER: Okay. Go to the next page, Mr. Diaz.

21 Q. (By Mr. Baxter) And this is a paragraph entitled, Action
22 and Request for Information. What does it say?

23 A. The FHWA, the Federal Highway Administration, requests
24 information from state DOTs regarding the performance of the
25 ET-Plus in the field. Please immediately contact your state

1 DOTs and advise them of these recent developments, ask that
2 they pay particular attention to all crashes involving these
3 devices and request that any findings from their
4 investigations be shared with the FHWA Office of Safety. As
5 more information becomes available, it will be shared with
6 you and with all states.

7 Q. And what does that indicate to you, Mr. Harman?

8 A. Finally somebody is looking into this.

9 Q. And they're -- they're going to ask the states what's
10 happening and ask states to look at their accidents and get
11 back to them?

12 A. Yes, sir.

13 Q. Do you think that June 14th letter is going to be the
14 final word in this case from the FHWA?

15 A. I hope and pray not.

16 Q. All right, sir. Now, one of the things we heard in
17 opening, Mr. Harman, was that you at one time made some
18 heads yourself; is that right?

19 A. Yes, sir.

20 Q. And I believe the implication was that you had a 4-inch
21 channel, so how dare you come in here and throw rocks at
22 Trinity, and all they've got is a 4-inch channel and you
23 built one; is that right?

24 A. That's what they represented. Yes, sir.

25 Q. Okay. And is that the truth?

1 A. Absolutely not.

2 THE COURT: Mr. Baxter, I can't hear you when
3 you're not in front of that mic.

4 Q. (By Mr. Baxter) Did you build -- did you build some
5 heads, Mr. Harman?

6 A. Yes, sir, I did.

7 Q. About how many did you build?

8 A. Right around 280.

9 Q. All right. Now, did they have a 4-inch channel?

10 A. Yes, sir.

11 Q. Were they like these ET-Plus with all these secret
12 changes in it?

13 A. Absolutely not.

14 Q. What are the differences?

15 A. Mine had a 4-inch channel, but all the internal
16 dimensions mirrored the 5-inch.

17 Q. So all the internal dimensions, the ones that counted,
18 looked like the old ET-Plus?

19 A. Yes, sir.

20 Q. Did it have the long feeder chute?

21 A. It had the 36-1/2 -- I think half-inch-thick feeder
22 chute.

23 Q. Was it inserted into the throat?

24 A. It was inserted into the throat.

25 Q. Well, how did you fix that?

1 A. I compensated the height by making the chamber larger.

2 Q. So the chamber in yours was the same size as the
3 original ET-Plus?

4 A. The -- the height of the chamber was a little larger
5 than the original ET-Plus, because I had to compensate for
6 inserting the channels.

7 Q. Okay. What about the exit gap?

8 A. The exit gap was an inch and a half or larger, the way
9 the original ET-Plus was.

10 Q. What about the angle of the plates?

11 A. The angle of the plates, I -- I -- I guess it would be
12 predetermined to bend them to where they mirrored the
13 original ET-Plus.

14 Q. So you had the 4-inch channels, but is that where the
15 similarities end?

16 A. That's where the similarities end.

17 Q. Okay. So it wasn't anything like the secret change to
18 the ET-Plus?

19 A. Absolutely not.

20 Q. All right, sir. Now, Mr. Harman, I think one of the
21 things you've told us was that when you got out to some of
22 the wrecks in the past, you had reused a head; is that
23 right?

24 A. Yes, sir, several times.

25 Q. All right. And -- and how did you do that?

1 A. Well, through the course of an accident, you just cut
2 the extruded ribbon off. It's actually demonstrated, and
3 then pull the head off, repair the w-beam, reinstall the
4 posts, and then put the same head back on over and over and
5 over.

6 Q. And did you do that?

7 A. Yes, sir.

8 Q. All right. Did Trinity at one time indicate in their
9 advertisement or on their website you could reuse it?

10 A. Yes, sir. On their website, on their -- their
11 handbooks, the installation manuals, everything.

12 MR. BAXTER: Let me see Exhibit 1141-1, if I can,
13 Mr. Diaz.

14 Q. (By Mr. Baxter) This is --

15 MR. BAXTER: Can you blow up that middle portion?
16 There you go.

17 Q. (By Mr. Baxter) It says installations and repair
18 advantages. What does it say?

19 A. The ET-Plus head is typically reusable after a design
20 impact.

21 Q. And this is?

22 A. 2006.

23 Q. Okay. And that was what they were saying in those days?

24 A. Yes, sir.

25 Q. And that was using the old ET-Plus?

1 A. That was on the -- yes. That was right after they had
2 did the changes.

3 Q. Okay. I want to -- I want to skip, if I can now, to
4 1141-8, which is their latest epistle on that.

5 And was that pretty much what you were used to and what
6 you saw in advertising from Trinity?

7 A. No, it's changed.

8 Q. Okay. What's it changed to now?

9 A. Now it's up to the decision of -- the reusability rests
10 on specifically the transportation authority. In other
11 words, you would have to get someone to cert how it's
12 reusable.

13 Q. Okay. They don't say it's typically reusable now?

14 A. No, sir.

15 Q. Well, why is that? Can you reuse this ET-Plus with the
16 secret changes once it's been in a wreck?

17 A. Not that one you would not reuse.

18 Q. Why not?

19 A. It would bust the welds. The welds would bust. The
20 impact plate will deform. The feed channels which make up
21 the feed chute are weaker. They warp; they bend.

22 Q. You just can't reuse it?

23 A. No, sir.

24 Q. Well, if you can't reuse it, how do you fix it?

25 A. You have to buy a new head.

1 Q. Before you could use the old head and save the states
2 money?

3 A. Yes, sir. To this day, they're still reusing the
4 ET-2000 and the original ET-Plus to this day.

5 Q. And now you've got to go buy a new head, after they made
6 all those changes?

7 A. Yes, sir.

8 Q. Now, one of the things I heard during opening,
9 Mr. Harman, is that you've been charged with wanting to be
10 in competition with Trinity. How do you plead to that?

11 A. I want to compete and sell the heads with the entire
12 industry.

13 Q. You want to plead guilty to that?

14 A. Guilty, yes.

15 Q. All right. Would you like to compete?

16 A. Absolutely.

17 Q. Would you like to put out a safer head?

18 A. Yes, sir. I think mine would be safer.

19 Q. All right. Did you know the competition was bad
20 somehow?

21 A. That's -- that's not what I was -- no, sir.

22 Q. All right. I noticed, Mr. Harman, that when I had you
23 moving around and walking up to the stand, you limped a
24 little bit. Why is that?

25 A. I -- I have a pro -- prosthesis.

1 Q. Okay. Did that happen on the job or what happened?

2 A. It happened years ago on the job. Yes, sir.

3 Q. And you lost your -- lost your leg, lost your foot?

4 A. Yes, sir, I lost my leg.

5 Q. Well, looks like that would qualify you for disability
6 and you could have stayed at the house -- at the house
7 trailer?

8 A. No, sir. I was too young for that.

9 Q. All right. Did you want -- did you want to compete then
10 and work?

11 A. Yes, sir.

12 Q. And you want to do it now?

13 A. Yes, sir.

14 Q. And if, in fact, you could compete with Trinity, you'd
15 like to?

16 A. Yes, sir.

17 Q. All right. Do you think you could ever compete with
18 them?

19 A. I could -- I would hope I could compete with the
20 industry. Yes, sir.

21 Q. Okay. Now, the other charge I heard against you from
22 Mr. Shaw was that you had hired a lobbyist.

23 A. Yes, sir.

24 Q. How do you plead to that?

25 A. Guilty.

1 Q. All right. So what did you hire a lobbyist for?

2 A. To get that off the road.

3 Q. You're talking about the 4-inch channel ET-Plus?

4 A. Yes, sir.

5 Q. Did you hire one in 2013?

6 A. Yes, sir.

7 Q. How much did you pay him?

8 A. Me and him work -- he had to be paid something and he
9 agreed to \$2,000, and he understood what was happening. He
10 actually was doing it because he believed in it.

11 Q. Okay. So you got a 2,000-dollar lobbying effort?

12 A. Yes, sir.

13 Q. Did you hire a lobbyist in 2014?

14 A. Yes, sir.

15 Q. How much did you pay him?

16 A. I paid him 10,000.

17 Q. Did you get a 10,000-dollar lobbying effort?

18 A. Again, he's -- he worked as -- he was more of a -- I
19 guess I could say a higher level lobbyist and his normal
20 rate was 35,000 a month, and he -- they talked it over and
21 agreed to a 10,000 one-month contract.

22 Q. All right. Is that all the -- the lobbying you've done?

23 A. Yes, sir.

24 Q. Did you see anything wrong with that?

25 A. Absolutely not. I was trying to get --

1 Q. Were you able to give massive amounts of money to
2 Congress to pursue your cause?

3 A. No, sir, I did not.

4 Q. Do you have the financial resources to do that?

5 A. No, sir, I do not.

6 Q. So, Mr. Harman, you found a problem; you investigated
7 it; is that right?

8 A. That's correct.

9 Q. You looked at public documents?

10 A. Yes, sir.

11 Q. You worked on your own on looking at these heads and
12 cutting them apart?

13 A. Yes, sir.

14 Q. You looked at how many accidents do you think you've
15 been to?

16 A. Hundreds.

17 Q. Hundreds?

18 A. Yes, sir.

19 Q. And you conducted -- found out what happened and looked
20 at the guardrails, and you found out those were all
21 ET-Pluses?

22 A. Yes, sir.

23 Q. Were the other competitors of Trinity -- and they do
24 have some competitors, don't they?

25 A. Yes, sir, they do.

1 Q. Were those guardrails failing at the same rate?

2 A. No, sir. I have not found any.

3 Q. Okay. Now, one of the other things I heard from
4 Mr. Shaw was that, well, there's a matrix and you can only
5 hit these things up to 62 miles an hour. Is that right?

6 A. No, sir.

7 Q. Where do these things go?

8 A. These things are installed on interstates every day with
9 75 miles an hour and 80 miles an hour.

10 Q. And the Federal Government approves that?

11 A. Yes, sir.

12 Q. Mr. Harman, are you here just to get money?

13 A. Absolutely not.

14 Q. Were you here just because Trinity sued you and you're
15 mad at them and you wanted to sue them back?

16 A. Absolutely not.

17 Q. Why are you here?

18 A. I'm here because this thing is failing, and I'm trying
19 to do everything I can to bring it to the public's
20 attention.

21 MR. BAXTER: I'll pass the witness, Your Honor.

22 THE COURT: Cross-examination.

23 MR. SHAW: May I proceed, Your Honor?

24 THE COURT: You may, Mr. Shaw. Are those where
25 you want them to be, or do you want to move them around?

1 MR. SHAW: I -- Your Honor, I can work with them
2 there.

3 THE COURT: Then you may proceed.

4 MR. SHAW: Thank you.

5 CROSS-EXAMINATION

6 BY MR. SHAW:

7 Q. Mr. Harman, you and I have met before, have we not?

8 A. Yes, sir.

9 Q. You're aware that the FHWA, as we sit here today, has
10 found that the ET-Plus with four-inch guide channels is
11 fully eligible for federal reimbursements; isn't that true?

12 A. With the memorandum, I don't know what the decision is.

13 Q. Well, let's take a look at -- let's look at D 2 then,
14 why don't we? We know on June 17th, 2014, that Michael
15 Griffith -- you talked with Mr. Baxter about an email -- a
16 memo coming from Mr. Artimovich, but actually, the June
17 17th, 2014 memo comes from Michael S. Griffith; isn't that
18 correct?

19 A. Yes, sir.

20 Q. And who is Michael S. Griffith?

21 A. He, I guess, is the -- according to this title, he's the
22 Director of Office Safety.

23 Q. Mr. Artimovich's boss?

24 A. I don't know what the --

25 Q. We know it's not Mr. Artimovich?

1 A. Yes, sir, that's correct.

2 Q. All right. And we know at that particular time, June
3 17th, 2014, the Office of Safety had received inquiries from
4 the FHWA division offices and state DOTs regarding federal
5 aid eligibility. Did I read that correctly?

6 A. Let me get my glasses on. Where are you reading that
7 at?

8 Q. The very first sentence?

9 A. Yes, sir.

10 Q. And it goes on to say with the sentence beginning with
11 our: Our September 2nd, 2005 letter, FHWA No. CC-94 to
12 Trinity is still in effect, and the ET-Plus w-beam guardrail
13 terminal became eligible on that date and continues to be
14 eligible for federal-aid reimbursement. Isn't that what it
15 says?

16 A. Yes, sir.

17 Q. And if we go to the end of this particular diagram,
18 exhibit -- well, let's -- let's go through it a little
19 closer, Mr. Harman. In fact, if we'll look under the
20 background section in the second paragraph, it begins in
21 January 2012.

22 A. Yes, sir.

23 Q. In January 2012, allegations were made to FHWA that the
24 ET-Plus had been modified by Trinity and that those
25 modifications had not been presented to FHWA. Did I read

1 that correctly?

2 A. Yes, sir.

3 Q. And I think I heard you tell Mr. Baxter that you met
4 with the FHWA in January of 2012, correct?

5 A. Yes, sir.

6 Q. And specifically, this email goes on to say: It was
7 alleged that the ET-Plus crash tests presented to FHWA in
8 2005 did not document a dimensional change to the guide
9 channels of five inches to four inches. Is that what it
10 says?

11 A. Yes, sir.

12 Q. And then this memo goes on to say that in February 14th,
13 2012 --

14 MR. SHAW: And the next paragraph, Mr. Hernandez.

15 THE COURT: Would you slow down a little bit,
16 Mr. Shaw?

17 MR. SHAW: Sure, Your Honor.

18 THE COURT: All right. Proceed.

19 Q. (By Mr. Shaw) Trinity confirmed to FHWA that the
20 reduction in the width of the guide channels from five
21 inches to four inches was a design detail inadvertently
22 omitted from the documentation submitted to FHWA. Do you
23 see that?

24 A. Yes, sir. I see where you read that.

25 Q. And that was in the official statement from FHWA in June

1 of 2014, correct?

2 A. Yes, sir.

3 Q. The FHWA goes on to say that additionally, Trinity
4 confirmed that the company's ET-Plus end terminal with the
5 four-inch wide guide channels was crash tested to the
6 relevant crash test standards, NCHRP Report 350, at the
7 Texas Transportation Institute, TTI, in May 2005. Did I
8 read that correctly?

9 A. Yes, sir.

10 Q. If we'll continue, according to the FHWA statement,
11 therefore -- it says in the last sentence on that page:
12 Therefore, based upon all the information available to the
13 agency, including re-examination of the documentation from
14 the ET-Plus crash tests, FHWA validated that the ET-Plus
15 with the four-inch guide channels was crash tested in May
16 2005. Did I read that correctly?

17 A. Yes, sir.

18 Q. And it concludes in the last paragraph before it goes
19 into its notes to say: An unbroken chain of eligibility for
20 federal-aid reimbursement has existed since September 2nd,
21 2005, and the ET-Plus continues to be eligible today. Did I
22 read that correctly?

23 A. Yes, sir.

24 Q. And this would have been a memo that came out after you
25 met with Mr. Artimovich, correct?

1 A. Yes, sir.

2 Q. In fact, as I know from taking your deposition, you told
3 the FHWA and Mr. Artimovich in January of 2012 that changes
4 to the ET-Plus were, in your view, affecting the performance
5 of the ET-Plus. You told him that, did you not?

6 A. The way I understood, I told him that and then Trinity
7 denied the changes.

8 Q. Did you tell him that they were affecting the
9 performance of the ET-Plus?

10 A. Yes, sir.

11 Q. You sent a letter to FHWA in January 12th of 2012, did
12 you not?

13 A. Yes, sir.

14 MR. SHAW: Let's take a look at D 112.

15 Q. (By Mr. Shaw) Do you recognize this, Mr. Harman, as a
16 letter from you to SPIG -- from SPIG?

17 A. Yes, sir.

18 Q. And SPIG is one of your companies, is it not?

19 A. Yes, sir.

20 Q. And SPIG is in the business of manufacturing end
21 terminals, is it not?

22 A. It -- guardrail.

23 Q. Is there a company called Selco?

24 A. Yes, sir.

25 Q. Is Selco in the business of manufacturing end terminals?

1 A. No, sir.

2 Q. Were they ever?

3 A. No, sir.

4 Q. Has there ever been a time in which SPIG or Selco has
5 ever manufactured an end terminal?

6 A. At one time SPIG did.

7 Q. All right. And that was your company?

8 A. Yes, sir.

9 Q. All right. You write to Mr. -- at the Roadway Departure
10 Team and provide as a cover sheet to them, a version of your
11 presentation, do you not?

12 A. Yes, sir.

13 Q. In fact, the letter says -- if we'll look at the bottom,
14 I think it's probably signed by you, Mr. Harman, and here
15 you're talking to these individuals about a report from
16 SPRIG -- SPIG Industries, are you not?

17 A. Yes, sir.

18 Q. And you tell the FHWA at that time that the enclosed
19 report discloses the differences between the early
20 production ET-Plus design and the current production ET-Plus
21 design, do you not?

22 A. Some -- yes, sir.

23 Q. And this was in January of 2012, correct?

24 A. Yes, sir.

25 Q. In your letter you go on to tell FHWA that we have

1 prepositioned an early production ET-Plus head and a current
2 production ET-Plus head near your office that can be -- that
3 can both be delivered to you within a couple of hours; is
4 that correct?

5 A. I'm trying to find where you're reading.

6 Q. I think he's highlighting it for you now, Mr. -- Mr.
7 Harman.

8 A. All right. Yes, sir.

9 Q. So you're telling the people at FHWA that you have some
10 heads for them to look at; isn't that correct?

11 A. Yes, sir.

12 Q. And that for their convenience, you will provide that to
13 them; isn't that right?

14 A. Yes, sir.

15 Q. You're telling them in this particular diagram that you
16 have a report that you're going to provide them that
17 explains the defect that you had uncovered with the ET-Plus;
18 isn't that right?

19 A. Yes, sir.

20 Q. And that defect deals with the four-inch guide channels,
21 does it not?

22 A. And multiple other changes, yes, sir.

23 Q. And other changes that you've told them about?

24 A. Some of them, yes, sir.

25 Q. You enclosed with this letter a disk with a paper

1 version of your SPIG presentation entitled Failure
2 Assessment of Guardrail Extruder Terminals, correct?

3 A. Yes, sir.

4 Q. In fact, that is a presentation that had you put
5 together, correct?

6 A. Yes, sir.

7 Q. We'll take a look at D 8. How many pages is D 8, Mr.
8 Harman?

9 A. I think it's 104 or 108.

10 Q. So over a hundred-page presentation concerning failure
11 assessment of guardrail extruder terminals that you had put
12 together and forwarded to the FHWA as early as January of
13 2012; isn't that right?

14 A. Yes, sir.

15 Q. And in that particular presentation that you provided,
16 there are photographs, are there not?

17 A. Photographs, diagrams, yes, sir.

18 Q. There's photographs, there's diagrams, measurements?

19 A. Yes, sir.

20 Q. You talked to -- all that's contained within this
21 document that you're providing to them; isn't that right?

22 A. Some of it, yes, sir. Some of the differences in
23 changes.

24 Q. You told the FHWA when you met with them that there were
25 accidents that were happening; isn't that correct?

1 A. Yes, sir.

2 Q. You told them that you felt like that the ET-Plus was
3 dangerous, correct?

4 A. Yes, sir.

5 Q. You told the FHWA that you felt like that it was failing
6 on the roadways, correct?

7 A. Yes, sir.

8 Q. You actually went and visited personally with Mr.
9 Artimovich about this, did you not?

10 A. Yes, sir.

11 Q. You also met him at your attorney's office, did you not?

12 A. Yes, sir.

13 Q. And while at the attorney's office, you provided to him
14 heads, such as the ones that we have here in the courtroom,
15 for him to inspect himself, correct?

16 A. Yes, sir.

17 Q. And you, again, reiterated to Mr. Artimovich at that
18 time the concerns that you had with the ET-Plus, correct?

19 A. Yes, sir.

20 Q. You told him about the change from the five to the
21 four-inch guide channel, did you not?

22 A. Yes, sir.

23 Q. You told him about the fact that the feeder chute
24 guide -- I apologize. You told him about the guide channel
25 was now inserted into the head three quarters of an inch?

1 A. Yes, sir.

2 Q. You told him that you had concerns about the overall
3 length of the guide channel, correct?

4 A. Yes, sir.

5 Q. In fact, you informed Mr. Artimovich about what you said
6 were your findings about the ET-Plus and provided him a
7 detailed compilation of your findings, did you not?

8 A. Some of them, yes, sir.

9 Q. Well, if -- we'll take a look at your -- do you remember
10 giving a declaration in this particular case, Mr. Harman?

11 A. If you've got a document to look at -- I'm not --

12 Q. I'll have them look for it, and we'll come back to it,
13 just make sure we're accurate about this.

14 You show Mr. Artimovich all the differences that you
15 allege occurred in this particular -- in this particular
16 heads, did you not?

17 A. Showed him, like I said, some of the differences -- the
18 most prominent ones.

19 Q. You talked to him about what you thought were other
20 internal dimension changes to the ET-Plus, did you not?

21 A. Yes, some of the terminal dimensional changes.

22 Q. When you talked to Mr. Artimovich at the lawyer's
23 office, your lawyer's office, you told him about the
24 measurements that you had made of the ET-Plus, correct?

25 A. Yes, sir.

1 Q. You told him about those differences?

2 A. Yes, sir.

3 Q. You told him, again, at that particular meeting that you
4 were concerned about the ET-Plus and whether it should be on
5 the roadway?

6 A. Yes, sir. So was he at that time.

7 Q. All right. Did he tell you that he was going to look
8 into this matter?

9 A. He was concerned that it definitely didn't match what --
10 what he knew about.

11 Q. Did he tell you that he was going to look into it?

12 A. Yes, sir.

13 Q. All right. And do you know that he did look into it?

14 A. No, sir, I don't know what he done.

15 Q. You have no idea about any conversations that he may
16 have had with Trinity Industries as a result of you bringing
17 these allegations to his attention?

18 A. He -- at the second meeting or third, I can't remember
19 which one it was, he had indicated he had met with you all
20 at a intimate or private location, yes, sir.

21 Q. All right. And did you understand that to be a trade
22 show-type setting where people in the industry were meeting
23 at that particular time? Did you know that?

24 A. The way he represented it was at somewhere away from the
25 trade show.

1 Q. Was it as intimate as it was at your lawyer's office?
2 Did he explain that to you?

3 A. He didn't go into detail, no, sir.

4 Q. Okay. So we don't know whether or not when you met with
5 Trinity it was as intimate as it was when you invited him to
6 come to your lawyer's office and y'all met and looked at
7 heads, he just didn't talk to you about that?

8 A. No, sir. He didn't go into detail on where y'all met or
9 who was there or anything.

10 Q. But we do know that when you met with him, you told him
11 that the internal dimensions, in your view, changed the
12 performance of the ET-Plus?

13 A. Like I said, I showed him some. The way his reactions
14 was it was like he understood. He was really going to get
15 involved in it, so I didn't go any further.

16 Q. So is my -- is the answer to my question, yes, you told
17 him about the internal dimensions and how, in your view,
18 they changed the performance of the ET-Plus?

19 A. Yes, sir, some of them.

20 Q. And I want to make sure that we cover this, Mr. Harman,
21 and we cover it specifically. You told him about, and you
22 want to make sure, and I -- you told him about the five and
23 the four-inch change, correct?

24 A. Yes, sir.

25 Q. You told him about a change in the exit gap from one

1 inch to one and a half inch?

2 A. Yes, sir.

3 Q. You told him about, in your view, the height of the
4 entrance of the chamber had changed?

5 A. Yes, sir.

6 Q. You talked to him about the length of the feed channel?

7 A. Yes, sir.

8 Q. You told him the FHWA -- FHWA about your claims that
9 there had to be significant other changes to the ET-Plus?

10 A. I don't remember that, no, sir.

11 Q. You don't remember telling me that?

12 A. I remember telling him those -- that those were
13 significant changes.

14 Q. Why don't we take a look at your deposition on Page 32,
15 Line 25? Do you remember we had an opportunity to question
16 you earlier before this case, Mr. Harman, and we asked you
17 some questions about your involvement in this case and about
18 your meetings with Mr. Artimovich?

19 A. Yes, sir.

20 Q. And on this particular page, Page 32, that goes into
21 Page 33, I asked you: What else? And I believe your answer
22 on the next page was: I indicated to him that probably with
23 these changes, there had to be significant other changes.

24 Did I read that correctly?

25 A. Yes, sir.

1 Q. So you told him that in your view, there had to be
2 significant other changes, as well?

3 A. Yes, sir.

4 Q. You told Mr. Artimovich and the FHWA about the size of
5 the parts to accommodate those changes that you were
6 informing him about, did you not?

7 A. Ask that question again.

8 Q. You told him about the size of the parts that you
9 believe had been changed to accommodate the other changes
10 that you believe that existed? You told him that?

11 A. The size of the parts?

12 Q. Yes.

13 A. The dimensions of the heads, yes, sir.

14 Q. Okay. I think we're using the same language, parts,
15 dimensions of the head?

16 A. Yes, sir.

17 Q. Why don't we take a look at your deposition at Page 32,
18 Line 8, so we can make sure we're talking about the same
19 thing and what full disclosure that you made to FHWA.

20 MR. SHAW: If we'll go to Page 32, Line 8.

21 Q. (By Mr. Shaw) What's different about the product that
22 you told Mr. Artimovich about? And your answer is: The
23 five-inch to four-inch feed channel change.

24 A. Yes, sir.

25 Q. You said that?

1 A. Yes, sir.

2 Q. We'll go down this particular page to page -- Page 32,
3 Line 25, which is, in essence, the same thing we just
4 covered.

5 A. Yes, sir.

6 Q. So we are talking about the same parts?

7 A. Yeah. Yes, sir.

8 Q. Okay. I'm correct.

9 THE COURT: Gentlemen -- let me stop you,
10 gentlemen. You're beginning to talk over each other. It's
11 not clear. You have to make sure that the other one stop
12 before you finish, and that goes for both of you.

13 MR. SHAW: It's my fault, Your Honor. I
14 apologize.

15 THE COURT: Let's proceed.

16 Q. (By Mr. Shaw) You also talked about an insertion of the
17 feed channel. You told him about that inside of the
18 extruder -- extruder chamber, did you not?

19 A. Yes, sir.

20 Q. Talked to him about that change?

21 A. Yes, sir.

22 Q. You talked to him about the length from the point of
23 entry to the extruder head being narrowed from 12 inches to
24 11 inches, did you not?

25 A. I do -- the -- the length of the chamber, I don't know

1 if I went over that with him or not. I can't remember that.
2 I know I went over the -- the exit gate.

3 Q. We talked about you showing Mr. Artimovich heads, that
4 he checked out those samples himself?

5 A. Yes, sir.

6 Q. And, in fact, Mr. Artimovich actually took photographs,
7 did he not, of the heads that you provided to him to -- to
8 inspect; isn't that right?

9 A. Yes, sir, he did.

10 Q. And he took measurements, did he not?

11 A. He took some, yes, sir.

12 Q. You know in this particular case in connection with this
13 lawsuit that you sent a request to the FHWA asking for their
14 participation to come to testify. Do you remember that?

15 MR. BAXTER: Objection, Your Honor.

16 THE COURT: What's your objection, Counsel?

17 MR. BAXTER: That's -- that both in contrary to
18 what had been agreed on previously and what the Court told
19 him to do.

20 THE COURT: Approach the bench.

21 (Bench conference.)

22 THE COURT: What's your problem?

23 MR. BAXTER: It's a direct violation of the motion
24 in limine what you just said, that he wasn't going to be
25 allowed to say the FHWA won't come to this lawsuit. That's

1 what he's trying to talk about.

2 MR. SHAW: Your request to the preadmitted
3 exhibit, Your Honor, D-46. We want to go through all the
4 stuff that was told to him in the request. We're not
5 talking about them not coming here to testify. We're
6 talking about the request of the information. It's a
7 preadmitted exhibit.

8 MR. BAXTER: He's trying to intimate that the FHWA
9 won't come to Court, and that's exactly what he asked him.

10 THE COURT: Let me review the record just a
11 second.

12 (Pause in proceeding.)

13 THE COURT: You're getting awful close, Mr. Shaw.
14 I sent a request requesting that they come participate.

15 MR. SHAW: I'm just going to talk to him about the
16 two-year request, Your Honor. That's it. We're not going
17 to talk about the --

18 THE COURT: I don't have a problem with you going
19 through the preadmitted exhibit, but whatever is in the
20 preadmitted exhibit is not going to go in contrary to the
21 limine order.

22 MR. SHAW: Yes, sir.

23 THE COURT: The limine order predominates.

24 MR. SHAW: Thank you.

25 MR. BAXTER: Thank you, Judge.

1 (Bench conference concluded.)

2 THE COURT: All right. Let's proceed, Counsel.

3 MR. SHAW: Let's look at Defendants' Exhibit No.
4 46.

5 Q. (By Mr. Shaw) Are you familiar, Mr. Harman, with
6 Defendants' Exhibit 46, the whole document?

7 A. Yes, sir.

8 MR. SHAW: If you'll expand it out, Mr. Hernandez.

9 A. I have not seen this before.

10 Q. (By Mr. Shaw) You have not seen this before?

11 A. I might have. I've looked at so many documents. I
12 don't recognize it right off.

13 Q. This is an admitted document in this particular case
14 that's dated March 13th of 2014. Do you see that?

15 A. Yes, sir.

16 Q. And it's addressed to the U.S. Department of
17 Transportation, Federal Highway Administration, is it not?

18 A. Yes, sir.

19 Q. And it references in it's RE line, the reference line,
20 United States Joshua Harman v Trinity Industries. Do you
21 see that?

22 A. Yes, sir.

23 Q. It goes on and it says: Dear Sir or Madam, we represent
24 Joshua Harman in a False Claims Act action against Trinity
25 Industries and Trinity Highway Products.

1 Did I read that part of that sentence correctly?

2 A. Yes, sir.

3 Q. I'm not going to go through the entire letter,
4 Mr. Harman. But if we'll go to Roman Numeral No. I, the
5 summary of the case --

6 MR. SHAW: On Page 1 of that letter, Roman Numeral
7 No. I of that case, Mr. Hernandez.

8 Q. (By Mr. Shaw) You'll see that this letter, on your
9 behalf, is summarizing the case. And like I said, we're not
10 going to read it, but the jury will have an opportunity to
11 read it when they have a chance to deliberate in this
12 action.

13 And you will go to -- continue through here to the
14 second page of this letter under summary of the case, first
15 paragraph, first sentence, beginning with subsequent to the
16 approval in January 2012 -- 2000, Trinity secretly modified
17 several of the critical dimensions of the ET-Plus,
18 including, among other modifications, reducing the interior
19 dimensions of the chute through which the guardrail is
20 extruded and flattened on vehicle impact.

21 The next sentence goes on and says: The modified
22 design does not allow the guardrail to properly feed through
23 the head and causes the guardrail to, quote, throat lock in
24 the head during impact.

25 Did I read that correctly?

1 A. Yes, sir.

2 Q. So this letter, written on your behalf, provided to the
3 FHWA in March of 2014 is -- starts setting out all of your
4 particular allegations about this particular matter?

5 MR. BAXTER: Objection, Your Honor. The -- the
6 report doesn't report to do anything, and I object to the
7 characterization of it.

8 THE COURT: Overruled.

9 Q. (By Mr. Shaw) In fact, if we'll go --

10 MR. SHAW: And, Ladies and Gentlemen of the Jury,
11 Mr. Harman will read it so we're not going to read it all.

12 Q. (By Mr. Shaw) But if we'll go to like the third
13 paragraph. The last sentence of the third paragraph where
14 at the February 2012 meeting, Trinity admitted for the first
15 time that it had, in fact, made one change to the ET-Plus,
16 but it did not reveal to Mr. Artimovich other changes,
17 including the changes to the interior dimensions of the
18 chute through which the guardrail is fed on impact.

19 Did I read that correctly?

20 A. Yes, sir.

21 Q. So that was also an allegation or a claim or -- that you
22 were informing the FHWA about back in March of 2014,
23 correct?

24 A. Can you ask your question again?

25 Q. Yes, you may.

1 A. I said, can you ask your question --

2 Q. I'm sorry. I thought you wanted me to clarify?

3 A. Yes, clarify.

4 Q. If you look at this, we're saying or someone is saying
5 on your behalf, they're saying they represent you. You're
6 saying to them that Mr. Harman -- Mr. Artimovich doesn't
7 know everything. These things weren't revealed to Mr.
8 Artimovich. You're telling the FHWA this back in March of
9 2014, are you not?

10 A. Yes, sir.

11 Q. You're telling the --

12 MR. SHAW: If we'll go to the last paragraph of
13 this particular exhibit on that page.

14 Q. (By Mr. Shaw) You tell the FHWA in the first sentence:
15 Every time Trinity sold the ET-Plus after the secret
16 modifications, it necessarily provided false certification
17 that the ET-Plus conformed to the unit that had been
18 approved by the FHWA, correct?

19 A. Yes, sir.

20 Q. You're telling the FHWA, in essence, that they had been
21 lied to?

22 A. Yes, sir.

23 Q. All right. We know after this -- after all this
24 information that you had provided to them, we know from the
25 Exhibit D-2, Mr. Hernandez, that we looked at, that they

1 rejected your allegations, did they not, in June 17th of
2 2014?

3 A. Again, I don't know what this letter or what this
4 memorandum is for. I know there's a new one that's saying
5 they're looking into it.

6 Q. All right.

7 MR. SHAW: Let's take a look at the new memorandum
8 that you're referring to. That would be Plaintiff's Exhibit
9 1286, I believe.

10 Q. (By Mr. Shaw) Let's take a look at this memorandum, who
11 is now from Tony Furst, correct?

12 A. Yes, sir.

13 Q. And this memorandum came out on October the 10th, 2014,
14 correct?

15 A. Yes, sir.

16 Q. And it says here in the very first paragraph, the June
17 2014, in response to inquiries from state Departments of
18 Transportation, the Federal Highway Administration's Office
19 of Safety issued a memorandum regarding the federal aid
20 eligibility of ET-Plus w-beam guardrail end terminal
21 manufactured by Trinity Highway Products, Trinity.

22 Did I read that correctly?

23 A. Yes, sir.

24 Q. It says: This memorandum updates the 2014 memorandum to
25 advise you about several recent developments.

1 A. Yes, sir.

2 Q. Is that correct?

3 A. Yes, sir.

4 Q. All right. When we go through this particular memo, it
5 says: In general -- under the background section --

6 MR. SHAW: If you could highlight the first
7 section, the first paragraph, please, Mr. Hernandez.

8 Q. (By Mr. Shaw) In general, FHWA's eligibility letters
9 confirm that roadside safety hardware was crash-tested to
10 the relevant criteria, that those crash tests were presented
11 to FHWA, and that FHWA confirmed that the device met the
12 relevant crash test criteria.

13 Is that what I read correctly?

14 A. Yes, sir.

15 Q. So as of Friday, the FHWA is again saying that the FHW's
16 (sic) eligibility concerning the ET-Plus had been
17 crash-tested; the results had been provided to the FHWA; and
18 the FHWA, again, is confirming, again, Friday before today
19 that the device met the relevant crash test criteria?

20 A. If they're referring to the letters I think there was,
21 that was the one I told you or spoke of earlier that was
22 procured by fraud.

23 Q. Those are the letters that you say were procured by some
24 fraud that was perpetuated upon the Federal -- FHWA, by
25 Trinity, and I assume, Texas A&M University?

1 A. There was -- who done it, I don't know. But as far as
2 the -- the fraud, yes, it was procured by fraud.

3 Q. And that fraud was some type of a plan that was hatched
4 between Texas A&M University and Trinity to defraud the
5 Federal Government. That's your allegation?

6 A. That's what you said.

7 Q. What is the evidence, Mr. Harman, that you have about
8 this fraud to secure these approvals from the FHWA?

9 A. It'd be proven in this case.

10 Q. What evidence do you have for this jury, Mr. Harman?

11 A. Documents.

12 Q. What documents do you have that in this False Claims Act
13 case, Trinity intentionally lied to the FHWA to secure
14 federal reimbursement? What documents do you have to prove
15 that?

16 A. These letters that you're referring to, that there's
17 presentations that were made that tests were done that were
18 not done.

19 Q. All right. Anything else other than that?

20 A. I mean, like I said, the representation that tests were
21 done that a certain size head, and they were not.

22 Q. Okay. So let's make sure you and I are communicating,
23 Mr. Harman.

24 A. Yes, sir.

25 Q. You're talking about in 2005, Texas A&M crash-tested a

1 4-inch head; is that correct?

2 A. It's been represented that they crash-tested a 4-inch
3 head. What the internal dimensions of that head no one
4 knows.

5 Q. Do you recognize that the crash test report that was
6 provided to the FHWA was compiled by Texas A&M? Do you
7 understand that?

8 A. Which crash test?

9 Q. In 2005.

10 A. The -- the 2005 test was compiled, I think, at Texas
11 A&M.

12 Q. You understand that it was submitted to the FHWA,
13 correct?

14 A. I understand that Texas A&M refused to submit it and
15 requested that Trinity submit it.

16 Q. Do you understand that it was submitted?

17 A. Yes, sir.

18 Q. You understand that it was compiled by Texas A&M?

19 A. It was, yes.

20 Q. You understand that in that crash test report, there are
21 videos and photographs that were also provided to the FHWA
22 of that crash test in 2005?

23 A. Yes, sir.

24 Q. You understand that Texas A&M -- or you understand that
25 in response to reviewing that crash test, the FHWA in 2005

1 said that the ET-Plus with a -- that was crash-tested -- is
2 represented to be crash-tested in that report was
3 350-compliant. You understand that?

4 A. You broke up and broke -- broke up the question.

5 Q. That was a poor question and I apologize.

6 You understand that the report from 2005 was submitted
7 to FHWA in 2005 representing to have crash-tested a 4-inch
8 ET-Plus head. You understand that?

9 A. No, sir.

10 Q. And you don't agree with that?

11 A. The report references no 4-inch head, and the -- and the
12 test was for the height of the rail. It had nothing to do
13 with the modified ET-Plus.

14 Q. You understand that the head that was tested in the 2005
15 crash test was a 4-inch guide channel head. You understand
16 that?

17 A. As I stated just a second ago, it's -- what it was it
18 could be a 4-inch, what I seen, but as far as the internal
19 dimensions and the critical dimensions, no one knows what
20 those are.

21 Q. Okay. You understand that whatever was crash-tested in
22 2005, whatever it was, whatever that head was --

23 A. Yes, sir.

24 Q. -- as a result of that submission to the FHWA, they said
25 that it was eligible for federal reimbursement at that

1 point?

2 A. At that point, on the 31-inch-high rail, yes, sir.

3 Q. And the reason that they said that is because the crash
4 test data that they looked at in that report from 2005
5 showed that it was NCHRP 350-compliant. Isn't that correct,
6 what the data they were showing?

7 A. On the -- on the 2005 test?

8 Q. Yes.

9 A. It -- it -- on the height of the rail, what they were
10 evaluating, it passed the NCHRP 350 test.

11 Q. So -- so you recognize that the data that was in the
12 crash test report in 2005 as submitted to the FHWA indicated
13 that the crash test results were 350-compliant; is that
14 right?

15 A. Where they were evaluating the height of the rail, yes,
16 sir.

17 Q. We talked -- I'm talking now with you about NCHRP 350,
18 and we haven't talked about that yet.

19 THE COURT: Let's avoid sidebar comments. We
20 don't need a narrative. We need questions.

21 MR. SHAW: Yes, sir. I'm sorry, Your Honor.
22 Defendants' Exhibit 3.

23 Q. (By Mr. Shaw) Defendants' Exhibit No. 3, Mr. Harman, is
24 a NCHRP Report 350. Do you recognize that document?

25 A. Yes, sir. I've seen it before.

1 Q. Now, I understand that you do not consider you're an
2 ex -- yourself an expert on NCHRP Report 350, do you?

3 A. No, sir.

4 Q. You do recognize that the FHWA is the expert on the
5 crash-testing of end terminals such as the one in dispute in
6 this case. You recognize that?

7 A. Yes, sir. When disclosed, yes, sir.

8 Q. I don't think that you consider yourself to know more
9 than the FHWA does about -- about this report 350, do you?

10 A. No, sir.

11 Q. You recognize that the highway safety engineers at FHWA
12 know more about NCHRP 350 perhaps than you or me?

13 A. Yes, sir.

14 Q. We -- you do know that the NCHRP Report 350 sets out
15 standards concerning crash testing of highway safety
16 products. You understand that?

17 A. Yes, sir. They've got parameters.

18 Q. I also understand that you do not consider yourself an
19 expert in crash test videos that are -- are produced as a
20 result of crash tests that are run pursuant to Report 350?

21 A. No, sir, I do not.

22 Q. In fact, you do not consider yourself qualified, as I
23 understand it, to evaluate crash tests that -- crash tests
24 that are run pursuant to NCHRP 350, do you?

25 A. No, sir.

1 Q. As I understand it, you have only looked at NCHRP Report
2 350, and I think your testimony is, quote, from time to
3 time?

4 A. Yes, sir, that's correct.

5 Q. Would I be correct to say that you have never thoroughly
6 looked at NCHRP Report 350?

7 A. No, that's correct.

8 Q. You provided to the ladies and gentlemen your background
9 and you're not an engineer?

10 A. No, sir.

11 Q. You don't consider yourself an expert in welding?

12 A. No, sir.

13 Q. You don't consider yourself an expert in accident
14 reconstruction?

15 A. No, sir.

16 Q. You don't -- you're not a certified welder?

17 A. No, sir. I've been around a lot of welding, but, no,
18 I'm not a certified welder.

19 Q. You've never conducted a crash test?

20 A. No, sir.

21 Q. You've never seen a crash test?

22 A. No, sir.

23 Q. In fact, even as we sit here in this courtroom today in
24 which you are seeking over \$200 million, you've never
25 crash-tested the ET-Plus with a 4-inch guide channel, have

1 you?

2 A. No, sir.

3 Q. So whether or not the ET-Plus with a 4-inch guide
4 channel is -- is 350 -- is compliant with NCHRP Report 350,
5 you don't know based upon any crash test that you have
6 performed?

7 A. No, sir.

8 Q. You understand that from -- the FHWA has said that the
9 ET-Plus with a 4-inch guide channel is compliant with NCHRP
10 Report 350? Do you understand that?

11 A. Ask your question again.

12 Q. Do you understand that the FHWA, the -- the agency that
13 you say Trinity has been lying to, has stated as their
14 official policy, the official statement, that it is
15 compliant with Report 350?

16 A. I understand it says eligible.

17 Q. For reimbursement?

18 A. For reimbursement, and the compliance is based upon
19 representations by your client.

20 Q. Now, for it to become eligible for reimbursement, does
21 it have to be crashworthy under 350?

22 A. Yes, sir.

23 Q. All right. So you recognize that they have said that
24 it's eligible for reimbursement, correct?

25 A. Based upon your representations, yes, sir.

1 Q. Okay. You have never personally been involved in the
2 manufacture of an ET-Plus at any Trinity facility, have you?

3 A. No, sir.

4 Q. You have never been involved in any type of
5 crash-testing of an ET-Plus performed by the engineers at
6 Texas A&M, have you?

7 A. No, sir.

8 Q. You were not at the crash test that was performed in
9 2005 at Texas A&M, were you?

10 A. No, sir.

11 Q. You weren't at the crash tests that were performed of
12 the ET-Plus in 2010, were you?

13 A. No, sir.

14 Q. You understand that it was crash-tested in 2010 on two
15 different occasions. You understand that?

16 A. I understand one was a Test Level 2 and the other one
17 was an out-of-criteria test. It wasn't even a NCHRP 350
18 test. And, again, there's no drawings of anything to that
19 head.

20 Q. You weren't at either one of those tests, were you?

21 A. No, no, sir.

22 Q. But you do understand that end terminals like the
23 ET-Plus are crash-tested to certain federal standards. You
24 understand that?

25 A. Yes, sir.

1 Q. You understand that they are supposed to pass a crash
2 test under NCHRP Report 350, correct?

3 A. Yes, sir.

4 Q. You understand that one of the parameters or criteria
5 for that test is whether -- how fast the vehicle was going?

6 A. Yes, sir.

7 Q. You understand that one of the criteria of whether or
8 not it is an appropriate crash test for 350 is the angle at
9 which the end terminal is impacted. You understand that?

10 A. For the 350 criteria, yes.

11 Q. Yes. You understand that the weight of the vehicle is
12 also a consideration for 350. Do you understand that?

13 A. It's -- they test it at a variance, yes.

14 Q. You understand that if the vehicle is skidding or yawing
15 that it is out of federal criteria. You understand that?

16 A. Yes, sir.

17 Q. You understand that if the -- you understand that end
18 terminals are not designed to save lives in every car
19 accident, don't you?

20 A. They're designed to completely limit the life -- the
21 dangers of life and limb, and that was why they were
22 developed, because the BCT were impaling the vehicles.

23 Q. Do you believe that ET highway safety products such as
24 the end terminal are designed to prevent accidents in every
25 occasion?

1 A. No. Accidents happen. That's no question. It's --
2 it's to make sure the damages are not impaling the vehicle.
3 It's something I hadn't seen on any of the other models.

4 Q. So you recognize as -- as I have told the jury, that the
5 accident's already happening by the time you hit the end
6 terminal. You recognize that?

7 A. That is correct.

8 Q. You recognize that you're not going to impact an end
9 terminal such as the ET-Plus, unless you have left the
10 roadway?

11 A. That is correct.

12 Q. You recognize that the -- the true objective of the end
13 terminal device, like an ET-Plus, is try to make what's
14 already a bad situation not any worse. Is that a fair
15 statement?

16 A. Not exactly.

17 Q. It -- would you agree with me that the true objective of
18 the end terminal device, like the ET-Plus, is to try to make
19 a severe situation not more severe?

20 A. These terminals, the ET-2000 and the ET-Plus, was
21 developed for the sole purpose of keeping that guardrail
22 from going into the vehicle on the end of the guardrail.

23 Q. May --

24 MR. SHAW: Let's look at Defendants' Exhibit No.
25 256. If we'll look at the middle email in this chain from

1 Mr. Terry Hale.

2 Q. (By Mr. Shaw) It says here from Mr. Terry Hale, in
3 February 2013: Yes, we definitely use the ET-Plus. As with
4 any terminal, there will be certain accidents that do not
5 have desirable outcomes. All indications are that the
6 ET-Plus is actually one of the better performers. Terry.
7 Did I read that correctly?

8 A. Yes. This is the early 2/13.

9 Q. Did you ever talk to Mr. Terry Hale about your concerns
10 about the ET-Plus?

11 A. No, sir. I never spoke to him before in my life.

12 Q. Do you agree with his statement that as with any
13 terminal, there will be certain accidents that do not have
14 desirable outcomes? Do you agree with that statement?

15 A. Yes, sir.

16 MR. SHAW: If we could, please, Mr. Hernandez,
17 have Defendants' Exhibit No. 295.

18 Q. (By Mr. Shaw) This is an email apparently to you at --
19 at your email address at Selco Construction Company,
20 correct?

21 A. Yes, sir.

22 Q. From Mr. Dale Russell; is that correct?

23 A. Yes, sir.

24 Q. Do you know Mr. Dale Russell?

25 A. Yes, sir.

1 Q. And this was from subject, Georgia Department of
2 Transportation.

3 A. Yes, sir.

4 Q. And he's writing to you, Mr. Harman, is he not?

5 A. Yes, sir.

6 Q. It says here, quote: We found four instances of
7 guardrail entering the passenger compartments of vehicles
8 during the six-year period. Two occurred in 2004 and two in
9 2002 -- 2012. I'm sorry.

10 A. Yes, sir.

11 Q. Three of the four involved intrusion into the passenger
12 side door. These vehicles had to be in a yaw to have struck
13 at this angle.

14 Did I read that correctly?

15 A. That was his assumption, yes, sir.

16 Q. Yes. And I think you just told me that vehicles that
17 are yawing are not intended to be within the criteria of
18 350; is that correct?

19 A. That is correct.

20 Q. These devices are not tested for strikes of this type,
21 Mr. Russell continues to say; isn't that right?

22 A. Yes, sir.

23 Q. And in summary, he says --

24 MR. SHAW: The data at the last sentence there,
25 Mr. Hernandez.

1 Q. (By Mr. Shaw) In summary, the data does not indicate
2 cause for concern regarding the terminals either before nor
3 after the design changes in question.

4 Do you see that?

5 A. Yes, sir.

6 Q. Do you have any reason to believe that Mr. Dale Russell
7 at the Georgia DOT was in on the -- some type of conspiracy
8 with the Federal Government and A&M and Trinity?

9 A. Dale Russell is a reporter for Fox News.

10 Q. Do you have any reason to believe that he's on the
11 conspiracy with them?

12 A. I don't believe that's his words.

13 Q. Do you have any reason to believe that in the previous
14 email the 256 Terry Hale, the DOT -- from the DOT in New
15 York is in on this fraudulent conspiracy between Trinity and
16 FHWA and Texas A&M?

17 A. Again, I never met with Mr. Hale before.

18 Q. So you don't have any evidence that he's in on it, too?

19 A. No, sir.

20 Q. You understand, then, that the FHWA is the expert on
21 crash-testing, do you not?

22 A. Yes, sir.

23 MR. SHAW: Let's take a look at Defendants'
24 Exhibit No. 10.

25 Q. (By Mr. Shaw) Are you familiar with Defendants' Exhibit

1 No. 10?

2 A. I probably looked -- like I say, I've looked at several
3 documents and looked at several memorandum. I've probably
4 looked at it at some point.

5 Q. Do you understand that under FHWA 1997 policy memorandum
6 that the FHWA has the ability to revoke acceptance of an end
7 terminal under certain scenarios?

8 A. Yes, sir.

9 Q. You understand that they can revoke the acceptance of an
10 end terminal, if they believe that there was a flaw in the
11 crash-testing. Do you understand that?

12 A. I understand that based upon the representations that,
13 yes, they have that power.

14 Q. Do you understand that they can revoke the acceptance of
15 an end terminal, if they believe real-world performance
16 reveals unacceptable safety problems? Do you believe that?

17 A. Yes, sir.

18 Q. You've claimed that here, haven't you, that the
19 real-world safety performance reveals that this end terminal
20 is unsafe?

21 A. Yes, sir, I know that.

22 Q. And you've claimed that here to the jury, correct?

23 A. Yes, sir.

24 Q. You've also claimed that the end terminal being marketed
25 and sold is significantly different from the version that

1 was crash-tested; isn't that correct?

2 A. Yes, sir.

3 Q. You've made that allegation to the FHWA, correct?

4 You've told them that?

5 A. That -- yes, sir.

6 Q. You've told them that along with the things that we've
7 discussed earlier.

8 Do you recognize that even though the FHWA, under this
9 1997 policy memorandum, having the power to revoke the
10 eligibility has not done so as we sit here today?

11 A. No. No, sir, they have not. Based upon the
12 representations, they have not.

13 MR. SHAW: Let's take a look at Defendants'
14 Exhibit No. 30 -- No. 37.

15 Q. (By Mr. Shaw) Do you understand this to be a response
16 from Mr. Artimovich to Daniel Hinton at the FHWA?

17 A. Yes, sir.

18 Q. And do you understand this to have been dated Thursday,
19 October 11, 2012?

20 A. Yes, sir.

21 Q. And what is -- at that particular time, all the way back
22 in October of 2012, he is telling that -- he's telling
23 Mr. Hinton that the Trinity ET-Plus end terminal with the
24 four-inch guide channel was eligible for reimbursement under
25 Federal-Aid Highway Program under FHWA Letter CC-94 of

1 September 2nd, 2005. Did I read that correctly?

2 A. Yes, sir, you did.

3 Q. Let's take a look at Defendants' Exhibit No. 260.

4 MR. SHAW: And -- if you could blow up Defendants'
5 Exhibit No. 260, Mr. Hernandez, to the top email.

6 Q. (By Mr. Shaw) Do you see this as a letter to Leroy
7 Tyree?

8 A. A Leroy Tyree, yes.

9 Q. You see that?

10 A. Yes.

11 Q. And do you understand that Leroy Tyree is with the
12 Maryland DOT?

13 A. I did not know that.

14 Q. And do you see that Mr. Artimovich is, again, saying the
15 same language in November of 2012, that the ET-Plus end
16 terminal with the four-inch guide channel is eligible for
17 reimbursement under the Federal-Aid Highway Program under
18 FHWA CC-94 of September 2nd, 2005?

19 A. Yeah, I see where he is saying that just the four-inch
20 channel. He doesn't -- at this time he doesn't know about
21 all the other changes or hasn't been confirmed about them.

22 Q. Do you -- let's look at Defendants' Exhibit No. 29. Do
23 you recognize Defendants' Exhibit No --

24 MR. SHAW: If we can go to the middle email,
25 Mr. --

1 Q. (By Mr. Shaw) Do you recognize this as an email from
2 Mr. Artimovich in February 14th of 2013 to Mr. James Martin?

3 A. I see it's an email, yes, sir.

4 Q. And do you understand Mr. James Martin to be with the
5 North Carolina Department of Transportation?

6 A. I did not know that, no.

7 Q. Do you see where Mr. Artimovich is telling Mr. James
8 Martin in the second paragraph --

9 MR. SHAW: Mr. Hernandez.

10 Q. (By Mr. Shaw) When the ET-Plus was tested in 2005, the
11 end terminal with the four-inch feeder channels met all
12 crash test safety standards, and FHWA has received no
13 complaints from the states from the past -- from the states
14 over the past seven years during which the terminal has been
15 nationwide. Did I read that correctly?

16 A. Yes, sir, you did read it correctly.

17 Q. In fact, Mr. Artimovich, in February of 2013, says, only
18 in early 2012 did a competitor of the company that
19 manufactures the device reach out to FHWA and other
20 organizations to allege performance issues. Did I read that
21 correctly?

22 A. You read it correctly, but I believe AASHTO had sent a
23 letter by this time to -- recommending those problems.

24 Q. You talked with Mr. Baxter about the fact that you
25 actually manufactured an end terminal with four-inch guide

1 channels, did you not?

2 A. Yes, sir.

3 Q. And you placed those into the roadway?

4 A. Yes, sir.

5 Q. That end terminal that you manufactured with four-inch
6 guide channel also had an insert into the extruder throat,
7 did it not?

8 A. Yes, sir.

9 Q. The insertion into the -- the insertion into the
10 extruder throat is one of the complaints that you have with
11 the ET-Plus, is it not?

12 A. If you don't compensate for it, yes, sir, it is a
13 problem.

14 Q. You were involved in patent litigation with Trinity
15 Industries?

16 A. Yes, sir.

17 Q. Did you ever -- strike that. I...

18 Let's talk about -- let's look at one more of these,
19 Mr. Harman. Defendants' Exhibit No. 257.

20 A. Can I get some water?

21 MR. BAXTER: May I approach the witness, Your
22 Honor?

23 THE COURT: That's fine. Hand it to the CSO,
24 Mr. Baxter.

25 THE WITNESS: I'm sorry.

1 THE COURT: All right. Let's continue.

2 Q. (By Mr. Shaw) On the screen is Defendants' Exhibit No.
3 257 from Mr. Artimovich dated April 10th of 2013 to John
4 Jewell at the California Department of Transportation. Do
5 you recognize this email?

6 A. Yes, sir.

7 Q. Do you recognize that Mr. Artimovich in April of 2013
8 is, again, saying that the ET-Plus end terminal with the
9 four-inch guide channel is eligible for reimbursement?

10 A. Based upon the representations, yes, sir.

11 Q. What rep -- what misrepresentation?

12 A. Based upon your --

13 Q. Oh, based on my -- based on my representation. Okay, I
14 understand.

15 A. Based upon your client's representations, they had
16 approved it, yes, sir.

17 Q. Let's talk about and turn our attention to, Mr. Harman,
18 your business. You have been in the business of
19 manufacturing end terminals, correct?

20 A. Yes, sir.

21 Q. You have built your own end terminal in the past, have
22 you not?

23 A. Yes, sir.

24 Q. This was built through one of your companies, SPIG?

25 A. Yes, sir.

1 Q. You're the owner of SPIG and Selco, are you not?

2 A. One of them, yes, sir.

3 Q. You're the president of SPIG?

4 A. Yes, sir.

5 Q. And SPIG manufactures or did manufactures and sells
6 highway end terminals, does it not?

7 A. Yes, sir.

8 Q. And SPIG is co-owned with your brother, Chris Harman?

9 A. Yes, sir.

10 Q. You acknowledge, do you not, and I think you talked with
11 Mr. Baxter about this, that SPIG wants to compete with
12 Trinity in the end terminal business, do they not?

13 A. I want to compete with the industry, yes, sir.

14 Q. You want to sell your own end terminal --

15 A. Yes, sir.

16 Q. Is that correct?

17 A. Yes, sir.

18 Q. Your plans, as a result of the money that you may
19 receive from this particular litigation, is to recapitalize
20 SPIG so that you can begin manufacturing end terminals to
21 compete with Trinity Industries; isn't that correct?

22 A. If -- if it's -- yes, sir. If I'm successful, yes, sir.

23 Q. If the jury is to -- is to award you -- I think
24 Mr. Baxter said \$200 million, I guess 35 percent of that
25 would be, what, \$70 million, do you want to take that \$70

1 million from -- that the jury awards you and to use it to
2 capitalize your business in Virginia to manufacture end
3 terminal devices; is that correct?

4 A. I have multiple things I want to do, but, yes, sir,
5 that's one of them.

6 Q. In fact, that was what, I believe, the official
7 statements on behalf of SPIG and Selco were to the
8 bankruptcy court over in Virginia, I believe; is that right?

9 A. I wasn't involved in that, but, yes, sir.

10 Q. That would have been Mr. -- your brother, Mr. Harman --
11 Mr. Chris Harman?

12 A. Yeah. It might have been. I'm not familiar with it.

13 THE COURT: Mr. Harman, would you speak up,
14 please?

15 THE WITNESS: Oh, I'm sorry.

16 THE COURT: We need to make sure everybody can
17 hear you.

18 THE WITNESS: Yes, sir.

19 THE COURT: Let's continue, Counsel.

20 Q. (By Mr. Shaw) In fact, let's look at Defendants'
21 Exhibit No. 82. Are you familiar with Mr. Ed Rogers?

22 A. No, sir.

23 Q. Do you understand that Mr. Ed Rogers is an individual
24 that was involved in trying to help raise money for SPIG so
25 that they could compete in the end terminal business?

1 A. For the last two to three years, this is all I've done.
2 I've never met Mr. Rogers, never even spoke to the man.

3 Q. So for the last two to three years, your primary work
4 focus has been on being a Plaintiff in this lawsuit?

5 A. My primary work focus is to get this brought to light.
6 These things are killing people every day.

7 Q. Have you been to SPIG or Selco lately?

8 A. Not that often, no.

9 Q. Do you understand that --

10 MR. SHAW: If we'll go to the next page of this
11 particular document -- turn to Page, Mr. Hernandez, 82-0007.

12 Q. (By Mr. Shaw) We'll look at the last bullet point on
13 this presentation that was made on behalf of SPIG, your
14 company of which you are president. It says: The recall of
15 Trinity's modified end terminals would mean removal and
16 replacement of approximately one million units in the U.S.,
17 a one-billion-dollar revenue opportunity windfall for SPIG.

18 Did I read that correctly?

19 A. Yes, sir. Again, this is a presentation I never even
20 seen or knew about.

21 Q. That's going out on the company, of which you're the
22 president, that makes end terminals, correct?

23 A. No. This is -- the way I understand it, the gentleman
24 created it on his own, and it never went out to nobody.

25 Q. In fact, this was a presentation that was sent out to

1 try to find investors for your company, was it not?

2 A. Not that I'm aware of.

3 MR. SHAW: Let's look at the next page or open
4 that back up so we can see the whole page, Mr. Hernandez.

5 We'll go to the following page. Take a look at
6 Page, Mr. Hernandez, please, 82-0004 of this exhibit.

7 Q. (By Mr. Shaw) We'll look at the last paragraph of this
8 investment prospectus that your company is sending out to
9 potential investors. SPIG has a unique right to sell the
10 popular end terminal design. Plans to capture 20 percent of
11 the U.S. end terminal market in 18 to 24 months, then
12 continue rapid growth to take market share from an exposed
13 Trinity.

14 Did I read that correctly?

15 A. Yes, sir, you did. And -- and, again, to my knowledge,
16 this was never sent out. This gentleman created it, and I
17 never seen it before and never had spoke to him.

18 MR. SHAW: Let's look at Defendants' Exhibit No.
19 385.

20 THE COURT: Before you do that, let's approach the
21 bench, counsel.

22 (Bench conference.)

23 THE COURT: We're at almost 6:00 o'clock,
24 Mr. Shaw. Any idea how much longer your cross is going to
25 go?

1 MR. SHAW: Maybe five minutes, Your Honor, at the
2 most.

3 THE COURT: What about your redirect?

4 MR. BAXTER: A good bit, Your Honor.

5 THE COURT: I'm sorry?

6 MR. BAXTER: A good bit.

7 THE COURT: All right. Let's finish your cross
8 and see where we are. We may stop and start on your
9 redirect. But let's finish up.

10 MR. SHAW: Okay.

11 (Bench conference concluded.)

12 THE COURT: All right. Let's proceed.

13 MR. SHAW: If we could look -- Mr. Hernandez, if
14 you could bring up 385.

15 Q. (By Mr. Shaw) Are you familiar with Exhibit No. 385?

16 A. Yes, sir.

17 Q. Is this the document reflecting the retention of a
18 lobbyist hired by Selco to try to get Trinity's products
19 removed from the roadway?

20 A. The defective E -- the modified ET-Plus, yes, sir.

21 Q. This was a lobbyist that you hired from Washington,
22 D.C., to promote the removal and replacement of faulty crash
23 heads; isn't that correct?

24 A. Yes, sir.

25 MR. SHAW: Let's take a look at Defendants' No.

1 386.

2 Q. (By Mr. Shaw) Is this likewise an Exhibit 386,
3 Mr. Harman, where you retained an individual to lobby the
4 U.S. House of Representatives and the U.S. Senate on behalf
5 of you and your companies?

6 A. Yes, sir.

7 Q. Was this also part of your company's business plan, as
8 we've looked at some of the other documents, that once
9 Trinity was removed from the marketplace as a result of your
10 allegations, this was -- was this part of that plan as well?

11 A. Absolutely not.

12 Q. In fact --

13 MR. SHAW: Take a look at Defendants' Exhibit No.
14 405.

15 Q. (By Mr. Shaw) Is this the resource retention letter from
16 the Washington, D.C., lobbying firm, HBW?

17 A. Yes, sir.

18 Q. And is this where they confirm the fact that they're
19 going to be assisting Selco, one of your companies,
20 government relations activities in Washington, D.C., to
21 promote the removal and replacement of faulty crash heads?

22 A. Yes, sir.

23 Q. In fact, according to this particular document, if we'll
24 look at the last paragraph: We will undertake this project
25 for the amount of \$2,000 per month; is that correct?

1 A. Yes, sir.

2 Q. I thought I heard you tell Mr. Baxter that you had only
3 paid them \$2,000. Did you just use them for one month?

4 A. Yes, sir, just one month.

5 Q. Okay.

6 MR. SHAW: Let's look at Defendants' Exhibit No.
7 388. Is this also a lobbying registration form from June
8 24th of 2014?

9 A. Yes, sir.

10 Q. And, in fact, this lobbying -- would -- this lobbying --
11 lobbyist would have been retained less than a week or so
12 after the FHWA issued their formal statement that the
13 ET-Plus with a 4-inch guide channel was eligible for federal
14 reimbursement?

15 A. Yes, sir.

16 Q. In fact, with this -- this was with the Carmen Group?

17 A. Yes, sir.

18 Q. Are they likewise in Washington, D.C., there to lobby
19 United States Congressmen?

20 A. Yes, sir.

21 Q. You paid this lobbying group \$10,000, I believe, you
22 said earlier in your testimony, did you not?

23 A. Yes, sir.

24 Q. Did you pay them for simply one month?

25 A. Yes, sir. That's all the contract -- they made special

1 negotiations where they'll do it for just one month.

2 Q. Mr. Harman, you -- I want to make sure that I
3 understand. You are asking the jury to award you money,
4 because you say that Trinity Highway Products lied to a
5 federal agency to get approval of their product so it could
6 be reimbursed federal dollars, correct?

7 A. Ask the question again.

8 Q. You are saying to this jury -- you're asking them to
9 award you compensation, because you believe you have
10 uncovered that Trinity deliberately and intentionally lied
11 to the Federal Government so that the ET-Plus would become
12 eligible for federal reimbursement. Is that what you're
13 saying?

14 A. I'm asking this jury to reimburse the Federal Government
15 for the misrepresentations of a modified ET-Plus that is
16 killing people and maiming them.

17 Q. The same ET-Plus that the Federal Government has said is
18 eligible for reimbursement as of last Friday and has the
19 same 4-inch guide channel on it that you were placing onto
20 the roadway in Virginia?

21 A. Based upon your representations.

22 MR. SHAW: I believe that's all I have. Thank
23 you, Your Honor.

24 THE COURT: All right. You pass the witness,
25 Counsel?

1 MR. SHAW: Yes, Your Honor.

2 THE COURT: Okay. Ladies and gentlemen, we're at
3 6:00 o'clock in the evening. There's going to be additional
4 examination of the witness from the Plaintiff. I'm not -- I
5 had hoped we could get this witness off the witness stand
6 this evening before we stopped, but I'm not going to keep
7 you any longer.

8 We'll start with redirect examination of the
9 witness by the Plaintiff in the morning.

10 I'm about to excuse you for the evening. I want
11 to give you a couple instructions before I let you go. The
12 first one you can anticipate, and that is, don't discuss
13 this case when you get home with anyone, anytime, anyplace,
14 anywhere. Don't discuss it with each other.

15 Leave your juror notebooks on the table in the
16 jury room. I'd like to have you -- I'd like to have you in
17 the jury room assembled and ready to go by about 8:20 in the
18 morning. I'm going to do everything within my power to have
19 you in the box and us started at 8:30. So if you'll set
20 your travel plans accordingly, hopefully, we won't have
21 rainy, inclement weather tomorrow morning like we did today.

22 Ladies and gentlemen, travel safely, and you're
23 excused with those instructions until tomorrow morning.

24 COURT SECURITY OFFICER: All rise.

25 (Jury out.)

1 THE COURT: All right. We'll continue with
2 redirect in the morning. Counsel, I'll be in chambers by
3 7:30, if there are any issues that develop overnight.

4 We stand in recess until tomorrow morning.

5 MR. CARPINELLO: Before we recess, Your Honor, may
6 I -- we have a dis -- may I approach?

7 THE COURT: Go to the podium, Mr. Carpinello. Is
8 this something that needs to be taken up now?

9 MR. CARPINELLO: I think you directed -- Your
10 Honor directed us to have for your review any disagreements
11 with regard to designations that may come up tomorrow.

12 THE COURT: Deposition designations?

13 MR. CARPINELLO: Deposition designations. And
14 we -- there is disagreement about Mr. Artimovich. We've
15 consulted and we have not reached agreement, so we have the
16 depositions and we have the objections of the Defendants',
17 and our objections to their cross-designations.

18 THE COURT: All right. If you'll hand those to
19 the courtroom deputy, I'll review them overnight.

20 MR. CARPINELLO: Thank you, Your Honor.

21 THE COURT: All right. With that, we stand in
22 recess until tomorrow morning.

23 COURT SECURITY OFFICER: All rise.

24 (Court adjourned.)

25

CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/_Shelly Holmes_____
SHELLY HOLMES, CSR, TCR
Official Court Reporter
State of Texas No.: 7804
Expiration Date 12/31/14

10/13/14
Date

/s/_Susan Simmons_____
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Deputy Court Reporter
State of Texas No.: 267
Expiration Date 12/31/14

10/13/14
Date

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

UNITED STATES OF AMERICA * Civil Docket No.
EX REL JOSHUA HARMAN *
VS. * 2:12-CV-89
* Marshall, Texas
*
* October 14, 2014
*
TRINITY INDUSTRIES, INC. & *
TRINITY HIGHWAY *
PRODUCTS, LLC * 8:11 A.M.

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE RODNEY GILSTRAP
UNITED STATES DISTRICT JUDGE

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14 P R O C E E D I N G S

15
16 (Jury out.)

17 COURT SECURITY OFFICER: All rise.

18 THE COURT: Be seated, please.

19 All right. Is the Plaintiff prepared to read into
20 the record those items from the list of preadmitted exhibits
21 that were used by the Plaintiff before the jury yesterday?
22 You should be ready.

23 MR. CARPINELLO: I think Ms. Monroe just stepped
24 out of the courtroom.

25 MS. MONROE: Sorry, Your Honor. For the

1 Plaintiff, the exhibits used for October 13th were
2 Plaintiff's Exhibit 886, P-948, P-1055, P-1141, P-1146,
3 P-1248, P-1249, P-1252, and P-1286.

4 THE COURT: All right. Are there objections to
5 that rendition by the Defendants?

6 MR. SHAW: May I have a moment? May I confer with
7 Ms. Monroe, Your Honor?

8 THE COURT: You may.

9 (Pause in proceeding.)

10 MR. SHAW: We have no objections to that, Your
11 Honor.

12 THE COURT: All right. Then let me hear a
13 rendition of the same from the Defendants.

14 MR. SHAW: Yeah, Ethan Shaw for the Defendants,
15 Your Honor. The Defendants (sic) that we referred to
16 yesterday and asked to be made part of the record are as
17 follows: D-2, D-3, D-8, D-10, D-29, D-37, D-46, D-82,
18 D-112, D-256, D-257, D-260, D-295, D-385, D-386, D-388,
19 D-405. Your Honor, that concludes our list.

20 THE COURT: All right. Are there objections from
21 the Plaintiff as to that rendition by the Defendants?

22 MS. MONROE: No. Plaintiff has no objections.

23 THE COURT: All right. Are we missing some
24 lawyers this morning? I don't see Mr. Baxter in the room.

25 MR. WARD: I guess he was coming over at 8:30,

1 Judge. I don't know.

2 THE COURT: All right. Is --

3 MR. WARD: I haven't seen him, but I know he's
4 around.

5 THE COURT: All right. Is there an issue about a
6 motion in limine matter based on something Mr. Harman may
7 have said yesterday?

8 MR. SHAW: Yes, Your Honor. I have a copy. If I
9 could approach and hand it to the court personnel for your
10 review, because it's not anything that's in this particular
11 record.

12 THE COURT: You may approach.

13 MR. SHAW: Thank you. Your Honor, if I may
14 proceed.

15 As we understand the Court's motion in limine --
16 and, of course, mindful of it and we do not want to approach
17 it. We understand one of the Court's motions in limine to
18 be that the Defendants are prohibited from inquiring about
19 Mr. Harman copying the ET-Plus product. That's our
20 understanding of the Court's motion in limine ruling.

21 Yesterday, during his testimony -- and I have a
22 copy of the live transcript here -- on Page 84 of
23 Mr. Harman's testimony, when he was being questioned by
24 Mr. Baxter, there was a section of his testimony beginning
25 on Page 84, Line 5, where he says --

1 THE COURT: Can you put that on the screen,
2 Counsel?

3 MR. SHAW: Hopefully, I can. This is from
4 yesterday's testimony.

5 Let's see here. I'm doing this the wrong way,
6 Judge. How do you focus it?

7 THE COURT: On the top.

8 MR. SHAW: I guess you know why I don't mess with
9 the technical, Judge. I apologize.

10 This is Page --

11 THE COURT: You ought to see some of the patent
12 lawyers I get in here.

13 MR. SHAW: This is Page 84, Judge, beginning on
14 Line 5, and the question is from Mr. Baxter: After you
15 became worried about the accidents -- now, Mr. Harman, I've
16 got to ask, sir -- you're -- you're not an investigator and
17 you're not a safety expert and you're installing guardrails,
18 why did you take this on?

19 And Mr. Harman says: I'm in the safety industry.
20 That's what I was trained. This is not supposed to happen.
21 Were you -- were -- were they hitting some of the heads that
22 you installed?

23 Yes, sir. I never seen any of them hit in the
24 state, and I'll assure you they're out there.

25 The heads -- did you eventually get some of these

1 heads and take them apart?

2 Yes, I did.

3 How many did you cut apart and investigate?

4 He says: Several.

5 Leaving, of course, the impression with the jury
6 that he was cutting apart heads due to his concern for
7 safety in the nation and to investigate. We know, however,
8 from the patent litigation, the deposition clip transcript
9 they provided to you, Judge, that in actuality, we see
10 beginning on Page 256 of this testimony from Mr. Harman that
11 the reason that he was cutting open heads was not
12 necessarily at that time the stated reason for safety and to
13 investigate for the nation, but rather so that he could
14 reverse-engineer and copy the product.

15 We see that begin on Page 256, Line 9 and conclude
16 on Page 248, Line 12, Your Honor.

17 So that being what the inconsistencies of the
18 testimony and the statements that were made yesterday, and
19 mindful of the Court's motion in limine, we believe, simply
20 stated, that the door has been opened to that testimony.

21 THE COURT: You believe the door has been opened
22 to what testimony, Mr. Shaw?

23 MR. SHAW: The ability to ask him that, in fact,
24 he wasn't cutting open heads to investigate for public
25 safety. He was cutting them open so that he could redesign

1 it and copy the ET-Plus and place it onto the roadways as
2 his own product.

3 THE COURT: Is there a response from the
4 Plaintiff?

5 MR. CARPINELLO: Yes, Your Honor.

6 George Carpinello, Your Honor, Boise Schiller &
7 Flexner.

8 There is no inconsistency in the testimony. The
9 fact that he may have cut them open to copy it, if that's
10 what they claim, is not inconsistent with cutting them open
11 to determine what's causing the accidents. We're talking
12 about two entirely different events, and I don't think he's
13 opened the door to copying.

14 He was asked how he determined that they had
15 changed the dimensions, and he testified that he cut them
16 open to examine the change in dimensions. That was one of
17 the ways how he could determine they changed the dimensions
18 of the head.

19 You've already excluded the act of copying, and I
20 don't think his testimony that he did cut them open for that
21 purpose for determining the change in the heads is not
22 inconsistent in any way with the fact that he may have also
23 cut them open at a different time for a different purpose.

24 THE COURT: All right. Anything else, Mr. Shaw?

25 MR. SHAW: No, Your Honor.

1 THE COURT: I'm not persuaded that his testimony
2 that he cut heads open to investigate them opens the door to
3 the Defendant showing or attempting to show that he's copied
4 Trinity products. So your request to go into that is
5 denied. The motion in limine remains as it was previously.

6 MR. SHAW: Yes, Your Honor.

7 THE COURT: Are there other matters we need to
8 take up before we bring the jury in?

9 Mr. Mann?

10 MR. MANN: Yes, sir.

11 THE COURT: You're on your feet.

12 MR. MANN: Yes, sir. Your Honor, a couple things.
13 On the preadmitted -- on the admitted exhibits from
14 yesterday, 1248 is a compilation of a lot of pictures. And
15 I think we just need to clarify for the record that not all
16 of those pictures are admitted, but I think if you'll allow
17 counsel to go through those where we'll have a clear record
18 for later, I think that would be, hopefully, the best use of
19 the Court's time.

20 THE COURT: Aren't those designated 1241 dash
21 something so that each of the individual pictures has a
22 subsequent number?

23 MR. MANN: I think they are and I think we
24 probably need to go back and verify that.

25 THE COURT: Why don't you -- why don't you meet

1 and confer with opposing counsel during the morning recess.
2 And if we need to readdress that for purposes of the record,
3 we will.

4 MR. MANN: Right. And, Your Honor, Ms. Dyer and I
5 have met and gone through lots of objections. We've got it
6 down to a very few objections, and I could read this into
7 the record, but there's a lot to read into the record. I
8 don't know if you want to use the Court's time right now to
9 do it. This is for Dr. Coon and it won't be until probably
10 later this afternoon.

11 THE COURT: Not right now. We need to get
12 started.

13 MR. MANN: I just didn't want to waive our
14 objections.

15 THE COURT: You're not -- in my view, they've not
16 been waived.

17 MR. MANN: Thank you, Your Honor.

18 MR. SHAW: Just very briefly, Your Honor. One
19 additional item that if I can be heard very quickly, Your
20 Honor.

21 The -- some of the appellate lawyers in this case
22 tell me that we had previously objected to the lobbying --
23 admission of the lobbying documents, and we have not secured
24 a ruling on that. I want to make sure we don't waive
25 anything. If the Court wants to hear formal argument from

1 Mr. Roach later about this particular matter, that's fine;
2 otherwise, Judge, if you could just deny us for the record
3 on that and overrule our objection or indicate somehow or
4 another there's been no waiver so that you may hear more --
5 more argument about that later.

6 THE COURT: Well, with regard -- with regard to
7 the lobbying dockets that were -- documents -- lobbying
8 documents that were offered by Plaintiff on their list of
9 preadmitted exhibits during the pretrial, the Court admitted
10 those as a sanction under Rule 37 for the clear failure of
11 the Defendants to comply with the Court's order to produce
12 all lobbying materials.

13 When having produced none, it was clear that the
14 Plaintiff themselves generated many documents that were
15 clearly things the Defendant should have produced. And I
16 found that the Defendants failed to comply with my order,
17 and under Rule 37, I admitted all of those documents offered
18 by the Defendant -- by the Plaintiffs as preadmitted
19 exhibits as a sanction under Rule 37. And that's clearly
20 stated on the record. So in my view, the matter's been
21 dealt with.

22 MR. SHAW: Judge, I think that the issue that I
23 think we want to just make sure is emphasized is that -- and
24 I think there was a motion that was filed about this
25 yesterday or objection that was filed about this written

1 objection while we were actually in trial yesterday
2 afternoon, is that in the bullet points of it, Judge -- and
3 I know we need to get going, so I'm going to get brief.

4 THE COURT: In about 10 seconds, I'm going to stop
5 you, so go ahead.

6 MR. SHAW: Judge, just that -- the point I want to
7 emphasize is it's improper to allow that type of evidence as
8 a sanction. That's the gist of it, Judge. We understand
9 your ruling, and we just wanted to make sure that was clear
10 on the record.

11 THE COURT: All right.

12 MR. SHAW: Thank you.

13 THE COURT: Let's bring in the jury.

14 Mr. Harman, if you want to return to the witness
15 stand, you may. That's fine. And we have a water pitcher
16 up there today, too, so you're covered.

17 COURT SECURITY OFFICER: All rise for the jury.

18 (Jury in.)

19 THE COURT: Good morning, ladies and gentlemen.
20 Please have a seat.

21 Welcome back.

22 We'll continue with the redirect examination of
23 Mr. Harman by the Plaintiff.

24 Mr. Baxter, you may proceed.

25 MR. BAXTER: Thank you, Your Honor. May it please

1 the Court.

2 Your Honor, one housekeeping matter. I know
3 yesterday I kept pointing to the 5-inch and the 4-inch head
4 we have here in the courtroom. My colleagues chided me
5 because I didn't know the exhibit numbers. But could I --
6 could I have for the record that the 5-inch head that we
7 have here in the courtroom that the Plaintiffs have
8 introduced is Exhibit No. 948-11, and for the 4-inch that
9 the Plaintiffs have introduced that's here in the courtroom,
10 that number is 1252-1.

11 THE COURT: Any objection from the Defendants?

12 MR. SHAW: No objection.

13 THE COURT: So noted in the record.

14 All right. Let's proceed with redirect.

15 MR. BAXTER: All right. Thank you, Your Honor.

16 JOSHUA HARMAN, PLAINTIFF'S WITNESS, PREVIOUSLY SWORN

17 REDIRECT EXAMINATION

18 BY MR. BAXTER:

19 Q. Mr. Harman, I want to ask you a few questions about the
20 things you were asked about yesterday, and I want to start,
21 if I can, first with one of the exhibits that they showed
22 you, the DX-3.

23 MR. BAXTER: Mr. Diaz, if I can have that up,
24 please, sir.

25 Q. (By Mr. Baxter) Now, you were asked about this

1 yesterday, and you were asked if you were an expert on this.
2 This is the NCHRP Report 350, which really is the guidelines
3 one can use for testing and other criteria; is that right?

4 A. Yes, sir.

5 Q. Okay. Let me see if I can get you, however, to look at
6 Section 2.3.1.

7 MR. BAXTER: And, Mr. Diaz, if you could bring
8 that section up, which is on the Bates number DX-003.0018.

9 Q. (By Mr. Baxter) And this, Mr. Diaz -- I mean,
10 Mr. Harman, has to do with the test article that's being
11 tested; is that right?

12 A. Yes, sir.

13 Q. And you've read this before, have you not?

14 A. Yes, sir.

15 Q. And it says if you're going to have a test article -- if
16 you're going to test it, that all key elements or materials
17 in the test article that contribute to its structural
18 integrity or impact behavior must be sample-tested and the
19 results documented in the test paper.

20 Is that what it says?

21 A. Yes, sir.

22 Q. Physical and chemical material properties can generally
23 be obtained from the supplier providing the test articles.
24 To ensure that all critical elements are considered, a
25 careful after-test examination of the test article is

1 essential.

2 Do you see that?

3 A. Yes, sir.

4 Q. Materials should be tested independently when a failure
5 occurs.

6 Now, the language that says a careful after-test
7 examination of the test article is essential, what -- what
8 does that mean, if you're looking at a test article?

9 MR. SHAW: Objection, Your Honor. Calls for an
10 expert opinion. The document speaks for itself, and Mr.
11 Harman told us yesterday he's not an expert on 350. He's
12 already testified that he's not.

13 THE COURT: I'll sustain that objection.

14 Q. (By Mr. Baxter) Mr. Harman, just reading the English
15 language -- not as an expert, but just reading the English
16 language, does it say that you have to have a careful
17 after-test examination of the test article?

18 A. Yes, sir.

19 MR. SHAW: Objection, Your Honor. Objection, Your
20 Honor. It's the same objection. He's trying to do
21 indirectly what the Court has said he can't do directly.

22 THE COURT: Well, the document speaks for itself.
23 Counsel, if you want to review the language of the document
24 expressly with the witness, that's fine, but for the witness
25 to characterize the document goes beyond what the document

1 says on its face.

2 Q. (By Mr. Baxter) Is that what it says on its face?

3 A. Yes, sir.

4 Q. All right. Let me get you to also look at, Mr. Diaz,
5 3.0067 in the same document.

6 MR. BAXTER: This will be in Chapter 6, and can we
7 blow up the portion on the right-hand side?

8 Q. (By Mr. Baxter) You've seen this before, have you not,
9 Mr. Harman?

10 A. Yes, sir.

11 Q. And is this an outline of what a test report is supposed
12 to show?

13 MR. SHAW: Objection, Your Honor. Mr. Harman --
14 it calls for an expert opinion. Mr. Harman testified
15 yesterday he's not an expert on test reports or test
16 crash -- crash-testing. So how would he know what a test
17 report is supposed to show or not show?

18 THE COURT: I don't -- I don't find that calls for
19 an expert opinion. That's overruled.

20 Q. (By Mr. Baxter) Is that what -- is that what it does is
21 an outline of how to write a report?

22 A. Yes, sir.

23 Q. And can I draw your attention to Roman Numeral II
24 (a)(2), Test Article Design and Construction.

25 A. Yes, sir.

1 Q. Is that to be included in the report apparently?

2 A. Yes, sir.

3 Q. All right. Thank you.

4 Now, in --

5 MR. BAXTER: Can I see PX 156, Mr. Diaz.

6 Q. (By Mr. Baxter) Now, this, Mr. Harman, I'm going to --
7 you looked at yesterday, was a report from Texas
8 Transportation Institute, now known as Texas A&M, about the
9 test run in 2005; is that right?

10 A. Yes, sir.

11 Q. All right. And have you read this report?

12 A. I went through it, yes, sir.

13 Q. Okay. What is the title of the report?

14 A. At the top?

15 Q. Yes, sir, at the top.

16 A. NCHRP Report 350, Testing of the ET-Plus for
17 31-inch-high W-Beam Guardrail.

18 Q. Does it anywhere in the title indicate that they're
19 testing the prototype of a new head?

20 A. No, sir.

21 Q. Have you managed to look through this report and were
22 you able to find a single example anywhere in this report
23 where TTI reported to Trinity or reported to the Federal
24 Highway Administration that they tested a new prototype
25 head?

1 A. No, sir.

2 Q. Is there a single mention of any changes that were made
3 to the head that was placed on the -- on the test where they
4 ran the little small clown car into it?

5 A. No, sir.

6 Q. Is there a single mention of any change at all?

7 A. No, sir, none.

8 Q. What did they tell the Federal Highway Administration
9 they used in the test?

10 A. From what I could tell and look through the document was
11 the standard ET-Plus.

12 Q. Okay. The standard ET-Plus, and that would be this one,
13 the 5-inch, which has now been designated as 948-11?

14 A. Yes, sir.

15 Q. And they never mentioned that they used this one?

16 A. No, sir.

17 Q. Not at all, not once?

18 A. No, sir, nowhere.

19 Q. Well, did -- was there a reason to test putting a head
20 on a 31-inch-high guardrail?

21 A. I was understanding that the smaller car would go
22 underneath it.

23 Q. Okay. Were they raising the guardrail because there
24 were bigger vehicles and SUVs on the highway now?

25 MR. SHAW: Objection, Your Honor. Calls for

1 speculation on Mr. Harman's part as to what TTI was doing or
2 not doing.

3 THE COURT: Sustained.

4 Q. (By Mr. Baxter) Do you know if there was talk in the
5 industry about raising the guardrail to 31 inches?

6 A. Yes, sir.

7 Q. Okay. And what was that about?

8 A. It was the larger vehicles on the road.

9 Q. Okay. So this test was to see if the small car would
10 submarine, if you raised it to 31?

11 A. Yes, sir.

12 Q. And that's what the report is all about?

13 A. Yes, sir.

14 Q. And not a word -- not a word, not a sentence, not a tot
15 or a tiddle that they use the new prototype head?

16 A. No, sir, not a word, nothing.

17 Q. Okay. If you --

18 MR. BAXTER: Let me see if I can get up PX 133 if
19 I can, Mr. Diaz.

20 Q. (By Mr. Baxter) This is an email -- a Trinity email
21 that was in November of 2009. Have you seen this email
22 before?

23 A. Yes, sir.

24 Q. All right. And this is an email prior to them building
25 a prototype, is it not?

1 A. Yes, sir.

2 Q. All right. And this is an email which we looked at
3 yesterday in opening that says they could save a whole \$2 a
4 head if they changed the channel?

5 A. Yes, sir.

6 Q. Or \$50,000 a year?

7 A. Yes, sir.

8 Q. Or \$250,000 in five years?

9 A. Yes, sir.

10 Q. Did they ever indicate that they were having a problem
11 anywhere with the five-inch channel at this time?

12 A. Not -- no, sir.

13 Q. All right, sir.

14 MR. BAXTER: Roll the email up just a little bit
15 if you could, please, Mr. Diaz. All right. Stop right
16 there.

17 Q. (By Mr. Baxter) It says: I think we could get a better
18 ET. It will be a little lighter for side impacts. We'll
19 save a few bucks. Welding will be stronger at the juncture
20 of the head and legs. Welding, which hasn't been a problem,
21 will be a bit more mistake proof, and the fit of the head on
22 the guardrail will be much closer. Do you see that?

23 A. Yes, sir.

24 Q. And what does the next sentence say?

25 A. If -- if TT -- if TTI agrees, I'm feeling that we could

1 make this change with no announcement. We did pretty good
2 with the TRACC changes.

3 Q. And no amounts means they're not going to tell anybody
4 they changed it?

5 A. Yes, sir.

6 MR. SHAW: Objection. Objection, Your Honor.
7 It's not in his email. He's speculating about what somebody
8 else means.

9 THE COURT: He asked him what he thought no
10 announcement meant. He can give his opinion as to that.
11 That's not an expert matter. That's overruled.

12 Q. (By Mr. Baxter) Well, let me ask you, Mr. Harman. If
13 you were going to do something and change one of your
14 products and -- and not make an announcement, does that sort
15 of make it secret?

16 A. Yes, sir.

17 Q. And it said we did pretty good with the TRACC changes.
18 Do you know what a TRACC is?

19 A. Yes, sir, that's another device that's on the road.

20 Q. Okay. And apparently they'd done it before with that
21 device?

22 A. Yes, sir.

23 Q. What -- what exactly -- exactly what is the TRACC?

24 A. TRACC is a system that's used at the end of the concrete
25 parapet. It's the large like bull nose. It's yellow with

1 the black stripe, but this has both sides. It -- it's like
2 accordance as the vehicle hits it. You'll see it right out
3 here on I-20 at the -- at the -- right at the concrete
4 piers. It doesn't have guardrail. It just mounts directly
5 to the concrete.

6 Q. And that's generally in the middle?

7 A. Yes, sir.

8 Q. And apparently they had changed it before and kept that
9 secret?

10 A. Yes, sir.

11 Q. Okay. Now, he asked you about competition yesterday.

12 Now, one of the things he said to you is that you might
13 stand to get 35 percent of this. Do you remember him asking
14 you that?

15 A. Yes, sir.

16 Q. And that's just wrong, isn't it?

17 A. Yes, sir.

18 Q. Okay. But he -- he asked you about DX 82.

19 MR. BAXTER: Could I see that, Mr. Diaz?

20 Q. (By Mr. Baxter) This has to do with an email that says:
21 I'm looking -- Chris and Carl, I'm looking forward to
22 meeting with you and Revere Finance, and I'm studying up on
23 the company. Attached is the material I gave to McLarty
24 Capital Partners. Still waiting to hear from them. We
25 could adapt this for Revere, if needed. Do you see that?

1 A. Yes, sir.

2 Q. Did you ever meet with Mr. Rogers?

3 A. I never spoke to him on the phone or met him in person
4 ever.

5 Q. Did you authorize him to do anything? You're the
6 president of the company.

7 A. No, sir.

8 Q. Did you -- did you have a brochure that you sent out to
9 anybody?

10 A. As I stated yesterday, I -- I was not aware of anything
11 that was ever sent out.

12 Q. Okay. You didn't hire him, you don't know what he said,
13 and you didn't have anything to do with him; is that right?

14 A. No, sir. He just appeared.

15 Q. And you're the president of the company?

16 A. Yes, sir.

17 Q. All right. Did you ever -- after he sent -- if he sent
18 anything out, did you say, yeah, that's right, I'll -- I'll
19 adopt that?

20 A. Absolutely not. I told -- when I --

21 Q. Did you --

22 A. When it come to light, I didn't know anything about it.

23 Q. Did you have any association, a phone call, an email, a
24 smoke signal from Ed Rogers?

25 A. No, sir.

1 Q. All right. Now -- but he accused you yesterday of
2 wanting to compete with Trinity; isn't that right?

3 A. Yes, sir.

4 Q. That you wanted to see if you could get back in business
5 and build heads that would compete, right?

6 A. Yes, sir, absolutely.

7 Q. Shame on you, Mr. Harman. Competition is not right, is
8 it?

9 A. After I've looked at -- over the accidents, I feel very
10 confident that I can design a head that's much safer.

11 Q. And do you want to compete with them?

12 A. Absolutely.

13 Q. Are you ashamed of that somehow?

14 A. No, sir.

15 Q. Have you told everybody you'd like to compete with them?

16 A. Yes, sir.

17 Q. Look over and tell the jury you want to compete with
18 them or not.

19 A. Yes, sir, I want to compete with them. After seeing the
20 accidents I've seen, there's no question there's -- there's
21 problems with it, and I can fix a lot of that.

22 Q. Okay. And somehow are you ashamed of that?

23 A. No, sir.

24 Q. You're proud of it?

25 A. I've got two daughters. I look at -- I'm doing it for

1 them.

2 Q. All right. Now, let's talk about Mr. Artimovich. After
3 you met with Mr. Artimovich --

4 MR. BAXTER: Can I see PX 688, Mr. Diaz?

5 Q. (By Mr. Baxter) Did Mr. Artimovich at first indicate
6 that he was taking you seriously and was going to get
7 something done about it?

8 A. In the beginning, yes, sir.

9 Q. Okay. Now, have you seen 688 before? This is a draft
10 letter addressed to Mr. Brian Smith at Trinity Industries.

11 Do you know who Mr. Smith is?

12 A. Yes, sir.

13 Q. Was he the vice president, later the president of
14 Trinity Industries?

15 A. Vice president, yes, sir.

16 Q. Okay. This is a draft letter that Mr. Artimovich wrote;
17 is that right?

18 A. Yes.

19 Q. It's been produced in this litigation?

20 A. Yes, sir.

21 Q. Dear Mr. Smith, it has come to our attention from
22 various sources that the w-beam guardrail terminal used in
23 the ET-Plus head may not be performing as intended. We
24 appreciate the time you took to meet with Nicholas
25 Artimovich of my office at the recent meeting of the

1 American Traffic Safety Association in Tampa, Florida, to
2 explain the crash test results of the current ET-Plus.

3 However, even though it appears that the E-Plus (sic)
4 terminal can still meet crash testing requirements, the
5 number of highway crashes with fatal injuries involving the
6 ET-Plus terminal does not match the excellent history of the
7 original ET-2000 terminal. Is that right?

8 A. That's -- I understand that's what -- after they looked
9 at the pictures I had put on and seen all the accidents I
10 was showing them.

11 Q. And then down at the bottom it says: We asked Trinity
12 -- we asked the following of Trinity. Drawing of the
13 extruder head used in the 2005 test at TTI, specifically
14 those used in test number -- and it lists the test; is that
15 right?

16 A. Yes, sir.

17 Q. If available, you locate the extruder heads used in the
18 2005 tests at TTA (sic) and document the internal and
19 external dimensions?

20 A. Yes, sir.

21 Q. Have you ever seen any documentation of the internal and
22 external dimensions of that head that were done by TTI?

23 A. No, sir, absolutely not.

24 Q. And you conduct an in-service performance evaluation of
25 the current Trinity extruder terminals to determine their

1 performance. Please include an investigation into the
2 crashes documented by Mr. Joshua Harman listed in the
3 enclosed documents. Is that right?

4 A. Yes, sir.

5 Q. So apparently they had seen your pictures?

6 A. Yes, sir.

7 Q. They have paid attention to your investigation?

8 A. Yes, sir.

9 Q. Did this ever get sent?

10 A. Not that I'm aware of, sir.

11 Q. Okay. And I think the testimony was that Trinity, the
12 president of Trinity, and other officials met with Mr.
13 Artimovich after he requested a more intimate meeting at the
14 Tampa convention; is that right?

15 A. Yes, sir.

16 Q. Okay.

17 MR. BAXTER: Let me look at PX 403 if I can,
18 please, Mr. Diaz.

19 Q. (By Mr. Baxter) We looked at a whole series of emails
20 yesterday Mr. Shaw showed you where Mr. Artimovich is
21 telling various states that the ET head plus is -- ET-Plus
22 head is approved; is that right?

23 A. Yes, sir.

24 Q. At that time, did he have all of the relevant
25 information?

1 MR. SHAW: Objection, Your Honor. Asking him to
2 speculate about what somebody else had or didn't have. How
3 does he know that's not based on his own personal knowledge?

4 THE COURT: I'll sustain that.

5 Q. (By Mr. Baxter) Did at that time -- do you know whether
6 or not he knew that Trinity wanted to keep their changes
7 secret?

8 A. No, sir.

9 Q. Did he -- did he have the benefit of the five flare --
10 five failed flare tests that were done in 2005 and 2006?

11 A. Absolutely not, he did not know.

12 Q. Did he have the advantage of knowing what the dimensions
13 of the prototype head were that were tested?

14 A. No, sir.

15 Q. Did anybody ever do any measurements of those?

16 A. It was -- no, sir.

17 Q. All right. Now, in this email, which is going to South
18 Carolina, is it not?

19 A. Yes, sir.

20 MR. BAXTER: Let me look at the last paragraph.

21 Q. (By Mr. Baxter) However, there does seem to be a valid
22 question over the field performance of the current ET-Plus
23 compared to other versions. Was that from Mr. Artimovich?

24 A. Yes, sir.

25 Q. And was that apparently based upon what you told him and

1 what he had found out?

2 A. I -- I would assume he had other information by that
3 time.

4 Q. Okay. Now, they asked you about DX 46 yesterday, and DX
5 46 really was a letter from lawyers to the Federal Highway
6 Administration in March of 2014; is that right?

7 A. Yes, sir.

8 Q. Are you familiar with this exchange with the Federal
9 Highway Department?

10 A. I -- yes, sir.

11 Q. Was this an attempt to try to get Mr. Artimovich's
12 deposition in this case?

13 A. Yes, sir.

14 Q. And did he ever show up and get deposed?

15 A. No, sir.

16 Q. Refused to come?

17 A. Yes, sir.

18 Q. All right. Now, let me ask you about -- about DX 2, if
19 I can. Now, DX 2 is the memorandum that they have talked to
20 the jury about that says: This device is approved. Is that
21 right?

22 A. Yes, sir.

23 Q. When this was written, did they have the benefit of the
24 internal emails at Trinity?

25 A. No, sir.

1 Q. Did they have the benefit to know that the ET-Plus
2 modified head with the secret changes had been tested and
3 run into by this little bitty car five times and it failed
4 all five times?

5 A. No, sir.

6 Q. Did they have the advantage of knowing what the internal
7 dimensions were?

8 A. No, sir.

9 Q. What is the only change that they reference in their
10 letter? Look down here at the bottom. On February the
11 14th -- now, that's at the -- at the intimate Valentine
12 meeting; isn't that right?

13 A. Yes, sir.

14 Q. Trinity confirmed to FHWA that the reduction in the
15 width of the guide channels from five inches to four inches
16 was a design detail inadvertently omitted from the
17 documentation submitted to FHWA. Additionally, Trinity
18 confirmed that the company's ET-Plus terminal with a
19 four-inch guide channel was crash tested to the relevant
20 crash test standards and then they cite 350 at Texas
21 Transportation in May of 2005. And did they tell them there
22 that one of those test was with a standard head?

23 A. Yes, sir.

24 Q. Did -- did they put that in the report? In this letter
25 did they mention that, oh, by the way, one of those tests

1 wasn't even with a prototype?

2 A. No, sir. No.

3 Q. All right. Is there another change of this head
4 mentioned in this letter?

5 A. No, sir.

6 Q. Is there any indication that at the intimate Valentine
7 meeting in 2012 that Trinity told Mr. Artimovich any other
8 changes other than the five-inch to the four-inch?

9 A. No, sir.

10 Q. Does he mention it anywhere in this letter?

11 A. No, sir.

12 Q. Okay. Now, we've got PX 1286, and we looked at that
13 yesterday.

14 MR. BAXTER: Let me have that one, Mr. Diaz.

15 Q. (By Mr. Baxter) 1286 is the new memo that came out last
16 Friday. Are you familiar with that, sir? We looked at it
17 yesterday.

18 A. Yes, sir.

19 Q. Okay. That letter -- and if -- and I believe that
20 Mr. Shaw asked you about it. Let me look at the part that
21 says background.

22 MR. BAXTER: Blow that up, Mr. Diaz.

23 Q. (By Mr. Baxter) And you remember he asked you about
24 this first paragraph?

25 A. Yes, sir.

1 Q. And it says: In general, the FHWA's eligibility letters
2 confirm that roadside safety hardware was crash tested to
3 the relevant criteria, that those crash tests were presented
4 to the FHWA, and the FH confirmed the device met the
5 relevant crash test criteria. Is that what it says?

6 A. Yes, sir.

7 Q. And it says in general. It's not talking about any
8 particular test, is it?

9 A. That's correct.

10 Q. And it certainly isn't talking about the 2005 test, is
11 it?

12 A. No, sir.

13 Q. All right. Does it say that Missouri and Massachusetts
14 have suspended the use of the ET-Plus?

15 A. Yes, sir.

16 Q. And does it also say there's ongoing activity by the
17 American Association of State Highways and transportation
18 officials to do a study of the crashes out there on the
19 highway with this device?

20 A. Yes, sir.

21 Q. And the next paragraph says: They're requesting the
22 state DOTs regarding information about the ET-Plus in the
23 field, paying particular attention to all crashes involving
24 these devices. Is that what it says?

25 A. Yes, sir.

1 Q. It appears that the FHWA has reopened the investigation?

2 A. Yes, sir. I would -- I would hope and pray that they're
3 finally looking at it.

4 Q. And apparently the last letter hasn't been written by
5 the FHWA about this, but certainly that June letter is not
6 the last one, is it?

7 A. Absolutely not.

8 Q. All right. One more area. We talked about reusability
9 yesterday?

10 A. Yes, sir.

11 Q. And there was a document I forgot to ask you about which
12 is PX 1150.

13 MR. BAXTER: If I can see that one, Mr. Diaz.

14 Q. (By Mr. Baxter) This has -- this is installation
15 instructions. Does this come from Trinity?

16 A. Yes, sir.

17 Q. And is this a version that is in '05 -- 12/20/05?

18 A. Yes, sir.

19 MR. BAXTER: Can I see the next portion of it, Mr.
20 Diaz, and I believe I can tell you the page that I need. I
21 need page -- the next to the last page which would be Page
22 22 down at the bottom, Mr. Diaz.

23 Q. (By Mr. Baxter) All right. And it says, repair. Do
24 you see that?

25 A. Yes, sir.

1 Q. And it says this is what they're telling you in 2005
2 with the original ET-Plus, is it not?

3 A. Yes, sir.

4 Q. At the accident site, set up necessary traffic control
5 and then remove any debris, install any necessary
6 delineation necessary for the damage system, take inventory
7 of the damaged system and determine what parts are reusable
8 and what parts need re -- replaced. Check the extruder head
9 for damage. It is normally reusable?

10 A. Yes, sir.

11 Q. Is that what it says?

12 A. Yes, sir.

13 Q. And was that your experience with the five-inch channel
14 original ET-Plus head?

15 A. Yes, sir.

16 Q. And how many times could you -- you reuse it?

17 A. Oh, we -- I know the ET-Plus, ET-2000, six, seven times.
18 You would just pull the head off and reuse it.

19 Q. Okay. This device right here, 1252-1, the four-inch
20 channel, is there a chance in the world once it's been in a
21 wreck, you can ever reuse it?

22 A. No, sir. Generally the head's locked up, even the
23 ground stuck in where you can't get it out. You cannot pull
24 the head back off. I've ripped a rail completely in half
25 trying to pull it off.

1 Q. Now, Mr. Harman, just as a businessman, if you sell a
2 product and somebody can reuse it over and over again, does
3 that mean you can't sell them another one until it wears it
4 out?

5 A. Yes, sir.

6 Q. But if you sell them a product that immediately becomes
7 obsolescent the minute it's hit in an accident, does that
8 mean you've got to buy a new one?

9 A. Yes, sir.

10 MR. BAXTER: Pass the witness, Your Honor.

11 THE COURT: Additional cross-examination.

12 CROSS-EXAMINATION

13 BY MR. SHAW:

14 Q. Good morning, Mr. Harman.

15 A. Good morning.

16 Q. Will you take a look, please, at Defendants' Exhibit No.
17 6?

18 COURTROOM DEPUTY: Sorry.

19 MR. SHAW: Oh, I'm sorry. He was motioning at
20 me, and I didn't know why. I apologize.

21 Q. (By Mr. Shaw) We'll start again. Good morning, Mr.
22 Harman.

23 A. Good morning.

24 Q. Let's talk about Defendants' Exhibit No. 6. You were
25 talking with Mr. Baxter about this a few moments ago. Do

1 you see that this is the crash test report from May or July
2 of 2005? You see that?

3 A. Yes, sir.

4 Q. This is from the crash test that was conducted in May,
5 correct?

6 A. Yes, sir. Two tests.

7 Q. Two tests. And this is the report that was generated,
8 correct?

9 A. Yes, sir.

10 Q. I think I -- if we could go to the very top of this
11 particular page at the very -- the slogan at the very top.

12 What does that say, Mr. Harman?

13 A. Where?

14 Q. Texas Transportation Institute?

15 A. Yes, sir.

16 Q. And at the very bottom, what does it say? Texas
17 Transportation Institute, the Texas A&M University System,
18 College Station, Texas. Did I -- did I read that correctly?

19 A. Yes, sir.

20 Q. In fact, this is the report that was compiled by Texas
21 A&M, isn't it?

22 A. Yes, sir.

23 Q. You understand that Trinity is not in the crash testing
24 business? You understand that?

25 A. Yes, sir.

1 Q. You understand that Texas A&M compiled this report;
2 isn't that correct?

3 A. TTI did.

4 Q. TTI?

5 A. Yes, sir.

6 Q. Which is -- which is part of Texas A&M?

7 A. I don't know how it's structured. I understood it was
8 separate, TTI was.

9 Q. You understand that TTI is a -- is a governmental agency
10 here in the state of Texas?

11 A. Yes, sir.

12 Q. All right. And you understand that their location is
13 there on the Texas A&M campus in College Station? You
14 understand that?

15 A. I know it's close, yes, sir.

16 Q. All right. You said that there was nowhere in the
17 report that references that there was an ET-Plus tested with
18 a four-inch guide channel, I think that's what I heard you
19 say?

20 A. That's correct.

21 Q. All right. However, we know, do we not, sir, that an
22 ET-Plus with a four-inch guide channel was tested in May
23 of -- May of 2005? We know that to be true, do we not?

24 A. It's represented that it was. I've looked at pictures.
25 It might have been a four-inch, but the internal dimensions,

1 there's no way of knowing anything.

2 Q. Well, let's take a look at D 161. Have you had an
3 opportunity to review Defendants' Exhibit 161, which has
4 been admitted in evidence in this case?

5 A. Yes, sir.

6 Q. This is an email from Nick Artimovich from Roger Bligh,
7 is it not?

8 A. Yes, sir.

9 Q. And, in fact, this email is dated 2/28/2002 -- 2012,
10 correct?

11 A. Yes, sir.

12 Q. And this is in connection, as the jury will hear
13 throughout the trial, with the investigation that FHWA and
14 TTI and Trinity undertook once your allegations were brought
15 to their attention. And what Mr. Bligh says to Nick
16 Artimovich is: I can confirm on behalf of TTI that the
17 feeder rails tested in the end-on impact of the ET-Plus in
18 2005 which is the subject of the FHWA Letter CC-94 were four
19 inches wide. Did I read that correctly?

20 A. Yes, you did.

21 Q. And, in fact, Dr. Bligh, the engineer at A&M who was
22 involved with this particular project, is telling the FHWA
23 that upon their investigation and looking back at the May
24 crash test that generated the report of July, that there was
25 a four-inch guide channel used on the prototype that was

1 used in that test; isn't that what he's saying?

2 A. This was after I brought it out to them that they first
3 denied they made one. Then they went back and then
4 confirmed it, yes, sir.

5 Q. They went back and evaluated and investigated what
6 happened based upon your --

7 A. They --

8 Q. If I could finish, please, sir, so we don't talk at the
9 same time?

10 A. Yes, sir.

11 Q. And went and investigated your allegations, looked back
12 and looked at this some five years earlier to try to
13 determine what happened, and this was what TTI told the
14 FHWA; isn't that correct?

15 A. The way I understand it, they produced the first photo
16 that was of a five-inch, represented as a four-inch. Then
17 they went back and changed the photograph, that they thought
18 that this was a four-inch and then produced that. That's
19 what I understand.

20 Q. So is it your testimony here that what Dr. Bligh is
21 telling Mr. Artimovich is a lie?

22 A. I don't believe Dr. Bligh could -- he produced a
23 photograph. I don't believe anybody can say what it was.

24 Q. All right. You understand -- let's go to the next
25 paragraph. It says: This will confirm by TTI proving

1 ground personnel -- this was confirmed through TTI proving
2 ground personnel through analysis of photographs. Isn't
3 that what it says?

4 A. Yes, sir, that's what I was talking about. They had
5 produced one photograph that turned out to be a five-inch.
6 Then they went back and found another photograph and
7 produced it and represented it was a four-inch.

8 Q. Let's go to the last -- third paragraph where Dr. Bligh
9 says: Let me, again, apologize for the inad -- inadvertent
10 omission of this detail from the test report. Do you see
11 that?

12 A. Yes, sir.

13 Q. And that's TTI saying that the drawing of the four-inch
14 was inadvertently omitted by TTI, Texas A&M; isn't that what
15 he's saying?

16 A. He's saying that with all the checks and balances, they
17 inadvertently left out the photo -- the -- I guess the
18 drawing or whatever.

19 Q. And we know --

20 MR. SHAW: If we could take a look at Defendants'
21 Exhibit 291.

22 Q. (By Mr. Shaw) Is this a scale -- have you seen this
23 photograph before, Mr. Harman?

24 A. At some point. This doesn't look like the photograph
25 that was given -- that I seen that was going to the FHWA.

1 Q. All right. This is a photograph with a four -- a scale
2 photograph taken from the video so that -- that's scaled to
3 indicate what the size of the guard channel that was tested
4 in May of 2005; isn't that correct?

5 A. It looks like something that reports to that, yes.

6 Q. You mentioned -- if we could look also at Defendants'
7 Exhibit 289. Is this the same photograph?

8 A. This is the photograph I understood that was given to
9 the FHWA.

10 Q. So, in fact, if we look at the bottom right-hand corner
11 or bottom left-hand corner next to the exhibit stick --
12 exhibit sticker --

13 MR. SHAW: If you can maybe rotate that for us
14 perhaps, Mr. Hernandez?

15 Q. (By Mr. Shaw) We see the FHWA Bates stamp number on
16 this particular photograph, do we not?

17 A. Yes, sir.

18 Q. So this would be the photograph -- a copy of the
19 photograph that was in the possession of the FHWA, correct?

20 A. This would -- I'm assuming would have been the digital
21 version that was sent to them with the email.

22 MR. SHAW: If we could also look at Defendants'
23 Exhibit 289.0002.

24 Q. (By Mr. Shaw) In fact, this is a photograph, Mr.
25 Harman, of the crash test of the actual vehicle hitting the

1 end during the test, is it not?

2 A. I think this is just a still shot. I don't believe this
3 is a --

4 Q. It's not a screenshot of a video? Maybe just a
5 photograph?

6 A. I don't know what it is. It might just be a photograph.

7 Q. However, whatever we see there is a vehicle who is
8 impacting the end of an end terminal device, do we not?

9 A. Again, I think they were pulling it up to indicate the
10 height of the bumper, and they took side shots, if I
11 remember, so they would show how -- what was relative to the
12 height of the rail itself.

13 Q. What I want to focus on, Mr. Harman, is the vehicle.

14 A. Yes, sir, the little car.

15 Q. The car. Do you see the sticker on the front of the
16 car -- on the hood of the car?

17 A. Yeah, it looks like a hazard sign or --

18 Q. Looks like some type of slogan like on NASCAR or
19 something on the front of the car?

20 MR. SHAW: Mr. Harman (sic), if you could -- Mr.
21 Hernandez, if you could blow that up for me, please?

22 Q. (By Mr. Shaw) Do you see the sticker on the hood of the
23 car?

24 A. I see the two -- the circle with the two --

25 Q. We've now got it in yellow.

1 A. Yeah, I know, I see -- that's what I said, I see the
2 circle with the whole sticker. I can't -- it looks like
3 some writing or something on it.

4 MR. SHAW: Let's go back to 289.001.

5 Q. (By Mr. Shaw) Do we see that same sticker on this
6 particular exhibit there in the right-hand corner as -- as
7 indicated on this picture?

8 A. Yes, sir. A piece of it. It just cut it out.

9 Q. And this would be the photograph that was in the
10 possession of the FHWA indicating the four-inch guide
11 channel was crash tested in 2005; is that correct?

12 A. Again, I don't know how they get the measurements or
13 anything, what they're trying to show. It's -- I cannot --
14 by looking at this photograph, trying to line up the lines,
15 and I've looked at it, you cannot ratio it the way they
16 represent. It's just too grainy.

17 Q. You were talking, Mr. Harman, with -- yesterday -- or
18 this morning with Mr. Baxter about NCHRP 350.

19 A. Yes, sir.

20 Q. You may remember that you and I talked about this
21 yesterday, and that would be Defendants' Exhibit No. 3. You
22 may remember that we talked about this yesterday, and I
23 thought that you told me pretty clearly that you were not an
24 expert on 350.

25 A. Oh, I'm not, no, sir.

1 Q. You told me pretty clearly, I thought, that you had not
2 looked at 350 in quite some time and had never looked at it
3 very thoroughly.

4 A. No, I've looked through it. That's -- like I said on
5 the record yesterday, I've looked through it several times.

6 Q. You don't understand the interpretation of it or what it
7 means for the people who are actually involved in the field
8 in crash-testing, do you?

9 A. No, I didn't say that. I can read it and understand
10 what it means.

11 Q. Well then, let's take a look at Page --

12 MR. SHAW: On Defendants' Exhibit No. 3,
13 Mr. Hernandez, Page 25. I don't believe that Mr. Baxter
14 read this particular portion to you. If we could blow that
15 up. This is under test conditions.

16 THE COURT: Mr. Shaw?

17 MR. SHAW: Yes.

18 THE COURT: Sidebar comments that Mr. Baxter
19 didn't read this to you are inappropriate. You're to ask
20 questions of the witness.

21 MR. SHAW: I apologize.

22 THE COURT: Sidebar comments about it looks like a
23 NASCAR sticker are inappropriate. We need questions that
24 the witness can answer.

25 MR. SHAW: Yes, Your Honor. I apologize.

1 Q. (By Mr. Shaw) If we could look at, Mr. Harman, this
2 particular section that we've had blown up. It is not
3 uncommon for a designer/tester to make design changes to a
4 feature during the course of conducting the recommended test
5 serious or after successful completion of the test series.

6 Changes are often made to improve performance or to
7 reduce cost of the design or both. Questions invariably
8 arise as to the need to repeat any or all of the recommended
9 tests. Good engineering judgment must be used in such
10 instances.

11 As a general rule, a test should be repeated if there
12 is a reasonable uncertainty regarding the effect the change
13 will have on the test.

14 Have I read that correctly?

15 A. Yes, sir. You read it correctly.

16 MR. SHAW: If we could pull up Defendants' Exhibit
17 No. 38, please.

18 Q. (By Mr. Shaw) You discussed this email with
19 Mr. Baxter -- or I apologize. You did not discuss this
20 email with Mr. Baxter. This is a different email? I'm
21 sorry.

22 If you could look, please, at Exhibit -- at the top --
23 the to and from line, Mr. Harman.

24 A. Yes, sir.

25 Q. This is from Roger Bligh to Steve Brown in 2003, was it

1 not?

2 A. Yes.

3 Q. Steve Brown was another email that you discussed with
4 Mr. Baxter, and then Roger Bligh is the engineer at Texas
5 A&M; is that correct?

6 A. Yes, sir.

7 Q. If we go through this particular email --

8 MR. SHAW: The next one down, Mr. Hernandez.

9 Q. (By Mr. Shaw) -- from Steve Brown to Hayes Ross -- do
10 you see that?

11 A. Can I see the whole document for just a second?

12 Q. Sure.

13 A. Okay. I hadn't seen it before. I didn't know if this
14 was an internal document, but go ahead.

15 THE COURT: Let's get back on track. The witness
16 is not to ask questions of the attorney. The attorney is
17 not to make statements that are not questions. Let's have
18 the attorney ask questions and the witness answer them and
19 keep it that way, okay, gentlemen?

20 THE WITNESS: Yes, sir.

21 THE COURT: Let's go forward.

22 Q. (By Mr. Shaw) If you would look in the 2003 email from
23 Steve Brown to Hayes Ross, Paragraph 6, it says: We don't
24 know of any reason we can't make some changes. When we met
25 to discuss the development of the ET-Plus, we had proposed a

1 4-inch guide channel for the guide chute. The dimensions of
2 the guide chute date to the very original ETs that SYRO
3 fabricated. The guys in Girard will look at the ET guide
4 chute on Monday and will get over to our plant in Fort Worth
5 Monday or Tuesday to look at the same thing.

6 Do you see that?

7 A. Yes, sir.

8 Q. That email is in response to Mr. Hayes Ross writing to
9 Steve Brown in the email directly before.

10 MR. SHAW: Could we look at that?

11 Q. (By Mr. Shaw) This is Hayes Ross writing to Steve Brown
12 in February of 2003. Do you see that?

13 A. Yes, sir.

14 Q. And Hayes Ross is another engineer at Texas A&M, is he
15 not?

16 A. Yes, sir.

17 Q. And that email begins with: Steve was at Riverside this
18 afternoon to review ET brackets with Buth, Bligh, et al.
19 Here are some info/questions.

20 Did I read that correctly?

21 A. Yes, sir.

22 MR. SHAW: If we'll go to the next page,
23 Mr. Hernandez, and if you'll go to No. 6 from Mr. Hayes Ross
24 in 2003 from TTI.

25 Q. (By Mr. Shaw) He's asking Steve Brown: We are thinking

1 impact performance of the head may be improved by reducing
2 the available clearance between the downstream end of the
3 guide chute and the w-beam, in both the lateral and vertical
4 directions.

5 Do you know of any reason why this should not be done?
6 I think the current vertical clearances provides a way to
7 pull the flattened rail out of the head for repairs, but I'm
8 not sure this is an overriding need or concern. Hayes Ross.

9 Did I read that correctly?

10 A. Yes, sir.

11 Q. So in 2003, TTI is initiating questions concerning the
12 impact performance of the head by reducing the clearance
13 between the downstream end of the guide chute and the
14 w-beam; is that correct?

15 A. Yes, sir.

16 Q. You were asked some questions about -- from Mr. Baxter
17 about competition and announcements. When you made the
18 4-inch -- your 4-inch guide channel end terminal device, did
19 you announce that to the people you sold it to?

20 A. At that time, I thought it was approved.

21 Q. My question is, did you announce it to your customers?

22 A. Yes, sir. As far as -- as -- not the 4-inch channel,
23 no; as part as the terminal, yes.

24 Q. So you didn't announce the fact that you were making
25 guide channels with 4-inch -- making end terminals with

1 4-inch guide channels. There was no announcement on your
2 part?

3 A. No, sir.

4 Q. Just a few more questions, Mr. Harman.

5 A. Yes, sir.

6 Q. We talked about the FHWA and the June 17th, 2014 letter.

7 MR. SHAW: If we could pull that up, Defendants'
8 Exhibit No. 2.

9 Q. (By Mr. Shaw) This is the letter, I think, that you told
10 me was procured by fraud. Do you remember that testimony?

11 A. Yes, sir.

12 Q. Have you gone back to the FHWA and told them that this
13 letter was procured by fraud?

14 A. I think that's what this trial was about.

15 Q. Have you personally, Mr. Harman, gone to Mr. Michael
16 Griffith and told him that you believe that he wrote this
17 letter and it was procured by fraud in this particular case?

18 A. No, sir.

19 Q. Have you gone to Mr. Griffith's supervisors and told
20 him -- told them that Mr. Michael Griffith had engaged in
21 fraudulent conduct in a scheme with TTI and/or Trinity to
22 write this particular letter saying that the ET-Plus is
23 eligible for reimbursement?

24 A. No, sir.

25 Q. Have you gone to the U.S. Attorney to tell them to begin

1 investigating into the fraud that you believe has occurred
2 by writing this particular letter to show that the ET-Plus
3 is eligible for reimbursement?

4 A. No, sir.

5 Q. Have you ever told anyone at FHWA, the Federal
6 Government, anyone that they need to do an investigation
7 into how this particular letter was written and your belief
8 that it was procured by fraud?

9 A. No, sir. Not in the last months, no, sir.

10 Q. Ever?

11 A. I didn't know about the letter just for a couple months
12 ago.

13 Q. Have you done it in the last couple of months?

14 A. No, sir.

15 Q. In fact, this year here is the first tribunal of any
16 sort that you've ever raised that particular allegation,
17 isn't that true?

18 A. Yes, sir.

19 Q. In fact, have you had an opportunity to look at your
20 pleadings in this particular case?

21 A. Not as of lately, no, sir.

22 Q. Do you know whether or not this allegation about the
23 FHWA fraud is found anywhere in any of the official
24 documents that have been filed on your behalf with this
25 Court concerning the fraud in this particular letter that

1 you say exists?

2 A. It's represented as mis -- misrepresentations, yes.

3 Q. So you would say that this letter is a
4 misrepresentation?

5 A. Misrepresentation was done before, yes.

6 Q. No, I'm talking about Defendants' Exhibit No. 2, Mr.
7 Harman.

8 Are you aware anywhere in any of the official papers
9 that you have filed with this Court making the allegations
10 that you make about the fraud being perpetuated upon the
11 Government to secure this letter? Have you ever
12 specifically alleged that in any papers with this particular
13 Court?

14 A. Not that I'm aware of.

15 Q. Let's turn our attention, Mr. Harman, with your
16 discussions with Mr. Artimovich. You talked to him about
17 the height of the entrance of the chamber?

18 A. Yes, sir.

19 Q. You indicated to him -- you indicated to Mr. Artimovich
20 that as best you -- as best you can remember, you told him
21 that there -- the measurements -- the differences in the
22 measurements, the changes in the internal dimensions; you
23 told him that?

24 A. Some of them. There's a whole lot more since then, but,
25 yes, some of them I did tell him.

1 Q. You told him about the length from the point of entry to
2 the extruder had to have been narrowed down. You told Mr.
3 Artimovich that, did you not?

4 A. Okay. You're -- ask the question again. I'm sorry.

5 Q. When you were talking to him about the internal
6 dimensions, you told Mr. Artimovich in your meetings with
7 him that the length from the point of entry to the extruder
8 had to be narrowed down.

9 A. I don't remember going over that to him.

10 Q. Let's take a look at your deposition, Mr. Harman, to
11 maybe refresh your recollection. On Page 33, Line 17, and
12 what -- we begin on Line 17, Mr. Harman, when we deposed
13 you: What are they? What are the other dimensions that you
14 believe were changed?

15 And you say to me: The length from the point of entry
16 to the extruder had to be narrowed down.

17 Did I read that correctly?

18 A. Yes, sir.

19 Q. All of the information that you are complaining about in
20 this lawsuit was provided to Nick Artimovich at the FHWA by
21 you, was it not?

22 A. Not all of it, no, sir.

23 Q. Let's take a look at your deposition on Page 143, Line
24 19.

25 What is your understanding of what -- do -- but you do

1 know that at the time of the retroactive approval that was
2 provided by FHWA, all of the information that you are
3 complaining about here was provided to Nick Artimovich by
4 you, was it -- was it not?

5 If we could look at your answer, Mr. Harman, that time
6 when you were under oath in your deposition. Is that your
7 answer?

8 A. Yes, sir.

9 MR. SHAW: Your Honor, if I could confer?

10 THE COURT: You may have a minute.

11 MR. SHAW: May we approach, Your Honor?

12 THE COURT: Approach the bench, counsel.

13 (Bench conference.)

14 MR. SHAW: Your Honor, we don't want to violate a
15 motion in limine, obviously. Mr. Harman has testified
16 that -- excuse me, Your Honor. Mr. Harman has testified in
17 response to my question about did he provide an announcement
18 when he made his own ET-Plus or his own end terminal with a
19 4-inch channel, he said I thought it was approved. That's
20 what he said.

21 The reason he's saying that is because he relied
22 upon the crash-testing that we conducted on the ET-Plus and
23 now he's saying is not good. My understanding of your
24 motion in limine is we can't talk to him about
25 crash-testing, but the reason he's saying it's approved to

1 go onto the marketplace is because he was relying upon our
2 crash-testing when he was copying our product.

3 Again, I just think he's opening the door. We're
4 not allowed to tell the whole story here. What -- he took
5 our product, Your Honor, and he copied it, and he put it
6 onto the marketplace, and he said I don't have to test it
7 because it's already been crash-tested. It was only when he
8 got caught doing that by the Virginia --

9 THE COURT: He didn't say it had already been
10 crash-tested. He said it was approved, and he didn't
11 indicate where the source of that approval came.

12 MR. SHAW: Well, can I ask him that, Your Honor?
13 I don't want to violate the motion in limine.

14 THE COURT: Well -- I mean, your clients are on
15 trial here, not the Plaintiff.

16 What's -- what's the response from the Plaintiff?

17 MR. BAXTER: He didn't say he didn't know anything
18 about the crash-testing. He didn't say that he did.
19 They're just trying to get in the back door. They just
20 can't leave it alone. They want to prove that he copied
21 something. They just can't get away from it. Judge, you
22 told him don't do it. He continues to try to do it. It's
23 just another ruse to try to get --

24 MR. MANN: Your Honor, that's in his response. He
25 didn't lead him down that path. That's his response to a

1 whole different question, and the issue is not whether he
2 knew about crash-testing. He placed a 4-inch guide channel
3 out based on the approval that Trinity already had, whether
4 it's crash-testing or not.

5 THE COURT: Well, you know, when we had the motion
6 in limine issues arise in pretrial, I directed that you
7 could go into the fact that he manufactured and used a
8 4-inch head. And, you know, there was no request that you
9 be able to show that he relied on TTI's crash-testing of all
10 these things.

11 MR. MANN: Your Honor --

12 THE COURT: And -- and we've got to draw a line
13 somewhere. And, you know, in my view, he hasn't clearly
14 opened the door, all right? I won't say that he might not
15 open it going forward, but right now, when he says I thought
16 it was approved, that doesn't open the door, in my view, to
17 you going into him copying or relying on crash tests.

18 MR. SHAW: Or relying on crash tests.

19 THE COURT: Okay. Let's go forward.

20 MR. SHAW: All right. Thank you, Your Honor.

21 (Bench conference concluded.)

22 THE COURT: All right. Let's proceed.

23 MR. SHAW: Can we go -- switch to the ELMO. Thank
24 you.

25 Q. (By Mr. Shaw) Mr. Harman, do you remember in this

1 particular case that some of the official papers that you
2 filed, you were asked to identify individuals, and you did
3 identify Mr. Artimovich, did you not, sir?

4 MR. BAXTER: Excuse me, Your Honor. This is a
5 pleading filed in a pretrial proceeding. It's not proper in
6 this case, and I object to it.

7 THE COURT: State your objection again,
8 Mr. Baxter.

9 MR. BAXTER: It's a pleading required by this
10 Court pretrial in this case. It's not anything that he's
11 authored. It's a pleading that we filed in this Court, and
12 those pleadings aren't admissible and it's not admissible.

13 MR. SHAW: It's an interrogatory, Your Honor,
14 Mr. Mann tells us, interrogatory response.

15 THE COURT: Are you attempting to impeach the
16 witness with this?

17 MR. SHAW: I just want to ask him if he still
18 agrees with the statement that he gave in his
19 interrogatories, Your Honor, about Mr. Artimovich.

20 THE COURT: All right. I'm going to sustain the
21 objection. We're not going to get into trying the case
22 based on the pleadings that have been filed. There are
23 thousands and thousands of documents on file in this case,
24 and we're not going to open the door to that. If you want
25 to ask him who he understands Nick Artimovich is, you may

1 certainly do so.

2 MR. SHAW: Thank you.

3 THE COURT: We're not going to do it based on that
4 document that you put on the -- the document camera.

5 MR. SHAW: Yes, Your Honor.

6 Q. (By Mr. Shaw) Mr. Harman, have you understood the
7 questions that I've asked of you?

8 A. Yes, sir.

9 Q. Thank you very much.

10 MR. SHAW: I pass the witness, Your Honor.

11 THE COURT: All right. Additional direct?

12 MR. BAXTER: Very briefly, Your Honor.

13 REDIRECT EXAMINATION

14 BY MR. BAXTER:

15 Q. Mr. Harman, they showed you a picture --

16 MR. BAXTER: Let me see, Mr. Diaz, if I can get up
17 463?

18 Q. (By Mr. Baxter) -- of allegedly what they tested in
19 2005, and I believe you said that originally they had sent a
20 picture of a five-inch channel. Is this it?

21 A. Yes, sir, that is it.

22 Q. Okay. And so when TTI was trying to explain to the FHWA
23 what they tested, they sent them a picture of a five-inch
24 channel; is that right?

25 A. Yes, sir.

1 Q. And later on, they sent them another picture -- let me
2 ask you this, Mr. Harman. Why in the world did they have to
3 go seven years later and go dig out a picture? Why didn't
4 they just dig out the measurements they made of the head
5 when they tested it?

6 A. Because they was trying to hide it.

7 Q. Were there any measurements of any head when they tested
8 it?

9 A. No, sir.

10 Q. You mean they put that thing up there and despite what
11 350 requires, they didn't measure it?

12 A. No, sir. They didn't measure nothing.

13 Q. And what they did is they got a picture and they tried
14 to get the computer to tell you what size things were in the
15 picture; is that what they did?

16 A. No -- no, sir.

17 MR. SHAW: Excuse me, Mr. Baxter.

18 Objection, leading and it asked him to testify
19 about what other people's mind-set was and also the
20 interpretation of 350, Your Honor.

21 THE COURT: Well, it's certainly leading. I'll
22 sustain as to that basis.

23 Q. (By Mr. Baxter) Mr. Harman, did they produce out of
24 their files the -- any measurement of the whatever it is
25 they tested in 2005, did they produce one single solitary

1 measurement of that article?

2 A. No, sir.

3 Q. All right, sir.

4 MR. BAXTER: Now, let me see Plaintiff's Exhibit
5 956 if we can, please, Mr. Diaz.

6 Q. (By Mr. Baxter) I want you to look down at the bottom.
7 This is an email from Dr. Buth. Do you know who Dr. Buth
8 is? Is he at TTI?

9 A. Yes, sir.

10 Q. Okay. And he is -- is sending an email, is he not,
11 about who's going to actually furnish the report to the
12 Federal Highway Administration?

13 A. Yes, sir.

14 Q. Let's look down at the bottom. Brian, we have finished
15 preparing a report of testing the 31-inch high and will be
16 sending a PDF, as well as paper copies to you.

17 Now, in that very first sentence, does he say: Oh, and
18 by the way, it's the new prototype head?

19 A. No, sir.

20 Q. The 31-inch high ET, what is that?

21 A. That's just the height of the system -- the height of
22 the rail.

23 Q. And is that what the report is about --

24 A. Yes.

25 Q. -- the height of the rail?

1 A. Yeah, they tested two vehicles, a pickup to see if it
2 would ride over it or go under it and then a little car to
3 see if it would go underneath the head.

4 Q. All right. I'm thinking that Trinity should be the one
5 to submit the letter requesting FHWA's approval of the
6 device. Is it saying I'm thinking Trinity ought to send our
7 report in and not TTI?

8 A. Yes, sir.

9 Q. Now, Mr. Harman, you got asked again today about are you
10 alleging a conspiracy, and you said -- and they tried to
11 intimate that you're saying the FHWA had committed fraud.

12 Are you saying that?

13 A. No, sir.

14 Q. Are you alleging some grand conspiracy?

15 A. No, sir.

16 Q. Are you saying that the FHWA and Trinity got in cahoots
17 together to do all this?

18 A. No, sir.

19 Q. Are you saying that Trinity didn't supply the requisite
20 information to the FHWA to make a decision?

21 A. They kept -- they kept it hid, yes.

22 Q. Are you saying they didn't tell them about failed tests?

23 A. Yes.

24 Q. Are you telling them they didn't give them the
25 dimensions of the prototype?

1 A. I'm not understanding -- are you asking me if I told the
2 government about it?

3 Q. Are you alleging that Trinity didn't tell that to the
4 government?

5 A. Yes, sir.

6 Q. Have there been things that you have found out in this
7 litigation that you didn't even know?

8 A. Yes, sir.

9 Q. That you went to talk to Mr. Artimovich?

10 A. Yes, sir, absolutely.

11 Q. And this jury is going to be the first folks to hear it?

12 A. Yes, sir.

13 Q. Thank you very much.

14 MR. BAXTER: That's all I have, Your Honor.

15 THE COURT: Additional cross, Mr. Shaw?

16 MR. SHAW: No, Your Honor.

17 THE COURT: All right. You may step down, Mr.

18 Harman.

19 THE WITNESS: Thank you, sir.

20 THE COURT: Ladies and gentlemen, before Plaintiff
21 calls their next witness, we're going to take a short
22 recess. And this is one of those short periods where you
23 can leave your notebooks in your chairs if you'd like.

24 Don't discuss the case among yourselves. Stretch
25 your legs, get a drink of water, we'll be back in here

1 shortly and continue. You're excused for recess at this
2 time.

3 COURT SECURITY OFFICER: All rise.

4 (Jury out.)

5 THE COURT: Be seated, please.

6 Mr. Baxter, who will your next witness be?

7 MR. BAXTER: We're going to call Mr. Malizia as an
8 adverse witness, Your Honor.

9 THE COURT: All right. When do you anticipate
10 calling Dr. Coon?

11 MR. BAXTER: I don't think it's going to be until
12 tomorrow, Your Honor, frankly.

13 THE COURT: All right. I understood there were
14 demonstrative disputes with regard to Dr. Coon. I want to
15 know when -- or maybe I'm misunderstanding. I just want to
16 make sure I have a chance to take up any demonstrative
17 disputes before the witness gets called.

18 MR. MANN: And I don't -- there's not -- it's
19 down to a very few at this point.

20 THE COURT: All right.

21 MR. MANN: We just haven't had a chance to talk
22 again.

23 THE COURT: All right. Then let's take a short
24 recess, and we'll continue. The Court stands in recess.

25 COURT SECURITY OFFICER: All rise.

1 (Recess.)

2 (Jury out.)

3 COURT SECURITY OFFICER: All rise.

4 THE COURT: Be seated, please.

5 All right. Before we bring the jury in, in light
6 of the order of the witnesses and the rate at which we're
7 moving, I think it's important that I go ahead and give the
8 parties guidance on the deposition designations and counter
9 designations and objections to the same regarding the
10 deposition of Nicholas Artimovich. And I'm prepared to do
11 that.

12 I'm going to give you the areas where I believe
13 objections should be sustained and identify those with
14 specificity. Other areas in the designations and counter
15 designations not addressed, if there are objections to those
16 areas, those objections are overruled.

17 The first objection I'm going to grant is
18 beginning on Page 38, Line 18, through Page 39, Line 2. The
19 objection there is granted, and that's excluded.

20 The next is on Page 44, Line 19, through Page 45,
21 Line 18. That objection is sustained. That designation is
22 excluded.

23 The next is on Page 46, Line 7, through 13.
24 That's excluded. The objection is sustained.

25 The next is Page 54, Line -- on Line 4, beginning

1 with the word me, that's okay. Following me, it begins and
2 noted, starting with the and noted, through Line 10, is
3 excluded. That one actually starts in the middle of the
4 line. So it starts -- the excluded portion starts after the
5 word me and at the word and on Line 4, Page 54, through Line
6 10.

7 The next is on Page 69. That's Lines 3 through
8 14. That's excluded. The objection is sustained.

9 The next is on Page 92, beginning -- excuse me,
10 Page 90 -- Page 90, beginning at Line 10 through 16. That's
11 excluded.

12 I want to come back to Page 105 and 106 and 107,
13 but I'll skip over those for the time being.

14 The next exclusion is on Page 123, Line 9 through
15 17, and Page 125, Line 9, through Page 126, Line 10.

16 Also on Page 126, Line 18, through Page 127, Line
17 4. Those are excluded.

18 Now I'll go back to Page 105, 106, and 107. This
19 is primarily regarding the use of a document with the
20 deponent -- or the deposition witness that is not
21 pre-admitted in this case. And I'm assuming that there may
22 be some effort to use that docket -- document as a
23 demonstrative, but I want to hear from counsel on this
24 remaining objection. This would begin at Line 7 on Page 105
25 and continue through Page 106, 107, and up the first eight

1 lines of Page 108.

2 So this is your designation, Mr. Carpinello?

3 MR. CARPINELLO: I assume -- I don't have the
4 deposition in front of me, Judge. I'm flying blind, but
5 understand that it is ours. And the -- may I approach the
6 podium?

7 THE COURT: You may approach the podium.

8 MR. CARPINELLO: I'm told the document that's
9 discussed is the weldment drawings which is P 40 which is a
10 pre-admitted exhibit.

11 THE COURT: All right. My understanding of the
12 basis of your objection was that the document was not a
13 pre-admitted exhibit. Do the Defendants know otherwise? Is
14 this a document that perhaps was offered from both sides and
15 pre-admitted on one side but not the other?

16 MS. TEACHOUT: Our understanding, Your Honor,
17 was --

18 THE COURT: Let's go to the podium, Ms. Teachout,
19 please.

20 MS. TEACHOUT: Excuse me, Your Honor.

21 Our understanding, I think, that what was being
22 referred to was P 714. It's not pre-admitted, but we can
23 check the other exhibit that Mr. Carpinello referenced to
24 see if that was pre-admitted. Our understanding is that P
25 714 --

1 THE COURT: I'm not -- I'm not concerned about the
2 objections beyond the fact that the witness is being deposed
3 on the document that may not be properly in evidence. The
4 other objections raised are overruled. But I am concerned
5 about the status of that document. It's identified as
6 Deposition Exhibit 15 during the deposition. And it appears
7 that the Defendants' objection is that the document is not
8 pre-admitted.

9 MR. CARPINELLO: May I have a moment, Your Honor?

10 THE COURT: You may. We're wasting time, Counsel,
11 and the jury is out and the clock's running, but given the
12 fact that this deposition is going to come later today, and
13 I didn't get these until the end of the day yesterday, I'm
14 trying to get it disposed of.

15 MR. CARPINELLO: Your Honor, P 714 is one of the
16 revisions of the weldment drawings, and it's part of P 40.

17 THE COURT: So you're telling me it is
18 pre-admitted?

19 MR. CARPINELLO: Yes, I -- yes, Your Honor, it's
20 our understanding.

21 THE COURT: Do the Defendants know otherwise? I
22 mean, the basis of your objection is that it's not a
23 pre-admitted exhibit. If that's clearly erroneous, are you
24 going to withdraw your objection? Let me hear -- let me
25 hear from the Defendants.

1 MR. SHAW: Your Honor, we withdraw that
2 objection. Conferred with Ms. Monroe --

3 THE COURT: Okay.

4 MR. SHAW: -- and she confirmed that that exhibit
5 is within another pre-admitted exhibit.

6 THE COURT: That objection is withdrawn. That
7 designation is permitted.

8 MR. SHAW: Thank you, Your Honor.

9 THE COURT: Okay. That should be complete
10 guidance on the Artimovich deposition with both objections
11 to designations and counter designations.

12 Mr. Brown, is it my understanding you wish leave
13 to be absent during some portion of the remainder of the
14 day?

15 MR. BROWN: Just for the portion before lunchtime,
16 Your Honor, to work with a witness if that --

17 THE COURT: All right. If for some unexpected
18 reason your presence should be needed, I assume you're going
19 to be close to the courthouse.

20 MR. BROWN: Extremely close, Judge.

21 THE COURT: All right. Just make sure my law
22 clerks have your cell phone number so if anything comes up,
23 we can reach you. Otherwise, you have leave to be absent.

24 MR. BROWN: May I step forward and give it to
25 them?

1 THE COURT: You can give them that.

2 MR. BROWN: Thank you.

3 THE COURT: All right. Is there anything else we
4 need to do before we take up -- bring the jury in and take
5 up the next witness?

6 MR. CARPINELLO: No, Your Honor, not from
7 Plaintiff.

8 THE COURT: All right. Anything further
9 Defendants are aware of?

10 MR. SHAW: Nothing at this time, Your Honor.

11 THE COURT: All right. Let's bring in the
12 witness, please, Mr. McAteer.

13 COURT SECURITY OFFICER: All rise for the jury.
14 (Jury in.)

15 THE COURT: Be seated, ladies and gentlemen.
16 Sorry that short recess took longer than anticipated. We --
17 we did some other business while you were out.

18 We'll continue. Plaintiffs may call their next
19 witness.

20 MR. CARPINELLO: Wade Malizia, Your Honor.

21 THE COURT: All right. If you'll come forward,
22 sir, our courtroom deputy will administer the oath to you,
23 and then after you've been sworn, you may take a seat here
24 to my right at the witness stand.

25 (Witness sworn.)

1 THE COURT: If you'll come around, sir, and have a
2 seat here.

3 All right. Mr. Carpinello, you may proceed when
4 you're ready.

5 MR. CARPINELLO: Thank you, Your Honor.

6 WADE MALIZIA, PLAINTIFF'S WITNESS, SWORN

7 DIRECT EXAMINATION

8 BY MR. CARPINELLO:

9 Q. Good morning, Mr. Malizia.

10 A. Good morning.

11 Q. Sir, do you work for Trinity Highway Products, LLC?

12 A. Yes, I do.

13 Q. Are you also an employee of Trinity Industries?

14 A. Yes.

15 Q. And, sir, what's your position with Trinity?

16 A. I'm Vice President of Operations for the Trinity Highway
17 Products Division.

18 Q. And please describe what duties you have, sir, as Vice
19 President of Operations.

20 A. I'm over the manufacturing facilities for that division.

21 Q. And you oversee all the manufacturing facilities?

22 A. Yes, sir.

23 Q. And how many of those are there?

24 A. Seven.

25 Q. And where is your office -- you have an office, sir, or

1 a place where you work generally?

2 A. Yes, I office out of the Girard, Ohio, facility.

3 Q. And how long have you been at Girard, sir?

4 A. Since 1983.

5 Q. And is that when you started with Trinity, sir?

6 A. No. That's when I started with Syro Steel. That was in
7 1983. And then Trinity bought Syro Steel in 1992.

8 Q. And have you had any involvement, sir, with a product
9 called the ET-Plus?

10 A. Yes, sir.

11 Q. And describe generally what your involvement with that
12 product has been.

13 A. I was over the manufacturing of it for several years.

14 Q. When you say you were over it, you supervised the actual
15 manufacturing of the product?

16 A. I supervised the plants.

17 Q. That manufactured the product?

18 A. Yes.

19 Q. And they made the -- let me rephrase the question. Did
20 that also include supervision of the manufacturer of the
21 predecessor ET-2000?

22 A. Yes, sir.

23 Q. And is it true that somewhere around the year 2000, the
24 ET-2000 was replaced by the ET-Plus?

25 A. That's correct.

1 Q. And the ET-Plus is manufactured at the Girard facility
2 where you're located?

3 A. Yes, sir.

4 Q. Did there come a time, sir, when the President of
5 Trinity asked you how much Trinity would save if it went
6 from a five-inch to a four-inch channel on the ET-Plus?

7 A. I believe what he asked me was what was the -- the
8 difference in the weight.

9 Q. Okay. Well, what's --

10 MR. CARPINELLO: Could we have Exhibit 133,
11 please -- Plaintiff's 133? Could we go to the original --
12 the original message on this line?

13 Q. (By Mr. Carpinello) Sir, I direct your attention to the
14 first original message from Steve Brown to you dated
15 November 9th, 2014, at 2:00 p.m. Do you see that, sir?

16 A. Yes, sir.

17 Q. Now, who was Steven Brown at that time?

18 A. He was my supervisor.

19 Q. What was his position with Trinity?

20 A. He was Vice President of Operations at that time.

21 Q. Who was President of Trinity at that time?

22 A. I'm not -- I can't remember. I think it might have been
23 Rodney Boyd at that time.

24 Q. Okay. So Mr. Brown is sending you an email saying I'd
25 like to start pushing to change the ET to the four-inch

1 channel. How much weight do we save each and what would be
2 the cost savings each, assuming 25-cent steel. You see
3 that, sir?

4 A. Yes, sir.

5 Q. Okay.

6 THE COURT: Let me -- let me stop a minute. Mr.
7 Malizia, if you could back away from that microphone just a
8 little bit, we're getting some distortion.

9 THE WITNESS: Okay.

10 THE COURT: That will be better. Thank you.

11 Continue, Counsel.

12 MR. CARPINELLO: Thank you, Your Honor.

13 Q. (By Mr. Carpinello) And you responded on that day, a
14 little while later -- your email at the top of that page,
15 using a C4 times 5.4 number. Now, what is that, what --
16 tell the jury, please, what that C4 times 5.4 with the hash
17 tag means.

18 A. 5.4 is -- that's the weight of that channel, linear --
19 I'm sorry -- per linear foot.

20 Q. And versus the C6. Now, that's a typographical error,
21 isn't it, the C6?

22 A. Yes.

23 Q. You meant the C5?

24 A. I did.

25 Q. Okay.

1 MR. CARPINELLO: And may -- Your Honor, may I --
2 may I go around the podium to point to the ET-Plus?

3 THE COURT: Yes, you may.

4 MR. CARPINELLO: Thank you.

5 Q. (By Mr. Carpinello) Just so the jury understands, Mr.
6 Malizia, we're talking about this thing right here when we
7 talk about the channel, correct?

8 A. That's correct.

9 Q. And on the ET-Plus that was being manufactured in
10 November of 2004, this was five inches in width, correct?

11 A. That's correct.

12 Q. And it had a particular weight, correct?

13 A. That's correct.

14 Q. What was the weight of the channel on each side; do you
15 recall? Do you recall?

16 A. The complete weight or the weight per foot?

17 Q. Well, how about weight per foot, sir.

18 A. Yeah, because that's what I had in my email. It's 6.7
19 pounds per foot.

20 Q. Okay. And you're talking about changing -- you're
21 talking about the change in weight and the change in price
22 going to a 4-inch channel, correct?

23 A. Correct.

24 Q. Okay. And, sir, these two channels together serve what
25 function on the ET-Plus?

1 A. That's the guide chute, I believe they call it.

2 Q. And the -- and the guardrail actually sits in this guide
3 chute, correct?

4 A. That's correct.

5 Q. And when the head is impacted by a vehicle, the head is
6 pushed down the guide channel, correct?

7 A. It's pushed down the guardrail.

8 Q. Okay. And as it's pushed down the guardrail, the
9 guardrail feeds through this channel and extrudes out the
10 end of the head; isn't that correct?

11 A. That is correct.

12 Q. Okay.

13 MR. CARPINELLO: Now, could we have the next
14 email, please? And could we -- yes, thank you.

15 Q. (By Mr. Carpinello) Now, this is, again, November 9th,
16 2004, from Steve Brown to Rodney Boyd and Brian Smith. And
17 I think you said Steve Brown was vice president?

18 A. Yes.

19 Q. And Rodney Boyd was president?

20 A. I -- I think so, yes.

21 Q. And Brian Smith, what position did he hold at this point
22 in time?

23 A. He was our international sales manager, and he was also
24 our liaison between us and Texas A&M University.

25 Q. TTI?

1 A. Yes.

2 Q. And who's Will Burney?

3 A. He was a sales manager.

4 Q. Okay. So these are all senior executives of Trinity,
5 correct?

6 A. Trinity Highway Products, yes.

7 Q. Okay. And then Mr. Brown says: If Wade's numbers are
8 good, we would save \$2 per ET.

9 That means \$2 per head?

10 A. Yes.

11 Q. That's \$50,000 per year, and \$250,000 in 5 years by
12 using the 4-inch channel for the legs.

13 Do you see that, sir?

14 A. Yes, I do.

15 Q. Okay. And then he says, at the bottom: If TTI agrees,
16 I'm feeling that we could make this change with no
17 announcement.

18 Do you see that, sir?

19 A. Yes, I do.

20 Q. Okay. And he also says: We did pretty good with the
21 TRACC changes.

22 Do you see that, sir?

23 A. Yes.

24 Q. And what is TRACC, sir?

25 A. TRACC is another product that we make.

1 Q. It's another safety device, isn't it, sir?

2 A. It's a crash cushion.

3 Q. I'm sorry. It's a crash cushion?

4 A. Yes.

5 Q. Is he referring, sir, to changes that TT -- I'm sorry --
6 that Trinity made to that crash cushion without making an
7 announcement, sir?

8 A. I do not know what he meant by that.

9 Q. Okay. Did you ever ask, sir?

10 A. No, I did not.

11 Q. Okay.

12 MR. CARPINELLO: Could I have the next email,
13 please? Top email.

14 Q. (By Mr. Carpinello) Now, the next email is from Rodney
15 Boyd to Steve Brown and Brian Smith with a copy to Will
16 Burney. Again, these are all executives of Trinity,
17 correct?

18 A. Trinity Highway Products, yes.

19 Q. Okay. Brian, start talking to TTI about this. The 8
20 pounds lighter head may give us a problem in travel distance
21 with the pickup truck.

22 Do you see that, sir?

23 A. Yes, sir.

24 Q. Do you know whether your -- do you know whether this
25 head with -- with a 4-inch channel was ever tested with a

1 pickup truck?

2 A. I'm not involved with crash tests so I wouldn't know.

3 Q. You don't know one way or another?

4 A. I don't.

5 Q. Okay. You never discussed it with anybody at Trinity
6 whether this head had been tested with a truck, correct?

7 A. I did not.

8 Q. Okay. Even to today, you've never discussed it with
9 anyone?

10 A. I have not.

11 Q. Okay. Now, did Mr. Brown ask you to create a prototype
12 with a 4-inch channel rather than a five-inch channel so it
13 could be tested?

14 A. Yes, he did.

15 Q. And when did he ask you to do that, sir?

16 A. I believe it was in early 2005.

17 Q. Now, you're -- you're not an engineer, correct, sir?

18 A. I am not.

19 Q. Okay. And did Mr. Brown give you any direction as to
20 how to build it other than to make an ET-Plus with a 4-inch
21 channel?

22 A. No.

23 Q. He didn't tell you how to build it?

24 A. He did not.

25 Q. Did he tell you any other dimensions to make?

1 A. No. All he said was to use the exact same head, and the
2 only change would be to go from a 4-inch channel to a 5-inch
3 channel.

4 Q. And was that the only change you made, sir?

5 A. From the 4-inch to the 5-inch.

6 Q. From the 5-inch to the 4-inch?

7 A. Thank you. Yes, 5-inch to the 4-inch, yes, that's
8 correct.

9 Q. That's the only change you made?

10 A. Changing the two channels, yes.

11 Q. Okay. And did you do any computer analysis, sir, to see
12 what was the best way to incorporate the 4-inch channel?

13 A. No.

14 Q. Did you consult any engineer either at Trinity or TTI as
15 the best way to attach the 4-inch channel to the head?

16 A. No. We have some pretty skilled welders and -- and my
17 welders in the shop and my supervisors have been around this
18 sort of stuff quite a bit.

19 Q. So --

20 A. It was basic fit-up.

21 Q. So basically what happened is, Mr. Brown says to you,
22 add -- add a 4-inch channel to the head. You went to your
23 welders and said add a 4-inch channel to the head?

24 A. We talked about it, about the best way we thought it
25 would be to put it together, and that's how we did it.

1 Q. And how did you do it, sir?

2 A. We found that the 4-inch channel would actually insert
3 into the throat, and made a much better attachment and weld
4 design. So that's how we did it.

5 Q. When you say better attachment, sir, you're not opining
6 on whether it works better in a crash, are you?

7 A. No. I'm talking about the structural integrity of the
8 joint.

9 Q. Okay.

10 MR. CARPINELLO: May I come around, Your Honor?

11 THE COURT: You may.

12 Q. (By Mr. Carpinello) Okay. So the original or the one
13 that was in production and being sold, the original ET-Plus,
14 this channel is welded to this --

15 THE WITNESS: Your Honor, can I stand up and see
16 what he's pointing to?

17 THE COURT: Yes, you may.

18 MR. CARPINELLO: Thank you, Your Honor.

19 THE COURT: Let's let the witness use the handheld
20 microphone.

21 If you'll come to this corner, sir, that way you
22 ought to be able to see without blocking the jury.

23 And as with yesterday, Members of the Jury, if it
24 helps you to stand in place and look, you're free to look do
25 that. You're certainly not required to.

1 All right. Let's continue.

2 Q. (By Mr. Carpinello) So the original ET-Plus, these
3 channels are welded flush with the opening of this -- this
4 throat, correct?

5 A. That's correct.

6 Q. So it's metal to metal, and then there's a weld,
7 correct?

8 A. Yes.

9 Q. Okay. And that's the way the ET-Plus had been produced
10 since the ET-Plus went on the road, correct?

11 A. As long as I can remember, yes.

12 Q. And that's the way the ET-2000 was welded, correct?

13 A. That's correct.

14 Q. And that's back into the '90s, correct?

15 A. Yes.

16 Q. Okay. Are you aware of any problems that arose from the
17 way they welded the channel to the throat?

18 A. No, I'm not.

19 Q. Okay. So you -- you and your welders got together and
20 said let's take this channel and let's stick it into --
21 inside the throat, correct?

22 A. That's correct.

23 Q. Okay. So now this 4-inch channel is protruding into the
24 throat, correct?

25 A. That's right.

1 Q. Okay. About 3/4 of an inch?

2 A. That is correct.

3 Q. And you changed the nature of the weld, correct?

4 A. That's right.

5 Q. This is called a fillet weld, and this is called a butt
6 weld, right?

7 A. That is correct.

8 Q. Now, I am -- I understand you and your welders decided
9 to do this?

10 A. That's right.

11 Q. You didn't call anybody at TTI?

12 A. No.

13 Q. You didn't call anybody or any engineers at Trinity?

14 A. No.

15 Q. You didn't say to Mr. Brown, this is the way we're going
16 to do it. You -- I'm not just saying just. You and your
17 welders decided that's the way we're going to do it?

18 A. It was the most logical way to do it. Yes.

19 Q. Logical way to weld?

20 A. Stronger weld, in our opinion, as well.

21 Q. Okay. Again, you have no opinion or any knowledge as to
22 how this weld would perform in a crash, correct?

23 A. No, I don't.

24 Q. And just, again, when you decided to put it -- put this
25 in here, you didn't ask anybody at Trinity or TTI, have you

1 done a -- could you do a computer analysis to see how this
2 change would affect the stresses on the guardrail as it sped
3 through here; is that correct?

4 A. I did not do that. TTI didn't do that.

5 Q. Okay. Well, you don't know if anybody did it, correct?

6 A. I don't know.

7 Q. Okay.

8 A. I know I didn't.

9 Q. Okay. And you didn't call Mr. -- Dr. Bligh --

10 THE COURT: Let's go back to -- to your seat, and
11 if you'll turn around to the CSO, the court security officer
12 will take the microphone from you. Or you can put it back,
13 that's fine. Have a seat.

14 THE WITNESS: Sorry.

15 THE COURT: All right. Mr. Carpinello.

16 MR. CARPINELLO: Thank you, Your Honor.

17 Q. (By Mr. Carpinello) And you didn't call Dr. Bligh or
18 Dr. Buth or Mr. Alberson or any of those people and said,
19 how would my -- my welders and I are thinking, you know, we
20 want to stick this in, but we don't know how it would affect
21 it in a crash. You didn't do any of that, correct?

22 A. I personally did not.

23 Q. And you don't know if anybody else did that, correct?

24 A. They may have. I'm not aware of it.

25 Q. Okay. When you made this prototype, did you take a

1 picture of it?

2 A. No.

3 Q. Did you make a drawing of it?

4 A. No, I did not.

5 Q. Okay. Do you know if anybody took a picture of it?

6 A. I don't believe we did.

7 Q. Okay. So you delivered this prototype or somebody
8 delivered this prototype to TTI for testing?

9 A. That's correct.

10 Q. Okay. Did -- before you delivered it, did you go
11 through and measure all the different dimensions like how
12 far this was in or how wide the throat was or any of the --
13 or how this distance -- how this distance had changed? Did
14 you measure any of that?

15 A. We knew what it was.

16 Q. Did you measure it?

17 A. I didn't personally measure it, no.

18 Q. So I take it you didn't know -- nobody, to your
19 knowledge, measured it and wrote it down anywhere, correct?

20 A. No.

21 Q. Okay. And you chose the fillet weld because you felt
22 from a welding perspective that that was a better weld?

23 A. I know it's a better weld.

24 Q. Well, in your opinion, it was a better weld?

25 A. In my opinion, in my professional opinion, I'm a

1 certified weld inspector. I've been a certified weld
2 inspector for about 12 years. I've been around welding for
3 35 years.

4 Q. But you've never done any welding; isn't that true?

5 A. I have welded.

6 Q. You've welded, sir?

7 A. Yeah, not -- not for pay, but I -- I taught myself how
8 to weld just so I could understand it better.

9 Q. Well, sir, let me show you your testimony from your
10 previous deposition.

11 MR. CARPINELLO: March 19th, 2014, Page 45, Line
12 23, could I have that up, please?

13 Q. (By Mr. Carpinello) Question -- you remember you were
14 asked: When did you start doing fabrication or welding at
15 SYRO?

16 Now, SYRO was the predecessor -- manufacturer of the
17 ET-2000, correct?

18 A. That's correct.

19 Q. And you say: I was -- I never did fabrication or
20 welding, if that's what you're asking, Jeff.

21 A. Yes.

22 Q. Question --

23 A. And I --

24 THE COURT: Gentlemen, one at a time --

25 THE WITNESS: Okay.

1 THE COURT: -- all right? One at a time. Ask
2 your question, Mr. Carpinello.

3 MR. CARPINELLO: Thank you.

4 Q. (By Mr. Carpinello) And you say: I was never -- I never
5 did fabrication or welding, if that's what you're asking,
6 Jeff.

7 QUESTION: Right?

8 ANSWER: I never did it. I was around it and studied
9 it, that sort of thing.

10 QUESTION: You studied for -- for rates?

11 For rates.

12 Did you study fabrication with respect to anything to
13 do with engineering of a product?

14 ANSWER: No.

15 So you are not a welder, correct, sir?

16 A. That's correct.

17 Q. Okay. And, again, you didn't consult any welding
18 experts did you, sir, when you decided to use this weld?

19 A. No, other than myself, and I call myself a welding
20 expert.

21 Q. Well, when you were asked previously, sir, on -- in July
22 of 2014, Page 38, Line 2 --

23 MR. CARPINELLO: Can I go to the line above that,
24 please? I'm sorry. Page 31, Line 14. 31, Line 14.

25 Q. (By Mr. Carpinello) Do you know, sir, whether any

1 welding experts were consulted on the strength of the weld?

2 And your answer was: I don't know.

3 So to your knowledge, you did not consult any welding
4 expert, correct?

5 A. Besides myself, no, I did not.

6 Q. Okay. Well, you didn't say that when you were in the
7 deposition, correct?

8 A. I -- I agree.

9 Q. Okay.

10 MR. CARPINELLO: Now, could we go to Page 38, Line
11 2?

12 Okay. Could I have that highlighted, please?

13 Q. (By Mr. Carpinello) And do I understand -- I recall your
14 testimony that no -- neither you nor anybody, to your
15 knowledge, consulting -- consulted a welding expert as to --
16 as to the relative appropriateness or strength of those two
17 welds.

18 And your answer was: That's correct.

19 That was your testimony, was it not, sir?

20 A. It is.

21 Q. And you didn't consult any welding expert as to the
22 strength of the weld?

23 A. No, I did not.

24 Q. You did not, because that's what you testified to last
25 time. When you were asked whether any welding experts were

1 consulted on the strength of the weld, you said I don't
2 know. That was your testimony, was it not, sir?

3 A. Yes, sir.

4 Q. Okay. Now, what happened to the prototype that you
5 delivered to test -- for testing to TTI?

6 A. I don't know.

7 Q. Do you know if any measures were taken to preserve the
8 prototype, after it was supposedly tested?

9 A. I'm not aware.

10 Q. Okay. Do you know whether TTI -- anybody at TTI took
11 any measurements whatsoever of this prototype that was
12 tested in 2005?

13 A. I'm not aware of it.

14 Q. Okay. And you didn't make a duplicate of the prototype.
15 When you made the prototype, you didn't say to your people,
16 you know, we really should preserve, because this one is
17 going to get hit. We should preserve exactly what we're
18 doing here so we have a record, did you?

19 A. No. I only made one.

20 Q. And Mr. Brown didn't ask you to make a duplicate, did
21 he?

22 A. No, he did not.

23 Q. Okay. Do you know if anybody at TTI asked anyone at
24 Trinity to preserve the prototype after it was hit?

25 A. I don't know.

1 Q. To your knowledge, no one did, correct?

2 A. I'm not aware of it.

3 Q. Okay. Now, eventually, this change from 5 inches to 4
4 inches was incorporated in the fabrication drawings at
5 Trinity, correct?

6 A. Please repeat the question.

7 Q. Eventually, this change from the 5-inch to the 4-inch
8 was incorporated into fabrication drawings at Trinity,
9 correct?

10 A. That's correct.

11 Q. In fact, it was done almost immediately, wasn't it?

12 A. I don't know the dates. I'd have to look at the
13 drawings.

14 Q. Okay.

15 MR. CARPINELLO: Could we have -- could we have
16 No. 1, please? Slide 1?

17 Q. (By Mr. Carpinello) Can you tell the jury what this is,
18 please?

19 A. It's a fabrication drawing.

20 Q. Okay. And you didn't make this drawing, correct?

21 A. No, sir.

22 Q. Who made this drawing?

23 A. Well, it looks like there were several draftsman that
24 had worked on it.

25 Q. Did they add -- did they make these drawings under your

1 direction?

2 A. No.

3 Q. Do you know under whose direction the drawings were
4 made?

5 A. No.

6 Q. Do you know who told them to make the changes in the
7 drawings?

8 A. No, I don't know.

9 Q. Do you know if any engineers were involved in making the
10 drawings?

11 A. Trinity engineers?

12 Q. Yes.

13 A. There was no Trinity engineers involved.

14 Q. Okay. Do you know if any TTI engineers were involved in
15 making the drawing?

16 A. I would think so.

17 Q. You would think so?

18 A. Yes, sir.

19 Q. But you testified previously that you had no idea
20 whether TTI was involved in these drawings. Didn't you
21 testify to that, sir?

22 A. If that's what I testified, yes.

23 Q. Okay. Maybe we should look at your testimony from March
24 19th, 2014, Page 96, Line 2.

25 QUESTION: Okay. But I think you had indicated these

1 drawings were made after the inventor approved the change.
2 Would these drawings have gone back to the inventor for
3 approval?

4 ANSWER: I don't know if they had or not.

5 As you sit here today, you don't know, sir, whether
6 anybody from Trinity reviewed or let alone approved those
7 drawings, correct? I'm sorry. From TTI. Let me rephrase
8 the question.

9 As you sit here today, you don't know if anybody from
10 TTI has reviewed and approved all those drawings of changes
11 to the ET-Plus, correct?

12 A. That's because I'm not in that communicate, no.

13 Q. Okay. And you have no idea, sir, whether the --

14 MR. CARPINELLO: If we could go back to Slide 1.

15 Q. (By Mr. Carpinello) you have no idea, sir, whether --
16 what the -- what these people did on this drawing matched to
17 what you did on the prototype; is that correct?

18 A. It was a pretty basic fit-up design. It was really only
19 one way to do it. So it -- in my opinion, it's exactly the
20 same as the prototype.

21 Q. I'm sorry?

22 A. In my opinion, it's exactly the same as the prototype.

23 Q. Did you take the drawings or the fabrication drawings
24 and compare them to the prototype to make sure the
25 dimensions were the same?

1 A. There's only one logical way --

2 MR. CARPINELLO: Your Honor, I ask that the
3 witness be directed to answer the question.

4 THE COURT: You need to answer the question, Mr.
5 Malizia.

6 And, Mr. Carpinello, if you would pause after he
7 answers before you jump in with the next question, we
8 wouldn't get the overlap we're getting.

9 MR. CARPINELLO: Yes, Your Honor.

10 THE COURT: But you need to answer the question.

11 THE WITNESS: Okay.

12 A. Would you please repeat it, then?

13 Q. (By Mr. Carpinello) You didn't compare this fabrication
14 drawing with the prototype that you created to see that the
15 dimensions were, in fact, the same, correct?

16 A. That's correct.

17 Q. Because for one reason, you didn't have the prototype,
18 correct?

19 A. I did not.

20 Q. And for another reason, you didn't have the picture,
21 correct?

22 A. No.

23 Q. And for another reason, you didn't have a drawing of the
24 prototype, correct?

25 A. There was no drawing.

1 Q. And for another reason, you didn't even take down the
2 dimensions of the prototype; isn't that correct?

3 A. That's correct.

4 Q. Okay. Now, in the lower right-hand corner we see a box
5 with a bunch of letters and numbering, correct? Bottom
6 left-hand corner?

7 A. Yes, sir.

8 Q. Explain to the jury what these various -- it starts at 1
9 at the bottom and goes up to 9 at the top. Just describe
10 generally to the jury what -- what's the significance of
11 that?

12 A. These are revisions to the drawing.

13 Q. Okay. And I see various dates there. Are -- those are
14 the dates of the revisions?

15 A. Yes, sir.

16 Q. Okay. And I see Revision 4. If you count up four
17 boxes, you see 4 and you see 5/31/05?

18 MR. CARPINELLO: Yes, thank you.

19 Q. (By Mr. Carpinello) You see 5/31/05. Channel was C5 at
20 6.7. Is that pounds per foot? Am I reading that correctly?

21 A. Yes, sir.

22 Q. So that records the change in the channel from 5-inch to
23 4-inch, correct?

24 A. Yes.

25 Q. Okay. But before that, there was a change made in 2004,

1 correct? And that's Revision No. 3. It says May 10, 2004,
2 changed fit and weld at Section A-A with enlarged view.

3 MR. CARPINELLO: And if I could ask Mr. Diaz to go
4 to -- to go to the next slide, No. 3?

5 I hope that went into the cup.

6 (Witness spills water.)

7 THE COURT: Let's take a minute.

8 THE WITNESS: Sorry about that.

9 THE COURT: Don't worry, Mr. Malizia. That
10 happens at least once every trial.

11 THE WITNESS: The lid was stuck.

12 THE COURT: All right. Are we back in shape to
13 proceed? Take a little longer.

14 THE WITNESS: Sorry about that.

15 THE COURT: Okay. Let's continue.

16 MR. MILLER: Does the witness need water, or does
17 he have water still?

18 THE COURT: There's water up here. I'm not sure
19 -- I'm not sure the form of the delivery system is good as
20 it could be.

21 MR. MILLER: We water here.

22 THE COURT: We're fine, Mr. Miller. Have a seat.
23 Let's continue.

24 Q. (By Mr. Carpinello) So you have on screen, Mr. Malizia,
25 what's been marked as ET-Plus Revision 3, and we have a

1 detail circled. And is that -- is that the detail that's
2 referenced in the -- in the box with regard to Revision 3?

3 A. Yes, sir.

4 Q. And that was a change in the width of the throat; is
5 that correct?

6 A. That's incorrect.

7 Q. Well, it was your prior testimony that it was a change
8 in the drawing to reflect what you were actually
9 manufacturing, correct?

10 A. That's right. But that's not the question you asked.

11 Q. Okay. All right.

12 MR. CARPINELLO: And could we go to Slide 6,
13 please?

14 Q. (By Mr. Carpinello) And this shows that there was a
15 change in -- on the drawings at least, of the dimensions of
16 the throat, correct?

17 A. The drawing was changed. The part was not.

18 Q. Okay. Again, it was a change in the dimensions of the
19 throat in the drawing, correct?

20 A. I don't understand that question.

21 Q. Okay. You see, sir, that before Revision 3, you see the
22 dimensions listed there, that it's 4 and a half inches on --
23 from -- from end-to-end on the outside measurement and 4
24 inches in the -- on the inside dimension and that it's
25 changed to 4 and 3/8ths on the right-hand side as a result

1 of Revision 3?

2 A. Your interpretation of that is incorrect.

3 Q. Sir, I'm just asking about the drawing.

4 A. And I'm telling you your interpretation of where that
5 line is, is incorrect.

6 Q. Okay.

7 A. And that's why I had it enlarged so we can better see
8 it.

9 Q. Okay.

10 A. The dimensions on the left-hand side are exactly the
11 same as the right, and it's just blown up so you can better
12 view -- the four and a half inch is referencing the top
13 pleat.

14 Q. So why was it -- why was there a change listed on the
15 weldment drawings that there was, in fact, a change?

16 MR. CARPINELLO: Could I have Slide 4, please?

17 Q. (By Mr. Carpinello) You see, sir, where it says
18 Revision 3, BT, SH, May 10, 2004, changed fit and weld at
19 Section A-A with enlarged view. Do you see that, sir?

20 A. Yes, sir.

21 Q. If there were no change in dimensions, would there be a
22 listing that there was a change in dimensions, sir?

23 A. There was a change in the way it was drawn, not in the
24 change in the way it was built.

25 Q. So I repeat my question. You changed the drawing, sir,

1 correct?

2 A. The drawing was changed.

3 Q. Yes, okay.

4 MR. CARPINELLO: Could I have Exhibit 7, please?

5 Q. (By Mr. Carpinello) This is an email from you to Bob
6 Takach dated March 2nd, 2004, correct?

7 A. Yes, sir.

8 Q. And you say, Bob, we need to change one of the
9 dimensions on the 995 drawing. That's what you said,
10 correct?

11 A. Yes, sir.

12 Q. We need to change one of the dimensions on the 995
13 drawing, correct?

14 A. Yes, sir.

15 Q. And 995 refers to what product, sir?

16 A. The ET-Plus --

17 Q. Okay. It is incorrect --

18 A. -- Plus.

19 Q. It is incorrect. The Section A-A view, center left of
20 the drawing, shows the chute opening at four and a half.
21 Actually it's four and seven-eighths. This needs to be
22 changed. This will obviously change the overhang
23 dimensions, also. Is that correct, sir?

24 A. Yes, sir.

25 Q. Okay. Let's show the jury what we're talking about.

1 MR. CARPINELLO: If I may, sir, could you
2 please -- may I, Your Honor, ask him to stand up?

3 THE COURT: Yes, you may.

4 Q. (By Mr. Carpinello) We are talking about the width
5 here, are we not, sir?

6 A. Yes, sir.

7 Q. Okay. And you said we've got to change the dimension on
8 the drawing of this, correct?

9 A. Yes.

10 Q. Okay. And it's, in fact, wider on this model, correct?

11 A. That's incorrect.

12 Q. Well, okay. Are you aware, sir, that there are
13 ET-Pluses -- ET-Pluses and ET-2000s on the road with a width
14 of the throat at four inches?

15 A. I'm not aware of any.

16 Q. Okay. In any event, it's your position that there was
17 never any change in the width, but that the drawing did have
18 to be changed because the drawing, for how long, had been
19 incorrect? How long had you been using this drawing to
20 fabricate this product when you told Bob Takach that they
21 had to change the drawing because the drawing was wrong?

22 A. I don't know how long.

23 Q. And just to be clear, sir, the drawing is what the
24 fabricators use to make the product; isn't that correct?

25 A. That's correct.

1 Q. Okay.

2 THE COURT: Let's return to your seat, please, Mr.
3 Malizia.

4 Q. (By Mr. Carpinello) Now, there were other changes
5 reflected in these drawings, correct?

6 A. Changes to the drawing?

7 Q. Other changes to the product reflected in the drawing,
8 correct?

9 A. I'm familiar with the five to four change, yes.

10 Q. Okay.

11 MR. CARPINELLO: Could I have Slide 9, please?

12 Let's go to Slide 11. I think this is the -- we can get a
13 close-up of it.

14 Q. (By Mr. Carpinello) Now, this is -- this reflects
15 Change 4, which was made on May 31, 2005, correct, sir?

16 A. Yes, sir.

17 Q. And that was how many days after this test at TTI?

18 A. I don't know the date of the test, sir.

19 Q. Okay. You're aware that the test was actually done in
20 May of 2005?

21 A. I think so, yes.

22 Q. Okay. Now, one of the changes that was made was the
23 width of the channel was changed from five-inch to
24 four-inch, and we see that from the top versus the bottom
25 view, correct?

1 A. Yes, sir.

2 Q. Okay. And another change is that the -- the channel is
3 now inserted into the throat; isn't that correct?

4 A. That's correct.

5 Q. Okay.

6 MR. CARPINELLO: And if we could have Slide 12.

7 Q. (By Mr. Carpinello) Because you inserted it into the
8 throat, the distance between the top and the bottom through
9 which the -- the guardrail runs has decreased; isn't that
10 correct, sir?

11 A. Yes, sir.

12 Q. And that was decreased from one foot three and
13 three-eighths inches to one foot three inches, correct?

14 A. Where is that first dimension?

15 Q. Let me show you.

16 A. I'm taking your word for it, but I know it changed.

17 MR. CARPINELLO: Yeah, could I see Slide 13,
18 please?

19 Q. (By Mr. Carpinello) You see that it's originally 1-3
20 3/8, sir?

21 A. Yes, I see it.

22 MR. CARPINELLO: If we can go back to Slide 12?

23 Q. (By Mr. Carpinello) It's now 1-3, correct?

24 A. That's correct.

25 Q. And that dimension was changed further later on, wasn't

1 it, sir?

2 A. It was changed on the drawing.

3 Q. Okay. And is this another example of where the drawing
4 did not match what you were actually manufacturing?

5 A. That's correct.

6 Q. (By Mr. Carpinello) Okay.

7 MR. CARPINELLO: Could I have Slide 16, please?

8 Q. (By Mr. Carpinello) And it -- on the drawing, it's
9 now reduced even further, is it not, to 1-foot-2-7/8?

10 A. The dimensions on the drawing was changed, but not the
11 way that it was built.

12 Q. But in any event, you agree with me that the dimension
13 was changed, in fact, from 1 - 3-3/8 to 1 - 2-7/8, correct?

14 A. That is correct.

15 Q. Okay.

16 MR. CARPINELLO: Now, could I have -- could I have
17 Slide 17, please?

18 Q. (By Mr. Carpinello) So this shows the -- that change
19 from 1 - 3/38 to 1 - 2-7/8, correct, sir?

20 A. I agree.

21 Q. Okay. And, again, what we're talking about is this
22 channel through which the w-beam travels as it's extruded
23 through the head -- the head, correct?

24 A. That's correct.

25 Q. Okay. And that was reduced from here to here, correct?

1 A. Yes.

2 Q. Okay. Was that change disclosed to the FHWA?

3 A. I am not involved with disclosures to the FHWA.

4 Q. So you don't know?

5 A. I don't know.

6 Q. Okay. Now, another change that was shown on Revision 4
7 which was made on December -- May 31 was that the guide
8 channel was now inserted into the throat three quarters of
9 an inch, correct?

10 A. Yes.

11 Q. And that's shown on Slide 11. You see the red circles
12 there, sir? That shows that the channels are now inserted
13 into the throat, correct?

14 A. That's correct.

15 Q. And that changed the internal dimensions of the throat,
16 did it not?

17 A. Slightly, yes.

18 Q. Yeah. Well, you say slightly. Are you an expert on how
19 much -- on -- on what effect these changes have on the
20 performance of the product?

21 A. No. I'm just saying it was just changed by the
22 thickness of the web of that channel.

23 Q. Okay.

24 A. Which is about 3/16 of an inch.

25 Q. It was three quarters of an inch, wasn't it, sir? Isn't

1 that what the diagram show, three quarters of an inch, if
2 you look at the --

3 A. Yeah, 3/16 on each side, yes.

4 Q. Okay.

5 MR. CARPINELLO: Could I have Slide 21, please?

6 Q. (By Mr. Shaw) So is this not a correct representation,
7 sir, of what the product looked like before the change and
8 what it looked like after the change? These channels are
9 now inserted into the throat?

10 A. Yes.

11 Q. Okay. And was that change disclosed to the FHWA?

12 A. Again, I'm not involved with that.

13 Q. Okay. Now, when you inserted the channels into the
14 throat, that reduced the length of the head -- I'm sorry, of
15 the -- of the guide channel from the throat to the end of
16 the channel, correct? It's now reduced because you've now
17 stuck it into the throat, correct?

18 A. Not at that time.

19 Q. Well --

20 A. Initially, we added three quarters of an inch to it and
21 made it the exact same length.

22 Q. Right. You -- you -- you correctly recognized that when
23 you insert it in here, you're reducing the length so you
24 have to add three quarters of an inch to the end, right, and
25 that's what you did, right?

1 A. That's correct.

2 Q. But then you said to Mr. Brown, but we can save money if
3 we -- if we don't do that because if I have to add three
4 quarters of an inch, I have more waste than I had before, so
5 let's just, like, lop it off; isn't that correct?

6 A. That's incorrect.

7 Q. Okay. Let's go to the email, sir.

8 MR. CARPINELLO: And that is 152 -- Plaintiff's
9 152, please, Mr. Diaz. Can I go to the beginning of the
10 email, please?

11 Q. (By Mr. Carpinello) This is an email from you to Steve
12 Brown --

13 MR. CARPINELLO: If I could have that highlighting
14 back, please, Mr. Diaz.

15 Q. (By Mr. Carpinello) -- dated June 10th, 2005. Now,
16 this is, like, 10 days after you made the revision of the
17 drawing that we just talked about, May 31, right? The
18 revisions we talked about were May 31, right?

19 A. Yes.

20 Q. Now, this is June 10th. You say the drawings have been
21 revised for the 995 using four-inch channel. Because the
22 channel slides inside of the head, it has to -- it has to
23 be --

24 MR. CARPINELLO: Can I have that highlighted,
25 please?

1 Q. (By Mr. Carpinello) -- it has to be three quarters of
2 an inch longer than the five-inch channel. The five-inch
3 channel was cut to 3 - 1. This utilized all the 40-foot
4 stock without any drop. What is drop, sir?

5 A. Drop is the leftover part of the material after you cut
6 it from a long piece of stock.

7 Q. Waste, correct?

8 A. It's -- yeah.

9 Q. Okay. The four-inch channel will be 3 - 1 and three
10 quarters. We will have a 27-inch drop from a 40-foot stock.
11 The 995 drawings have always indicated a 3 foot channel, but
12 this starts at the swedge point, not the overall length.
13 Question is, can we shorten the overall chute by three
14 quarters of an inch or buy channel at 4 feet 11?

15 A. 40 foot 11.

16 Q. I'm sorry, 40 foot 11.

17 MR. CARPINELLO: Next email, please, in the chain.

18 THE COURT: All right. Just a second.

19 Mr. Carpinello, please slow down --

20 MR. CARPINELLO: I'm sorry.

21 THE COURT: -- when you're reading like that.

22 And, Mr. Malizia, I don't care if he reads it right or
23 wrong. It's not your job to correct him.

24 THE WITNESS: Yes, sir.

25 THE COURT: Okay. Let's continue.

1 MR. CARPINELLO: May I have the next email in the
2 change highlighted? Mr. Diaz, let's just go to the email
3 because I'm a little disoriented here where you're -- I need
4 to have the email with the to and from.

5 Q. (By Mr. Carpinello) Okay. So Steve Brown responds to
6 you at 5:12 p.m. and he says --

7 MR. CARPINELLO: May I have the email, please?

8 Q. (By Mr. Carpinello) I think we can shorten it, but
9 we'll need to get TTI to okay it. Why not draw it up with
10 the short legs, and don't show TTI anything else. If they
11 don't like it, they'll tell us.

12 Do you know why Mr. Brown told you not to show anything
13 else to TTI?

14 A. I have no idea why he said that.

15 Q. Okay. Did -- did Mr. Brown get approval from TTI to
16 shorten it three quarters of an inch so you'd have less
17 waste?

18 A. He did.

19 Q. Okay. And, in fact, that's what you did, correct?

20 A. That is correct.

21 Q. Okay. So the length wound up shorter than it was before
22 you made your change, correct?

23 A. The length of the channel actually is the same now as it
24 always has been.

25 Q. But the length of the channel from the throat to the end

1 is now shorter; isn't that correct?

2 A. But the overall length of the channel, though, is the
3 same.

4 Q. Sir, please answer my question. The length of the
5 channel from the end of the throat to the end of this is
6 shorter on this than this. If you would go outside and look
7 at it on the -- on an installation, it's three quarters inch
8 shorter because you took the same length and inserted it
9 three quarters of an inch, so the distance from this point
10 to the end is shorter, correct?

11 A. That's correct.

12 Q. Thank you. And you knew enough when you built it the
13 first time, when you first made the change, to add three
14 quarters of an inch to compensate, but then you asked
15 Mr. Brown, we can save money, less waste if we just lop off
16 the three quarters of an inch, and that's what you did,
17 didn't you, sir?

18 A. I didn't say lop off.

19 Q. Oh, I'm sorry. You cut off three quarters of an inch?

20 A. We asked to remove three quarters of an inch from the
21 length, yes.

22 Q. And what's what happened?

23 A. They approved it.

24 Q. That's what happened?

25 A. Yes.

1 Q. And that was put on the highway?

2 A. Yes.

3 Q. Was the FHWA told about that?

4 A. Again, I'm not involved with FHWA submittals.

5 Q. Okay. Now, sir, let me show you a picture of the
6 ET-Plus tested in 1999. Are you aware that 1999 was when
7 the -- the testing was done to approve the ET-Plus?

8 A. I'm not real good with all those dates, but I -- I
9 believe you.

10 Q. Okay. Now, sir, I'd like to show you a picture from
11 Trinity's own archives of the test of your prototype in
12 2005.

13 MR. CARPINELLO: May I have that picture? Can I
14 get that side-by-side, Mr. Diaz? Can I get that
15 side-by-side, 26 and 27?

16 Let's look at 26 again.

17 Q. (By Mr. Carpinello) I want to focus, Mr. Malizia, on
18 the plate that's welded to the face of the ET-Plus.

19 MR. CARPINELLO: And I wonder if Mr. Diaz could
20 circle that, please.

21 Q. (By Mr. Carpinello) Maybe --

22 MR. CARPINELLO: We're getting there. I'm sorry,
23 Your Honor.

24 Q. (By Mr. Carpinello) Okay. Do you see that, Mr. Malizia?

25 A. Yes, sir.

1 Q. Okay. Now, I want to show that same thing on the -- on
2 the prototype that you created on -- that was tested in
3 2005. Do you see the difference, sir?

4 A. I don't see any difference.

5 Q. I'm sorry?

6 A. I don't see any difference.

7 Q. You don't see any difference between the one that was
8 shown, which appears to be welded at a different location
9 for the face?

10 A. Please go back to the other one.

11 Q. Do you see that, sir?

12 A. Yeah.

13 Q. Now, if we go back to the other one, do you see that the
14 location of the plate itself has been moved back?

15 A. I don't agree.

16 Q. Moved forward?

17 A. No.

18 Q. You don't see any difference?

19 A. No. They're the same.

20 Q. In -- I just want to be clear. In your opinion, that
21 plate from the 1999 and the 2005 test is exactly the same?

22 A. Exactly the same.

23 Q. Okay. Now, let me show you, sir --

24 MR. CARPINELLO: Can I have Slide 23, please?

25 The -- actually, let's go to -- let's go to Slide 24.

1 Q. (By Mr. Carpinello) Is this an accurate representation
2 of the changes that were made in the -- in the -- in the
3 drawings in 2005, sir, that the -- the -- first of all, the
4 -- the channel goes from 5-inch to 4-inch?

5 A. I agree with that part.

6 Q. And the distance -- the distance of the guide channel
7 from the end of the throat to the end of the guide channel
8 went from 3-1 to 3-3/4?

9 A. I'm not sure of that dimension, to be honest with you.

10 Q. Okay. But it is shorter, correct?

11 A. Yes.

12 Q. Okay. And another difference is that the channel is now
13 inserted 3/4 of an inch into the throat?

14 A. Yes.

15 Q. And at least on the drawing, the dimensions of the
16 throat have changed from 4 inches to 4-3/8 inches, correct?

17 A. That's incorrect.

18 Q. What's the changes on the throat?

19 A. There's nothing on the drawing that ever denotes
20 4 inches anywhere.

21 Q. Again, did you not send an email to Mr. Takach to say
22 that the drawings on the dimension of the throat were wrong
23 and needed to be changed?

24 A. I did not say that.

25 Q. You did not say that?

1 A. I said that the dimensions on that drawing were
2 incorrect.

3 Q. Right. And on the drawing needed to be changed?

4 A. That's correct.

5 Q. And on the drawing, the internal dimensions of that --
6 the -- of that gap opening in the throat went from 4 inches
7 to 4-3/8 inches, correct?

8 A. On the drawing, it was not -- was never designated
9 before. That 4 inches has been never been designated on any
10 drawing that I've ever seen.

11 Q. Well, the outside dimensions of that opening were
12 designated, and you told Mr. Takach that they had to change
13 because they were wrong, correct?

14 A. On the drawing, they were wrong.

15 Q. Okay. So on the drawing, the dimensions of the throat
16 were changed, correct?

17 A. Yes.

18 Q. Okay.

19 MR. CARPINELLO: And may I have the next slide,
20 please?

21 Q. (By Mr. Carpinello) And here's a side view, sir. And,
22 again, the length of the channel has changed. They've now
23 inserted 3/4 of an inch into the throat, and the vertical
24 distance has changed from 1 - 3-3/8 to 1 - 2-7/8, correct,
25 sir?

1 A. I agree.

2 Q. Okay. And you don't know, sir, whether any of those had
3 ever been disclosed to the FHWA; is that correct?

4 A. I wouldn't know.

5 MR. CARPINELLO: Your Honor, I'm going to -- may I
6 use the ELMO?

7 THE COURT: You may.

8 Q. (By Mr. Carpinello) I just want to --

9 MR. CARPINELLO: Thank you. I'm going to need
10 some assistance.

11 THE COURT: There are adjustments on that lens to
12 focus in or out.

13 Q. (By Mr. Carpinello) I just want to be clear,
14 Mr. Malizia. You're saying that the dimensions on those two
15 heads are exactly the same. That that plate is placed
16 exactly the same in both of them?

17 A. Yes, sir.

18 Q. Okay. You notice any change in the weld, sir?

19 A. The angle of the picture on the left versus the picture
20 on the right doesn't -- the picture on the right doesn't
21 allow you to see the weld that's on the head, the faceplate.
22 So you can't -- you can't decipher that there's a difference
23 from this picture, because the picture doesn't show you
24 where that weld's at. In my opinion, they're exactly the
25 same.

1 Q. Do you know -- sir, do you know if there was any change
2 in the exit gap between what was tested in 1999 and 2005?

3 A. No. It's the same.

4 Q. So it's your testimony it was the same?

5 A. Yes, it's always been the same.

6 Q. So if people were to come into the courtroom and testify
7 that they had measured a number of ET-Pluses or ET-2000s
8 with more than 1-inch exit gap, that would be a
9 manufacturing error?

10 A. Not necessarily.

11 Q. Okay.

12 A. Any ones that we've ever pulled have always been 1 inch
13 minimum.

14 Q. Okay. And, again, you're not aware of, sir, of any of
15 the changes made on the weldment drawing, all of those
16 revisions were ever disclosed to the FHWA; is that correct?

17 A. I'm not involved with that.

18 Q. Okay. Thank you.

19 MR. CARPINELLO: No further questions.

20 THE COURT: Okay. Cross-examination of the
21 witness by the Defendants.

22 You may proceed when you're ready, Mr. Shaw.

23 MR. SHAW: Thank you, Your Honor.

24 CROSS-EXAMINATION

25 BY MR. SHAW:

1 Q. Mr. Malizia, you and I have met, but I want to go back
2 through and -- introduce yourself and go into a little bit
3 of your background so the jury knows something more about
4 you.

5 Where were you born?

6 A. Youngstown, Ohio.

7 Q. Where do you currently live?

8 A. Nearby there, Poland, Ohio, like the country.

9 Q. How long have you lived in Poland, Ohio?

10 A. Pretty much all my life. I lived in Chicago for a few
11 years, but other than that pretty much, all my life.

12 Q. How long have you been in the steel business,
13 Mr. Malizia?

14 A. For a very long time. I'm a third-generation
15 steelworker from Youngstown, Ohio. Worked for Youngstown
16 Sheet & Tube. My grandfather worked for Youngstown Sheet &
17 Tube. My father worked for Youngstown Sheet & Tube.

18 Q. Did you have an opportunity to go to college?

19 A. Yes, sir.

20 Q. Where did you go?

21 A. Youngstown State University.

22 Q. Did you get a degree from Youngstown State University?

23 A. I did.

24 Q. What year did you graduate?

25 A. '78.

1 Q. How long did it take you to finish school, Mr. Malizia?

2 A. A pretty long time.

3 Q. What's a pretty long time?

4 A. About eight years.

5 Q. Why did it take eight years?

6 A. Because I was working in the mill and trying to raise a
7 family.

8 Q. What did you do down at the mill?

9 A. I was a bricklayer.

10 Q. When did you first begin working for Trinity Highway
11 Products?

12 A. Trinity bought SYRO Steel Company in 1992. I had
13 started with SYRO Steel in September of 1983, and that's
14 when I first started work with highway products.

15 Q. When you came on Trinity Highway Products, what was your
16 job?

17 A. I was a cost estimator and industrial engineer.

18 Q. What is a cost estimator?

19 A. I did estimates for sales to bid on jobs.

20 Q. Were you working out of the Girard, Ohio, location?

21 A. I was.

22 Q. What was the next position that you obtained with
23 Trinity Highway?

24 A. I became plant manager.

25 Q. And what were the duties and responsibilities of a

1 plant manager?

2 A. We were responsible for the manufacturing side and
3 galvanizing side of the facility that I was over.

4 Q. What type of products were being made when you were
5 plant manager at the Girard, Ohio, facility?

6 A. We made standard guardrail posts; we made bridge
7 railing; and eventually we started making some proprietary
8 products.

9 Q. And when we say proprietary products, what are you
10 referring to?

11 A. Like the ET and a few others, Cat SRT.

12 Q. In connection to the ET-Plus, what is Trinity Highway
13 Products' job? What do they do with it?

14 A. We manufacture it.

15 Q. Is there any design of the ET-Plus that is undertaken by
16 Trinity Highway Products?

17 A. No.

18 Q. Back in the 2004/2005 timeframe, Mr. Malizia, what was
19 your job?

20 A. I was still plant manager.

21 Q. And what are you as you sit here today?

22 A. I'm vice president of operations.

23 Q. And are there plants that are under your control?

24 A. Yes, sir.

25 Q. Or supervision?

1 A. Yes, sir.

2 Q. But back in the 2004/2005 timeframe, you were a plant
3 manager in Girard, Ohio?

4 A. That's correct.

5 Q. Let's turn our attention now, Mr. Malizia, to the -- to
6 the construction of the prototype. Were you asked to
7 construct a prototype?

8 A. I was.

9 Q. And what do you understand a prototype to be?

10 A. The prototype was to be the exact same head, and the
11 only difference was to use a 4-inch channel instead of a
12 5-inch channel.

13 MR. SHAW: Your Honor, if I may venture in front?

14 THE COURT: You may.

15 MR. SHAW: Thank you.

16 THE COURT: You may take the same leave
17 Mr. Carpinello did.

18 Q. (By Mr. Shaw) When we talk about the ET-Plus,
19 Mr. Malizia, when we talk about the portion of this end
20 terminal that is below this weld, the part that's going
21 downward (indicating), what is that referred to?

22 A. We call that the head or the working part of the unit.

23 Q. I remember when you were talking with Mr. Carpinello
24 that you described how the guardrail flattens and is
25 extruded out of the working end.

1 A. Yes, sir.

2 Q. From this point up to the top on either the 5-inch or
3 the 4-inch, is this referred to as the guide channel and
4 what some people have called the window or the chute?

5 A. We call it the guide channel. Yes.

6 Q. So this would be the guide channels, correct?

7 A. Yes, sir.

8 Q. And this would be the 5-inch guide channel?

9 A. That's correct.

10 Q. And this would be the 4-inch guide channel; is that
11 right?

12 A. Yes, sir.

13 Q. And just so that we're correct and I understand, on the
14 5-inch, the guide channel attaches to the head or the
15 working end, and there is a butt weld that goes around on
16 the top and sides.

17 Is that a fair statement?

18 A. That's correct.

19 Q. All right. Now, when you were asked to build the
20 prototype, what type of a head, as we say, the working end,
21 did you utilize?

22 A. We used the exact same one.

23 Q. Because there's only one?

24 A. That's correct.

25 Q. There's only one working end?

1 A. That is correct.

2 Q. You took the working end and did what with it to make
3 the prototype?

4 A. We attached the 4-inch channels to it.

5 Q. When we attached the 4-inch channel to the prototype,
6 why isn't a butt weld reutilized on the 4-inch channel like
7 it is on the 5-inch channel?

8 A. The -- the most logical way to do it would be to put
9 inside, like we did, and if you put a butt weld, it would
10 actually be smaller than the opening. So it was more
11 logical to put it on the inside.

12 Q. The 4-inch channel actually fits into three-quarters of
13 an inch into the working end?

14 A. That's correct.

15 Q. What type of weld is utilized here on the 4-inch?

16 A. It's a fillet weld.

17 Q. So in essence, as we look at these two heads, if we were
18 simply to take this 5-inch off of here and take and put this
19 4-inch over here, this could actually be a prototype, too?

20 A. Yes, it could.

21 Q. Or we could have simply used this as a prototype?

22 A. That's exactly right. Yes.

23 Q. Is it fair to say that the only difference is we've
24 taken a 5-inch channel and placed it onto the same type of
25 head and inserted it three-quarters of an inch and fillet

1 welded it across the top?

2 A. That's correct.

3 Q. Thank you, Mr. Malizia.

4 From a fabrication standpoint, Mr. Malizia, was there
5 anything difficult or extraordinary about placing a 4-inch
6 channel on the same type of working head -- working side of
7 the head of the ET-Plus, anything complicated about that?

8 A. No, not at all.

9 Q. Was the 4-inch channel that was being utilized for the
10 prototype, that was a stock size material?

11 A. Yes, sir. It's a standard hot roll shape just like the
12 5-inch channel.

13 Q. You visited with Mr. Carpinello about welding. I'd like
14 to turn my attention to that.

15 Are you familiar with butt welds and fillet welds?

16 A. Yes, sir.

17 Q. Tell the Ladies and Gentlemen of the Jury the basis of
18 your familiarity with that type of welding.

19 A. I've been around fabrication and welding pretty much my
20 entire career. I'm a certified weld supervisor. I've been
21 a certified weld supervisor for 12 years. The basic
22 difference between a butt weld, which is two pieces of plate
23 that are parallel with each other, and you run a -- a bead
24 across the top, you have minimal penetration.

25 If you have a fillet weld with two shoulders, you've

1 got two 90-degree -- you've got a 90-degree shoulder there,
2 and you can put a much stronger weld on there with better
3 penetration.

4 Q. When fabricating the prototype with the butt weld -- or
5 with the fillet weld -- I'm sorry -- at any time, any time
6 at all, Mr. Malizia, was the working end -- the head itself,
7 the working end, ever changed in any way?

8 A. No, sir.

9 Q. Are you aware of the working end of the ET-Plus to have
10 ever been changed in any way, even as we sit here today?

11 A. No, sir.

12 Q. You talked with Mr. Carpinello about inserting the guide
13 channel three-quarters of an inch into the working head, the
14 working end, and we talked about why that was. I want to
15 explain that so we understand.

16 Originally, how long was the guide channel?

17 A. 3-foot-1.

18 Q. When it was originally made as a prototype, what did you
19 do regarding the length of the guide channel?

20 A. We added three-quarters of an inch to it.

21 Q. Why did you do that?

22 A. So that the visible length remained the same.

23 Q. Now, if I look at this prototype or this head --

24 THE COURT: Speak up, please, Mr. Shaw.

25 MR. SHAW: Yes, Your Honor.

1 Q. (By Mr. Shaw) When I look at this prototype or this head
2 from here to here (indicating) on the original prototype
3 that was sent to TTI, it was how long? The visible length?

4 A. Let me look. It was 3-foot-1.

5 Q. Why did you add the three-quarters of an inch onto the
6 end of it to make it that length? Why did you do that?

7 A. Because we had inserted it three-quarters of an inch
8 into the head.

9 Q. To compensate for the three-quarters of an inch you were
10 inserting in?

11 A. That's correct.

12 Q. Later, was that three-quarters of an inch -- later,
13 Mr. Malizia, was that three-quarters of an inch, again,
14 taken back or taken away, or as was talked about, cut off so
15 that the length remained what it originally was but only
16 three-quarters of an inch of it now was inside of the head?

17 A. That is correct.

18 Q. Was that a decision that was hidden or secreted away
19 from anybody?

20 A. No, sir.

21 MR. SHAW: If we could look at Defendants'
22 Exhibit No. 22. If we could go to the beginning of the
23 chain, Mr. Hernandez.

24 Q. (By Mr. Shaw) This was the beginning of the email, Mr.
25 Malizia, that was shown to you by Mr. Carpinello. And you

1 see where it says from Wade Malizia to Steve Brown?

2 A. Yes, sir.

3 Q. And what is it that you are telling Mr. Brown here?

4 A. I'm asking him if we could go back to the 3-foot-1
5 versus the 3-foot-1 and three-quarters.

6 Q. And why are you asking him that?

7 A. Because standard stock that -- that material usually
8 comes in was fit better with a 3-foot-1 and it has less
9 drop.

10 Q. You're going to have to educate me somewhat on the steel
11 business. When you say standard stock, what are you -- what
12 are you referring to?

13 A. The majority of hot roll mills roll long stock to
14 40-foot. That's a standard length. So we're cutting the
15 smaller pieces out of that 40-foot, and to utilize the
16 entire stock, that 3-foot-1 worked better.

17 Q. If we go to the last question on this particular part of
18 the email where Mr. Malizia says question is -- so was that
19 really what you wanted to know, what I've highlighted here
20 on this Exhibit No. 22?

21 A. That -- that's correct. We're either going to have to
22 continue using a 40-foot, or I'm going to have to get an
23 off-standard length.

24 Q. To avoid that -- to avoid that problem?

25 A. That's correct.

1 MR. SHAW: Let's go up the email chain, please,
2 Mr. Hernandez. Continue up so I can see who the recipient
3 is.

4 Q. (By Mr. Shaw) And Steve Brown then writes back to you
5 and Mr. Malizia -- to you and Mr. Smith on June the 10th,
6 2005; is that right?

7 A. Yes.

8 Q. And what does he want to know? I think we can shorten
9 it, but we'll need to get TTI to okay it. Is that what he
10 says?

11 A. Yes, sir.

12 Q. Why not draw it up with short legs, and don't show TTI
13 anything else?

14 Did I read that correctly?

15 A. Yes, sir.

16 Q. Do you have any idea what that means?

17 A. No.

18 Q. What did you do once you got this instruction from
19 Mr. Brown?

20 A. Well, I drew it up for him.

21 MR. SHAW: Let's look -- follow on through the
22 email chain, please.

23 Q. (By Mr. Shaw) What is this that we're showing here?
24 This email is from you, Wade Malizia, to Jack Marley. Do
25 you see that?

1 A. Yes, sir.

2 Q. And what is it that you're telling Mr. Jack Marley?

3 A. To do exactly that, to draw that detail -- what we call
4 Detail 7, and show it as a 3-foot-1 and not the 3-foot-1 and
5 three-quarters.

6 Q. Now, Mr. Malizia, did anyone from Trinity ever tell you
7 not to draw it up and to hide it?

8 A. Absolutely not.

9 Q. Did anybody from -- anybody from Trinity Industries tell
10 you, yeah, go ahead and make those changes, but never, ever
11 change it; never, ever show it on a drawing; never, ever put
12 it in an email, anything like that?

13 A. No, sir.

14 Q. Did anybody ever tell you to try to conceal this in any
15 way that these changes were being made, this three-quarters
16 of an inch change were being made?

17 A. No, sir.

18 Q. Has anybody ever suggested like you do anything like
19 that concerning the ET-Plus?

20 A. No, sir.

21 Q. Let's go look through the email change.

22 MR. SHAW: Keep scrolling down for me, please.

23 Q. (By Mr. Shaw) The next email from you, Wade Malizia, to
24 Brian Smith and Steve Brown says -- do you see that email,
25 Mr. Malizia?

1 A. Yes.

2 Q. And what is it that you're telling Mr. Smith and Mr.
3 Brown here?

4 A. That was the email that accompanied the drawing.

5 Q. And do you say there at the end -- right before it says
6 thanks Wade, what does that say?

7 MR. SHAW: If you can highlight that for us,
8 Mr. --

9 A. Let me know if TTI approves it, and I will revise the
10 drawing.

11 Q. (By Mr. Shaw) Did anybody tell you to do it whether TTI
12 approves it or not?

13 A. No, sir.

14 MR. SHAW: Let's go to the next email chain.

15 Q. (By Mr. Shaw) Eventually, does this email -- this change
16 as reported to TTI and does TTI eventually approve it?

17 A. Yes.

18 MR. SHAW: Let's -- if you'll find that email for
19 us, please, Mr. Hernandez, in this chain. Let's go through
20 the one from Dean Alberson.

21 Q. (By Mr. Shaw) And have you seen this email in which Dean
22 Alberson says: I agree with Gene?

23 A. Yes, sir.

24 Q. And do you understand Gene Buth to be the engineer --
25 Dr. Buth at Texas A&M?

1 A. Yes, sir.

2 Q. And do you see the previous email right before that
3 where Gene Buth says the three-quarter-inch shorter chute is
4 okay with me?

5 A. Yes, sir.

6 MR. SHAW: And if we go past -- the email past
7 Dean Alberson, please.

8 Q. (By Mr. Shaw) And Roger Bligh, do you know Dr. Bligh?

9 A. I do.

10 Q. And have you seen this email in which Dr. Bligh says: I
11 don't see any problem with the chute that is 3 inches
12 shorter (sic). I am copying Dr. Ross to get his input as
13 well?

14 A. Yes, sir.

15 Q. And then the last email from Dr. Ross, and what does he
16 say?

17 A. Okay by me.

18 Q. Based upon this approval, would you say -- based upon
19 these emails and your understanding, would you say that this
20 change was disclosed to TTI and approved by TTI?

21 A. Yes.

22 Q. Does Trinity have the ability to approve any changes to
23 the ET-Plus unilaterally without any input from Trinity --
24 from TTI?

25 A. No.

1 Q. Let's turn our attention now to Revision No. 3 that you
2 talked to Mr. Carpinello about, and that would be Exhibit
3 D-48.

4 THE COURT: Counsel, approach the bench, please.
5 (Bench conference.)

6 THE COURT: Mr. Shaw, I'm doing this at the bench
7 so this is not before the jury. But you are going to have
8 to stop saying I want to focus on and I'm going to turn my
9 attention to. You are making statements. You need to ask
10 questions.

11 You know, you're not -- you're not supposed to
12 tell the jury what's going to come up next. You're to ask a
13 question, and the jury will determine it.

14 MR. SHAW: Yes, Your Honor.

15 THE COURT: But this -- this attempt at sidebar
16 comments is just not acceptable.

17 MR. SHAW: Your Honor, my sincere apologies. It's
18 not intended.

19 THE COURT: I know it is. That's why we're here
20 at the bench. I'm directing you to do your best to stop it.

21 MR. SHAW: I certainly will. It is mainly
22 highlighting of areas to come. If the Court finds that
23 inappropriate, we certainly will not do it.

24 THE COURT: I don't think you tell the jury what
25 you're about to show them. You show it to them and they

1 determine whether they accept it or not. And that goes for
2 both sides of the case.

3 MR. SHAW: Your Honor, we'll certainly follow the
4 Court's instructions.

5 THE COURT: All right. It's 11:30. How much more
6 do we have with this witness, gentlemen, while I have all
7 sides up here?

8 MR. SHAW: I would guess I probably have about
9 15 -- maybe 10 minutes, 10 to 15 minutes, Judge, but please
10 don't hold me to it.

11 THE COURT: I'm just asking for an estimate.
12 What's your best estimate on redirect?

13 MR. CARPINELLO: Five minutes.

14 THE COURT: Okay. Let's continue.

15 (Bench conference concluded.)

16 THE COURT: All right. Let's continue.

17 MR. SHAW: Mr. Hernandez, if you'd pull up D-48.
18 Thank you.

19 Q. (By Mr. Shaw) What is Revision No. 3?

20 MR. SHAW: If you could highlight No. 3 in the
21 box, Mr. Hernandez.

22 A. That's a change to the detail on the drawing for Section
23 A-A with enlarged view.

24 Q. (By Mr. Shaw) Why was that revision included on this
25 particular fabrication drawing?

1 A. The original detail of Section A-A was very small and
2 hard for the welders to see out in the plant, and so I had
3 requested Bob Takach to enlarge that view so that there was
4 no question about where the dimensions were and what the
5 dimensions were.

6 Q. Is this Revision 3 a change to the way in which the
7 product is being built?

8 A. No.

9 Q. What does it mean to this phrase, change the drawing
10 to reflect the as-built condition? What does that mean,
11 Mr. Malizia?

12 A. The as-built condition is what -- how the product is
13 being built, and you want the drawing to reflect that as
14 closely as possible, and so I just wanted some clarification
15 on that, but there was no change to the product, just wanted
16 clarification on the drawing so as subsequent welders would
17 work on this, they knew exactly how to build it.

18 Q. Are these diagrams that the jury -- are these drawings
19 that the jury is going to have an opportunity to look at,
20 are these design drawings?

21 A. They're fabrication drawings.

22 Q. Would this situation on Revision 3 be the same as when
23 you talked to Mr. Carpinello about the inside vertical
24 clearance revision on the drawing?

25 A. Which one are we referring to?

1 Q. No. 9. If we can look at No. 9 there, Mr. Malizia, is
2 that a change to the product or a change to the drawing?

3 A. It's a change to the drawing, not the product.

4 Q. Has the product, the ET-Plus, ever been changed other
5 than the five to four-inch change, the insertion into the
6 throat, and the visible length being shortened by three
7 quarters of an inch?

8 A. No, other than the attachment plates kind of bounced
9 around a little bit, but I wasn't involved with any of those
10 changes.

11 Q. Do the attachment plates have anything to do with the
12 extruding of the guardrail?

13 A. No.

14 Q. From a fabrication standpoint and your involvement, were
15 any of these changes that were made to the ET-Plus
16 substantial?

17 A. No.

18 Q. Were any of them significant?

19 A. No, sir.

20 Q. You looked at two side-by-side photos on the ELMO a few
21 moments ago from the 1999 crash test and the 2005 crash test
22 concerning an outside bracket. Do you remember that?

23 A. Yes, sir.

24 Q. Why is it that you are so certain that both of those
25 heads are the same heads?

1 A. Because we've never made any changes to that plate.
2 It's always been welded the same.

3 Q. Did you -- what were -- was it that you were trying to
4 say about the angle of the photograph?

5 A. The 2005 photograph, the angle didn't allow you to see
6 where the weld attached to the faceplate. The -- the
7 faceplate actually covered that up.

8 Q. When you made the estimate as to how much cost was going
9 to go into -- what cost savings was going to go into the
10 change and you arrived at \$2 per head; is that right?

11 A. Yes, sir.

12 Q. How did you go through that analysis?

13 A. It was only the difference between the weight of a
14 five-inch channel versus a four-inch channel.

15 Q. Did you ever consider labor cost or anything like that?

16 A. No, which would have been part of the total cost, but
17 that's not what Mr. Brown asked me. He only asked me to
18 calculate the difference in the weight.

19 Q. Thank you, Mr. Malizia.

20 MR. SHAW: I pass the witness.

21 THE COURT: Redirect?

22 MR. CARPINELLO: Yes, Your Honor.

23 REDIRECT EXAMINATION

24 BY MR. CARPINELLO:

25 Q. Mr. Malizia, are you testifying that there was not a

1 change in the vertical height of the guide channel?

2 A. What I'm testifying to is that the channel was 3 foot 1
3 and is always 3 foot 1, still is today.

4 Q. No, I'm sorry, sir. I'm talking about the vertical
5 height of the guide channel.

6 MR. CARPINELLO: Could I have 25, please?

7 Q. (By Mr. Carpinello) Did you not testify, sir, when I
8 asked you before whether the height -- the vertical height
9 of the guide channel changed from 1 foot 2 and 7/8 to 1 --
10 I'm sorry, from 1 foot 3 and 3/8 to 1 foot 2 and 7/8?

11 A. Yes, I agree with that.

12 Q. Okay. So when Mr. Shaw just asked you whether there
13 were any changes other than the length of the -- of the
14 channel and whether it was inserted, that was incorrect,
15 wasn't it, because this changed, didn't it?

16 A. The question he asked me was the four-inch channel --
17 all of the changes that went into the fabrication were
18 related to that change.

19 THE COURT: Mr. Malizia, you need to answer the
20 question. The question is, did that change, as well?

21 A. Yes, I agreed to that.

22 THE COURT: Okay.

23 Q. (By Mr. Carpinello) And you said -- you were asked
24 whether the changes were significant or substantial, and you
25 said they were not, correct?

1 A. That's correct.

2 Q. Now, you're not telling this jury that you can tell them
3 -- you're an expert to tell them that these dimensional
4 changes had no impact on how this performs on the highway,
5 are you?

6 A. No, I'm just saying they're insignificant.

7 Q. From -- from your perspective in terms of a fabricator,
8 correct?

9 A. That's correct.

10 Q. Right. Your -- from your perspective, you don't care
11 whether it's 1 and 2 and 7/8 or 1 and 3 and 3/8, do you?

12 A. Please repeat the question.

13 Q. As a fabricator, you don't care whether it's 1 foot 2
14 and 2 -- 1 foot 2 inch and 7/8 or 1 foot 3 and 3/8, you
15 don't care. You could make it either way, couldn't you?

16 A. I'd build it to the drawing.

17 Q. Excuse me?

18 A. I'd build it to the drawing.

19 Q. Right. On some -- so I'm -- so what were you -- when
20 you were saying it wasn't significant or substantial, you
21 were not telling the jury that these changes were
22 insignificant from a safety perspective, were you?

23 A. No, as a fabricator.

24 Q. Because you have no idea; isn't that correct?

25 A. I'm not involved with crash testing.

1 Q. Now, Mr. Shaw showed you an email chain where TTI agreed
2 that they could shorten that channel by three quarters of an
3 inch, didn't they?

4 A. They did agree to that.

5 Q. Where is the email to TTI that says we're going to
6 reduce the vertical height of this channel from 1 - 2 and
7 7/8 to 1 - 3 and 3/8?

8 A. I'm not involved -- I was not involved with that.

9 Q. Oh. Do you know of one?

10 A. I don't.

11 Q. Okay.

12 THE COURT: Let's slow down, Mr. Carpinello.

13 MR. CARPINELLO: Sorry, Your Honor.

14 Q. (By Mr. Carpinello) Now, Mr. Shaw asked you about the
15 weld. Again, you have no idea whether a fillet weld would
16 withstand a crash better than a butt weld, correct?

17 A. That's correct.

18 Q. So when you say that change is insubstantial, you have
19 no idea whether it's substantial from a safety perspective,
20 do you?

21 A. No, only from a structural integrity perspective.

22 Q. You could build it either way?

23 A. That's right.

24 Q. And you don't know what -- you have no knowledge as to
25 whether a butt weld would withstand a crash better than a

1 fillet weld, do you?

2 A. No, I just know it's a stronger weld.

3 Q. Okay. Did you call anybody at TTI and say, we'd like
4 your opinion as to whether this change would affect the
5 performance of this product on the road?

6 A. No.

7 Q. Okay. And now, Mr. Shaw said to you that Trinity
8 doesn't design products -- doesn't design this product,
9 right? And you said, correct, they don't design it?

10 A. That's correct.

11 Q. But you created the prototype, didn't you?

12 A. I created a prototype based on what they recommended we
13 do.

14 Q. What they recommended was Mr. Brown sending you an email
15 saying build it with four inches, right?

16 A. That's correct.

17 Q. And that's what you did?

18 A. And then I sent it to them to look at.

19 Q. What did you send to them?

20 A. I sent them the prototype.

21 Q. Okay. And do we have any record of them responding or
22 reviewing or photographing or -- or make any record of the
23 prototype?

24 A. Not to me.

25 Q. To anybody?

1 A. They could have gone to somebody, but not to me.

2 Q. Okay. Now, Mr. Shaw asked you whether -- when you built
3 the prototype, whether you added three quarters of an inch
4 to the length of that channel, correct?

5 A. For a prototype, sir? Is that the question? Please
6 repeat the question.

7 Q. I'll rephrase the question.

8 Mr. Shaw asked you whether you -- when you created the
9 prototype, he asked you whether you added three quarters of
10 an inch because you were insetting the channel three
11 quarters of an inch into the throat, correct?

12 A. That's correct.

13 Q. And you said to compensate for the fact that I was
14 inserting it three quarters of an inch, correct?

15 A. That's correct.

16 Q. Okay. But then when you found out it would cost more
17 money, you changed your mind and asked Mr. Brown to cut the
18 three quarters of an inch at the end, correct?

19 A. We requested that, yes.

20 Q. Right. Because you said -- you said that the -- you
21 have to get a -- a part that was off standard list, right?

22 A. Yes, sir.

23 Q. What does that mean, off standard list?

24 A. Standard hot mill roll lens is 40 foot.

25 Q. All right. So that means it costs more money to Trinity

1 to put the product back the way it was before, correct?

2 A. Not necessarily. It's just easier to order a 40 footer.

3 Q. You're telling me it's not cheaper?

4 A. It may or may not be.

5 Q. Wasn't that what you told Mr. Brown in your email

6 that you had more waste and you'd have to go out and

7 get -- if it was the same price, why are you asking him

8 to lop off three quarters of an inch?

9 THE COURT: I'm going to ask you to slow down
10 again, Mr. Carpinello. It's important the jury understand
11 your question and the court reporter get it down. Take as
12 long as you want, but slow down.

13 Q. (By Mr. Carpinello) Why were you asking Mr. Brown to
14 cut off three quarters of an inch?

15 A. That way we wouldn't have a drop, a 27-inch drop I think
16 is what I said.

17 Q. Right. Which was waste, correct?

18 A. Or it could be used for another product, but in this
19 case, it might have been waste.

20 Q. Now, you testified to the strength of this weld. And
21 I'm going to read you, sir, your testimony from March 19th,
22 2014.

23 QUESTION: Line 25, Page 63.

24 QUESTION: Also, you were talking in terms of your
25 expertise in terms of welding. How do you test the strength

1 of a weld?

2 ANSWER: The American Welders Society has several
3 specifications to determine the integrity of a weld.

4 There's many. I don't know all of them.

5 But if you were going to test a weld on the ET-Plus
6 where the channel connects to the head, how would you test
7 the strength of that weld?

8 ANSWER: I don't know.

9 Line 24, Page 64: So you're not aware of anybody at
10 all -- so you're not aware of anybody at all within Trinity
11 that has the ability to test the welds -- the strength of
12 the welds on an ET terminal?

13 ANSWER: I'm not aware of anyone.

14 Did you give that testimony, sir?

15 A. Yes, sir.

16 Q. Okay. Sir, you said that there was no change in the
17 working portion of the head. I think Mr. Shaw used that
18 word in his question, the working portion.

19 A. Yes.

20 Q. Do you recall that testimony?

21 A. Yes, sir.

22 Q. You're not suggesting, are you, sir, that changes in the
23 width, the length, the distance, and the placement of these
24 are irrelevant to the safety of this product?

25 A. That's not for me to determine.

1 Q. Okay. But you did testify that there's been no change,
2 as long as you've been at Trinity, in this portion, correct?

3 A. That's correct.

4 Q. Okay. Do you know what this is, sir? Do you know what
5 this is?

6 A. It looks like a bolt.

7 Q. Splice bolt. Do you know if this is a splice bolt?

8 A. Yes, sir.

9 Q. And this connects the rails, correct? The -- the -- the
10 w-beam, the guardrail, right? And there's a whole bunch of
11 these. Every time you have to connect a guardrail when you
12 go down that line, there's whole bunch of these bolts,
13 correct?

14 A. That's right.

15 Q. And when this extrudes, those bolts have to go through
16 the bottom -- they have to go through this extruder throat,
17 right?

18 A. That's correct.

19 Q. Okay. And it goes right through, doesn't it? Did you
20 want -- you want me to --

21 A. No, I've seen it. I -- I understand.

22 Q. Does it go through that one?

23 A. It didn't look like it did.

24 Q. Okay.

25 MR. CARPINELLO: No further questions.

1 THE COURT: Additional cross, Mr. Shaw?

2 RECROSS-EXAMINATION

3 BY MR. SHAW:

4 Q. Mr. Malizia, when an ET-Plus leaves your facility after
5 it is manufactured in the Girard, Ohio, facility, do you
6 know of any way where an exit gap could get smaller?

7 A. No, absolutely not.

8 Q. That's all I have.

9 MR. SHAW: Thank you.

10 THE COURT: Additional direct?

11 MR. CARPINELLO: No further questions, Your Honor.

12 THE COURT: All right. You may step down, Mr.
13 Malizia.

14 MR. SHAW: May Mr. Malizia be excused, Your Honor?

15 THE COURT: Is there objection?

16 MR. CARPINELLO: No objection, Your Honor.

17 THE COURT: You're excused, Mr. Malizia. You're
18 free to leave. You're also free to stay. It's up to you.

19 All right. Ladies and gentlemen, it's about 13
20 minutes until noon. We're going to use this opportunity to
21 break for lunch. I'm going to ask you to leave your juror
22 notebooks on the table in the jury room. I'm afraid you're
23 on your own for lunch today.

24 Let's have you back in the jury room ready to go
25 so that we can start at 1:00 o'clock. Don't discuss the

1 case among yourselves or with anyone else. And with those
2 instructions, you're excused for lunch at this time.

3 COURT SECURITY OFFICER: All rise.

4 (Jury out.)

5 THE COURT: All right. Counsel, we stand in
6 recess for lunch.

7 (Recess.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true
and correct transcript from the stenographic notes of the
proceedings in the above-entitled matter to the best of my
ability.

/s/ Shelly Holmes
SHELLY HOLMES, CSR, TCRR
Official Court Reporter
State of Texas No.: 7804
Expiration Date 12/31/14

10/14/14
Date

/s/ Susan Simmons
SUSAN SIMMONS, CSR
Deputy Court Reporter
State of Texas No.: 267
Expiration Date 12/31/14

10/14/14
Date

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

UNITED STATES OF AMERICA * Civil Docket No.
EX REL JOSHUA HARMAN *
VS. * 2:12-CV-89
* Marshall, Texas
*
* October 14, 2014
*
TRINITY INDUSTRIES, INC. & *
TRINITY HIGHWAY *
PRODUCTS, LLC * 1:00 P.M.

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE RODNEY GILSTRAP
UNITED STATES DISTRICT JUDGE

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14 P R O C E E D I N G S

15
16 (Jury out.)

17 COURT SECURITY OFFICER: All rise.

18 THE COURT: Be seated, please.

19 Counsel, do we have some issue I need to take up
20 before I bring the jury back?

21 MR. MANN: Your Honor, if I could just address it.
22 And the issue is on demonstratives. I understand the
23 Court's prior rulings that if we're going to use impeachment
24 evidence, we don't have to just exchange that. And I
25 understand that.

1 But the issue on exchanging demonstratives, I was
2 under the impression that we were under a duty to disclose
3 to the Court the day before or the morning of the
4 hearings -- or the trial what demonstratives we have where
5 we know there's an objection where the Court can rule on
6 those objections. And we're not doing that in front of the
7 jury and wasting the Court's time and the jury's time.

8 THE COURT: Well, demonstratives on direct, yes,
9 but demonstratives on cross, generally, no.

10 MR. MANN: Okay. Well, that's what I wanted --

11 THE COURT: Have the parties been acting
12 otherwise? Have you been disclosing demonstratives for
13 cross that they haven't and vice versa?

14 MR. MANN: We would have, but we haven't gotten to
15 that point, but now that we have that directive, we'll
16 follow the same directive.

17 THE COURT: It's the same rule for both sides.

18 MR. MANN: Okay. That's fine.

19 THE COURT: All right. Let's bring in the jury.

20 MR. CARPINELLO: Your Honor, we have two other
21 issues that we need to raise quickly.

22 THE COURT: All right, Mr. Carpinello.

23 MR. CARPINELLO: Actually, I -- I -- I think it's
24 actually three minor issues.

25 The first is, Your Honor, that we received

1 designations from the other side for Mr. Alberson and
2 Mr. Ross. We object to those coming in by -- by deposition.
3 The witnesses are available to the Defendants. They're not
4 adverse witnesses.

5 And my understanding of the rules of evidence is
6 that you can't use your own witnesses by deposition. You
7 can use an adverse party at deposition for any purpose.

8 THE COURT: When would these be expected to be
9 presented? Today?

10 MR. CARPINELLO: In their case, but we have to
11 give the desig -- they say they're going to bring them
12 tomorrow -- use them tomorrow, if we get to their case, and
13 so we'd have to get designations, and I don't --

14 THE COURT: That's prompted your objection?

15 MR. CARPINELLO: That prompted -- I started -- I
16 was given -- at lunch, I was given their designations and I
17 think that they should be required to come in live.

18 THE COURT: What's the Defendants' response? Why
19 -- why is an available witness who can testify live being
20 presented by or proposed to be presented by deposition?

21 MR. SHAW: Judge, as I remember, this was -- this
22 issue was raised at the last trial, and this is exactly, as
23 I remember -- and perhaps I'm misspeaking; I certainly don't
24 want to -- but Dr. Alberson testified by deposition last
25 time at the last trial. I know that happened. He lives in

1 the same place that he lived then as now.

2 Dr. Hayes Ross, as I remember it, did not testify
3 at the last trial, but we do know that he's -- I think he's
4 sickly. He's fairly elderly, Your Honor, and sickly, and I
5 think suffering from cancer as I -- I understand. I think
6 we just probably assumed the Court's rulings concerning
7 Alberson were going to be the same as they were before.

8 THE COURT: You know, Mr. Shaw, you're the one
9 that made a huge issue about being able to force the
10 personal attendance of Chris Harman when he had a deposition
11 that had been taken. And are you telling me now that you
12 want to use depositions for live witnesses who can be
13 produced? Is that not a little bit hot on one side and cold
14 on the other?

15 MR. SHAW: Your Honor, I just think that we were
16 going to do it the most efficient way that --

17 THE COURT: Well, let's say this. If -- if a
18 deposition is permissible -- I'm going to say it
19 conditionally -- my directive was that designations and
20 counter-designations be disclosed and exchanged on Monday
21 for a Wednesday witness, so Tuesday, the Court could be made
22 aware of where the disputes were and deal with them
23 beforehand.

24 So if this is a proposed deposition witness for
25 tomorrow and you're just exchanging designations today,

1 you're late.

2 MR. SHAW: I think our designation -- designations
3 were timely. I think that Mr. Carpinello is simply bringing
4 up not about the designations themselves. He's bringing up
5 about the fact that the witness, he doesn't think, should
6 testify by deposition, but rather should be made to come
7 live.

8 My understanding is we submitted our designations
9 timely, Your Honor, per this Court's rules.

10 THE COURT: Well, he told me he got them at lunch
11 today.

12 MR. SHAW: If I can find out from the people who
13 were involved --

14 THE COURT: Well, let me just say this, Counsel:
15 I'll carry the issue of whether these witnesses may testify
16 by deposition or required to testify live. I'm not going to
17 keep the jury out any longer. We'll take this up either at
18 the end of the day today or at some other convenient time,
19 but we need to get the trial back on track.

20 MR. SHAW: Thank you, Your Honor.

21 MR. CARPINELLO: I apologize, Your Honor.

22 Number one, apparently I'm told we got it late
23 last night. But more importantly, Mr. Smith is going to be
24 the next witness, and this relates to Mr. Smith. We just
25 received from the state of Virginia a letter to Trinity

1 which was not copied from Trinity, but we got it from
2 Virginia that's taken the ET-Plus off the approved list in
3 the state of Virginia.

4 We'd like to put that on our exhibit list
5 obviously, Your Honor. We just got it literally moments
6 ago.

7 THE COURT: Does anything happen in advance in
8 this trial?

9 MR. CARPINELLO: If I could -- if I could have
10 asked the state of Virginia or any -- or Massachusetts or
11 anybody else to act -- or the FHWA --

12 THE COURT: FHWA is writing letters on Friday?
13 Mr. Shaw, what's your response?

14 MR. SHAW: I haven't seen the letter obviously,
15 Judge. If I could at least have an opportunity to look at
16 it, review it. We haven't seen it. This is the first I've
17 heard about it -- the first --

18 THE COURT: When did you get it, Mr. Carpinello?

19 MR. CARPINELLO: It was handed to me as I was on
20 my way over here, Judge.

21 THE COURT: So there wasn't an opportunity to
22 share it and discuss it over the lunch hour is what you're
23 telling me?

24 MR. CARPINELLO: Literally, it was handed to me in
25 a folder as I was walking out the door. I assume they had

1 it, because it was addressed to them. But we have copies,
2 too.

3 THE COURT: All right. I'm not going to rule on
4 it without the other side having seen it or it having been
5 presented to the Court, and I'm not going to hold up the
6 witness until we go through all that. I can't help the fact
7 that this is at a moment's notice.

8 Let's put the witness on. Before the witness
9 steps down, if we need a short recess and during that
10 interval, the trial team for each side can look at the
11 letter. Then we'll try to do it that way.

12 MR. CARPINELLO: Thank you, Your Honor.

13 THE COURT: All right. Let's bring in the jury,
14 Mr. McAteer.

15 COURT SECURITY OFFICER: All rise for the jury.

16 (Jury in.)

17 THE COURT: Welcome back from lunch, ladies and
18 gentlemen. Please have a seat.

19 Plaintiff, call your next witness.

20 MR. WARD: Call Mr. Brian Smith, Your Honor, by
21 adverse witness.

22 THE COURT: Mr. Smith, if you'll come forward, our
23 courtroom deputy will administer the oath. And then you may
24 have a seat at the witness stand.

25 (Witness sworn.)

1 THE COURT: Please come around.

2 All right. Counsel, you may proceed.

3 BRIAN SMITH, PLAINTIFF'S WITNESS, SWORN

4 DIRECT EXAMINATION

5 BY MR. WARD:

6 Q. Good afternoon, Mr. Smith.

7 A. Good afternoon.

8 Q. My name is John Ward. I don't believe we've met
9 before?

10 A. No, sir, I don't believe we have.

11 Q. I -- I -- I will try not to repeat a lot of things that
12 have gone here up to this time. I try to focus your
13 attention on some dates after I get some background. So
14 tell me where you live.

15 A. I live in Dallas, Texas.

16 Q. All right. And your position with Trinity Industries at
17 this time?

18 A. Vice President of International Sales.

19 Q. All right. And how long have you held that position?

20 A. About five years.

21 Q. All right. And at one time weren't you -- had a sort of
22 dual role, Vice President of International Sales and New
23 Product Development?

24 A. That's correct.

25 Q. When did you cease to have New Product Development?

1 A. About four or five years ago.

2 Q. Four or five years ago. So in 2011, maybe?

3 A. 2010/2011, yes, sir.

4 Q. You were quite actively involved with the Federal
5 Highway Administration in early 2010, writing for approval
6 letters, weren't you, sir?

7 A. That doesn't surprise me, yes.

8 Q. Well, I'm just trying to get the timeline. Were you
9 actively involved or were you not actively involved in 2010?

10 A. Well, I was actively involved, but my title had changed.

11 Q. Okay. My question -- I was trying to focus what your
12 duties were then.

13 THE COURT: Mr. Ward, we don't need a sidebar
14 comment about what you're trying to do. Just ask the next
15 question, please.

16 MR. WARD: Yes, sir.

17 Q. (By Mr. Ward) What were your duties with respect to new
18 product development, sir?

19 A. In which year?

20 Q. When did you get that title, what year?

21 A. The title of New Product Development?

22 Q. What type -- what year did you get that responsibility?

23 A. Say, 2003, 2004, 2005 --

24 Q. All right.

25 A. -- somewhere in that period. I'm not sure exactly what

1 the date was.

2 Q. I'll show you a demonstrative. Try to focus sort of our
3 time. All right. Can you see that, sir?

4 A. No, sir, I cannot.

5 Q. Can you see it now?

6 A. The top of it, but not the bottom.

7 THE COURT: Why don't you do this, Mr. Smith, why
8 don't you stand up, take this handheld microphone in front
9 of you, and stand right there where you can see the
10 demonstrative.

11 THE WITNESS: Yes, sir.

12 Q. (By Mr. Ward) All right. Is it true, sir, that you
13 actually became involved in the ET-Plus approval process
14 in -- actually a little before October 5 of 1999?

15 A. No, sir.

16 MR. WARD: Could we see Plaintiff's Exhibit 33,
17 please?

18 Well, he's going to have to step back to the
19 stand.

20 THE COURT: All right.

21 MR. WARD: Since he said that. I'm going to have
22 to show him.

23 Q. (By Mr. Ward) All right. Now, do you have Plaintiff's
24 Exhibit 33 there, sir?

25 A. Yes, sir, I see that.

1 Q. All right. That's a letter to you at Trinity
2 Industries, Mr. Brian Smith, and it's from the TT -- from
3 Texas Transportation Institute, isn't it?

4 A. Yes, sir, it is.

5 Q. And what it deals with is the agreement between Texas
6 Transportation Institute and Trinity Industries for the
7 performance of the test -- if you'll scroll on down -- on
8 October the 5th, 1999; isn't that correct? Right there.
9 The date scheduled for the test is described previously as
10 October the 5th, 1999.

11 A. Yes, sir.

12 Q. So you were involved at that time in develop -- doing --
13 with the testing of proposed new product which became the
14 ET-Plus; isn't that correct?

15 A. This was a financial document. I was in charge of -- of
16 making sure the payments were made to TTI, but I didn't have
17 any direct involvement in the new product development.

18 Q. Did you have involvement in arranging for the test to be
19 scheduled on October the 5th, 1999, as this letter states,
20 or didn't you?

21 A. Yes, on the financial side.

22 Q. All right. Now, then, if we could go ahead and while
23 you're seated there, you can see the dates up at the top,
24 can you not?

25 A. Yes, sir, I can.

1 Q. Okay. Well, we won't move -- I don't want you getting
2 up and down. That's not my purpose. So a test was
3 performed on October the 5th, 1999, correct?

4 A. I believe that's true.

5 Q. And that was with what we call the -- the three quarter
6 ton pickup truck?

7 A. Yes, sir.

8 Q. As designated throughout documents sometime as a 2000 P
9 truck; is that correct?

10 A. That's correct.

11 Q. And that lays -- that 2000 refers to the kilogram
12 weight, correct?

13 A. That's correct.

14 Q. And the P stands for the pickup truck?

15 A. Yes, sir.

16 Q. All right. And then there's one other test that this --
17 what we want to talk some today about is the 3-31 test, and
18 it will say 820 C, correct?

19 A. No, that's not correct.

20 Q. I mean -- excuse me, 3-30 test. Thank you for -- the
21 3-30 test is a small car test, correct?

22 A. Yes, sir, that's right.

23 Q. And 3-31, I just misspoke after you told me the correct
24 information. So when it says 820 C, that 820 kilograms or
25 some 1600 and some odd pounds, correct?

1 A. 820 kilograms, yes.

2 Q. Yes. So you agree -- would you agree with me that the
3 pickup truck that's being tested is about two and a half
4 times the weight -- a little less than two and a half times
5 the weight of the small car generally?

6 A. Yes, I would.

7 Q. Okay. And that's directly -- and the weight of the
8 vehicle is -- is the amount of the force applied to the head
9 when they're going the same mile per hours, the truck is
10 almost two and a half times as much kinetic energy hit --
11 hitting into that faceplate; isn't that correct?

12 A. I'm not sure.

13 Q. Okay. All right. So let's move on here just a little
14 bit on this test. That test was performed, wasn't it -- you
15 know that of your knowledge, don't you, from looking at the
16 records of -- of Trinity Industries?

17 A. Which test is that, sir?

18 Q. The 3-31 test on October the 5th, 1999?

19 A. Yes, sir.

20 Q. And the results of that test were reported to the
21 Federal Highway Administration by Dr. Hayes Ross from the
22 Texas Transportation Institute in December of 1999; is that
23 correct?

24 A. I believe that's right.

25 Q. And you've seen that letter, haven't you, sir?

1 MR. WARD: Let's -- let's bring it up for
2 refreshing -- it's Plaintiff's Exhibit 47.

3 Q. (By Mr. Ward) And let's -- have you seen this letter,
4 Mr. Smith?

5 A. Yes, sir, I have.

6 Q. Okay. Let's go over to Page 2 of that letter, and the
7 first full paragraph where it says Test 3-31. Test -- I
8 want to read this. See if I read it correctly. Test 3-31
9 with A modified ET-LET system. I'll stop right there. That
10 is the -- what is known as the ET-Plus that was put on the
11 market in 2000, correct?

12 A. Eventually it became the ET-Plus, yes.

13 Q. Well, was it market -- began in the year 2000; is that
14 correct? You say eventually, this is December. Was it put
15 on the market in the year 2000?

16 A. The ET-Plus system, yes.

17 Q. Okay. All right. Is believed to constitute the most
18 critical impact scenario as regard the evaluation of impact
19 performance of the plus head with the approved ET systems.
20 I read that correctly?

21 A. Yes, sir.

22 Q. All right. And in January 18th of 2000, let's see
23 Plaintiff's Exhibit 51. And you've seen this before, too,
24 haven't you, sir?

25 A. Yes, sir, I have.

1 Q. All right. And let's start there in the middle of the
2 second sentence -- second paragraph, I believe it's the
3 second full sentence. Now, then, this is from the Federal
4 Highway Administration back to Dr. Hayes Ross. Now, then,
5 Dr. Hayes Ross and the Texas Transportation Institute, they
6 were the testing agency for Trinity Industries, correct?

7 A. Trinity conducted some tests at TTI, yes, sir.

8 Q. In connection with this test, were they or were they not
9 the testing agency designated so by Trinity?

10 A. Yes, sir.

11 Q. Okay. That's all I wanted to know.

12 Now, in the second full par -- second paragraph, second
13 sentence, you stated that this end-on test with the
14 2000-kilogram pickup truck was the most critical to
15 demonstrate the acceptable performance of the modified
16 extruder head and that additional impacts at the end were
17 not needed.

18 You also stated that since no other changes were made
19 in the terminal anchor design, none of the side impacts in
20 Report 350 test matrix were necessary. We agree with your
21 conclusions.

22 Correct?

23 A. Yes, sir.

24 Q. All right. So that we can move on and sort of get my
25 timeline, from that date, October 5 -- October 5, 1999 --

1 this date down here is October 10th, 2014. 15 years -- it's
2 been 15 -- how many years? This covers a 15-year span?

3 A. Yes, sir.

4 Q. How many times since October the 5th, 1999 has Trinity
5 Industries had an ET-Plus terminal head subjected to a 3-31
6 test that was reported to the Federal Highway
7 Administration?

8 A. Well, Texas Transportation Institute conducts the tests
9 --

10 Q. No, sir. I said how many times has Trinity Industries
11 authorized either Texas Transportation Institute or any
12 other testing agency to do the critical test with the
13 2,000-kilogram or 4,409-pound pickup truck?

14 A. None.

15 Q. Okay. Now, a little background. I noticed that the
16 names have changed in this -- at the time of the October
17 15th, 2000 -- 1999 test. Trinity Highway Products was an
18 unincorporated division of Trinity Industries, Inc.; is that
19 correct?

20 A. Yes.

21 Q. It remained an unincorporated division up through 2007;
22 is that correct?

23 A. I'm not -- I'm not sure of the dates.

24 Q. Well, if we see correspondence addressed to Mr. Steve
25 Brown as Trinity Highway Products Division in 2007 and then

1 we begin to see, in 2008 thereafter, letters addressed to
2 people that was the president as Trinity Highway Products,
3 LLC, that would be a fairly good indication that that's when
4 it changed, wouldn't it, sir?

5 A. Yes.

6 Q. Okay. Now, when it changed -- when it became an LLC, it
7 was a wholly owned subsidiary of Trinity Industries, Inc.
8 That is, Highway Products, LLC; is that right?

9 A. I wish I knew more about the legal aspects of it. I
10 don't know for sure.

11 Q. Is that your understanding, that it is a wholly owned
12 subsidiary?

13 A. I don't know.

14 Q. As vice president of international sales of Trinity
15 Highway Products, LLC, you're telling this jury under oath
16 you don't have an understanding who the -- that it's owned
17 by Trinity Industries, Inc.?

18 A. What I'm saying is I don't know whether --

19 Q. Well --

20 A. -- if it's a wholly owned subsidiary of Trinity
21 Industries is correct. I don't know.

22 Q. Who did you report to when it was -- in 2007, when it
23 was Trinity Highway Products, an unincorporated division?

24 A. That would be Steve Brown.

25 Q. Who did you report to in 2008 and thereafter or --

1 strike that. I'm sorry.

2 When it became Trinity Highway Products, LLC, who did
3 you report to?

4 A. I'm not sure of the date when it became Trinity Highway
5 Products, LLC.

6 Q. My question was, when it became Trinity Highway
7 Products, LLC, who did you report to?

8 A. I don't know. I don't know when that date was.

9 Q. You don't -- I'm not asking you a date, sir. I'm
10 just -- once it became an LLC, who do you, Mr. Brian Smith,
11 report to?

12 A. As of November 2010, I reported to Greg Mitchell.

13 Q. In the year 2008, who did you report to?

14 A. Steve Brown.

15 Q. And in 2009, who did you report to?

16 A. Steve Brown.

17 Q. Up until -- was that November the 8th of 2011? Was
18 that -- did I get the right date?

19 A. 2010.

20 Q. 2010, who did you report to?

21 A. Up until that date, Steve Brown.

22 Q. All right. Do you remember whether Steve Brown was in
23 the -- during all that period of time that you reported
24 to -- you reported to him beginning in 2005, did you not?

25 A. In 2005, it might have been Rodney Boyd.

1 Q. Might have been. You don't remember?

2 A. I don't remember the exact dates, no.

3 Q. All right. Let's talk about the development of this
4 product. You said you first became involved at sometime
5 around 2003 when we went to -- in the sale and development
6 of new products; is that right?

7 A. In that time period, yes.

8 Q. All right. And did you -- do you recall, then, during
9 that period of time that there became to introduce this
10 concept of the Midwest Guardrail System?

11 A. Yes, sir.

12 Q. And the Midwest Guardrail System, the change was from a
13 27-inch-high system to a 31-inch-high system, correct?

14 A. 27-5/8, yes, sir.

15 Q. All right. Generally, we just say the 27 to 31, though,
16 don't we? Or do you --

17 A. Not -- sometimes and sometimes not.

18 Q. Okay. If I say 27, you'll know that was the original
19 standard. Can we have that agreement?

20 A. Sure.

21 Q. Okay. And -- let's see -- you recall, now then -- you
22 recall that during this period of time that you have been in
23 new products development, you became -- where you did a lot
24 of communicating with the Federal Highway Administration on
25 changes to the ET-Plus, didn't you?

1 A. Yes, sir.

2 Q. Okay. And I believe you under --

3 THE COURT: Mr. Ward, if you could get just a
4 little distance from that microphone.

5 MR. WARD: I'm sorry.

6 THE COURT: We wouldn't have to listen to you
7 breathe over it.

8 MR. WARD: Well, at my age, I'm glad to be
9 breathing, Your Honor.

10 THE COURT: I'm glad you're breathing too, but
11 just not in the microphone. Let's continue.

12 Q. (By Mr. Ward) All right. Let's see. You began to
13 communicate with the Federal Highway Administration during
14 that period of time on -- on any change to the product
15 itself, didn't you?

16 A. I communicated with FHWA on changes, not every one.

17 Q. Many times, though, you did, didn't you?

18 A. Yes.

19 Q. And regardless of how minor the change was, you would
20 first describe it -- on the minor changes that didn't
21 require crash-testing. When you did it, you would
22 communicate with them and tell them what it was that you
23 wanted to change, the -- the Federal Highway Administration,
24 correct?

25 A. Correct.

1 Q. And they would decide whether or not you needed to do a
2 test or didn't do a test, correct?

3 A. Sometimes, yes.

4 Q. Well, sometimes they'd say do a test; sometimes they'd
5 say you don't need to do a test?

6 A. Correct.

7 Q. And then if they did -- if they didn't require a test,
8 they would send you an approval, correct?

9 A. Correct.

10 Q. And you followed that procedure many, many times, didn't
11 you, sir?

12 A. Yes.

13 Q. That was a standard procedure?

14 A. Yes.

15 Q. And it didn't -- I recall that there was one change
16 where we were just talking about changing the number of bolt
17 holes in this flange here for mounting purposes. You still
18 would contact the Federal Highway Administration in advance,
19 wouldn't you?

20 A. I believe Steve Easton did that before me. Yes.

21 Q. Trinity would?

22 A. Yes.

23 Q. And follow the exact same procedure. We want to change
24 this particular feature. Federal Highway Administration
25 would consider it, then notify you and say that will be

1 fine; you can do it without doing any test, correct?

2 A. Correct.

3 Q. Or you would talk to them sometimes about a change, and
4 you would propose a test. They might say, yes, that's
5 enough, or they might tell you another test?

6 A. I think the procedure would be whether -- usually, TTI
7 would ask what test do you want to see to FHWA, and FHWA
8 would respond accordingly.

9 Q. Well, you would be involved in those, though. You would
10 know about the conversations going on about what the
11 procedure was, wouldn't you?

12 A. When it came to crash test, usually I would take the
13 lead.

14 Q. All right. Well, let's talk about -- you can see up
15 there on that date, there's a critical -- there's a date of
16 May 27th, 2005, correct?

17 A. Correct.

18 Q. And you know that's sort of a critical date in this
19 case?

20 A. Yes.

21 Q. Okay. So according to a memo that I have, TTI made a
22 proposal concerning this change to --

23 MR. WARD: Let's see Plaintiff's Exhibit 136.

24 Q. (By Mr. Ward) Now, that's a memorandum where Trinity --
25 where TTI is making a proposal about getting approval for

1 using the ET-Plus. See on the introduction there, it says
2 the introduction. I guess it's the third sentence or second
3 sentence.

4 It is anticipated that this system will soon be adopted
5 as a standard by several states. Do you see that?

6 A. Yes, sir.

7 Q. Is that your recollection also during that timeframe?

8 A. It's what the document says.

9 Q. You don't have any recollection of this?

10 A. I don't specifically recall this document.

11 Q. No. I'm -- no, please listen to my question. Maybe I
12 didn't make it clear.

13 Is this about the same timeframe that you believe that
14 there was -- it was -- that it was anticipated that was soon
15 going to be a standard, the 31-inch?

16 A. Yes.

17 Q. Okay. And TTI is saying to Trinity there is a need to
18 modify and test an ET-Plus system that will meet NCHRP
19 Report 350 test requirements with the MGS. Do you see that
20 sentence?

21 A. Yes, sir, I do.

22 Q. Okay. And so the modifications to the current system,
23 the following changes are proposed. Now, any of those deal
24 with anything other than raising the height of the guardrail
25 system from 27 to 31 inches as far as you understand?

1 A. Yes.

2 Q. Which one is that?

3 A. Item B.

4 Q. Increase block depth of 12 inches?

5 A. Yes.

6 Q. Okay. That doesn't have anything to do with the
7 guardrail system?

8 A. It doesn't have anything to do with raising the height
9 of the guardrail.

10 Q. Okay. That remained the same then?

11 A. I'm sorry?

12 Q. That increased the block-out depth to 12 inches
13 beginning at post 3. Was that going to be a standard for
14 both systems, the 27 and the 31?

15 A. No, sir.

16 Q. Okay. Did it have anything to do with the -- any
17 modifications to the 5-inch channel that I see right here,
18 this -- this device (indicating)?

19 A. No.

20 Q. Do any of those proposed -- any of those listed there,
21 do any of them have anything to do with the change in the
22 5-inch that's here in front of me?

23 A. No.

24 MR. WARD: For the record -- for the record, I'm
25 just -- this is for the record, 5-inch is Exhibit P-948-11.

1 Q. (By Mr. Ward) And so go on over to Page 2, if you will.

2 And TTI is recommending that we do two tests, correct?

3 A. That's correct.

4 Q. The 3-30 test with a small car, and the Test 3-35 with a
5 pickup truck redirection. And it says this length of need,
6 but that's just over 12 and a half feet or right at 12 and a
7 half feet, correct, for the -- what that means is that the
8 pickup truck is going to strike downstream from the terminal
9 head correctly -- approximately 12 and a half feet?

10 A. That's correct.

11 Q. Okay. It's not a head-on collision?

12 A. No, sir, it's not.

13 Q. Okay. Now then --

14 MR. WARD: Thank you, sir.

15 Q. (By Mr. Ward) Now, you've -- in some prior testimony,
16 you had recalled that when y'all decided to go forward with
17 this that you had a three-way phone conversation. Do you
18 recall that?

19 A. Yes, I do.

20 Q. And does this focus you that this was sometime in the
21 late winter or early spring of 2005?

22 A. Late winter 2004, early spring 2005, yes.

23 Q. Okay. I see. Thank you, sir. I got off a year.

24 And you had a three-way phone conversation that involved the
25 Federal Highway Administration, Mr. Artimovich, and several

1 of the engineers down -- people down at TTI and yourself,
2 correct?

3 A. That's what I recall, yes.

4 Q. Yes. And basically, y'all discussed the proposal we
5 just saw that you were going to do and proposed two tests,
6 and see what those were -- the result of those two tests
7 were. And they would then -- TTI would write a report and
8 tell them the results, and the Federal Highway
9 Administration would tell you whether it was approved or
10 tell you whether you need to do something else.

11 Is that a fair statement of what you previously told
12 us?

13 A. Can you break that down? That was pretty lengthy.

14 Q. Okay. Who was -- who was on -- was I correct on the
15 three different groups on the meeting?

16 A. Yes.

17 Q. Okay. Was I correct that you discussed doing two tests
18 to gain approval for using ET -- standard ET-Plus with a
19 31-inch guardrail system?

20 A. I believe TTI/FHWA which test needed to be conducted.
21 And, yes, those tests were required by FHWA.

22 Q. All right. Well, that's what TTI had previously
23 recommended to Trinity before you had the conversation,
24 correct? That's what we just saw in that exhibit.

25 A. Well, the proposal was dated February 25th, 2005, two

1 days before the second test. I would imagine the phone
2 conversation took place well beyond -- well before this
3 proposal was written.

4 Q. Mr. Smith, this was in February.

5 A. I'm sorry. I get my dates mixed up. Sorry.

6 Q. This was in February 2005. The test took place in May.

7 A. May.

8 Q. So this conversation took place sometime pretty close
9 around the time of this memorandum.

10 A. I would say that's a fair statement.

11 Q. Okay.

12 THE COURT: Let's get back to questions and
13 answers. Let's get back to questions and answers rather
14 than statements and agreements. But let's proceed.

15 MR. WARD: Okay. Excuse me, Your Honor.

16 Q. (By Mr. Ward) And so the next -- so you agreed to go
17 forward with them; is that correct?

18 A. That's correct.

19 Q. And so the first test was performed on May the 5th,
20 2005?

21 A. Yes.

22 Q. It was performed with a 5-inch channel, correct?

23 A. An ET-Plus head with a 5-inch channel, yes, sir.

24 Q. Yes, sir. And after that date, TTI and Trinity have a
25 phone conversation in which you participated, did you not?

1 A. Can you be more specific?

2 Q. On or about May the 13th --

3 MR. WARD: If we could pull up the prototype
4 timeline, please.

5 Okay. If we could pull out -- we've already
6 talked about the 136. Let's pull out that 139 just to sort
7 of -- so we -- all right. Let's go to the -- down at the
8 bottom.

9 Q. (By Mr. Ward) This is an email from you to all of the
10 principals down at TTI, right? Dr. Alberson, Dr. Buth, Dr.
11 Bligh, Dr. Hayes Ross, and Dr. -- Mr. Bullard, is he a Ph.D.
12 also?

13 A. I don't believe so.

14 Q. And you copied the president of your company and Mr. Don
15 Johnson. Now, who is Mr. Don Johnson?

16 A. Don Johnson was a Trinity person.

17 Q. Well, what was his title at that time?

18 A. I'm not sure what his title was.

19 Q. What's your best recollection?

20 A. He was a liaison between Trinity and TTI.

21 Q. Did he work under your direction?

22 A. No, sir, he did not.

23 Q. Who did he report to?

24 A. Steve Brown, I believe.

25 Q. Okay. All right. So there on May the 13th, you say,

1 you know, as per yesterday's conversation, in other words,
2 on May the 12th, Trinity says he'd like to hear your
3 thoughts on changing the 5-inch channel on the ET-Plus to
4 the -- extruder head chute to a 4-inch channel, correct?

5 A. Correct.

6 Q. And so it seems to say that as can be seen from the
7 sample that Trinity shipped to TTI, this seems to
8 provide, one, a better fit, while also slightly reducing
9 the weight of the head. You wrote that, didn't you?

10 A. Yes, I did.

11 Q. Okay. You recall writing it?

12 A. Not specifically, but I believe that I wrote that, yes.

13 Q. Okay. Okay. And there was already a scheduled test on
14 or about -- for either May 25th or 26th?

15 A. Correct.

16 Q. And so you wanted to go forward and use that head if TTI
17 approved it?

18 A. I think it was --

19 Q. Well, you, on behalf of Trinity Highway Products?

20 A. I believe TTI wanted to go forward with the head, as
21 well, yes.

22 Q. All right. It just says they decided to accept the
23 modifications. You asked if it could be used, right?

24 A. Yes, could it be used.

25 Q. Okay. Well, they weren't asking you -- they didn't ask

1 you to send them a prototype, did they?

2 A. Yes, they did.

3 Q. Well, where is that email?

4 A. I don't know that an email exists.

5 Q. Well, now, you -- you previously testified under oath --
6 I don't want to have to go get it, but you didn't recall any
7 conversations with TTI around this time. Do you now have
8 some recollection about conversations other than what's here
9 in the email?

10 A. What I recall are previous emails dating back to 2003 in
11 which TTI asked Trinity whether it could build an ET-Plus
12 extruder head with a four-inch channel.

13 Q. Okay. That -- there had been that previous email
14 exchange. I'm not saying this was brand new, okay? Excuse
15 me, if you got that. But this is the first time that any
16 prototype had actually been fabricated by Trinity and sent
17 to TTI?

18 A. I don't think that is correct.

19 Q. Oh, okay. This was the first time that any prototype
20 had been fabricated by Trinity and shipped to TTI for a test
21 for the Federal Highway Administration?

22 A. I think Trinity fabricated the ET-Plus head with
23 four-inch channels so that TTI could inspect it. Once it
24 was there, the question was could it be in -- included in
25 the crash test that was scheduled for May the 25th or 26th.

1 Q. But as far as you know, that's the first one they'd done
2 thataway, hadn't they -- that's the only one they did. Mr.
3 Malizia testified here this morning that was his first one.

4 A. I didn't hear Mr. Malizia's testimony.

5 Q. Okay. Well, assuming that he did, do you have any
6 different recollection?

7 A. What did he testify to?

8 Q. That this was the first four-inch channel that he had
9 modified up at Girard, Ohio.

10 A. I believe that.

11 Q. Okay. All right. So let's go forward. As soon as you
12 shipped that, you -- you sent that -- the next -- the next
13 day that was -- did I get -- let's see, what was the date of
14 that first email? Get my dates -- so he sends it -- 7:34,
15 you send this email confirming your conversation, correct?

16 A. Correct.

17 Q. All right. And you get a reply back at a little after
18 10:00 o'clock, and it says, hello, Brian, you know, we
19 haven't heard yet from Hayes, but everybody at Riverside
20 believes that the heads work fine. We'll install it the
21 test on May 25/May 26. Right?

22 A. You paraphrased, but, yes, that's what it says.

23 Q. Okay. And but now then, let's see, also --

24 MR. WARD: Let's see 141. Well, wait just a
25 minute.

1 Q. (By Mr. Ward) At 10:05, right after you replied back to
2 him, you sent an email -- no, Mr. Alberson sends an email to
3 somebody at TTI named Chris Chatham, says please work on the
4 drawing to reflect the new head, right?

5 A. That's what the email says, yes, sir.

6 Q. Okay.

7 MR. WARD: Let's go -- let's see P 140.

8 Q. (By Mr. Ward) Well, and we see that --

9 MR. WARD: Roll up from that. I'm looking for the
10 one where you wrote right back and said that you would like
11 a drawing. Okay. I guess I've got the wrong exhibit.

12 Excuse me, Your Honor.

13 Q. (By Mr. Ward) Didn't -- didn't you write back that
14 date, and let's see, 141 -- well, I thought there was --
15 didn't -- didn't you write back on or about that date and
16 request a -- a drawing from T -- from -- from -- oh, I've
17 got it wrong. I'll get it right in a minute.

18 Dr. Alberson, that same date after he told his man at
19 work down there, didn't he request a drawing? There we go.
20 That Exhibit number is 141. Okay. You sent back
21 immediately and said: Hey, did you guys prepare a drawing
22 for the four-inch channel? And if yes, can we have it?
23 Correct?

24 A. No, sir.

25 Q. Well, Dean Alberson says, hi, Brian and Steve, did you

1 guys generate a drawing? If yes, can we have a copy?

2 Didn't he request that from you?

3 A. Yes, he did.

4 Q. All right. When did y'all get around to sending him a
5 drawing in response to that email?

6 A. I believe it was in early June.

7 Q. Well, wasn't it on or about -- my timeline is not very
8 good. It's my fault.

9 THE COURT: Counsel, approach the bench, please.
10 (Bench conference.)

11 MR. WARD: I apologize, Your Honor.

12 THE COURT: That's all right. Do we need some
13 kind of a -- do you need to consult with the other side? Do
14 we need some kind of a break or are you ready to go?

15 MR. WARD: Your Honor, I just can't lay my hand
16 on the right email. It's here. I just --

17 THE COURT: Do you need to ask for some help from
18 your trial team? I'm just trying to avoid the pauses so we
19 can keep things moving.

20 MR. WARD: Okay.

21 MR. CARPINELLO: Take a minute, Your Honor?

22 THE COURT: Take a minute and consult, and we'll
23 go forward.

24 (Bench conference concluded.)

25 Q. (By Mr. Ward) Well, when you sent the email, it was

1 after the test had already been run, correct? When you sent
2 the drawing, it was after the test had already been run?

3 A. Yes.

4 Q. And at the time they ran the test, they had no drawing
5 of the extruder head -- of -- of the four-inch, did they?

6 A. No, sir.

7 Q. And you know that the NCHRP requirements -- you're
8 familiar with those 350 requirements, aren't you, to some
9 extent, sir?

10 A. Which requirements would those be?

11 Q. Those -- the NCHRP dealing with what the
12 responsibilities are with respect to testing?

13 A. The test matrix, yes, I'm familiar with that.

14 Q. Well, are you familiar with the obligations of the --
15 the people doing the testing to examine the test article?

16 A. We rely on TTI because they're the testing agency, to
17 understand those.

18 Q. Well, but you didn't furnish them any drawing or
19 anything, did you?

20 A. Yes, we did.

21 Q. After the test?

22 A. After the test, yes, sir.

23 Q. And -- and to your knowledge, there was no drawing ever
24 prepared by -- that you've ever seen that was prepared down
25 at TTI of the drawing -- of the -- of the extruder head?

1 A. Not that I've seen, no.

2 Q. And so we run the test on the morning of May 27th, do we
3 not?

4 A. Yes, sir. The test was run on May 27th.

5 Q. Without a drawing, and then a report was prepared --

6 MR. WARD: And let's see Exhibit 156.

7 Q. (By Mr. Ward) This is the report, correct, sir?

8 A. Yes, this is the TTI test report of the two tests that
9 were conducted in May of 2005.

10 Q. All right, sir. And this test report was in -- actually
11 sent by Trinity Industries to the Federal Highway
12 Administration in August of 2005, wasn't it?

13 A. Yes, sir.

14 Q. And there's an email here dated July the 21st. Let's
15 see -- that's just the front page of the report.

16 MR. WARD: Let's see 956 so we can get our timing
17 down.

18 Q. (By Mr. Ward) All right. 956 down at the bottom is an
19 email from Dr. Buth to you, correct?

20 A. Yes, sir.

21 Q. And for the first time in the history, he says that
22 Trinity should be the one to submit the letter with this
23 test report requesting FHWA approval, correct?

24 A. I don't know if it's the first time in history, but
25 that's what the memo says.

1 Q. Well, do you recall any time that a -- that a test
2 report involving a crash test was ever submitted by Trinity,
3 rather than TTI, prior to this event? Do you recall any
4 such event?

5 A. Would you ask the question one more time, please?

6 Q. Do you recall any previous test report involving crash
7 testing that was submitted by anyone other than TTI prior to
8 this one?

9 A. I'm sorry, sir. I still don't understand the question.
10 Would you ask it one more time?

11 Q. Do you agree that Trinity -- that TTI asked Trinity to
12 be the one to send the test report concerning the test
13 conducted May 27th and the one on May 6th?

14 A. Yes, sir, I do.

15 Q. Okay. Do you agree -- can you tell me of any time prior
16 to that that any test report of a crash test had been
17 submitted directly to the Federal Highway Administration by
18 Trinity rather than TTI?

19 A. Yes.

20 Q. Actual crash report?

21 A. Yes, sir.

22 Q. When was that?

23 A. Probably several.

24 Q. Okay. Then I'm wrong about that. Thank you.

25 Did you -- but this was submitted -- an approval was

1 received on this by a letter to Mr. Steve Brown; is that
2 correct?

3 A. Yes.

4 Q. All right. Let's see the --

5 MR. WARD: 169.

6 Q. (By Mr. Ward) Now, this is the actual letter where Mr.
7 Steve Brown sent this report on August the 10th to FHWA,
8 correct?

9 A. I believe Mr. Johnson sent this.

10 Q. All right. Excuse me, Mr. Don Johnson?

11 A. Yes, sir.

12 Q. And y'all had received it on or about July 21st. We
13 just saw that, correct?

14 A. On or about, yes, sir.

15 Q. Yes, sir. And so the executives at Trinity had this
16 report for about three weeks, didn't they, before it was
17 submitted to the Federal Highway Administration?

18 A. Yeah, that sounds right.

19 Q. Yes, sir. And during the period of time that Trinity
20 Industries had this report, it was reviewed by various
21 people there in the organization, wasn't it?

22 A. I don't know.

23 Q. You previously testified it was reviewed by the Trinity
24 executives or not?

25 A. I don't believe I said the Trinity executives reviewed

1 the report, no.

2 Q. Who else -- well, it was -- it was directed to you. Did
3 you review the report?

4 A. This is 2005, nine years ago. I can't recall what I
5 did.

6 Q. You can't recall what you did. Well, let's look at the
7 report. Let's see what you know about what's true --
8 correct or incorrect, please.

9 MR. WARD: Let's pull up 156.

10 Q. (By Mr. Ward) Okay. We've established that there were
11 two tests run. Only one of them was with the ET-Plus
12 standard head, correct?

13 A. With ET-Plus extruder head with a five-inch channel, you
14 mean?

15 Q. Well, was that not the standard head at that time?

16 A. Up until this testing, yes.

17 Q. Okay. Well, are you saying that this -- that the title
18 of the report, the ET-Plus with the 31-inch w-beam guardrail
19 was anything other than the five-inch channel as far as
20 anyone knew?

21 A. That's what the test report says.

22 Q. Well, okay. Let's go over to Page 3. Description of
23 the test article. It says: A standard ET-Plus with eight
24 modifications. All of those modifications deal with raising
25 the height, do they not?

1 A. No.

2 Q. Do -- do any of those modifications have anything to do
3 with the extruder head?

4 A. No, sir.

5 Q. Okay. So insofar as anybody reading this, it would say
6 a standard ET-Plus, correct?

7 A. I don't think it says one way or the other.

8 Q. Okay. Is there -- you sent that down as a prototype and
9 discussed it with them May 13th, 2005, correct?

10 A. I'm not sure of the dates, but, yes, we sent a prototype
11 to them before the May test.

12 Q. Okay. Is the word prototype anywhere in this report?

13 A. Not that I'm aware of.

14 Q. Okay. Is there anything in writing anywhere in this
15 report that would tell anybody at the Federal Highway
16 Administration that you -- that you tested anything other
17 than a five-inch -- an extruder head with a five-inch
18 channel?

19 A. There are photos within the report that show the tested
20 head that had four-inch channels.

21 Q. Okay. Is that the way that you believe Trinity is
22 supposed to report things, that you don't put anything in
23 writing and you require the Federal Highway Administration
24 to conduct an investigation of the photographs to see if
25 you've tested what you said you tested?

1 A. Well, TTI prepares the test reports, not Trinity.

2 Q. Trinity submitted the report, didn't they?

3 A. Yes.

4 Q. Now, you understand that the Federal Highway
5 Administration has no way of knowing what goes on other than
6 what you report, what Trinity sends them? No, now you sent
7 this report, sir, Trinity did, didn't they?

8 A. Yes.

9 Q. Okay. You know that the Federal Highway Administration
10 has no way of knowing what the truth is by just looking at
11 the report unless it tells them something in the report;
12 isn't that correct?

13 A. Correct.

14 Q. The Federal Highway Administration has to rely totally
15 on the accuracy of the report and what's reported to them in
16 order to make a decision, don't they?

17 A. Correct. And if they have questions, they come back to
18 the testing agency or the submitter.

19 Q. Or the submitter. In this case, Trinity Industry. They
20 never said a word. They approved this -- this for use on
21 the 31-inch system in September of 2005, didn't they?

22 A. Yes, they did.

23 Q. And you have not told them one word at that point in
24 time about any change to the extruder head, have you?

25 A. No.

1 Q. You have not provided them any drawing with the changes
2 to the extruder head?

3 A. Correct. TTI has said that a drawing was --

4 MR. WARD: Objection, Your Honor, as being
5 nonresponsive.

6 THE COURT: All right. Mr. Smith, you need to
7 limit your answers to the questions asked. The attorneys
8 for Trinity will have an opportunity to cross-examine you.
9 But at this point, I'm telling you to limit the answers to
10 the questions asked.

11 Re-ask the question, counsel.

12 Q. (By Mr. Ward) There was not one word, not one drawing
13 or anything about a prototype in that report?

14 A. Correct.

15 Q. From that point forward until January of 2012, every
16 communication with the Federal Highway Administration
17 between you and the Federal Highway Administration, you
18 would believe that they believed and had reason to believe
19 that you had tested only the five-inch channel; isn't that
20 correct, sir?

21 A. That TTI had crash tested the five-inch channel, yes.

22 Q. Let's make this clear. TTI doesn't manufacture and sell
23 these terminal heads, do they, sir?

24 A. Correct.

25 Q. And you -- and Trinity Industries pays TTI to do the

1 testing?

2 A. Correct. TTI does the testing.

3 Q. And TTI pays them for any -- any services they perform
4 in connection with writing any report?

5 A. Say that again.

6 Q. Trinity pays TTI for the services of -- performed by TTI
7 in writing the report?

8 A. Correct.

9 Q. There's no question that TTI is acting as the testing
10 agency on behalf of Trinity Industries, is there?

11 A. I think TTI is acting on its own behalf, as this is a
12 TTI product.

13 Q. Are you saying that -- are you telling us that TTI
14 is not acting on behalf of Trinity Industries when they
15 do the testing. Is that your testimony?

16 A. I'm saying TTI is acting on behalf of both Trinity and
17 TTI.

18 Q. Okay. Well, they're acting on both of them. Y'all do
19 have a close business relationship, don't you, sir?

20 A. We have a long business relationship, yes.

21 Q. Well, you've developed -- you have joint development
22 agreements, correct?

23 A. Correct.

24 Q. And -- and you have where you share in the costs of
25 different things to try and develop new products?

1 A. Correct.

2 Q. All right. Let's go forward -- just -- let's move
3 forward.

4 Starting -- let's go to -- just talk about some of the
5 changes. In 2009, you started communicating with the
6 Federal Highway Administration about some changes, didn't
7 you, sir?

8 Do you recall that in 2009, in about May -- let's just
9 sort of get -- let's look at May the 9 -- May the 19th,
10 2009, to just sort of get our timeframe.

11 A. Okay.

12 Q. This is Exhibit 1069.

13 Now, that's -- that's a letter that you wrote
14 requesting -- what you're going to change there is the
15 configuration of the post, correct?

16 A. Correct.

17 Q. Okay. And then it says the re: Request for acceptance
18 of the ET-Plus and ET-31. You agree with me at that time
19 the Federal Highway Administration knew about only one
20 ET-Plus head, correct?

21 A. Correct.

22 Q. 5-inch channel?

23 A. Correct.

24 Q. They had not been told anything. And when you wrote
25 that letter, you sent that letter. You also --

1 MR. WARD: Let's see. Exhibit -- Exhibit 1209,
2 just so we can sort of get what's going on here.

3 Q. (By Mr. Ward) All right. Second paragraph down at the
4 bottom where you're writing Mr. Nicholas Artimovich: As
5 with the previous acceptance requests, Trinity is also
6 including a pro -- proposed acceptance letter draft for your
7 convenience. You say: Of course, the draft is -- is only a
8 suggestion and is subject to your review and editing.

9 There was a procedure that had been developed that when
10 you would make a request for a change and you would contact
11 them, you would also draft a proposed letter of acceptance
12 for Mr. Artimovich to review. And then y'all -- if they
13 wanted to make any changes to that, y'all would talk and
14 decide on the changes and then ultimately you'd get a letter
15 of acceptance; isn't that right?

16 A. That would be the exception, not the rule.

17 Q. Pardon me?

18 A. That would be the exception, not the rule.

19 Q. Well, you sent it on May the 19th, didn't you? You sent
20 them a proposed acceptance letter?

21 A. That's the date of this email, yes.

22 Q. Well, let's flip right over here and see. And then you
23 wrote him on May -- that same date you sent -- we just
24 looked at the letter dated May the 19th, correct?

25 A. Yes.

1 MR. WARD: And then let's look at Exhibit 245.

2 Q. (By Mr. Ward) Now, isn't that the proposed acceptance
3 letter that you also sent there in May of 2009?

4 A. It appears to be, yes.

5 Q. Okay. So you say that was the exception, not the rule.

6 MR. WARD: Let's go to -- then to Exhibit 244.

7 Q. (By Mr. Ward) That's an email there --

8 MR. WARD: Yes, go on the back page there.

9 Q. (By Mr. Ward) On May the 29th, 2009 -- no, May the 19th,
10 2009, is that the draft --

11 MR. WARD: Let's move back one more. Ed, is --
12 no, back behind. Up here, okay?

13 Q. (By Mr. Ward) Is this the same email there we're talking
14 about, as with the previous acceptance request? I'm not
15 trying to put words in your mouth. I'm trying to understand
16 these emails.

17 A. Right. And the date is not included in the enlarged
18 section.

19 Q. Well, it's up there, May 19th. You see that date?

20 A. Yeah. There are three different shots on the screen.
21 If that's the same date, I have no reason to believe it's --
22 it's not --

23 MR. WARD: All right. Let's look at Exhibit 244.

24 Q. (By Mr. Ward) Now then, this is a letter from you to
25 Nick Artimovich, after you had met, concerning your previous

1 requests in May; is that right? Up here, June 8th, right at
2 the top, June 8th?

3 A. Yes, sir.

4 Q. And so who is Don Gripne, as per your meeting with Don
5 Gripne?

6 A. Don Gripne is a consultant for Trinity Highway Products.

7 Q. He's been a long-time consultant, hadn't he?

8 A. He's been around for a while, yes.

9 Q. How many years?

10 A. I don't know.

11 Q. You used him a lot in working with -- you and Don Gripne
12 together interacted with Mr. Nick Artimovich several times,
13 didn't you?

14 A. Yes.

15 Q. Okay. And now in this one down -- you send them some
16 prior tests. One of them is on this test about -- well, one
17 of them is 12-J. We know that's sometime around 2002, isn't
18 it?

19 A. Without looking at the letter, I don't know.

20 Q. Well, you agree with me that we know that this CC-94 is
21 September 2005, don't we?

22 A. Yes, sir.

23 Q. Okay. And so that one -- don't you believe that was
24 before that date?

25 A. I believe it's before May 2005, yes.

1 Q. Yes. Okay. And you sent -- and then so you sent
2 another -- in the second paragraph, you're also talking
3 about a test that was done with that 12-J letter in --
4 sometime before 2005.

5 A. Yes, sir.

6 Q. And then you also mentioned here additionally, recent
7 crash-testing of the FLEAT. Now, what is the FLEAT -- whose
8 product is that?

9 A. It's a flared energy absorbing terminal from one of our
10 competitors.

11 Q. Right. And you're asking TTI there in June of 2009 to
12 consider that recent crash-testing, aren't you, sir --

13 A. Yes.

14 Q. -- of a competitor's product?

15 A. Correct.

16 Q. You didn't have any drawings to submit with that, of
17 course.

18 A. Any drawings?

19 Q. To submit with this crash test that -- of your
20 competitor.

21 A. The drawing was available on the FHWA website as an
22 enclosure of the approval letter.

23 Q. Okay. But you had no drawings or any information other
24 than what was publicly disclosed?

25 A. Correct.

1 Q. All right. And you sent them a draft letter dated in
2 June 2009, very similar to the May letter, did you not? Do
3 you recall doing that?

4 A. Do you have a copy that I can look at, please?

5 Q. Yes, sir.

6 MR. WARD: Exhibit 244. I believe that's what
7 we've got up there. The next page behind that. There. It
8 was attached to that email.

9 Q. (By Mr. Ward) It was another request for approval,
10 right, where you prepared the draft for Mr. Artimovich to
11 review?

12 I know it's referring to one March 13th, but that's
13 also on that other one that we just looked at.

14 MR. WARD: Scroll it down so he can see the rest.

15 A. Please.

16 Q. (By Mr. Ward) Yes. You're talking about what you
17 submitted, correct, for --

18 Can you see the name of the devices -- you see we're
19 still talking about those two breakaway posts?

20 A. Yes, sir, I do.

21 Q. Okay. Don't you think this is the same sort of approval
22 chain?

23 A. As the earlier proposed draft?

24 Q. Yes.

25 A. Yes.

1 Q. Okay. And so then you -- like we -- we saw that you met
2 in June, and then after you submitted that FLEAT request,
3 use the FLEAT September the 18th --

4 MR. WARD: Let's see 1216.

5 Q. (By Mr. Ward) Mr. Artimovich wrote back to your
6 long-time consultant, Mr. Don Gripne, and he says: In
7 order to ensure fairness in our acceptance of the
8 Trinity ET-Plus and ET-31 with two breakaway posts,
9 please review the letter Roadway Systems regarding the
10 FLEAT.

11 That's the product that we just talked about a few
12 moments ago, correct?

13 A. Correct.

14 Q. And so he asked the question: Why should we run the --
15 should the same three tests not be run on the ET that FLEAT
16 had to run, correct?

17 A. Correct.

18 Q. And you answer and give him your response to that in
19 October of 2009, don't you?

20 A. Do you have a copy of that that I can see?

21 Q. Yes, sir.

22 MR. WARD: 1175.

23 A. Okay.

24 Q. (By Mr. Ward) All right. Page 2 I just want to talk
25 about. Down here at the paragraph where it says in further

1 response, it's about four paragraphs up from the signature.

2 In further response to his September 18th email, all
3 right, you say the three test referenced were conducted on
4 the FLEAT with a 30- to 48-inch offset. And then recites
5 this FHWA letter says that it's a step -- that the tests
6 were run on the FLEAT.

7 And you say -- your assumption is presumably, because
8 it's flare rate would result in more critical tests than
9 with the tangential SKT, right?

10 A. That's what this email says.

11 Q. Yeah. And RSI would have been able to reference
12 previously conducted crash tests to point that additional
13 testing was not necessary. So what you're saying, you're --
14 you're presenting the argument, well, FLEAT -- we ought to
15 be able to use these other tests to get our product
16 approved, correct?

17 A. Yes.

18 Q. All right. And then the next thing that I see
19 concerning this matter is that after that, there was a long
20 pause, and then I see -- what I see next is Exhibit 276.
21 We'll go to that.

22 And then Mr. Artimovich says to you -- he finally gets
23 back. He's writing to you right there, February 25th.

24 THE COURT: Let's get to a question, Mr. Ward.

25 Q. (By Mr. Ward) Is that the correct date, sir?

1 A. It appears to be, yes.

2 Q. Okay. And he writes and says: I finally got back to
3 writing acceptance letters. It was difficult after Don
4 twisted my arm so hard yesterday when we were in Harrisburg
5 together.

6 MR. WARD: And let me know if we can move it to
7 signature.

8 Q. (By Mr. Ward) Do you see that? Is that what you
9 received from Mr. Artimovich?

10 A. Yes.

11 Q. Okay.

12 MR. WARD: And so let's scroll up and see what you
13 said in reply.

14 Q. (By Mr. Ward) And so you -- you review this letter
15 that's dated 12 -- talk about it's got a mistake on Page 1
16 on -- because it said 13Q rather than 12Q. Do you recall
17 that?

18 A. That's what the email says.

19 Q. I'm going to put up here a blown-up exhibit or enlarged
20 exhibit, 264. Can you see this?

21 THE WITNESS: Your Honor, may I get up and go
22 around the corner?

23 THE COURT: Can you see it from where you're
24 seated?

25 THE WITNESS: No, sir. The screen is directly in

1 the way.

2 MR. WARD: Can we put the -- well, okay. Can we
3 just put Exhibit 244 on the -- he can look at the screen and
4 I'll point to where I'm --

5 THE COURT: That will be fine.

6 MR. WARD: Will that be all right, since we don't
7 have the system here --

8 THE COURT: That will be fine.

9 Q. (By Mr. Ward) Do you have Exhibit 264 in front of you?

10 A. There's no exhibit number on the screen.

11 Q. All right.

12 A. Okay. I see it.

13 Q. So now then, you're saying that you're seeking approval
14 for these ET-Plus and ET-31 of the 5-inch channel. As far
15 as far as anybody knows with the Federal Highway
16 Administration, we're talking about this one with the
17 5-inch, correct?

18 A. Yes.

19 Q. The truth is, since at least September of 2005, Trinity
20 has manufactured and sold nothing but the 4-inch channel in
21 the ET-Plus.

22 A. September 2005, after the FHWA letter was issued. I
23 don't know exactly when we started building the ET-Plus
24 extruder heads with 4-inch channels, but that sounds
25 reasonable.

1 Q. Okay. So -- but as far as the Federal Highway
2 Administration knows, the only thing that's out there on the
3 road is the 5-inch channel that's been sold since, say,
4 October 1, 2005 for the purpose of this question.

5 A. Okay.

6 Q. Is that correct? Is that correct?

7 A. Yes.

8 Q. All right. And the testing had been done. You --
9 you -- that you're referring to, some of it by Texas
10 Transportation Institute, but we know that you have just --
11 we just read the October email where you're also wanting
12 them to consider the FLEAT, correct?

13 A. Yes, sir.

14 Q. And this is a draft, and the only -- only change you
15 made in this three-page letter was right -- was on Page 2
16 where in the draft it said 13Q; isn't that correct?

17 A. Correct.

18 Q. Okay. And it's right here. So you wrote back to Mr.
19 Artimovich. And right down in this last sentence, you say:
20 Recent full-scale crash tests have been demonstrated.

21 What you're talking about there, you're talking about
22 those FLEAT tests, aren't you? There hadn't been any recent
23 test with this system.

24 A. I believe it was the SKT test, but -- yes.

25 Q. Well --

1 A. It wasn't the ET-Plus.

2 Q. Well, you had also talked about the FLEAT, hadn't you?

3 A. Yes.

4 Q. And you talked about it being a 4-foot offset, 30 to 48
5 inches?

6 A. Correct.

7 Q. All right. Now, so I can understand what a 30- to
8 48-inch offset is, let's -- I've got a demonstrative
9 prepared.

10 MR. WARD: And if you'll pull that up on the
11 screen.

12 Q. (By Mr. Ward) Now, this is not meant to scale or
13 anything, but you can see that sort of the darker brown is
14 running along the -- if we were looking down on this, what
15 we would see was this guardrail. And when it would get back
16 about 50 feet from where the terminal head is, it would
17 begin to sort of go off in the uniform pattern for --
18 until -- when you got to the end where the terminal head --
19 the terminal head would be approximately 4 feet or would be
20 4 feet from the center line of the guardrail.

21 Does that describe generally what a flare is?

22 A. Yes. The FLEAT is flared over 37 and a half feet
23 instead of 50 feet.

24 Q. Okay. So we just moved that up. I mean, this -- in
25 general, the illustration will be 37 and a half rather where

1 the break -- where it would begin to fall away from the
2 roadway?

3 A. Right, which makes more significant flaring.

4 Q. All right. So it'd be a more significant flaring and be
5 a more -- put -- be more difficult to pass generally,
6 wouldn't it?

7 A. A redirection test, yes, sir, it would.

8 Q. But what about a head-on test?

9 A. I -- I don't know.

10 Q. You don't know. But that's one that you talked to them
11 about in October of 2009 that you wanted them -- wanted the
12 Federal Highway Administration to consider for approving
13 this, correct?

14 A. I think what I said was for redirection purposes for the
15 3-35 test.

16 Q. Okay.

17 A. If the FLEAT has passed testing at 3-35 with this 4-foot
18 offset, then a prudent engineering person could conclude
19 that an ET-Plus on a straight tangent, no offset, that the
20 ET-Plus would pass the --

21 Q. You're strictly asking for a redirection test then?

22 A. For the FLEAT purposes, yes.

23 Q. All right. And so you gained approval on March the
24 15th, 2010, correct? This came back to you with only the
25 change from --

1 A. Can I see that document?

2 Q. Yes. Oh, you want the March 15th. Sure. Excuse me.

3 MR. WARD: That would be 279.

4 A. Yes, sir, that's it. March 10th -- or March 15th --
5 excuse me -- 2010.

6 Q. (By Mr. Ward) So the only test that you referenced
7 in anything that you had sent to the Federal Highway
8 Administration at the time you requested this testing
9 was some tests that were run in 2002 on the five-inch
10 channel, correct? And the one test done on May 27th,
11 2005, correct?

12 A. I believe the 2002 test was a critical impact point test
13 that didn't have anything to do with the extruder head. It
14 wasn't an end-on hit.

15 Q. It wasn't an end-on hit, but it was -- it was on this
16 system with the five-inch channel?

17 A. Correct.

18 Q. Okay. Now, you know, we've already agreed, I believe,
19 that the Federal Highway Administration can only know what
20 you tell them as a representative -- or either Trinity or
21 your designated agency in making their approvals, correct?

22 A. Okay. Correct.

23 Q. And you referenced all these tests by the FLEAT on a
24 flared system in your emails and your -- and the draft
25 letters that you were sent, correct?

1 A. Say that again, please.

2 Q. You referenced in your requests for approval the FLEAT
3 test on a flared system, 48-inch flare?

4 A. Yes, sir.

5 Q. Okay. And you got the approval of March of 2010 --
6 March 15th, 2010, correct?

7 A. Yes, sir.

8 Q. And you have continued to use that approval as evidence
9 of the fact that the ET-31 and the ET-Plus, which the
10 Federal Highway Administration, until 2012, believed it was
11 this system, you've used that also, haven't you? You used
12 that March 15th, 2010 letter, ever since this controversy
13 came up, haven't you?

14 A. We -- the letter is the letter. I don't think we ever
15 brought a product to market -- the product that's described
16 in the letter.

17 Q. All right. But you did -- you did use that March 15th,
18 2010 letter when you went and met with Mr. Artimovich after
19 Mr. Harman blew the whistle, didn't you?

20 A. The letter was discussed in our meeting, yes.

21 Q. Yes. And then you know in looking at the June 2014
22 letter, Page 2 -- you've read that letter that we've heard
23 so much about, June 17th, 2014?

24 A. Yes, sir. Can we bring it up?

25 Q. Yes, sir, if you'd like. I think that's Defendants'

1 Exhibit 2, over on Page 2. You see that right there in the
2 middle of -- one of the letters that you cite about
3 four-inch guide channel is the one we've talked about,
4 September 2005. And then in addition, you cite a letter of
5 94 A -- that's -- that's one where you wrote and asked for a
6 change in the configuration, didn't have to do any further
7 post configuration, didn't have to do any further testing,
8 correct?

9 A. Can we look at that letter?

10 THE COURT: Mr. Smith, you need to answer the
11 question. If -- if you don't know without seeing something,
12 you just need to say you don't know.

13 THE WITNESS: Okay.

14 THE COURT: We're not going to go back and forth
15 with you asking for letters and letters and letters.

16 THE WITNESS: Yes, Your Honor.

17 THE COURT: You either know or you don't know.

18 THE WITNESS: Yes, Your Honor.

19 THE COURT: Let's move it along, Counsel.

20 Q. (By Mr. Ward) Do you know whether that's correct, sir?

21 A. I do not know without looking at the document, no.

22 Q. Well, you do not know, but you do know -- we just looked
23 at C -- C-12Q, correct?

24 A. Yes, sir.

25 Q. All right. So you're continuing to rely on this letter

1 of March 15, 2010. You've continued -- the Federal Highway
2 Administration has continued to rely on that, correct?

3 A. The Federal Highway has referenced it in this memo, yes.

4 Q. Yeah. Well, as of June 17th, 2014, had you ever told
5 the Federal Highway Administration about the flared system
6 that you had -- that Trinity had -- had TTI test for it in
7 2005 and 2006?

8 A. Personally, no.

9 Q. Do you know of anyone that had told the Federal Highway
10 Administration about the test -- the five crash tests that
11 had been run with this four-inch channel on the flared
12 system?

13 A. No.

14 Q. So it's fair to say the Federal Highway Administration,
15 as of the time of this letter of June 17th and the letter of
16 last Friday of October 10th of 2014, has no knowledge about
17 the failures of this four-inch system on a four-foot flare?

18 A. Correct.

19 Q. And you ran five tests -- TTI ran five tests at -- for
20 Trinity?

21 A. I believe that's correct.

22 Q. And every one of them failed?

23 A. In the eyes of TTI, yes.

24 Q. And are you arguing with a judgment of TTI on that, that
25 there were failures?

1 A. Absolutely not.

2 Q. And how many of those failures did you report to the
3 Federal Highway Administration as of today's date?

4 A. None.

5 Q. Okay. And that was on the flared system, and it was a
6 head-on test, all five?

7 A. Correct. A four-foot offset flared end terminal.

8 Q. Right. With a small car?

9 A. Small car, yes, sir.

10 Q. And they all failed?

11 A. Correct.

12 Q. And now, then, your lawyers have said in some question
13 and suggestions that fraud can only be committed when
14 somebody intentionally makes a misrepresentation to a third
15 party that -- to the Federal Highway Administration -- in
16 other words, that's the only way you can create fraud. Do
17 you agree with that?

18 A. I'm not an attorney, so --

19 Q. Okay.

20 A. So I'll say I don't know.

21 Q. Well, do you understand as a Vice President of
22 International Sales, that you have superior knowledge about
23 these products and what's been tested internally more than
24 the Federal Highway Administration?

25 A. Yes.

1 Q. And you know that the Federal Highway Administration
2 relies strictly on Trinity with their reporting and what
3 they tell them?

4 A. TTI and Trinity, yes.

5 Q. Well, Trinity is the one that's seeking the approval,
6 correct?

7 A. Yes.

8 Q. And they're the one that's disclosing this information
9 and has the legal obligation to disclose it to the Federal
10 Highway Administration, correct?

11 A. If so chosen by TTI, yes.

12 Q. And -- no, I'm asking doesn't Trinity have the legal
13 obligation to make a full disclosure to the Federal Highway
14 Administration?

15 A. If Trinity submits, yes.

16 Q. There's no condition about what Trinity submits to you,
17 is there, sir? It's what your obligation is to the Federal
18 Highway Administration, your company, Trinity?

19 A. In seeking approval or acceptance for a product, yes.

20 Q. Okay. Trinity didn't have a thing in the world to do
21 with this request as far as this time frame of getting this
22 March 15th, 2010 letter, did they?

23 A. Say that again, please.

24 Q. I mean, TTI didn't have a thing in the world to do with
25 getting this March 15th, 2010 letter, did they? They were

1 not involved in that?

2 A. TTI might have supplied or provided information to me.

3 Q. Did you -- did you say anything in any email that we've
4 talked about that TTI supplied you some information that you
5 were furnishing?

6 A. Not that I can recall.

7 Q. Insofar as you knew, were you the exclusive one that got
8 this letter approved?

9 A. Along with Don Gripne, yes.

10 Q. Okay. And you and other executives at Trinity are the
11 ones that made the sole decision not to tell the Federal
12 Highway Administration about the five failed tests?

13 A. Say that again, please.

14 Q. You and other people at Trinity are the ones that made
15 the decision not to tell the Federal Highway Administration
16 about the five failed tests with this ET terminal head --
17 four-inch?

18 A. The five failed tests were on an experimental R&D
19 project.

20 Q. Well --

21 A. Since it didn't pass testing, no, there was no need to
22 submit --

23 MR. WARD: Objection, Your Honor, nonresponsive.

24 THE COURT: Gentlemen, one at a time.

25 Finish your answer, Mr. Smith, and then I'll

1 determine whether it was responsive or not.

2 THE WITNESS: I finished my answer, sir.

3 THE COURT: All right. Let's move on to the next
4 question, Mr. Ward.

5 MR. WARD: All right.

6 Q. (By Mr. Ward) Insofar as this -- now you're trying
7 to call it an R&D project; that's fine. For my purposes
8 of this question, though, that -- at the same time
9 that -- right after you got this approval of September
10 2005, when you requested that approval, you were also
11 running tests on this, on the flared system, weren't
12 you, in that same timeframe?

13 A. TTI was running crash tests on the experimental R&D
14 project, yes.

15 Q. And they were using this head right here on the 4-inch?

16 A. With the 4-inch channel, yes, sir.

17 Q. Okay. All right. And you're not suggesting that anyone
18 other than either Trinity -- that Trinity -- anyone other
19 than Trinity had the ultimate responsibility to tell the
20 Federal Highway Administration what the facts were, are you?

21 A. I believe TTI determines what is submitted to -- to --
22 to Federal Highway Administration.

23 Q. So you're -- you're saying that it's -- if you didn't
24 tell the Federal Highway Administration about the five
25 failed tests, that's TTI's fault? Is that what you're

1 telling this jury? Is that where we're going?

2 A. We rely on TTI to tell us what to submit to FHWA, if TTI
3 chooses Trinity to be the submitter.

4 Q. All right. When you were submitting yourself on this
5 March 15th, 2010 letter, when you were in direct
6 communications and sending documents and making arguments
7 about the appropriateness of considering the FLEAT flared
8 system, did anyone -- did the Federal Highway
9 Administration -- did you ever tell the Federal Highway
10 Administration that I'm just telling you what Trinity --
11 what TTI tells me to tell you? Did you ever say that to the
12 Federal Highway Administration?

13 A. No. This wasn't a new product.

14 Q. Well, have you ever told the Federal Highway
15 Administration we only tell you the things about our product
16 that TTI tells us to tell you?

17 A. TTI conducts the crash-testing.

18 MR. WARD: Objection, Your Honor. He's
19 non-responsive. That was not my question.

20 THE COURT: Answer the question, Mr. Smith.

21 A. Would you please ask the question again?

22 Q. (By Mr. Ward) Did anyone with Trinity ever tell the
23 Federal Highway Administration we only tell you what TTI
24 tells us to tell you?

25 A. Not to my knowledge.

1 Q. You would agree with me that the Federal Highway
2 Administration has -- when you communicate with them
3 directly, they have to rely on you to tell -- Trinity to
4 tell them the truth about their products?

5 A. Yes.

6 Q. And you -- that the Federal Highway Administration has
7 to rely on you not to withhold material information about
8 your products; is that correct?

9 A. Products that are submitted, yes, correct.

10 Q. Well, if there's information that is material to them
11 making decisions about approval or disapproval for the
12 safety of the drivers on the driving -- on the public
13 highway system, aren't you supposed -- don't you recognize
14 your legal duty is to tell them anything that might be
15 material to their decision?

16 A. For a product that was submitted, yes, sir.

17 Q. Well, whether the product is submitted or not, if you
18 know something that you have learned in testing that would
19 call into question whether or not the product is safe, is it
20 your obligation to call that to the attention to the Federal
21 Highway Administration, you being Trinity?

22 A. If it was concerning a product that was being used in --
23 on the drive -- on the national highway system, yes.

24 Q. Well, this product right here, this one right here
25 (indicating), is this the one that was on the terminal in

1 the flared system that failed five times or not?

2 A. Yes, sir.

3 Q. Now then, you also, in connection with TTI, had them run
4 some computer simulations on this product, correct, on the
5 flared system?

6 A. TTI usually suggests computer simulations.

7 Q. They want you to run computer simulations?

8 A. TTI runs computer simulations, yes, sir.

9 Q. All right. How many computer simulations of a 3-31 test
10 have you submitted to the Federal Highway Administration
11 using this new product?

12 A. I've submitted none.

13 Q. You've submitted none. Have you requested them to run
14 any?

15 A. I have not.

16 Q. How expensive are the computer simulations?

17 A. I don't know.

18 Q. Can you give me an approximation?

19 A. 30 to \$40,000.

20 Q. And you haven't seen fit to request -- Trinity has not
21 seen fit to even request a computer simulation of this new
22 product with a 3-31 pickup test?

23 A. No.

24 Q. And -- okay. Now, just a few questions. On November
25 the 9th, 2011 --

1 MR. WARD: If we could call up that exhibit. I
2 believe it's 33, isn't it? No. 133.

3 Q. (By Mr. Ward) All right. The jury has seen this
4 numerous times. See on the first page --

5 MR. WARD: Back on the first page.

6 THE COURT: Mr. Ward, we don't need sidebar
7 comments about how many times the jury has seen it. You
8 need to ask your questions.

9 MR. WARD: Yes, sir. Apologize, Your Honor.

10 THE COURT: Let's proceed.

11 MR. WARD: Can we see the first page, please, Mr.
12 Diaz?

13 Q. (By Mr. Ward) Right at the beginning, the person's that
14 writing this is Mr. Steve Brown, is that correct, the
15 President?

16 A. No, sir.

17 Q. At that time he was the Vice President, correct?

18 A. At the bottom, yes, sir.

19 Q. Yes. And he's the -- the President then is Mr. Rodney
20 Boyd?

21 A. Correct.

22 Q. Mr. Steve Brown says: I would like to start pushing the
23 change to the ET to the four-inch channel, correct?

24 A. That's what the email says, yes, sir.

25 Q. And then he wants to know how much it will cost?

1 MR. WARD: And let's go to the next page.

2 Q. (By Mr. Ward) You were copied on that email, correct?

3 A. Yes, sir, I was.

4 Q. All right.

5 MR. WARD: And let's go down to --

6 Q. (By Mr. Ward) It says: I think we could get a better
7 ET. You see that down in the middle?

8 A. Yes, sir, I do.

9 Q. All right, sir. And welding will be stronger, and it
10 will fit better on the guardrail, will be much closer.
11 That's an improvement, isn't it, sir? Isn't that what he's
12 saying, it's going to be stronger?

13 A. That's what he's saying.

14 Q. All right. Tell me how many times after you got this
15 product approved in September the 9th, 2005, did you ever
16 advertise there were any improvements to the ET-Plus head --
17 ET-Plus system?

18 A. None that I'm aware of.

19 Q. Okay.

20 MR. WARD: And let's go right up -- on up.

21 Q. (By Mr. Ward) Mr. Brown had sent a copy of this to
22 Mr. Rodney Boyd who was then the President, and he
23 immediately told you that eight pound lighter head may give
24 us a problem in travel distance with a pickup truck. You
25 know what he's talking about is the 3-31 test, correct?

1 A. I don't know what he's talking about here.

2 Q. Do you know of any time you measured the travel distance
3 other than in connection with a head-on impact with the
4 terminal head and that you measure the travel distance down
5 the guardrail? Isn't that common language, sir?

6 A. That could be what he's saying, yes.

7 Q. Okay, sir. And one other thing -- all right, at any
8 time have you seen anyone from TTI in any test report ever
9 address the lighter head where they have evaluated and said,
10 don't worry about it -- ever seen anything in writing from
11 TTI where they evaluated that problem?

12 A. Not that I can recall.

13 Q. Have you ever seen anything up until this day where they
14 evaluated that problem?

15 A. No, not that I can recall.

16 Q. As far as you know, TTI has chosen to remain silent
17 about they recognized a problem and their solution was
18 silence; is that a fair statement?

19 A. I can't speak for TTI, sir.

20 Q. I said TTI. Excuse me. Thank you, sir. And I'll ask
21 you this question. If -- do you know of anything where
22 Trinity has ever acknowledged or tried to acknowledge this
23 problem of a lighter -- that's eight pounds lighter and
24 notify the Federal Highway Administration that might be a
25 problem?

1 A. Not to my knowledge.

2 Q. Have you ever seen anything where Trinity asked anybody
3 to address that problem?

4 A. Not to my knowledge.

5 Q. So that problem has never been addressed or -- at all as
6 far as you are aware?

7 A. Not to my knowledge.

8 Q. Okay.

9 MR. WARD: Let's go back down to -- one other
10 thing here.

11 Q. (By Mr. Ward) If -- the earlier email on that day, if
12 TTI agrees, I'm feeling we can make this change with no
13 announcement. It's fair to say y'all were successful in
14 making no announcement of the changes that were made until
15 Mr. Harman came forward; isn't that correct?

16 A. I'm not sure what Mr. Brown is saying here.

17 Q. Did you ever announce to the Federal Highway
18 Administration or anyone about the changes to the ET-Plus
19 head prior to Mr. Harman coming forward?

20 A. No.

21 MR. WARD: Pass the witness.

22 THE COURT: Approach the bench, Counsel.

23 (Bench conference.)

24 THE COURT: Who's going to cross-examine?

25 MR. SHAW: I am.

1 THE COURT: Do you have any kind of a guess as to
2 the length of time?

3 MR. SHAW: Judge, I might be able to get him off
4 by 3:20, 3:25. I'm going by how long it took last time.

5 THE COURT: All right. We'll take a recess now
6 then. I don't want to wait.

7 Let's clean up all these demonstratives and get
8 them out of the way, okay?

9 MR. WARD: Yes, sir.

10 THE COURT: All right.

11 (Bench conference concluded.)

12 THE COURT: Ladies and gentlemen, we're going to
13 take a recess at this time before cross-examination of the
14 witness begins.

15 You may leave your notebooks in your chairs. Take
16 an opportunity to stretch your legs, and we'll have you back
17 in here in a moment to continue with the cross-examination
18 of this witness. Don't discuss the case with yourselves in
19 any way. You're excused for recess at this time.

20 COURT SECURITY OFFICER: All rise.

21 (Jury out.)

22 THE COURT: The Court stands in recess.

23 (Recess.)

24 (Jury out.)

25 COURT SECURITY OFFICER: All rise.

1 THE COURT: Be seated, please.

2 Counsel, approach the bench, please?

3 (Bench conference.)

4 THE COURT: All right. The Court has before it a
5 letter dated October the 10th, 2014, executed by Charles W.
6 Patterson, PE, of the Virginia Department of Transportation.
7 Plaintiffs have moved to pre-admit this as an exhibit in
8 this case.

9 I understand the Defendants are opposed to that,
10 and the Court will afford both sides a short period of time
11 to offer their positions here at the bench outside of the
12 hearing of those in the courtroom. I'm doing that because
13 there has been some indication that this was produced from a
14 sealed proceeding in some other jurisdiction. So I thought
15 it better to do this outside of the hearing of all present
16 in the courtroom and the jury.

17 So you've moved to introduce it, Mr. Carpinello.

18 Mr. Shaw, give me the Defendants' objections.

19 MR. SHAW: Thank you, Your Honor. It's our
20 understanding that this is a communication that is part of
21 the sealed -- a sealed communication pursuant to a qui tam
22 action that is pending in the state of Virginia.

23 And during the body of the letter, Judge, it
24 references other letters that are clearly attorney-client
25 privilege letters. I don't know where this goes, if we let

1 this particular letter into evidence, if we then get into
2 those particular letters, as well. It's my good faith
3 understanding, Your Honor, that the letter never should have
4 been sent to Trinity, but this letter, like the other
5 letters that are in -- my understanding from what they're
6 telling me, should have been part of the attorney-client and
7 considered to be sealed. That's the first part of our
8 objection, Your Honor.

9 We just received it today when Mr. Carpinello gave
10 it to me.

11 THE COURT: I think it's undisputed both sides
12 received it today.

13 MR. SHAW: Yes. Thank you, Your Honor.

14 This other thing that I would say, Your Honor, is
15 that it appears to be incomplete. It doesn't even go into
16 effect until October 24th of 2014. It appears to be
17 indicating future action. So, therefore, Your Honor, in
18 some type of evidentiary incompleteness, it appears to
19 forecast other stuff that has not happened yet.

20 And lastly, Your Honor, we would object on the
21 basis of relevancy under Rule 401 and 403 because as we
22 understand the law here in the Fifth Circuit, what a state
23 is doing with the approval process for end terminal or any
24 other -- any other terminal in this particular setting, Your
25 Honor, is irrelevant to the issue of federal reimbursement.

1 You can have a product on a QPL and it not be used
2 and not be available for federal money or it can be on the
3 QPL and not be there for federal money. That's not the
4 determinative question. Respectfully, Your Honor, what we
5 believe in this case, okay?

6 THE COURT: Mr. Carpinello, 30 seconds to respond.

7 MR. CARPINELLO: Your Honor, it's not part of a
8 sealed proceeding, and on its face it's clear it's not.
9 There was a qui tam case brought in Virginia. It's sealed
10 until the Attorney General decides to intervene. This has
11 nothing to do with that case. This is a separate
12 determination made by the Department of Transportation which
13 sent a letter to Trinity. It's a public document. Nowhere
14 on the face of the document does it indicate that it is a
15 part of a sealed proceeding or is any way to be sealed.

16 It's a determination made by VDOT and it's
17 conditional, but the VO -- VDOT has made a determination
18 specifically because of the failure to disclose the changes,
19 that they are taking them off the approved list unless they
20 immediately run a test and the -- whether or not they are on
21 the state QPL is evidence that's been brought in by both
22 sides in this case and it's highly relevant to the question
23 in this case.

24 They cannot be in the position of waving in front
25 of the jury the FHWA letter and then saying, but you can't

1 get in the fact that there are states around the country
2 that are now saying because you have failed to disclose this
3 test, we are not going to submit this to the federal
4 government for reimbursement. That's what this letter
5 means. We are not getting -- we are not going to -- we are
6 not going to submit to the federal government for
7 reimbursement purchases of these because we're not going
8 to -- you're not going to get on our QPL.

9 THE COURT: All right. All right. Here's the
10 Court's ruling. The letter does not on its face indicate
11 that its confidential or that it's a part of any other
12 sealed proceeding. Even -- even for purposes of argument if
13 it were, it's been disclosed here. It's known to both
14 parties. It's presented to this Court, and I have no
15 alternative but to confront it and deal with it.

16 In the Court's view, this letter is clearly
17 relevant. The June 20 -- the June 14th, 2014 letter from
18 FHWA has been characterized repeatedly by the Defendants as
19 a final and retroactive certification of the products in
20 question for reimbursement. This clearly goes to that
21 issue. It clearly indicates in conformity with the October
22 10th, 2014 follow-up letter from the HW -- FHWA that this is
23 an issue still under evaluation and far from final.

24 That gives it requisite relevance in the Court's
25 view, which is not a terribly high bar under 401 and 402. I

1 understand the timeliness issue, but that is not the fault
2 of either party. It's before the Court, and the Court can't
3 duck it. I'm going to pre-admit it as whatever the next
4 Plaintiff's exhibit number is.

5 MR. KIRSNER: Your Honor, may I be heard briefly,
6 to request a redaction?

7 COURT REPORTER: I'm sorry?

8 THE COURT: You're going to have to speak into
9 this microphone. Identify yourself for the record, please.

10 MR. KIRSNER: Matthew Kirsner for the Defendants,
11 Your Honor.

12 As I look at the letter of October 10, 2014, the
13 last two sentences of the first paragraph specifically
14 involve attorney-to-attorney communications conducted in a
15 sealed qui tam investigation. The May 13th, 2014 request
16 and the June 14th, 2014 response, first paragraph of Page 1,
17 Your Honor, if I may. Both of those were conducted. We
18 request that both of those sentences be redacted, pursuant
19 to the Virginia qui tam statute and the witnesses not
20 questioned on those two correspondence pieces. Those were
21 attorney-to-attorney, and they're sealed investigation, Your
22 Honor.

23 THE COURT: You may respond.

24 MR. CARPINELLO: First of all, I don't believe
25 that's correct, that the references are at all

1 attorney-client communications in any way. And in any
2 event, this -- separate and totally apart from the qui tam
3 action, the Department of Transportation is conducting its
4 own investigation. My understanding is they sent demands to
5 Trinity for a response. DOT did not believe the response to
6 be sufficient. It's -- the -- the letter clearly speaks for
7 itself. And I think the representation that this was some
8 kind of a sealed communication is with -- completely without
9 foundation and, in fact, false.

10 MR. KIRSNER: Your Honor, I made the
11 communication and signed the letter and it's not false and I
12 take offense at that, sir.

13 THE COURT: Well, the first sentence of the first
14 paragraph says May 13, 2014, Virginia Department of
15 Transportation provided Trinity Highway Products with a
16 letter. I don't know how that's attorney-client privilege.

17 MR. KIRSNER: I wasn't -- respectfully, I'm not
18 claiming attorney-client, Your Honor. It was a sealed
19 investigatory privilege under Virginia statute where it was
20 transmitted from the agency. It was attorney to --

21 THE COURT: I don't -- I don't know what the
22 Virginia statute is, but as I said, the letter is here.
23 It's known to both parties. And quite honestly, it's not --
24 it's not this Court's obligation to police the prerogatives
25 or rules of the Virginia statute or whatever. It's -- it's

1 the responsibility of whichever Court may have that
2 authority to do that. And they may well do that.

3 But we're in the middle of a trial. It's been
4 presented. I can't ignore it. Your -- your request for
5 redaction is denied. The letter is pre-admitted.

6 MR. SHAW: And our objections are overruled, Your
7 Honor?

8 THE COURT: Your objections are overruled, as
9 noted.

10 MR. SHAW: Thank you.

11 MR. MANN: Can -- can I just correct one thing,
12 Your Honor? I know you said that we're taking the position
13 that the June 14 letter is a retroactive acceptance, and I
14 just want to be clear to the Court, we're not claiming
15 retroactive acceptance.

16 THE COURT: Well, it's clear that you're claiming
17 it's a final determination.

18 MR. MANN: Yes, sir. Yes, sir. Yes, sir.

19 THE COURT: And this indicates that it's not. So
20 it meets the relevance test.

21 MR. MANN: Yes, sir.

22 THE COURT: All right. Let's proceed.

23 (Bench conference concluded.)

24 THE COURT: All right. Are we ready to
25 proceed with cross-examination by the Defendants?

1 MR. SHAW: Yes, Your Honor. May I stay here at
2 the podium?

3 THE COURT: You may.

4 Let's bring in the jury, Mr. McAteer.

5 COURT SECURITY OFFICER: All rise for the jury.

6 (Jury in.)

7 THE COURT: Please be seated, ladies and
8 gentlemen.

9 We'll continue with the cross-examination of
10 Mr. Smith by the Defendants.

11 Mr. Shaw, you may proceed.

12 MR. SHAW: Thank you, Your Honor.

13 CROSS-EXAMINATION

14 BY MR. SHAW:

15 Q. Mr. Smith, have you ever intentionally lied to the FHWA
16 to get federal reimbursement for the ET-Plus?

17 A. Absolutely not.

18 Q. Have you ever intentionally and deliberately omitted any
19 information to get federal reimbursement for the ET-Plus?

20 A. Absolutely not.

21 Q. Who are you currently employed with?

22 A. Trinity Highway Products.

23 Q. How long have you worked at Trinity Highway Products?

24 A. 28 years.

25 Q. How did you get that job, sir?

1 A. I interviewed right out of -- out of college after I
2 graduated from Texas Tech.

3 Q. And what was your degree from Texas in?

4 A. In marketing.

5 Q. Are you familiar with the ET-Plus system?

6 A. Yes, sir, I am.

7 Q. Is the ET-Plus system simply the head, the guardrail, or
8 does it include other components, as well?

9 A. The system is just that, a complete system, including
10 many parts.

11 Q. Describe for us the ET-Plus system.

12 A. The ET-Plus system consists of an extruder head, up to
13 four pieces of guardrail, eight posts, six blocks, and
14 various hardware, angle struts, cable assemblies, cable
15 brackets, a whole myriad of products.

16 Q. Is there a difference between the ET-Plus system and the
17 experimental flared ET terminal end?

18 A. Yes.

19 Q. Tell the ladies and gentlemen of the jury, please, the
20 difference between an ET-Plus system and the flared ET
21 terminal end?

22 A. The ET-Plus system is a tangential terminal, meaning
23 it's installed parallel to the roadway. It can be tapered
24 up to -- up to 2 feet over 50 feet, so 25 to one taper.
25 With the flared 4-foot offset terminal, the flare rate is

1 quite a bit more drastic. It's 10 to 1 flare. It's flared
2 4 feet over 37 and a half feet, completely different
3 installation layout.

4 Q. Does Trinity Highway Products have a commercialized
5 flared end terminal system?

6 A. No, sir.

7 Q. Has Trinity Highway Products ever had a flared end
8 terminal system?

9 A. Not a flared ET-Plus, no, sir.

10 Q. Why not?

11 A. Lack of successful crash testing.

12 Q. You were asked some questions about -- well, has there
13 ever been an attempt to crash test a flared ET system?

14 A. Not a flared ET system, as we know it.

15 Q. What -- what was done, then?

16 A. A modified version of a flared offset terminal that
17 included various parts.

18 Q. What -- when we say offset terminal, what do you mean by
19 that?

20 A. As the diagram showed earlier, offsetting the nose or
21 the head of the terminal by 4 feet from the roadway.

22 Q. Well, was this a joint venture between Trinity and Texas
23 A&M?

24 A. Yes, it was.

25 Q. Did you rely on the expertise of Texas A&M to design the

1 experimental flared ET system and evaluate the test results?

2 A. Yes, sir.

3 Q. Was Texas A&M satisfied with those results?

4 A. No.

5 Q. Through the years, have there been other experimental
6 projects that you have been involved with during your time
7 of employment with Trinity Highway Products?

8 A. Yes, sir.

9 Q. How many?

10 A. Dozens.

11 Q. Did all of those experimental projects result in a
12 commercialized product?

13 A. No, sir.

14 Q. When I say a commercialized product, do you understand
15 what I mean?

16 A. A commercialized product that was brought to market by
17 Trinity, yes, I believe I do.

18 Q. Has Trinity ever brought to product and placed into the
19 roadways of our nation a flared offset ET system?

20 A. No, sir.

21 Q. Did Trinity ever submit a flared ET system for
22 acceptance by the FHWA?

23 A. No, sir.

24 Q. Why not?

25 A. Again, lack of successful crash testing.

1 Q. Did the FHWA ever ask you to ever provide to it copies
2 of a flared ET offset end terminal system for review?

3 A. No, sir.

4 Q. Did the FHWA know that Trinity and Texas A&M abandon --
5 abandoned their flared ET project?

6 A. I'm sorry. Could you ask that again, please?

7

8 Q. Is it your understanding that the FHWA knows that
9 Trinity and Texas A&M abandoned the flared ET offset
10 system?

11 MR. WARD: Your Honor, we object to what his
12 understanding about what the FHWA knew. If he wants to
13 produce some sort of document. We've seen nothing to
14 support that.

15 THE COURT: What the Federal Highway
16 Administration knew this witness would have to speculate.

17 I'm going to sustain the objection.

18 Q. (By Mr. Shaw) How is the experimental flared ET system
19 different from the ET-Plus system?

20 A. The most prominent difference is the installation
21 layout, again, a 4-foot offset over a 37 and a half feet,
22 resulting in about a 10 or 11 to 1 flare rate.

23 Q. When we talk about the flare rate as the flare in the
24 experimental flared ET system is that the same thing as an
25 acceptable flare rate for a tangent ET system?

1 A. The acceptable flare rate for the tangential ET-Plus is
2 25 to 1. So, no, it's quite a bit more severe with a 4-foot
3 offset flared end terminal.

4 Q. All right. Were you involved with the development of
5 the ET-Plus system?

6 A. From Trinity's standpoint, yes.

7 Q. When did you first become aware of the ET-Plus system?

8 A. In 1999.

9 Q. Who designed the ET-Plus?

10 A. Texas A&M.

11 Q. Were you involved in sales and marketing of the ET-Plus
12 in 2000?

13 A. Yes, sir, I was.

14 Q. In 2005?

15 A. Yes, sir, I was.

16 Q. Does Trinity install the ET-Plus?

17 A. No.

18 Q. Who installs the ET-Plus?

19 A. Contractors.

20 Q. Does Trinity maintain the ET-Plus?

21 A. No.

22 Q. Does Trinity sell the ET-Plus to the Federal Government?

23 A. No, sir.

24 Q. Does Trinity sell the ET-Plus to state DOTs?

25 A. Yes.

1 Q. Does Trinity sell the ET-Plus to private contractors?

2 A. Yes.

3 Q. Who have you worked with at Texas A&M on the development
4 of the ET-Plus?

5 A. Several people, including Dr. Roger Bligh, Dr. Gene
6 Buth, Dr. Dean Alberson, Dr. Hayes Ross, and Lance Porter.

7 Q. Does Trinity have its own design staff?

8 A. No.

9 Q. Who owns the design of the ET-Plus?

10 A. Texas A&M.

11 Q. Is Texas A&M responsible for all design and testing of
12 all the ET-Plus sold in the United States?

13 A. Yes, sir.

14 Q. Who has the authority of approving design changes to the
15 ET-Plus?

16 A. Texas A&M.

17 Q. Who designs whether design changes may impact ET-Plus
18 system performance?

19 A. Would you say that again, please?

20 Q. Who decides whether design changes may impact ET-Plus
21 system performance?

22 A. Texas A&M.

23 Q. Who designs whether -- who decides whether crash -- who
24 design -- who decides whether design changes should be
25 crash-tested before sale?

1 A. Texas A&M.

2 Q. Are you familiar with NCHRP 350?

3 A. Yes, sir, I am.

4 MR. SHAW: If you could pull up Defendants'
5 Exhibit No. 3, please.

6 Q. (By Mr. Shaw) Do you recognize Defendants' Exhibit No.
7 3?

8 A. Yes, sir, I do.

9 Q. Have you worked with the authors of Defendants' Exhibit
10 No. 3?

11 A. Yes, I have.

12 Q. Which of the authors have you worked with who wrote
13 Defendants' Exhibit No. 3, Report 350?

14 A. Dr. Hayes Ross for one, the inventor of the ET-Plus, and
15 Dick Zimmer as well.

16 Q. Is Dr. Hayes Ross one of the engineers at Texas A&M?

17 A. Yes, sir, he is.

18 Q. What types of tests are contemplated by Report 350?

19 A. For end terminals?

20 Q. For end terminals.

21 A. For end terminals, up to seven different tests.

22 Q. Can you describe what those seven types of tests are?

23 A. Yes, sir. Starting with the lower numbers, Test 3-30 is
24 a small car that we discussed before, impacting the terminal
25 at 62 miles an hour, 0 degrees impact angle and 4-foot --

1 excuse me -- a quarter offset, a quarter of the vehicle
2 width.

3 The 3-31 is the pickup truck, the 2,000-kilogram,
4 three-quarter-ton pickup truck, impacting the system at 0
5 degrees at 62 miles an hour.

6 3-32, small car, 15-degree impact on the nose.

7 3-33, the 2,000-kilogram truck, 15 degrees on the nose.

8 3-34 is a small car, 15-degree impact at the critical impact
9 point.

10 3-35 is the pickup truck, 20 degrees at the beginning
11 length.

12 And then 3-39 is a reverse-direction impact with --
13 with a pickup truck coming from the opposite direction at 20
14 degrees.

15 Q. Are you familiar with 350, Report 350?

16 A. Yes, sir, I am.

17 Q. Are there objective criteria that is presented in Report
18 350 to determine whether or not there has been a pass or a
19 fail of a crash test conducted pursuant to 350?

20 A. Yes, sir.

21 Q. Does 350 standards apply to the ET-Plus manufactured and
22 sold here in the United States today?

23 A. Yes.

24 Q. In your experience, does FHWA look to 350 standards to
25 determine the ET-Plus eligibility for federal highway funds?

1 A. Yes, sir.

2 Q. As we sit here today, is the ET-Plus eligible for
3 federal reimbursement?

4 A. Yes, sir, it is.

5 Q. Are you aware of any time when the ET-Plus has not been
6 eligible for federal reimbursement?

7 A. No.

8 Q. Explain to me and to the jury, please, the crash-testing
9 process beginning with the written proposals up and through
10 the tests. Are you involved with that?

11 A. Yes, sir, I am.

12 Q. How does that work, Mr. Smith?

13 A. TTI would put together a contract letter laying out the
14 details of the test, the cost of the test. Trinity would
15 sign that contract letter, if everything was agreeable, send
16 it back to TTI, along with payment for the crash test.

17 Q. Once a crash -- does Trinity crash test?

18 A. No, sir.

19 Q. Who performs the crash test?

20 A. Texas A&M.

21 Q. Are the results recorded?

22 A. Yes, sir.

23 Q. How are they recorded?

24 A. Through video recordings, through accelerometer trace
25 readings, instrumentation that's included in the vehicle,

1 photographs, physical measurements, a whole host of ways to
2 record the crash test results.

3 Q. How is the data -- who collects the data from the crash
4 test?

5 A. Texas A&M.

6 Q. Who interprets the data from the crash test?

7 A. Texas A&M.

8 Q. Who compiles the report, if there is one that's
9 compiled, of the crash test?

10 A. Texas A&M.

11 Q. Are all products that are crash-tested result in a
12 report?

13 A. No, sir.

14 Q. Who drafts the language for the crash test reports?

15 A. Texas A&M.

16 Q. Is there any type of a required format of what should or
17 should not be in a crash test report that you are aware of?

18 A. Yes.

19 Q. What is that?

20 A. It's dictated in NCHRP Report 350.

21 Q. Who decides the format that should be utilized for the
22 crash test reports for the products that are tested?

23 A. Texas A&M within the guidelines of NCHRP Report 350.

24 MR. SHAW: If we could pull up Defendants' Exhibit
25 No. 39.

1 Q. (By Mr. Shaw) Are you familiar with Defendants' Exhibit
2 39, Mr. Smith?

3 A. Yes, sir, I am.

4 Q. And what is Defendants' Exhibit No. 39?

5 A. It's an email string originated by Dr. Hayes Ross at
6 TTI --

7 Q. If we could look -- if we could look at the first email
8 of this email chain, is this Hayes Ross in the email that
9 you were referring to, Mr. Smith?

10 A. Yes. It's one of the authors of NCHRP Report 350.

11 Q. And also an engineer at A&M?

12 A. Correct.

13 Q. And this email is dated February 27th, 2003?

14 A. Correct.

15 Q. And if we will look, it is to Steve Brown?

16 A. Yes, sir.

17 Q. If we would look at the bullet point or Numerical
18 Paragraph No. 6 on the following page. Have you seen
19 this email before?

20 A. Yes, sir, I have.

21 Q. And what is being discussed in this email?

22 A. Dr. Ross is explaining to Steve Brown that TTI is
23 considering or thinking that the impact performance of the
24 extruder head can be improved by reducing the available
25 clearance between the downstream end of the guide chute and

1 the w-beam.

2 Q. What were the reasons for improving the ET-Plus guide
3 channel, as you understand them, that was being initiated
4 here by TTI in 2003?

5 A. I understand it to be a tighter fit around the
6 guardrail, which would eliminate wobble in the rail
7 during the -- during the impact.

8 MR. SHAW: Your Honor, if I may --

9 THE COURT: You may.

10 MR. SHAW: -- move this board?

11 Q. (By Mr. Shaw) These are -- these heads that are here
12 with us are not oriented upside down, but assume with me
13 that this is where the guardrail is. When you talk about
14 wobble, what is it that you're referring to?

15 A. Lateral and vertical space between the guardrail and the
16 channels.

17 Q. So the slack area?

18 A. Yes, sir.

19 Q. And was this your understanding as early as 2003, per
20 the suggestion of Texas A&M?

21 A. Yes.

22 Q. Did Texas A&M, in fact, conduct end-on crash testing of
23 the ET-Plus with a four-inch guide channel?

24 A. Yes, sir.

25 Q. When did that first occur?

1 A. The first test was May 27th of 2005.

2 Q. Were you present?

3 A. No, sir, I was not.

4 Q. Is there any doubt in your mind, as we sit here, that
5 the crash test that was conducted by Texas A&M in May of
6 2005 included an end terminal with a four-inch guide
7 channel?

8 A. No, no doubt in my mind.

9 Q. How is it that you are so certain when you say that?

10 A. Dr. Roger Bligh of TTI confirmed that.

11 Q. You were asked questions by Mr. Ward about the drawing
12 of a prototype being submitted with the submittal. Is there
13 other information that goes with the test reports, such as
14 data and calculations and photographs and that type of
15 thing?

16 A. Yes.

17 Q. Tell the Ladies and Gentlemen of the Jury what does go
18 into these crash reports when they are submitted to the
19 FHWA?

20 A. The crash test report gives a detailed photographic
21 rendering of what is included in the crash test.
22 Accelerometer traces, as I had said before, pass/fail
23 criteria, according to 350, along with the results and video
24 -- actual video of the crash test result -- the crash test
25 itself.

1 Q. Did Trinity ask Texas A&M to approve the ET-Plus with
2 the four-inch guide channel?

3 A. Say that one more time, please.

4 Q. Did Trinity ask Texas A&M to approve an ET-Plus with a
5 four-inch guide channel after 2003?

6 A. Yes.

7 Q. Did Trinity and Texas A&M discuss the guide channel
8 improvement in 2005?

9 A. Yes, sir.

10 Q. Was this discussion conducted by email?

11 A. Yes, it was.

12 MR. SHAW: If we could look at Defendants' Exhibit
13 No. 13?

14 Q. (By Mr. Shaw) You were questioned about this earlier.
15 Do you remember this email from you, Mr. Smith?

16 A. Yes, sir, I do.

17 Q. And what is it that you are saying to Mr. Alberson,
18 Mr. Buth, and Mr. Bligh and Mr. -- or Dr. Buth, Dr. Bligh,
19 Mr. Bullard, and Dr. Ross?

20 A. This email was after a prototype had been sent --
21 manufactured by Trinity and sent to TTI, and I was asking
22 the engineers at TTI to give us their thoughts on what they
23 thought about the prototype that was manufactured by Trinity
24 and sent to TTI.

25 Q. Did you get any feedback in response to this?

1 A. Yes, sir.

2 MR. SHAW: If we could look at Defendants' Exhibit
3 No. 14?

4 Q. (By Mr. Shaw) What is Defendants' Exhibit No. 14,
5 Mr. Smith?

6 A. It's a continuation of the email string that we just
7 looked at.

8 Q. And what is this email string discussing?

9 A. It's TTI's response to my question.

10 Q. For example, if we look at the one that's on the
11 screen -- the bottom one that's on the screen from Dr. Dean
12 Alberson, what does that say?

13 A. We haven't heard from Hayes on this issue, but we are in
14 agreement at Riverside that the head should work fine, and
15 we will install it for the test on May 25th/26th unless we
16 hear contrary to that plan.

17 Q. How about on the email that was at the top part of that
18 particular screen? What was this email concerning?

19 A. It was an email from Dr. Dean Alberson to Chris Chatham
20 instructing or asking Chris to work on a drawing to reflect
21 the new ET head.

22 Q. Did you ever provide to Texas A&M a drawing reflecting
23 an ET-Plus with a four-inch guide channel?

24 A. Yes, sir.

25 MR. SHAW: If we could look at Exhibit No. 40 --

1 or, Mr. Hernandez, I apologize, Defendants' Exhibit No. 42
2 first.

3 Q. (By Mr. Shaw) Do you see in front of you Defendants'
4 Exhibit No. 42?

5 A. Yes, sir, I do.

6 Q. Are you involved in this email string?

7 A. Yes, I am.

8 Q. The first -- the second email that I see there on this
9 email string is from Wade Malizia to you. Do you see that?

10 A. Yes, sir.

11 Q. And what is this?

12 A. He's providing a drawing of the ET-Plus head with the
13 four-inch channel.

14 Q. What do you do once you get this particular drawing?

15 A. Forward it to -- to TTI.

16 MR. SHAW: If we will look at the next email
17 string.

18 Q. (By Mr. Shaw) The one that is on your screen is an
19 email from who?

20 A. From Brian Smith, me, to Dr. Dean Alberson, Dr. Gene
21 Buth, Lance Bullard, and Dr. Roger Bligh.

22 Q. And what are you doing?

23 A. I'm forwarding the drawing provided to me by Wade
24 Malizia and asking TTI to provide its thoughts.

25 MR. SHAW: And if we could look at Exhibit No. --

1 if we can look at the email right above that one from
2 Mr. Buth, please, and highlight that, Mr. Hernandez?

3 Q. (By Mr. Shaw) And do you know Dr. Gene Buth?

4 A. Yes, sir, I do.

5 Q. And what is his position?

6 A. He's retired now, but he was the -- the lead director at
7 Texas A&M Riverside campus, TTI.

8 Q. And what what is the subject -- what is the subject
9 matter of this email from Dr. Buth?

10 A. It's the ET-Plus extruder head with four-inch channel.

11 Q. And does there appear to be an attachment there?

12 A. Yes, sir, an AutoCAD drawing.

13 MR. SHAW: And if we can look now at Exhibit No.
14 42 -- or 40, I'm sorry. If we look at the second page.

15 Q. (By Mr. Shaw) Is this the drawing, that's there in
16 front of your screen, Exhibit -- Defendants' Exhibit No. 42,
17 that was forwarded to Texas A&M reflecting the prototype
18 that had been earlier provided to them?

19 A. Yes.

20 Q. Has anybody ever told you to destroy this document,
21 destroy this drawing, hide it from the FHWA or anybody else?

22 A. No, sir.

23 Q. Has anybody ever told you to not talk about this
24 particular drawing or to destroy your emails in any way
25 concerning the -- this drawing of a four-inch change?

1 A. No.

2 Q. In fact, am I accurate to say that this drawing was
3 provided to Texas A&M before the test report was ever
4 provided to the FHWA?

5 A. Yes.

6 Q. How did you first become aware of the allegations that
7 were being made by Mr. Harman?

8 A. I was approached by Mr. Nicholas Artimovich with FHWA in
9 January of 2012 at a Transportation Research Board
10 conference in Washington, D.C.

11 Q. What did you learn at that particular time?

12 A. Mr. Artimovich explained to me that there were
13 allegations that Trinity was not manufacturing its ET-Plus
14 extruder head properly.

15 Q. Once you learned of these allegations about Mr.
16 Harman -- from Mr. Harman, what did you do?

17 A. I asked Mr. Artimovich for more information. The
18 explanation he gave me when we met in Washington at this
19 conference, I couldn't really understand what he was trying
20 to tell me, so I asked him for more information.

21 Q. Did you get more information?

22 A. Yes, sir, I did.

23 Q. What additional information did you receive, Mr. Smith?

24 A. I received from Mr. Artimovich a 100-page plus
25 PowerPoint presentation entitled to Failure Assessment of

1 Guardrail Extruder Terminals.

2 Q. Who did you understand the author of this document,
3 Failure Assessment of End Terminals?

4 A. Josh Harman.

5 Q. Did you review this particular document?

6 A. Yes, sir, I did.

7 Q. Did you ask other people to review this particular
8 document that you had received from Mr. Artimovich?

9 A. Yes, I did.

10 Q. What was your understanding as to where Mr. Artimovich
11 had gotten this PowerPoint-type presentation from?

12 A. From Mr. Harman.

13 Q. Who did you ask to review it with you?

14 A. Barry Stevens, Senior Vice President of Engineering for
15 Trinity Highway Products; Dr. Roger Bligh of TTI; Greg
16 Mitchell, President of Trinity Highway Products.

17 Q. And was that -- did you ask anybody from A&M to review
18 it?

19 A. Yes, Dr. Roger Bligh.

20 Q. From the length of time from when Mr. Artimovich told
21 you that he had been approached by Mr. Harman with his
22 allegations, how much period of time passed before you began
23 investigating these allegations?

24 A. I believe that Mr. Artimovich sent the PowerPoint
25 presentation to me a week or two after the conference, and

1 we immediately began to review the documents.

2 Q. And when you say immediately, what does that mean?

3 A. I mean immediately, right after we received the email
4 that included the PowerPoint presentation.

5 Q. How much period -- how long a period of time went by
6 while you were investigating this before you once again met
7 with Mr. Artimovich?

8 A. I believe it was three to four business days before we
9 -- before I asked Mr. Artimovich for a meeting, and that
10 meeting occurred on February 14th, 2012.

11 Q. In connection with the investigation into this matter,
12 did you have an opportunity to determine whether or not, in
13 fact, that a four-inch guide -- four-inch guide channel was
14 utilized in the crash test?

15 A. Say that again, please, sir.

16 Q. During your investigation into this matter, were you
17 able to determine and confirm the four-inch guide channel
18 had been crash tested in May of 2005?

19 A. Yes, sir, I was.

20 Q. How were you able to, once again, determine that?

21 A. That was confirmed by Dr. Roger Bligh of TTI.

22 Q. Are you aware of any type of photo analysis that was
23 conducted of the crash test video that was taken?

24 MR. WARD: Objection, Your Honor. He's not
25 qualified to talk about photo analysis. We object to that.

1 MR. SHAW: I think my question is, is he aware of
2 it, Your Honor.

3 THE COURT: I'll overrule it.

4 MR. SHAW: Can we look, please, at pre-admitted
5 Exhibit D 77?

6 Let's move on and let them find the appropriate
7 exhibit. They're telling me I'm incorrect, Your Honor. I
8 apologize.

9 THE COURT: Let's move along.

10 Q. (By Mr. Shaw) Did Texas A -- did this photo analysis --
11 was it provided to FHWA?

12 A. Yes, sir, it was.

13 MR. SHAW: They tell me I need to look at 291, Mr.
14 Hernandez.

15 Q. (By Mr. Shaw) Is this the photograph -- the scaled
16 photograph that was provided to FHWA or one -- a copy of one
17 that was?

18 A. Yes, provided by Roger Bligh and given to FHWA.

19 Q. Where was this subsequent meeting with Mr. Artimovich
20 held?

21 A. In Tampa, Florida.

22 Q. Who was at this meeting?

23 A. Mr. Artimovich, Barry Stephens, Greg Mitchell, and
24 Dr. Roger Bligh and me.

25 Q. Did Trinity take Mr. Harman's allegations seriously?

1 A. Very seriously.

2 Q. Do they take them seriously today?

3 A. Yes, absolutely.

4 Q. Would -- would you describe this meeting as an intimate
5 meeting?

6 A. It was a meeting that was away from the 2,000-person
7 crowd involved in this conference in Tampa.

8 Q. How many people would you estimate were at this
9 conference?

10 A. 2,000 to 5,000 in my estimation.

11 Q. Was it an industry-type conference?

12 A. Yes, sir, it was.

13 Q. At this meeting with Mr. Artimovich, was this photograph
14 discussed, D 291?

15 A. Yes, sir, it was.

16 Q. Did -- at this conference, did you review and the people
17 there with you review Mr. Harman's PowerPoint presentation?

18 A. Yes, sir, page-by-page.

19 Q. Was every page of Mr. Harman's PowerPoint presentation
20 reviewed with Mr. Nick Artimovich?

21 A. Yes.

22 Q. What type of data is needed to evaluate the claim that
23 an ET-Plus is a, quote, failing head, as Mr. Harman
24 describes it in his PowerPoint presentation?

25 A. Various things. The speed of the vehicle that impacted

1 the system. The angle of the vehicle at which it left the
2 roadway. The orientation of the vehicle, was it sliding
3 sideways. The installation of the -- the ET-Plus itself, is
4 it installed properly, things like that.

5 Q. Are you aware of the criteria under which end terminal
6 devices, such as ET-Plus, are tested under 350?

7 A. Yes, sir.

8 Q. Are they -- is the ET-Plus intended to be a device that
9 is a full net 100 percent safety device for every crash at
10 every speed at every vehicle in every way?

11 MR. WARD: Your Honor, I object. He's making him
12 an expert now evaluating crash tests. I object.

13 THE COURT: I'll sustain.

14 MR. WARD: Ask the jury to be disregard --
15 disregard his testimony.

16 THE COURT: Well, I'll sustain the objection to
17 the question. He's not answered it yet. And under my prior
18 instruction, the jury will disregard the question, as well
19 as any answer.

20 Let's move along.

21 Q. (By Mr. Shaw) Did you answer and the people there with
22 you answer all of Mr. Artimovich's questions that he asked
23 of you that day?

24 A. Yes, sir.

25 Q. From your observation, did it appear that the FHWA was

1 satisfied with the information and documents that you
2 presented to them?

3 MR. WARD: Your Honor, we object to his
4 speculation about what the FHWA was satisfied with at that
5 time.

6 THE COURT: He asked, did it appear to him they
7 were satisfied. He can give his personal view of it,
8 understanding that it's not the opinion of the FHWA. You
9 answered the question. I'll overrule the objection.

10 A. It was my understanding that FHWA was satisfied.

11 Q. (By Mr. Shaw) All right. Was there any follow-up
12 correspondence by Trinity to the FHWA after this particular
13 meeting?

14 A. Yes, a subsequent meeting a couple hours later.

15 Q. So from the time that Mr. Harman made these allegations
16 that were -- and Mr. Artimovich told you about them and to
17 this Tampa Bay meeting, how many -- how many days passed?

18 A. Around a month.

19 Q. During that month period of time, how would you describe
20 what your job duties and responsibilities were during that
21 month dealing with this issue?

22 A. Dealing with this issue was to gather as much
23 information as I possibly could in anticipation of the
24 meeting with Mr. Artimovich.

25 Q. Was there a time ever in which you were working in which

1 this issue was neglected, not considered serious, or
2 anything like that?

3 A. This was a top priority situation in my mind.

4 Q. Was it a top priority for the people that you reported
5 to?

6 A. Yes, absolutely.

7 MR. SHAW: Let's look at Defendants' Exhibit No.
8 162.

9 Q. (By Mr. Shaw) What is Defendants' Exhibit No. 162,
10 Mr. Smith?

11 A. It's an email string originated by Mr. Artimovich,
12 addressed to Dr. Roger Bligh and to me.

13 Q. If we would look at the bottom email -- and this email
14 is from Mr. Nick Artimovich, dated February 27th; is that
15 correct?

16 A. Yes, sir.

17 Q. And who is it addressed to?

18 A. To Dr. Roger Bligh and Brian Smith.

19 Q. And what is it that Mr. Artimovich is asking of you
20 here?

21 A. He asked: Brian, would you please send me the package
22 of crash tests and other information we reviewed that
23 morning, meaning the morning of February 14th.

24 Q. And what else did he ask of you or Mr. -- Dr. Bligh?

25 A. He asked of Dr. Roger Bligh if he would confirm that the

1 feeder rails, in his words, on the ET-Plus head tested in
2 2005 and included in the FHWA letter CC-94 were 4 inches
3 wide rather than the original 5-inch-wide rails.

4 Q. Did you provide the information that he was requesting
5 of you?

6 A. Yes, sir, I did.

7 MR. SHAW: If we could look at Defendants' Exhibit
8 No. 5.

9 Q. (By Mr. Shaw) What are we looking at Defendants' Exhibit
10 No. 5?

11 A. This is a crash test report authored by Texas
12 Transportation Institute of a crash test in April of 2010 --
13 or excuse me -- February of 2010.

14 Q. Was this provided to Mr. Artimovich?

15 A. Yes, sir, it was.

16 MR. SHAW: If we could look at Defendants' Exhibit
17 No. 162.

18 Q. (By Mr. Shaw) Are you familiar with Exhibit No. 162?

19 A. Yes, sir, I am.

20 Q. What is Exhibit No. 162?

21 A. It's a letter they wrote to Mr. Artimovich, a cover
22 letter that accompanied all of the information that he
23 requested as per the earlier email that we -- we reviewed.

24 Q. If you would, tell the Ladies and Gentlemen of the Jury
25 the information that you provided Mr. Artimovich, after

1 meeting with him in Tampa, and answering his questions?

2 A. The first item is a January 22nd, 2001 FHW email to

3 Steve Easton accepting the improved post breaker bar.

4 The next item is a July 2005 TTI crash test report of the
5 ET-31.

6 The third item is TTI photos of the May 27th, 2005 Test
7 3-30 of the ET-31.

8 The next item is the September 2nd, 2005 FHWA
9 acceptance letter of the ET-31 with steel posts.

10 The next item is a March 15th, 2010 FHWA acceptance
11 letter of the ET-Plus and ET-31 with two breakaway posts.

12 The next item is a February 2010 TTI crash test, Report
13 3-30, modified of the ET-Plus.

14 The next item is a November 10th -- excuse me --
15 November 2010 TTI crash test, Report 2-30, of the ET-Plus.

16 Q. Are there any other items on the second page that were
17 provided?

18 What do you tell Mr. Smith -- or Mr. Artimovich here in
19 the last full paragraph that's there on Page 2 of this
20 exhibit?

21 A. I know that Dr. Bligh has separately confirmed to you
22 that the feeder rails tested in the end-on impact of the
23 ET-Plus in 2005 were 4 inches wide, which is the subject of
24 the FHWA letter CC-94.

25 Q. I notice in this particular exhibit that you sent him

1 crash tests other than just the 2005 crash test.

2 A. Yes, sir.

3 Q. Has the ET-Plus with a 4-inch guide channel been
4 crash-tested at any time between May and when you sent this
5 letter to Mr. Artimovich?

6 A. Yes, sir. Twice.

7 Q. How many other times?

8 A. Twice.

9 MR. SHAW: If we could look at Defendants' Exhibit
10 No. 63.

11 Q. (By Mr. Shaw) What is it that we are looking at in
12 Defendants' Exhibit No. 63?

13 A. This is the 3-30 crash test with a small car of May the
14 27th, 2005.

15 Q. Was it based upon the results from that particular crash
16 test that the information that was provided to the FHWA to
17 get the approval so this product is eligible for federal
18 reimbursement?

19 A. Yes, sir.

20 Q. Was that considered by Texas A&M to be a successful
21 crash test?

22 A. Yes, sir, it was.

23 Q. Did anybody at Texas A&M or Trinity or anyone else ever
24 tell you that we needed to hide the crash test or destroy
25 any of the evidence that was --

1 MR. WARD: Your Honor, we're going to object to
2 what he says is told by someone. It's hearsay.

3 THE COURT: Sustained.

4 Q. (By Mr. Shaw) Are you aware, Mr. Smith, of any time, any
5 information from the crash test has been destroyed or
6 intentionally hid or anything like that?

7 A. No.

8 Q. What is your understanding of the change from the 27 --
9 27-5/8 guardrail height to 31-inch guardrail height? What
10 is your understanding of that?

11 A. The change from 27-5/8 to 31 inches, it had to do -- it
12 dealt with a w-beam guardrail system developed by the
13 University of Nebraska in anticipation of new testing
14 standards called MASH that included a heavier higher center
15 of gravity pickup truck, a quad-cab half-ton Dodge pickup
16 truck.

17 Q. Were you involved at all in how to set up that test and
18 what type of parameters and conditions and trucks and speeds
19 or anything dealing with that crash test?

20 A. No, sir. TTI handles that.

21 MR. SHAW: Pass the witness, Your Honor.

22 THE COURT: Redirect?

23 MR. WARD: Yes, Your Honor.

24 REDIRECT EXAMINATION

25 BY MR. WARD:

1 Q. Is Trinity the one that certifies to the Federal Highway
2 Administration that there has not been any changes in the
3 ET-Plus head, once it was approved, after May of -- I mean,
4 originally January of 2000, to get that approval?

5 A. I'm sorry. Would you say that again?

6 Q. Each year or many, many times a year, over the years,
7 you have to certify to different state Departments of
8 Transportation that there's been no changes, don't you?

9 A. No substantial changes, yes.

10 Q. And yet Trinity is the one that says that, correct?

11 A. Correct.

12 Q. All right. And you were asked questions about
13 photographs. There wasn't any individual photographs of
14 this head that anybody -- that were attached to that report
15 as such, was there? It was a video -- video and y'all
16 selected one screenshot; isn't that correct?

17 A. No. I believe the still photograph included in the
18 crash test report was what Dr. Bligh used to do his --

19 Q. That's what he used. Did he mention that photograph at
20 all in the report?

21 A. In which report, sir?

22 Q. In the May 27th, 2005 -- well, it's July when the report
23 is written. It's on the May 27th test.

24 Did he ever mention -- see the photograph of the 4-inch
25 channel? Did he ever mention anything about the 4-inch

1 channel and a photograph, try to tie them together in the
2 report?

3 A. In the report, no.

4 Q. Okay. Now, that drawing that you referred to there in
5 Dr. Buth's email, do you recall that in June of 2005?

6 A. Yes, sir.

7 Q. That was actually a fabrication drawing, wasn't it, sir?

8 A. Yes, it was.

9 Q. And you know that's not the drawing that you sent to him
10 on June 13th, 2005, don't you, sir, because yours sent the
11 details -- yours was only a Detail 7, correct?

12 A. Detail 7 is part of the fabrication drawing.

13 Q. But it wasn't the fabrication drawing, because you've
14 seen the email where they said show only the change in the
15 length of the legs that they're shorter and nothing else.

16 You recall that, don't you?

17 A. I recall an email that said something like that, yes.

18 Q. All right. So that was the one that had the drawing
19 that was furnished. It only showed the one thing about the
20 legs being shorter, didn't it, sir?

21 A. I don't know that. I don't think that that drawing has
22 ever been produced, but I'm assuming it was a drawing, a
23 fabrication drawing.

24 Q. Okay. I think you just made my point. The drawing that
25 was actually -- that you sent has never been found, has it?

1 A. I don't know.

2 Q. Do you -- have you ever seen it since you sent it in
3 June of 2005?

4 A. Not that I can recall.

5 Q. Okay. So you said that nobody directed you to destroy
6 anything. You know that TTI has destroyed the terminal head
7 that was actually used in the 2005 test, don't you?

8 A. That's what I understand.

9 Q. Okay. And you used the thing to investigate -- now, you
10 know that the Federal Highway Administration is not any type
11 of investigative agency, don't you?

12 A. I don't view them as investigative agency.

13 Q. They have to rely strictly on what people like Trinity
14 tell them. They want approval of their products; is that
15 correct?

16 A. Yes.

17 Q. Okay. All right. Now, you met with Mr. Artimovich.
18 You showed us all of the things that you told him. You
19 made no mention of the five tests that have been run
20 with this 4-inch and -- failures. You did not mention
21 that at all in that February Valentine's Day meeting in
22 2005 -- 2012, did you?

23 A. Correct.

24 Q. And so we'll just know what those tests were, you know,
25 those tests involved a small car hitting head-on at

1 0 degrees; isn't that correct?

2 A. Correct.

3 Q. So it wasn't a hit from an angle. It was a head-on
4 collision with those -- with those head (sic), and they all
5 failed with a direct 0-degree hit; is that correct?

6 A. That's correct.

7 Q. And you elected not to tell him that day in February of
8 2012 about any of that, that was a choice Trinity made,
9 correct?

10 A. Trinity never brought that information up in the
11 meeting.

12 Q. Well, you know about it and you didn't tell about it,
13 correct?

14 A. Correct.

15 Q. And you know at that time that Trinity had asked
16 Mr. Nick Artimovich and Mr. Artimovich had asked Mr. Dick
17 Powers in February of 2006 to waive running a 3-31 test on
18 this what you're calling a research project. You knew that,
19 don't you?

20 A. I've seen an email that said as much, yes.

21 Q. And you know that Trinity -- that the Federal Highway
22 Administration said, no, you can't have approval without
23 running a 3-31 test, correct?

24 A. I'd have to see the email again, but I believe that's
25 what it said.

1 Q. All right. And you didn't talk about -- you didn't tell
2 Mr. Artimovich that you had anything about any of that in
3 February of 2012, correct?

4 A. Any of what?

5 Q. About the failed tests, five times with this -- with
6 this 4-inch channel.

7 A. That's correct.

8 Q. And you didn't tell them since that date and you didn't
9 tell them as of today's date; is that correct?

10 A. That's correct.

11 Q. Thank you.

12 MR. WARD: Pass the witness.

13 THE COURT: Further cross-examination?

14 RECROSS-EXAMINATION

15 BY MR. SHAW:

16 Q. Mr. Smith, during your years of being at Trinity Highway
17 Products, has there ever been a time when crash tests on
18 experimental projects by Texas A&M and they're not sold into
19 the public, that information is disclosed as part of a
20 submittal process?

21 A. If the test is unsuccessful, there is no submittal to
22 FHWA for acceptance. So there have been many times where
23 the information was not submitted.

24 Q. Are you aware of anything under the NCHRP 350 that
25 requires failed tests and experimental projects that are not

1 commercialized or ever sold or manufactured to be submitted
2 to them at all?

3 A. No, sir, I'm not. I'm not aware.

4 Q. Thank you very much.

5 MR. WARD: Your Honor, just --

6 REDIRECT EXAMINATION

7 BY MR. WARD:

8 Q. All right. The test that you submitted there on
9 Valentine's Day of 2012, you submitted a test that had been
10 run in February of 2010, correct?

11 A. Yes, sir.

12 Q. And that was not a -- was not in compliance. That was
13 with a small car. That had never been furnished to the
14 Federal Highway Administration before, had it?

15 A. That's correct.

16 Q. And then the one you submitted that day that was run
17 later in -- I believe it was November of 2010?

18 A. Yes, sir.

19 Q. That was at a slower speed, wasn't it?

20 A. Yes, sir, it was.

21 Q. So that hadn't ever been submitted to the Federal
22 Highway Administration, had it?

23 A. Correct.

24 Q. And it was on a product -- a little different size head
25 for an Australian government project or test, wasn't it?

1 A. The head was exactly the same.

2 Q. Had a cover on it, didn't it, sir?

3 A. A plastic delineated cover, yes.

4 Q. It wasn't in compliance with the NCHRP 350, was it?

5 A. Yes, it was.

6 Q. It was not compliant with -- it was not done -- it was
7 not for Test Level 3, was it? It was a Test Level 2?

8 A. Correct.

9 Q. Slow speed?

10 A. Correct, 43 miles per hour.

11 Q. And at the same time you submitted those favorable tests
12 that you'd never thought needed to be submitted before, you
13 held back the five that had failed, correct?

14 A. The test reports that we submitted were of products that
15 FHWA had already accepted.

16 Q. You had never submitted those particular reports to the
17 Federal Highway Administration for almost two years -- well,
18 done in 2010, until Valentine's of 2012, correct?

19 A. Correct. But those -- because --

20 Q. Well, is that correct?

21 A. That's correct.

22 Q. All right. Thank you.

23 And at the same date, you had five tests that were
24 unsuccessful of this very same head at a speed of 62 miles
25 an hour, and you did not submit those?

1 A. Correct.

2 Q. Thank you.

3 THE COURT: Pass the witness?

4 MR. WARD: Pass the witness. Excuse me, Your
5 Honor.

6 THE COURT: Additional cross?

7 MR. SHAW: Briefly, Your Honor.

8 RECROSS-EXAMINATION

9 BY MR. SHAW:

10 Q. Mr. Smith, the crash test in 2010, were they of
11 commercialized products?

12 A. Yes, they were.

13 Q. Why did you give those to the FHWA when they asked for
14 them in 2012?

15 A. Anything that FHWA asked of us -- of me, of Trinity, we
16 will provide.

17 Q. What's the difference between the crash test in 2010 and
18 the experimental flared end terminal offset results? What's
19 the distinction under 350?

20 A. The distinction is between the two devices. In my mind,
21 they're completely different products. Again, one is offset
22 4 feet over 37 and a half feet, the 10 or 11 to 1 flare
23 rate.

24 And the other is a tangential terminal installed
25 parallel on the roadway with a taper rate of 25 to 1.

1 Q. Is it another difference the fact that the --

2 MR. WARD: Objection to leading, Your Honor.

3 THE COURT: This is cross-examination of an
4 adverse witness. It's overruled.

5 Q. (By Mr. Shaw) Is one difference also the fact,
6 Mr. Smith, that the flared ET offset has never been made,
7 sold, commercialized, or placed on any roadway in the United
8 States?

9 A. That's correct.

10 Q. As opposed to the other devices that have been tested
11 and passed and then are now placed on the roadways of the
12 United States with full approval of the United States
13 Government?

14 A. Correct.

15 Q. That's all I have.

16 THE COURT: Additional cross (sic)?

17 MR. WARD: Nothing further, Your Honor.

18 THE COURT: All right. You may step down,
19 Mr. Smith.

20 THE WITNESS: Thank you, sir.

21 THE COURT: Plaintiff, call your next witness.

22 MR. CARPINELLO: Your Honor, we're going to call
23 Nicholas Artimovich by videotape, Your Honor.

24 THE COURT: All right. Proceed with the
25 deposition.

1 MR. CARPINELLO: May I, just for the record, state
2 these have both our designations and the Defendants'
3 designations on the videotape?

4 THE COURT: I understand.

5 MR. SHAW: Judge, may Mr. Smith be excused?

6 THE COURT: Is there objection to Mr. Smith being
7 excused?

8 MR. CARPINELLO: No, Your Honor.

9 THE COURT: Mr. Smith, you're excused.

10 THE WITNESS: Thank you, Your Honor.

11 THE COURT: Let's proceed with Mr. Artimovich by
12 deposition.

13 MR. CARPINELLO: Excuse me, Your Honor.

14 THE COURT: Mr. Carpinello, what do you anticipate
15 the length of the designations?

16 MR. CARPINELLO: I understand -- I understand that
17 it is 48 minutes and some seconds.

18 THE COURT: All right.

19 MR. CARPINELLO: Which is why we -- he needs to be
20 reconnected.

21 THE COURT: All right.

22 (Video clip playing.)

23 QUESTION: All right. Mr. Artimovich, by whom are
24 you employed?

25 ANSWER: I'm employed by the Federal Highway

1 Administration.

2 QUESTION: And is that a department or a
3 subdevelopment of a larger government agency?

4 ANSWER: It is an agency of the U.S. Department of
5 Transportation.

6 QUESTION: And what is your job by -- with the
7 Federal Highway Administration?

8 ANSWER: My title is highway engineer, and I am an
9 engineer in the Office of Safety Technologies.

10 QUESTION: And how long have you been in that
11 position?

12 ANSWER: In that position -- I'm trying to
13 calculate the date. Yeah, I came to the Federal Highway
14 Administration Office of Engineering in 1988 under a very
15 similar capacity. So in the order of 24 years. But in
16 1999, I transferred to the Office of Safety doing the same
17 duties.

18 QUESTION: And have you been doing the same duties
19 since 1999?

20 ANSWER: Yes. In 2007, I added the duties dealing
21 with roadside barriers.

22 QUESTION: Explain to me, if you would, how
23 the Office of Safety works. Do different engineers have
24 different responsibilities?

25 ANSWER: The Office of Safety has two sections.

1 One is related to design issues. The other is related to
2 safety policy and program issues. The Office of Safety
3 Technologies has various teams within it that deal with
4 pedestrians, intersections, roadside design, and the like.

5 QUESTION: And is that the section that you're in?

6 ANSWER: I'm in roadside design, or as we call it
7 now, roadway departure.

8 QUESTION: Now, tell me what your work with
9 barrier end terminals encompasses.

10 ANSWER: The primary area dealing with barrier
11 terminals is the review of crash tests that are submitted by
12 either manufacturers, universities, states, or testing
13 laboratories to compare them to the appropriate test
14 criteria and to advise on eligibility for reimbursement
15 under the Federal Aid Highway Program for those pieces of
16 roadside hardware.

17 QUESTION: All right. Let me take two of those
18 and ask you some more questions about them. The first one
19 is eligibility for reimbursement. Can you explain why
20 that's a significant issue that you deal with?

21 ANSWER: Many states do not have the capability of
22 testing roadside hardware on their own, so they tend to rely
23 on tests conducted by other laboratories. There are only a
24 limited number of facilities in the country that are
25 certified to conduct roadside hardware crash tests.

1 And it's primarily an issue for private
2 manufacturers who are paid to have these tests conducted on
3 their hardware, and they request the Federal Highway
4 Administration's review and determination of eligibility in
5 order to be able to supply that hardware to contractors in
6 the various states.

7 QUESTION: Does the federal government pick up
8 part of the cost of equipment put on the National Highway
9 System?

10 ANSWER: The federal/state relationship works
11 where the Federal Highway Administration division office in
12 each state works with their state Department of
13 Transportation counterparts to develop a highway
14 construction program, everything from initial planning to
15 construction and maintenance of the highway system.

16 As part of the Federal Aid Program, the Federal
17 Highway Administration agrees to reimburse the state for the
18 expenses of their contractors, and reimburse those expenses
19 from the highway trust fund that are allotted to each of the
20 states.

21 QUESTION: Is there reimbursement for work that is
22 done on the national highway system?

23 ANSWER: Yes. There is a differentiation between
24 the national highway system and projects that are off the
25 national highway system. I believe it was the IST Act of

1 1991 directed that federal highway standards be applied to
2 projects on the national highway system, whereas state
3 standards may be used off the national highway system.

4 QUESTION: Are you aware of the fact that in 1999,
5 Texas Transportation Institute sought approval for certain
6 modifications to the ET-2000 terminal head?

7 ANSWER: Yes.

8 QUESTION: Now, in Deposition Exhibit 5 is what
9 appears to be the Federal Highway Administration letter
10 approving the changes to the ET-2000. Is that your
11 understanding?

12 ANSWER: Yes, it is.

13 QUESTION: And have you seen this letter before?

14 ANSWER: I have seen this letter, yes.

15 QUESTION: Are drawings of the product being
16 modified typically attached to a letter of this nature?

17 ANSWER: The answer is yes.

18 QUESTION: And why is that?

19 ANSWER: There are two reasons. One is to
20 document in the files the nature of the change. The primary
21 reason is to provide information to potential users of the
22 product.

23 QUESTION: Mr. Artimovich, I think you have all
24 this in front of you. Let me begin with what we marked as
25 Deposition Exhibit No. 8.

1 Is that a letter requesting approval of a -- let's
2 see -- just the re line, reference for FHWA acceptance of
3 ET-Plus terminal for 31-inch-high guardrail per NCHRP Report
4 350, Level 3, is this a letter requesting the acceptance of
5 certain changes and supported by testing?

6 ANSWER: Yes.

7 QUESTION: Now, let's go on to what we have marked
8 as A-10.

9 And can you identify A-10, please?

10 ANSWER: A-10 is titled NCHRP Report 350, Testing
11 of the ET-Plus for 31-inch-high W-Beam Guardrail, dated July
12 2005.

13 QUESTION: And was this test, that is, A-10,
14 submitted to the Federal Highway Administration in
15 connection with the letter that is A-8?

16 ANSWER: Yes. This test was submitted.

17 QUESTION: And are you familiar with this test?

18 ANSWER: I am familiar with a test, although I did
19 not review it in detail.

20 QUESTION: All right. Now -- and then let's go to
21 A-9, which is a letter from John Baxter to Steve Brown dated
22 September 2, 2005.

23 Have you seen this letter before?

24 ANSWER: Yes, I have.

25 QUESTION: Are you aware of any changes to the end

1 terminal other than what is stated in this letter?

2 ANSWER: I have become aware of allegations that
3 changes were made are not covered in the seven points in
4 this letter.

5 QUESTION: And what allegations have you heard or
6 become aware of?

7 ANSWER: Primarily relates to the width of the
8 feeder channels.

9 QUESTION: And how did you learn those?

10 ANSWER: I believe I first heard of those in
11 either late 2011 or early 2012 through telephone
12 conversations with Mr. Joshua Harman.

13 QUESTION: After learning this from Mr. Harman,
14 did you do anything to try to discover whether those
15 allegations are true?

16 ANSWER: Yes. I contacted representatives of
17 Trinity Industries and noted what appeared to be a
18 difference in dimensions between the information we had in
19 our files and what may have been in current production for
20 the ET-Plus head.

21 QUESTION: And who at Trinity did you contact?

22 ANSWER: I believe my primary contact was
23 Mr. Brian Smith.

24 QUESTION: And how was this done? Email,
25 telephone, in person?

1 ANSWER: I don't recall.

2 QUESTION: Did you, in fact, end up meeting with
3 Mr. Smith and others from Trinity and/or TTI?

4 ANSWER: Yes, I did.

5 QUESTION: And tell me what occurred at that
6 meeting.

7 ANSWER: Mr. Smith led the meeting, introduced me
8 to the other participants, and provided me with copies of
9 test reports that they had received from Texas
10 Transportation Institute. And as I recall, these were
11 primarily test reports of the ET-Plus system, both in 2005
12 and subsequent testing, to show that the current version of
13 the ET-Plus head had been crash-tested according to the
14 appropriate criteria.

15 QUESTION: And was one of those tests that
16 they showed you the 2005 test that we have marked as
17 Deposition Exhibit No. 10?

18 ANSWER: Yes, it was.

19 QUESTION: I believe right before we broke you
20 mentioned that someone -- we hadn't gotten to who -- had
21 given you copies of tests -- crash test reports; is that
22 correct?

23 ANSWER: Yes, sir.

24 QUESTION: And what copies of crash test reports
25 were you given?

1 ANSWER: I don't recall precisely which test
2 reports I received, but they related to the crash testing of
3 the ET-Plus terminal.

4 QUESTION: Was one of them the 2005 crash test
5 report that we marked as Deposition Exhibit No. 10?

6 ANSWER: I believe that was one of them, yes.

7 QUESTION: Do you recall the years of the other
8 reports?

9 ANSWER: Not specifically, but they were more
10 recent.

11 QUESTION: Now, you mentioned that Mr. Smith was
12 at this meeting in Tampa in February of 2012?

13 ANSWER: Correct.

14 QUESTION: Who else was there besides Mr. Smith?

15 ANSWER: Mr. Barry Stephens and Dr. Roger Bligh.
16 There was also another principal of the firm to whom I was
17 introduced, but I do not recall the name.

18 QUESTION: When you say other firm --

19 ANSWER: I'm sorry. Trinity Industries.

20 QUESTION: Would changes made after the test
21 require additional testing?

22 ANSWER: For the Federal Highway Administration to
23 properly review a change in the system, the manufacturer
24 should provide us with documentation of changes to the
25 systems if -- if they request a letter from the Federal

1 Highway Administration.

2 QUESTION: And what, if anything, did you say in
3 reaction to what these men told you?

4 ANSWER: I acknowledged the information they were
5 showing me and ultimately agreed that the documentation they
6 provided appeared to show that the product being marketed
7 nowadays and that being -- that was tested in 2005, did
8 indeed use the four-inch wide feeder chute.

9 QUESTION: Let me reference you to what has
10 previously been marked as Deposition Exhibit No. 7. And on
11 Exhibit 7, if you would look at Page 6, and that bears the
12 number Trinity 10923.

13 ANSWER: I have that page.

14 QUESTION: And what is the title of Figure 2 that
15 appears on that page?

16 ANSWER: Details of the Redesigned Extruder Head.

17 QUESTION: Does any diagram like this appear in
18 the 2005 test crash -- crash test report?

19 ANSWER: I did not see such a drawing.

20 QUESTION: Was anything else said at the meeting
21 that you can recall?

22 ANSWER: There was a discussion -- a brief
23 discussion of the illustrated PowerPoint or presentation
24 that had been provided by Mr. -- Mr. Joshua Harman that
25 alleged poor performance of the ET-Plus extruder head in

1 various highway crashes.

2 QUESTION: And what -- tell me what you recall of
3 that discussion.

4 ANSWER: The representatives from Trinity,
5 primarily Brian Smith, reviewed many of those illustrations
6 with me.

7 QUESTION: Did you say anything in response to
8 what Mr. Smith presented about the various incidents
9 depicted in the presentation?

10 ANSWER: Yes. I agreed that it is difficult to
11 assess a photograph of a crash based just on the -- let's
12 say, post-mortem of the crash. One needs to know more about
13 the circumstances leading up to it before one can accurately
14 assess whether or not the product performed as one would
15 have expected it to.

16 QUESTION: Okay. Anything else on that topic at
17 this meeting?

18 ANSWER: Not that I can recall.

19 QUESTION: How long did the meeting last?

20 ANSWER: It lasted on the order of one and a half
21 hour, 40 minutes.

22 QUESTION: And after the meeting, what, if
23 anything, did you do in response to the issues that were
24 raised?

25 ANSWER: Well, I had agreed to meet with Mr.

1 Harman at the -- the same -- at Safety Service Association
2 conference. And then I related to him some of the
3 discussions that I had had with the Trinity and TTI
4 representatives. And first of all, I noted that they
5 provided evidence that the crash testing done in 2005 did
6 indeed use the terminal head with the four-inch wide feeder
7 chute.

8 Now, Mr. Harman had also been collecting
9 photographs of other crashes involving the ET-Plus head, and
10 he was -- I would characterize him as somewhat upset that
11 these products were allowed to be used and that they were
12 causing severe crashes and with the implication that the
13 Federal Highway Administration should not continue to
14 support the product like this -- continued -- continued use,
15 and to that -- to that suggestion, I reiterated a request
16 that I had made to him earlier by telephone to please
17 provide me with details of any of those crashes that he
18 believed showed improper performance of the ET-Plus
19 terminal. And as before, he maintained that he would get
20 that information for me. He has never responded with any
21 subsequent details.

22 QUESTION: My question is, is whether you made any
23 effort to determine whether Trinity or TTI had disclosed
24 this change in the terminal head?

25 ANSWER: I made the effort to discuss it within my

1 office as to what should we do.

2 QUESTION: Okay. Did you go back and look at
3 prior acceptance letters?

4 ANSWER: I believe I did, to -- to see if indeed
5 there was any mention of that change in the width from five
6 inches to four inches. Of course, I subsequently reviewed
7 the material that Trinity supplied to me, the hard copies of
8 the reports that they had showed me at the Tampa meeting.
9 And they had included, to the best of my recollection, a
10 photograph of the 2005 testing -- correction -- a photograph
11 taken from the video of the 2005 testing which would
12 indicate that the width of that feeder chute was indeed four
13 inches.

14 QUESTION: Did you find any instance where either
15 TTI or Trinity had requested FHWA acceptance of a change
16 from a five-inch to a four-inch channel?

17 ANSWER: No, sir.

18 QUESTION: Did you find any instance where FHWA --
19 actually I have to stop using that acronym, where the
20 Federal Highway Administration had approved the change in
21 the feeder head and the feeder channel from five inches to
22 four?

23 ANSWER: Our correspondence with respect to the
24 ET-Plus does not refer to the width of the feeder head
25 specifically.

1 QUESTION: And, in fact, you had never heard of
2 that change before Mr. Harman brought it to your attention
3 in 2012; is that correct?

4 ANSWER: I believe that's correct.

5 QUESTION: You said that after you got back,
6 you -- I guess you talked to your colleagues. What
7 colleagues did you discuss things with?

8 ANSWER: I discussed it with my boss, Mr. Mike
9 Griffith, the Director of the Office of Safety Technologies.

10 QUESTION: This is Griffith?

11 ANSWER: Griffith, G-r-i-f-f-i-t-h, Michael
12 Griffith.

13 QUESTION: And who else internally here?

14 ANSWER: We subsequently brought the issue to our
15 chief counsel's office and discussed it with Mr. Bill Winne.

16 QUESTION: Bill Winning.

17 ANSWER: Winne, W-i-n-n-e.

18 QUESTION: What subsequent contacts did you
19 have with Trinity or TTI after the meeting?

20 ANSWER: I did request of Trinity copies of the
21 test reports that I had been shown at the Tampa meeting, and
22 they provided them.

23 QUESTION: Take a look -- we previously looked at
24 Deposition Exhibit 7 on Page 6. That's Trinity 10923.

25 ANSWER: Yes, sir.

1 QUESTION: Did they ever provide you with a
2 drawing like this that covered the 4-inch channel?

3 ANSWER: I do not recall receiving a drawing which
4 specified that dimension as 4 inches.

5 QUESTION: Sitting here today, do you have
6 anything in your file that would allow you to determine the
7 internal measurements of the ET-Plus using the 4-inch
8 channel?

9 ANSWER: First, of all, the 4-inch channel width
10 is an external measurement, but one action I did take was to
11 essentially replicate what I believe the TTI researchers
12 did, and that was to view the video documentation of the
13 crash-testing of the original ET-2000, which is in our file
14 from 1998, and the video of the testing of the ET-Plus
15 conduct indeed 2005.

16 I took a screenshot from a -- the video in each of
17 those video -- those crash tests and scaled off the width of
18 the feeder channel and compared it to other known dimensions
19 in those photographs. And it is clear to me that the tests
20 done in 2005 use a terminal head with a feeder channel that
21 was narrower than the ones conducted in 1998.

22 QUESTION: Have you asked for the prototype that
23 was, in fact, tested in 2005?

24 ANSWER: We have not asked for that. That is
25 still part of the internal discussions we're having.

1 QUESTION: Have you asked for drawings of the
2 prototype that was tested in 2005?

3 ANSWER: No.

4 QUESTION: Have you asked for drawings which show
5 changes made after the crash test in 2005?

6 ANSWER: No, sir.

7 QUESTION: Have you taken an ET-Plus head that
8 Trinity is currently selling and actually measured
9 dimensions in that head?

10 ANSWER: At the invitation of Mr. Josh Harman, I
11 met with him and he brought me to his then attorney's office
12 in Washington, D.C., and showed me examples of -- I believe
13 it was three extruder-type terminal heads, at which time he
14 showed me the differences, tried to explain the differences
15 of those terminal heads.

16 The -- I believe there was an ET-2000, an ET-Plus,
17 and a terminal manufactured by his company.

18 QUESTION: And this meeting in Mr. Harman's
19 attorney's office, when did that take place?

20 ANSWER: February 23.

21 QUESTION: And this is 2012?

22 ANSWER: Yes, sir.

23 QUESTION: Now, looking at this, I believe Trinity
24 has told you that the 5-inch feeder channel shown on the
25 bottom drawing is now 4-inch, correct?

1 ANSWER: That is correct. They have told me that.

2 QUESTION: Now, have they told you anything about
3 the length of the feeder channel, whether it is the same
4 length as the 5-inch was?

5 ANSWER: That was not a subject of our
6 discussions.

7 QUESTION: Have they told you anything about the
8 height of the feeder channel, whether that is -- is the same
9 height as the 5-inch was?

10 ANSWER: No, sir. We did not cover that topic.

11 QUESTION: Well, my -- my question went
12 specifically to whether or not they disclosed changes in the
13 length of the feeder channel. Is the answer no?

14 ANSWER: The answer is no. Well, I have no
15 recollection of that.

16 QUESTION: And my second question was, did they
17 disclose any changes in the height of the feeder channel
18 unit?

19 ANSWER: No, sir.

20 QUESTION: Have there been any disclosures about
21 the height and length of the feeder channel since 2005? Do
22 you have any information about that?

23 ANSWER: I have no information on that.

24 QUESTION: You mentioned that you got some
25 information from Trinity, and you met with Mr. Harman.

1 ANSWER: Yes.

2 QUESTION: And do we have two subsequent meetings
3 with Mr. Harman --

4 ANSWER: The first one --

5 QUESTION: -- or just one? Go ahead. I'm sorry.

6 ANSWER: I did, as I mentioned earlier, meet with
7 Mr. Harman at the meeting of the American Traffic Safety
8 Services Association. I believe it was the day after I had
9 met with the Trinity representatives, and -- and then
10 subsequently on February 23rd, Mr. Harman met with me. We
11 went to his attorney's office and looked at the various
12 extruder terminals he had in the -- in the office.

13 QUESTION: And any sub -- further meetings with
14 Mr. Harman after that?

15 ANSWER: No, sir.

16 QUESTION: Has Mr. Harman tried to contact you
17 after that?

18 ANSWER: Yes, but I don't recall specifically
19 detailed discussions, only Mr. Harman further pursuing his
20 contention that the changes in the extruder terminal are
21 leading to poor consequences.

22 QUESTION: Just as a point of reference, let's go
23 to Deposition Exhibit 7. This is the 1999 crash test
24 report?

25 ANSWER: Yes, sir.

1 QUESTION: And this -- would you agree that this
2 report -- this report, Deposition Exhibit 7, itemizes
3 changes Trinity made to the ET-2000 head?

4 ANSWER: I would say that the point of the test
5 report was to evaluate the changes that were made to the
6 ET-2000 Plus subsequently becoming the ET-Plus head.

7 QUESTION: Now, since this controversy arose,
8 which I guess was earlier this year, has Trinity or TTI
9 provided you any reports similar to this involving the
10 4-inch feed channel on the ET-Plus product?

11 ANSWER: They provided me with a number of reports
12 at that Tampa meeting that they indicate were crash tests of
13 the ET-Plus with the 4-inch-wide feeder channel.

14 QUESTION: But none of those was testing a 4-inch
15 feeder channel as a point of the test, was it?

16 ANSWER: That is correct. They were not
17 evaluating the 4-inch-wide feeder channel itself.

18 QUESTION: Looking at the '99 report, turn with
19 me, if you would, to Page 4, and down at the bottom of Page
20 4, we have a listing of NCHRP Report 350 crash tests.

21 ANSWER: Yes.

22 QUESTION: And there are seven of those tests that
23 are listed. It continues over to Page 11.

24 ANSWER: Yes.

25 QUESTION: A lot of photographs in between.

1 The only test that was performed in the '99 testing was of
2 the -- was Test No. 3-31; is that right? You want to go
3 over -- it's on the next page on Page 11.

4 ANSWER: Exhibit 7 is Test 3-31.

5 QUESTION: Right. Okay. And so the other seven
6 tests that are itemized on Pages 4 and 11 were not
7 performed?

8 ANSWER: I do not recall whether additional
9 testing was performed.

10 QUESTION: All right. Well, my -- my question is
11 why Test 3-31? Do you know -- is that the appropriate
12 test -- test to change in terminal head design? Do you know
13 why Test No. 331 -- excuse me -- 3-31 was tested or
14 performed by TTI?

15 ANSWER: The reason for running that test would be
16 to evaluate the effect of the six changes that are noted on
17 Page 4.

18 QUESTION: And is that the correct test to do
19 that?

20 THE ATTORNEY: You're not to answer that.

21 QUESTION: Okay. Let's go over now to Deposition
22 Exhibit 10. This is the 2005 crash test report?

23 ANSWER: Yes.

24 QUESTION: Hold on. Let me get to the same place.
25 Take a look, if you would, at Page 12.

1 ANSWER: Yes.

2 QUESTION: And 12 and 13 -- looking at
3 Pages 12 and 13 of the 2005 test, can you tell me which
4 NCHRP tests were performed by TTI?

5 ANSWER: On Page 13, it indicates that Tests 3-30
6 and 3-35 were performed.

7 QUESTION: Okay. It doesn't indicate that Test
8 3-31 was performed, does it?

9 ANSWER: No. No, it does not.

10 QUESTION: And do you know why TTI performed Test
11 3-31 in 1999 but not in the 2005 evaluation?

12 ANSWER: No, I do not.

13 QUESTION: Has Trinity advised you of any computer
14 simulation tests that it has performed on the ET-2000-Plus?

15 ANSWER: I cannot recall any discussion of
16 computer simulations of the ET-2000 or ET-Plus.

17 QUESTION: Have you ever accepted computer
18 simulation tests?

19 ANSWER: We have considered them in our evaluation
20 of some devices.

21 QUESTION: And what devices are those?

22 ANSWER: A sand barrel impact attenuator.

23 QUESTION: Anything else?

24 ANSWER: We did consider computer simulation when
25 deciding whether or not the height of signs was a factor in

1 the crashworthiness with respect to the manual and uniform
2 traffic control devices.

3 QUESTION: How about in connection with end
4 terminals?

5 ANSWER: We have not used computer simulation as
6 the basis for acceptance of an end terminal.

7 QUESTION: Have you considered it at all in
8 connection with reviewing an end terminal?

9 Let me ask it another way. Has anyone ever given
10 you a computer simulation in connection with an end
11 terminal?

12 THE ATTORNEY: You can answer.

13 ANSWER: I would have to say no.

14 QUESTION: I've asked the -- the court reporter to
15 mark as Deposition Exhibit 15 a diagram.

16 Mr. Artimovich, I'll represent to you that this is
17 a diagram of the ET-Plus or ET-2000-Plus head that shows
18 changes to it.

19 ANSWER: It shows drawings of the ET-Plus.

20 QUESTION: Right. Take a look at Revision No. 4,
21 which is the -- in the lower right-hand corner.

22 ANSWER: Yes.

23 QUESTION: What is the date of that revision?

24 ANSWER: July 6, 2005.

25 QUESTION: Of No. 4 as opposed to No. 5?

1 ANSWER: Okay. May 31st, 2005.

2 QUESTION: So that's after --

3 ANSWER: Revision No. 4.

4 QUESTION: I'm sorry. Still have more?

5 ANSWER: That was Revision No. 4.

6 QUESTION: Okay. And that's after the last of the
7 tests in the TTI report, correct?

8 ANSWER: The -- the -- the revision to the drawing
9 made after the -- the last test, right, yes.

10 QUESTION: And Revisions 4, 5, 6, 7, 8, 9, and 10
11 were all made after the last test, were they not.

12 ANSWER: Yes. They are all subsequent to that
13 test.

14 QUESTION: Did TTI advise you that -- let me count
15 them. One, two, three, four, five, six, seven, seven
16 revisions were made to the product after the test that they
17 rely on?

18 ANSWER: I do not recall which of these changes
19 are documented in our correspondence.

20 QUESTION: So did they tell you at all the changes
21 were made to the product after the last test?

22 ANSWER: As I noted earlier, these note changes to
23 the drawing that may be updating the drawing to reflect what
24 was actually crash-tested.

25 QUESTION: Did they provide you with anything --

1 any dimensions or drawings of the crash-tested product that
2 would allow you to make that comparison?

3 ANSWER: As I did not review this in 2005, I do
4 not have access to that information. Subsequently, they did
5 not provide me any detailed breakdown that would allow me to
6 make that comparison.

7 QUESTION: So you -- based on the information
8 available you -- for you today, you don't know whether these
9 drawings changed the prototype or not?

10 THE ATTORNEY: Objection.

11 ANSWER: Right.

12 QUESTION: Mr. Artimovich, contained within the
13 production that we got in response to both our subpoena to
14 the Federal Highway Administration and in response to the
15 FOIA request, we received this -- what appears to be a draft
16 of a letter that the court reporter has marked as Deposition
17 Exhibit 16.

18 First of all, let me ask: Have you ever seen this
19 before?

20 ANSWER: Yes.

21 QUESTION: Okay. What is it?

22 ANSWER: It is an internal draft of a proposed
23 letter to Brian Smith of Trinity Industries.

24 QUESTION: Do you know when this was done?

25 ANSWER: I don't recall the exact date, but I -- I

1 would have that information on file.

2 QUESTION: Okay. Do you know the approximate
3 date?

4 ANSWER: April and May 2012.

5 QUESTION: And who was to be the signatory of this
6 letter?

7 ANSWER: As a minimum, it would have been the
8 director of the Office of Safety Technology, Michael
9 Griffith.

10 QUESTION: I think you identified him previously
11 as your boss.

12 ANSWER: Yes, I have.

13 QUESTION: And has this letter ever been sent?

14 ANSWER: It has not.

15 QUESTION: Exhibit 14 is an exchange -- series of
16 email exchanges between you and Mr. Harman; is that correct?

17 ANSWER: Yes.

18 QUESTION: And in the email that you sent on March
19 14 of 2012, you see it's at the bottom of the first page?

20 ANSWER: Yes, sir.

21 QUESTION: You set forth some information about
22 the substitutes of components. Do you see that?

23 ANSWER: Yes.

24 QUESTION: Where did that information come from?

25 ANSWER: It came directly from our frequently

1 asked questions on our website.

2 QUESTION: And the question that Mr. Harman posed
3 in this email had to do with the cloning of previously
4 approved, if that's the right term, Federal Highway
5 Administration highway safety devices -- let me ask it
6 differently.

7 What did you understand Mr. Harman to be posing?

8 ANSWER: I understood that he was asking under
9 what conditions a copy of a crash-tested device could be
10 manufactured and sold.

11 QUESTION: And is that the information that you
12 provided in the email dated March 14, 2012 at 2:19 p.m.?

13 ANSWER: That's how I tried to answer his inquiry,
14 yes.

15 QUESTION: And the -- up at the top of that email,
16 there is an email from you to Mr. Harman, and it's dated
17 March 15, 2012 at 4:06 a.m. I hadn't noticed that before
18 here.

19 THE ATTORNEY: I believe it's 10:04.

20 THE ATTORNEY: Oh, 10:04 a.m.

21 QUESTION: But anyway, it said: All crashworthy
22 devices are to replicate the crash-tested device regardless
23 of who is manufacturing it.

24 Do you still agree with that statement?

25 ANSWER: In essence, yes.

1 QUESTION: Are there any caveats?

2 ANSWER: Yes. I would say that changes that have
3 been proposed, reviewed, and agreed to as not adversely
4 affecting the crashworthiness of the product would also be
5 acceptable modifications.

6 QUESTION: Let me get that exact verbiage. That
7 was very precise. You say that changes that have been
8 proposed, reviewed, and agreed to. Reviewed and agreed to
9 by who?

10 ANSWER: If you are referring to the eligibility
11 for federal aid funding, then that should be reviewed by our
12 office, the federal highways.

13 QUESTION: And your office hasn't delegated that
14 responsibility to any other organization, have you?

15 ANSWER: We have not yet delegated it.

16 QUESTION: Okay. And so at least as of now, that
17 has not been delegated to the Texas Transportation
18 Institute, has it?

19 ANSWER: Correct.

20 QUESTION: Good afternoon, Mr. Artimovich.
21 Hopefully my questions will be very brief this
22 afternoon.

23 Earlier in your testimony you talked about the
24 fact that you had received or actually requested from Brian
25 Smith that he transmit certain documents to you that were

1 reviewed in the February 14th, 2012 meeting in Tampa; is
2 that correct?

3 ANSWER: Yes, sir.

4 QUESTION: What is the next exhibit number,
5 please?

6 THE REPORTER: 18.

7 QUESTION: I'm going to hand you what the court
8 reporter will mark as Exhibit 18.

9 Mr. Artimovich, if you'll look at Exhibit No. 18,
10 I would ask you if that is, in fact, a follow-up to your
11 request that you received from Brian Smith on or about
12 February the 28th of 2012?

13 ANSWER: Yes, it is.

14 QUESTION: And it's my understanding that
15 Mr. Smith actually transmitted to you by FedEx a package of
16 materials; is that correct?

17 ANSWER: That's correct.

18 QUESTION: And in that package of materials you
19 have actually produced or your counsel has, subject to the
20 subpoena, certain of those documents; would that be fair to
21 say?

22 ANSWER: Correct.

23 QUESTION: Mr. Artimovich, as I look through this
24 document, it's my understanding that you were produced the
25 email that we have previously marked in this case and

1 discussed from Steve Easton that talked about certain
2 changes. You received the 2005 TTI -- July 2005 TTI crash
3 test report of the ET-31; is that right?

4 ANSWER: Yes, sir.

5 QUESTION: You were given photos from TTI of the
6 May 27, 2005 crash test; is that correct?

7 ANSWER: Yes.

8 QUESTION: You also received a September 2nd, 2005
9 FHWA acceptance letter of the ET-31 with steel posts; is
10 that right?

11 ANSWER: Yes.

12 QUESTION: You received a March 15, 2010 FHWA
13 acceptance letter of the ET-Plus and the ET-31 with two
14 break-away posts; is that right?

15 ANSWER: Yes.

16 QUESTION: You received also a February 2010 TTI
17 crash test report of a modified ET-Plus; is that right?

18 ANSWER: Yes.

19 QUESTION: And you received a November 2010 TTI
20 crash test report of the ET-Plus, as well; is that right?

21 ANSWER: Yes, sir.

22 QUESTION: Mr. Artimovich, I'm going to hand you
23 what is going to be marked as Exhibit 20. Tell me when
24 you've had a chance to look at that, please, sir.

25 ANSWER: Yes, sir.

1 QUESTION: Mr. Artimovich, this is, in fact, a
2 letter, or rather an email from Dr. Roger Bligh at TTI to
3 you; is that right?

4 ANSWER: Yes, sir.

5 QUESTION: Mr. Artimovich, you know Dr. Bligh
6 professionally, don't you, sir?

7 ANSWER: I do.

8 QUESTION: And you know him to be a Ph.D. engineer
9 at Texas Transportation Institute?

10 ANSWER: Yes.

11 QUESTION: During the meeting that you had with
12 the TTI and Trinity folks out in Florida, would you agree
13 that during that meeting that the Trinity and TTI folks were
14 very forthright with you about this issue of the four-inch
15 feeder chute being included on that test that was done in
16 May of 2005?

17 ANSWER: Yes, they were.

18 QUESTION: They answered and discussed all issues
19 that were posed. Would you agree with that, Mr. Artimovich?

20 ANSWER: Yes. I testified to that earlier.

21 QUESTION: Yes, sir. And I don't want to go back
22 and revisit any of that testimony, but at the conclusion of
23 that meeting, did you indicate to the Trinity and TTI folks
24 that you appreciated their time that they had spent with you
25 and thanked them for the information?

1 ANSWER: Yes.

2 QUESTION: And, again, as you testified, you asked
3 them to send the information that you requested as a
4 follow-up, and they sent it to you; is that right?

5 ANSWER: That is correct.

6 QUESTION: Mr. Artimovich, if we look back at
7 Exhibit No. 10, I believe that it is, and I think we've
8 already -- already identified this as the July 2005 crash
9 test report on the ET-31; is that right?

10 ANSWER: Yes.

11 QUESTION: Mr. Artimovich, you have earlier
12 testified that you are satisfied in your mind that a
13 four-inch guide chute was included during this crash test;
14 is that right?

15 ANSWER: I'm personally satisfied to --

16 QUESTION: Yes, sir.

17 ANSWER: That's my understanding, yes.

18 QUESTION: All right. And that's all I'm asking
19 is what your personal understanding is?

20 ANSWER: Yes.

21 QUESTION: Based upon your personal experience, do
22 the crash tests that are done on various products under
23 NCHRP 350, is the result of that test and what's being
24 measured the performance of the system? Is that what's
25 really at issue here?

1 ANSWER: It is the performance of the system
2 compared to the crash testing standards.

3 QUESTION: Mr. Artimovich, would you agree that
4 the test performed in -- the test, singular, performed in
5 the 1999 crash report was not performed in 2005?

6 ANSWER: Exhibit 7?

7 QUESTION: Exhibit 7 is '99.

8 ANSWER: Dated December of 1999?

9 QUESTION: Yes, sir.

10 ANSWER: Was not performed in 2005.

11 QUESTION: And that's Test No. 3-31?

12 ANSWER: Yes. NCHRP Report 350, Test 3-31.

13 QUESTION: And would you also agree with me that
14 you have no information at present about the prototype that
15 was crash tested in 2005, other than the fact that it had a
16 four-inch rail?

17 ANSWER: I have the information that's contained
18 in Exhibit 10.

19 QUESTION: Does that anywhere even disclose the
20 existence of a four-inch rail?

21 ANSWER: It does not provide details to that
22 level.

23 QUESTION: And since -- or excuse me, other than
24 the exhibit that is Exhibit 10, you don't have any
25 information about the dimensions of the head other than the

1 fact that the four-inch was -- excuse me, that the feeder
2 chute was a four-inch?

3 ANSWER: I have the emails that we have already
4 referred to that talk about the changes.

5 QUESTION: Do those -- do those disclose the
6 internal dimensions, any other changes other than simply
7 putting the four-inch on there?

8 ANSWER: They refer to various changes other than
9 the change from five inches to four inches.

10 QUESTION: You're talking about the 2001 email?

11 ANSWER: Yes, sir.

12 QUESTION: Okay. The changes, I think we
13 previously established, were made in 2005. Do you know
14 anything about the details of those changes?

15 ANSWER: I do not know when the changes were made,
16 but what I do believe is that the test that was ultimately
17 run in 2005 did include the change from five inches to four
18 inches.

19 QUESTION: Do you know what other changes, if any,
20 it included?

21 ANSWER: I believe those have already been
22 enumerated.

23 QUESTION: And do you know what other changes, if
24 any, were done after the test?

25 ANSWER: There have been changes --

1 QUESTION: I'm sorry. Go ahead.

2 ANSWER: There have been changes in other parts of
3 the terminal, but I don't recall documentation on any other
4 changes to the head itself.

5 QUESTION: The FHWA issued an acceptance letter
6 based upon the results of the 2005 crash test; is that
7 correct?

8 ANSWER: Yes. Exhibit 9, FHWA Letter CC-94, is
9 based on the tests that were conducted and reported on in
10 July 2005, which is Exhibit 10.

11 QUESTION: And that exhibit indicates that there
12 were successful tests that met Report 350 criteria, correct?

13 ANSWER: Yes, that's what the report indicates.

14 QUESTION: In the 2010 tests that were furnished
15 to you by Brian Smith, it's your understanding, isn't it,
16 sir, that those tests all included a four-inch channel,
17 correct?

18 ANSWER: Yes, sir.

19 (Videoclip ends.)

20 THE COURT: Does that complete the video
21 deposition?

22 MR. CARPINELLO: Yes, Your Honor.

23 THE COURT: All right. Ladies and gentlemen,
24 we're going to take a very short recess, and then we'll come
25 back in and start the next witness.

1 You may leave your notebooks in your chairs.
2 Don't discuss anything about the case. You are excused for
3 a recess at this time.

4 COURT SECURITY OFFICER: All rise.

5 (Jury out.)

6 THE COURT: Be seated, please.

7 Ladies and gentlemen, I want to remind you that I
8 have prohibited the jury from having cell phones in this
9 courtroom. During the deposition just completed, a
10 deposition of one of the key witnesses in this case, I
11 clearly heard what sounded like a walkie-talkie on the right
12 side of the courtroom and I heard a ring tone on the left
13 side of the courtroom. If I hear any other disruptions of
14 that nature, I will confiscate that device from the
15 offending party and I will bar all other similar devices
16 throughout the rest of the trial. I consider that an
17 unacceptable disruption and a distraction from the jury's
18 concentration. So that's -- that's my position on that, and
19 that's -- that's my final warning. Don't let it happen
20 again.

21 We will take about a five-minute recess, and then
22 I assume the Plaintiff is ready to call Dr. Coon; is that
23 correct, or what?

24 MR. BAXTER: Dr. Bligh, Your Honor --

25 THE COURT: Dr. Bligh?

1 MR. BAXTER: -- adversely, yes, sir.

2 THE COURT: All right. We'll take a five-minute
3 recess, and you can call your next witness.

4 MR. BAXTER: Thank you, Your Honor.

5 COURT SECURITY OFFICER: All rise.

6 (Recess.)

7 (Jury out.)

8 COURT SECURITY OFFICER: All rise.

9 THE COURT: Be seated, please.

10 Let's bring in the jury, Mr. McAteer.

11 Do we have the witness in the courtroom?

12 MR. BROWN: I believe he's out in the hallway.

13 THE COURT: Let's go get him. Save that much
14 time. Mr. Miller can do it.

15 Bring them in, please.

16 COURT SECURITY OFFICER: All rise for the jury.

17 (Jury in.)

18 THE COURT: Please be seated, ladies and
19 gentlemen.

20 Plaintiff, call your next witness.

21 MR. BAXTER: Call Dr. Roger Bligh, Your Honor,
22 adversely.

23 THE COURT: Dr. Bligh, if you'd raise your right
24 hand, you'll be sworn by our courtroom deputy.

25 (Witness sworn.)

1 THE COURT: Please come around, sir, and have a
2 seat here at the witness stand.

3 All right. Mr. Baxter, you may proceed.

4 MR. BAXTER: Thank you, Your Honor.

5 DR. ROGER BLIGH, PLAINTIFF'S WITNESS, SWORN

6 DIRECT EXAMINATION

7 BY MR. BAXTER:

8 Q. Dr. Bligh, my name is Sam Baxter. I don't think we've
9 met, sir. We're glad to have you in Marshall.

10 A. Thank you, sir.

11 Q. Would you state your name for the jury, please?

12 A. Yes. My name is Roger Bligh.

13 Q. And you have a Ph.D., do you not, sir?

14 A. Yes, sir, I do.

15 Q. Okay. And you work at the Texas A&M Transport --
16 Transport Institute?

17 A. That is correct.

18 Q. And how long have you been there, sir?

19 A. 28 years.

20 Q. And what's your title right now?

21 A. I am a research engineer.

22 Q. Okay. TTI has a mission statement, do they not?

23 A. Yes, sir.

24 Q. And you're familiar with it, don't you?

25 A. Yes, sir.

1 Q. And -- and you adopt it, don't you? You live by it,
2 right?

3 A. Yes, sir.

4 Q. All right. Let me --

5 MR. BAXTER: Mr. Diaz, can you pull that up?

6 Q. (By Mr. Baxter) Let me show you the mission statement,
7 Dr. Bligh, if I can, please, sir.

8 MR. BAXTER: Not this one, Mr. Diaz, but rather
9 the mission statement itself. It looks like that. You got
10 me?

11 Q. (By Mr. Baxter) Dr. Bligh, does that look familiar to
12 you, sir?

13 A. Yes, sir.

14 Q. And you call it a strategic plan, but it's how you do
15 things at TTI and the principles you live by, isn't it?

16 A. Well, I -- I -- I think the document speaks for itself.
17 It's a strategic plan, sir.

18 Q. All right, sir.

19 MR. BAXTER: Let me look at Page 3, if I can.

20 Q. (By Mr. Baxter) And this is the director of TTI, is it
21 not?

22 A. Yes, sir, it is.

23 Q. Okay. Now, TTI is actually a state agency, is it not?

24 A. Yes, sir, it is.

25 Q. And I know that somehow it's affiliated with A&M, but

1 the truth is, it's a state agency like the Welfare
2 Department is, isn't it? You've got to go to the
3 legislature to get money?

4 A. We are a state agency, as well as a member of the Texas
5 A&M University System, sir.

6 Q. But you work for a state agency, goes to the legislature
7 every two years and lobbies for money and gets
8 appropriations, don't you?

9 A. I'm not familiar with that process, sir.

10 Q. You don't know that you have to go down to Austin to
11 get into the state budget to get your money?

12 A. Well, I -- I know that we're a contract research agency,
13 so most of our funds come from contract research that we go
14 out and procure.

15 Q. Well, I mean, you've got a budget from the state of \$52
16 million, don't you, Doctor?

17 A. No, sir.

18 Q. Really? You don't get that from the legislature?

19 A. No, sir.

20 Q. You don't know?

21 A. No, sir, we do not.

22 Q. Okay. Let me look at Page 3. One of the things I found
23 that your director says that you live by -- that the goals,
24 strategies, and performance measured identified for the
25 three key imperatives are guiding the institute in our

1 pursuit of better ways to develop and maintain a safe and
2 efficient transportation system. And the very first one is
3 saving lives, isn't it?

4 A. Yes, sir.

5 Q. Time and resources. And you live by that, don't you?
6 Saving lives is very important, too?

7 A. Yes, it is.

8 Q. All right.

9 MR. BAXTER: Let me go to Page 5, if I could,
10 please, Mr. Diaz.

11 Q. (By Mr. Baxter) And down at the bottom under our
12 philosophies and values, it says that TTI is guided by a
13 fundamental philosophy that values integrity, objectivity,
14 and excellence and service to our sponsors. Is that right?

15 A. Yes, sir, I see that.

16 Q. And the very first one is integrity?

17 A. Yes, sir.

18 Q. And it's very important that your organization and the
19 members of it have high integrity, is it not?

20 A. Yes, sir.

21 Q. Okay.

22 MR. BAXTER: Now, let me go to the next page, if I
23 could, Mr. Diaz.

24 Q. (By Mr. Baxter) And down toward the bottom, I notice
25 that the institute considers the following topics as

1 representing the mega issues associated with transportation
2 today. Do you see that?

3 A. Yes, I do.

4 Q. What's the very first one?

5 A. Safety.

6 Q. Okay. And you'd agree with that, don't you?

7 A. Yes, sir, I do.

8 Q. So I can count on you, can I not, Dr. Bligh -- as we go
9 through this testimony and as we consider what has happened
10 in the past, that the overriding concern of TTI and you was
11 safety and saving lives; would that be right?

12 A. Yes, sir.

13 Q. And everything else has to be compared to that big
14 mantra of safety and saving lives; would that be right?

15 A. Yes, sir.

16 Q. And all of your decisions have to be governed by that,
17 don't they?

18 A. Yes, sir.

19 Q. And if it came to a conflict, say, between your own
20 personal gain and safety and saving lives, which one is more
21 important?

22 A. Absolutely safety.

23 Q. Okay. And I can count on you for that being the mantra
24 of you, Dr. Roger Bligh, and TTI?

25 A. Yes, sir.

1 Q. Safety first?

2 A. Yes, sir.

3 Q. Okay. Now, you're -- you're an Aggie, aren't you?

4 A. Yes, sir. I am.

5 Q. Went to A&M?

6 A. Yes, I did.

7 Q. Been there all this time?

8 A. Yes, I have.

9 Q. Is there something called the -- the Aggie creed or the
10 Aggie motto?

11 A. Yes, sir.

12 Q. Okay. Put it on up on the screen for me. Aggies do not
13 lie, cheat, or steal, do they?

14 A. That's correct, sir.

15 Q. And that's engrained from the very first minute you hit
16 the campus until the time you leave, whenever it is, even if
17 it's 28 years later, isn't it?

18 A. It is indeed.

19 Q. And that's what you live by, isn't it?

20 A. Yes, it is.

21 Q. Okay. Now --

22 THE COURT: Make sure you let him finish his
23 answers, Mr. Baxter.

24 MR. BAXTER: Thank you, Your Honor. I will.

25 Q. (By Mr. Baxter) Dr. Bligh, I take it, sir, that one of

1 the things that you've done in the past is that you've been
2 an inventor?

3 A. Yes, sir.

4 Q. Okay. You got any patents?

5 A. Yes, sir, I do.

6 Q. All right. Are there patents on this end rail system,
7 this guardrail system and the end terminals that we've heard
8 about?

9 A. Yes, there are.

10 Q. Okay. Let me show you one of the patents.

11 MR. BAXTER: Mr. Diaz, if you could bring up
12 Plaintiff's Exhibit No. 5.

13 Q. (By Mr. Baxter) This is Patent No -- - I think patents
14 go by the last three numbers so this is '928, isn't it?

15 A. Yes, sir, that's correct.

16 Q. And the title of it is the guardrail extruder terminal;
17 is that right?

18 A. Yes, sir.

19 Q. And the inventors on this patent are Dr. Buth -- is that
20 Dr. Qureshy? How do you say that?

21 A. I pronounce it Qureshy.

22 Q. Okay. Qureshy.

23 Is that Dr. Ross?

24 A. Yes, sir.

25 Q. And Dr. Sicking?

1 A. Yes, sir.

2 Q. That's right. And do you know Dean Sicking?

3 A. I do.

4 Q. Was he one of the inventors of the guardrail extruder
5 terminal?

6 A. Yes, sir, he was.

7 Q. All right. Now, you're not on this one, are you?

8 A. No, sir.

9 Q. Are you on some others?

10 A. Yes, sir.

11 Q. Okay. Now, one of the things, of course, that when
12 you're a patent owner -- and you owned the patent, did you
13 not, at one time, at least as an inventor?

14 A. I'm sorry, could you restate the question?

15 Q. This was your -- this -- if not this one, other
16 improvements or other inventions having to do with this
17 guardrail system, you were on the patent, were you not?

18 A. Yes, sir.

19 Q. And as a result of that, having the patent, either you
20 or TTI or A&M got into an agreement with Tex -- with TI --
21 with Trinity and made them the exclusive licensee of your
22 inventions; is that right?

23 A. You're talking specifically about this invention?

24 Q. Yes, sir.

25 A. Yes, sir.

1 Q. Okay. And so when Trinity put out the first product,
2 which was the ET-2000, that was partly your invention; is
3 that right?

4 A. I'm not sure I follow, sir.

5 Q. Well, let me get it -- let me -- let me see if I can get
6 down to it this way. Do you get royalties from Trinity
7 Industries for your inventions on these -- these heads?

8 A. No, sir, not -- not from Trinity.

9 Q. Okay. Who do you get them from?

10 A. We are compensated from the Texas A&M University System
11 who owns the technology and -- and the patents and has the
12 license agreement.

13 Q. A&M cut you in on the deal; is that right? If they have
14 an exclusive license with Trinity and they get paid money by
15 Trinity, you get part of it; is that right?

16 A. Yes, sir, at their discretion. We certainly are
17 fortunate to participate in that.

18 Q. Okay. And so the more of these things -- these heads
19 that Trinity sells, the more money you get?

20 A. Yes, sir. If it happens to be one that is within the
21 license agreement.

22 Q. Well, the ET-Plus is -- is within the license agreement,
23 is it not?

24 A. Yes, sir.

25 Q. Okay. So the more ET-Plus heads that Trinity sells, the

1 more you get, right?

2 A. Yes, sir.

3 Q. And if for some reason sales slack off or they can't
4 sell them, then your royalty would dwindle down, be less or
5 zero; is that right?

6 A. Yes, sir.

7 Q. Now, about how much money have you collected on the
8 sales of the ET-Plus that you've collected in royalties, Dr.
9 Bligh?

10 A. I don't have the exact figure.

11 Q. Don't need to be exact. Just give me a ballpark.

12 A. I -- I think it would be on the order of \$2 million.

13 Q. Okay. Dr. Bligh, we've got some information from you
14 and from Trinity, and there's a chart.

15 MR. BAXTER: If I can see that, Mr. Diaz.

16 Q. (By Mr. Baxter) And this chart goes through December of
17 2012. Have you got that date in mind?

18 A. Okay, sir.

19 Q. All right. And you see that you've collected
20 \$2,079,762.07?

21 A. Yes, sir.

22 Q. How much you -- have you collected in the year 2013 and
23 2014?

24 A. I don't have the exact figure, sir.

25 Q. Don't need an exact one. Give me a ballpark. Another

1 half million dollars?

2 A. Yes, sir.

3 Q. Another three quarters of a million dollars?

4 A. Yes, sir.

5 Q. Another million?

6 A. I'm not sure, sir.

7 Q. Okay.

8 A. I'm not sure.

9 Q. Could we -- could we round it off to say that you've
10 gotten somewhere between 2.75 million and \$3 million in
11 royalties from Trinity?

12 A. Yes, sir.

13 Q. And Dr. Buth and Dr. Ross and Dr. Alberson and Mr.
14 Bullard also get royalty payments, don't they?

15 A. Yes, sir.

16 Q. In fact, Dr. Buth gets the most, doesn't he?

17 A. On -- on this graphic, I see that, yes, sir.

18 Q. All right. In fact, he's gotten almost three and a half
19 million dollars and that's 21 months ago, isn't it?

20 A. Yes, sir.

21 Q. Okay. I take it, then, that you would like to have
22 the continued sales of the ET-Plus; would that be fair?

23 You like to keep getting those royalties?

24 A. Certainly if there are sales, we will get more
25 royalties, sir.

1 Q. Okay. And you like to get them?

2 A. You know, sir, I'm -- I'm very blessed to be able to
3 participate in that in -- in my line of work.

4 Q. Yes, sir. I understand that. And not to pry,
5 Dr. Bligh, but probably this dwarfs what you get in salary
6 from TTI, would it not?

7 A. Yes, sir, it does.

8 Q. Okay. Now, did it ever occur to you or to the other
9 professors at A&M that are getting these royalties that
10 there was a conflict of interest when you're asked to
11 evaluate and test the -- the very article that you're
12 getting royalties on?

13 A. No, sir. I don't see it that way.

14 Q. Well, I understand. Did anybody ever talk to you about
15 it or you talk to anybody about the conflict that existed?

16 A. I -- I don't recall any specific conversations.

17 Q. Okay. Well, wouldn't it be true, Dr. Bligh, that when
18 Trinity sends some information down to TTI, that they either
19 want to make changes or they want to do something to the
20 ET-Plus head, they're asking you to evaluate whether or not
21 they could make those changes? Isn't that right?

22 A. Yes, sir.

23 Q. And if the changes would sell more heads, do you think
24 there's not a conflict with you making the determination
25 that, let me see, make more money, make less money, I'll

1 decide that? That never occurred to you?

2 A. Sir, I would say that that is not an issue.

3 Q. Well, I'm just asking you if it ever occurred to you and
4 you ever thought maybe I'm not the one and my colleagues
5 that are getting the royalties aren't the ones that ought to
6 be deciding whether or not changes can be made to a product
7 that might sell more of them if I agree to the changes?

8 A. No, sir, I wouldn't agree with that. As inventors,
9 designers, developers of the product, we are, in fact, the
10 people that should be making those determinations and making
11 decisions about the future of that product.

12 Q. Just so the jury will understand, your position is you
13 are the very best one to determine whether or not they can
14 make a change that might sell them more product and you get
15 more money, right?

16 A. Yes. As a research engineer, we will evaluate the
17 safety aspects of that and -- and proceed accordingly.

18 Q. Okay. And so far, at least, you have determined that
19 the changes will be okay and that they can sell more and you
20 ought to get more money; isn't that right?

21 A. We have evaluated each change and each instance and made
22 appropriate recommendations.

23 Q. Okay. Did you ever turn one of them down?

24 A. I don't know off the top of my head.

25 Q. Well, think about it just a moment. Has TT -- has TTI

1 and you -- in evaluating the ET-Plus, in changes that
2 Trinity wanted to make, have you ever said, no, not doing
3 that; nope, not safe, not doing it?

4 A. I'm sure that we have, sir.

5 Q. Name one.

6 A. I don't have any specific instances at this moment that
7 I can recall.

8 Q. Well, any big ones? They -- they said, well, we want to
9 make it out of aluminum; it's a lot cheaper?

10 A. No, we've never been asked that, sir.

11 Q. All right. You just can't think of one?

12 A. Not -- not right now, sir, no.

13 Q. All right. One of the things that we've heard in this
14 case, Dr. Bligh, is that the ET-Plus is out on the
15 interstates. Would that be right?

16 A. Yes, sir.

17 Q. Did you drive up here to Marshall?

18 A. Yes, I did.

19 Q. Did you just pass hundreds, if not a thousand of them,
20 on the way up here?

21 A. I -- I wouldn't know what the number would be, sir.

22 Q. Bunch of them?

23 A. Yes, sir.

24 Q. Do you mind if I ask how -- what roads you took to get
25 here?

1 A. I don't know if I could remember all of them. I know I
2 took Highway 21; I took Interstate 45.

3 Q. All right. Let's stop on the interstate. What's the
4 speed limit on the interstate?

5 A. It -- it varies.

6 Q. Is it generally 75, sir?

7 A. In some sections outside of the -- the -- the
8 municipalities.

9 Q. Well, I mean no offense, sir, but College Station is not
10 exactly a metropolitan area. Once you got out of College
11 Station and got on 45, did you find the speed limit to be
12 75?

13 A. Yes -- well, yes, when I got onto 45.

14 Q. Okay.

15 A. It's not from College Station.

16 Q. All right. Now, one of the things that we've heard in
17 this case, sir, from the lawyers over here is that these
18 ET-Pluses, whether it's the 5-inch or the 4-inch or any of
19 them, really don't work very well if you hit them at a speed
20 higher than 62 miles an hour.

21 Do you agree with that, sir?

22 A. I don't have any information in that regard.

23 Q. You don't have any information in that regard; is that
24 what you said?

25 A. Well, if that exceeds our testing criteria.

1 Q. Have you ever written a paper about that, Dr. Bligh?

2 A. I'm not sure. About what, sir?

3 Q. About whether or not these things ought to function if
4 they're hit by a vehicle going faster than 62 miles an hour?

5 A. I don't recall writing --

6 Q. Okay.

7 A. -- a paper on that specific subject.

8 Q. Let me --

9 MR. BAXTER: Mr. Diaz, can you -- can you get up a
10 paper entitled Assessment of NCHRP Report 350 Test
11 Conditions? If not, I can put it on the ELMO.

12 Have you got it? Okay. He's saying yes.

13 Q. (By Mr. Baxter) Dr. Bligh, do you see that you, in fact,
14 were a co-author of a paper entitled Assessment of NCHRP
15 Report 350 Test Conditions in 2002?

16 A. I'm -- I'm familiar with this paper, yes, sir.

17 Q. Okay. Let me read you the first paragraph -- first
18 bullet point of this paper, okay?

19 MR. BAXTER: And can you go to the first page, Mr.
20 Diaz?

21 Q. (By Mr. Baxter) And I'm going to -- to go right here
22 past the introduction, the effects of higher speed -- the
23 effects of a higher speed limit on impact speed. The impact
24 speed for TL-3 test conditions was set at 62 miles an hour
25 under Report 350. Since the maximum speed limit at that

1 time was 65 miles an hour on rural interstate highways and
2 55 on other highways, a test speed of 62.2 miles an hour
3 seemed appropriate.

4 However, since the publication of the document, the
5 national speed limit, 55 miles an hour, was repealed, and
6 many states have adopted maximum speed limits of up to 75
7 miles an hour. Questions have been raised regarding the
8 appropriateness of using the 62 miles an hour as a test
9 speed given the higher speed limits. And some have
10 suggested that the impact speed be increased to 68 miles an
11 hour.

12 Did you write that?

13 A. Yes, sir.

14 Q. All right. Let me go, if I can, Dr. Bligh --

15 MR. BAXTER: To the third page, Mr. Diaz, which is
16 actually the top, labeled 40, and it has Table 2 right at
17 the top.

18 Q. (By Mr. Baxter) Now, the ET-Plus terminal is an
19 extrusion-type energy absorbing terminal, is it not?

20 A. Yes, sir, I would characterize it that way.

21 Q. All right.

22 MR. BAXTER: And go on down, Mr. Diaz, to see
23 where it says terminals on that page, or the next page.

24 Q. (By Mr. Baxter) And I want to read this to you,
25 Dr. Bligh, and see if this sounds familiar. For

1 extrusion-type energy absorbing terminals -- and that would
2 be like the ET-Plus; is that right?

3 A. Yes, sir.

4 Q. The capacity to handle the higher impact speed should
5 pose little problem. Did you write that?

6 A. I -- I can't see it yet, sir, but --

7 Q. All right. Here it is right there. See that second
8 paragraph?

9 A. Yes, sir.

10 Q. Did you write that?

11 A. Yes, sir.

12 Q. Field experience with some energy-absorbing terminals
13 has shown that they perform well in classes with impact
14 speeds well above 60 point -- 62.2 miles an hour. Did you
15 write that?

16 A. Yes, sir.

17 Q. The length of the terminal may have to be increased to
18 accommodate the higher kinetic energy level. Any design
19 modifications will likely be minor in nature, such as
20 replacing standard line -- line posts with breakaway CRT
21 posts. However, the inertial impulse associated with
22 accelerating the impact head may pose some problems for the
23 small car on tests, Test 30 and 32, at the higher impact
24 speed, and some redesigns to reduce the weight of the impact
25 head may be necessary.

1 Did you write all of that?

2 A. Yes, sir.

3 Q. And the import of your whole article was that these
4 devices will do just fine at the higher impact speeds.

5 Isn't that what the thrust of the article was?

6 A. No, sir. That's not what it says.

7 Q. Isn't that what it says, for extrusion-type energy
8 terminals, the capacity to handle the higher impact speeds
9 should pose little problem?

10 A. On that one sentence, and it goes on to say that there
11 could be some issues with -- with other conditions, sir.

12 Q. None of which will apply out on the interstate, will
13 they?

14 A. I don't understand the question, sir.

15 Q. Well, these things are all over the interstate, are they
16 not?

17 A. Yes, sir.

18 Q. Now, are you telling me that the only time they're going
19 to work is that if I hit them at 62.2 miles an hour or
20 slower?

21 A. No, sir. That's not what I'm saying.

22 Q. Okay. They, in fact, are supposed to work and do work
23 at higher impact speeds, do they not?

24 A. That's not what I'm saying either, sir. They've been
25 tested to a certain standard, and -- and so that is the

1 design conditions to which they are developed.

2 Q. And what your paper had to do with was to say that it
3 should be little problem for them to absorb the kinetic
4 energy at higher impact speeds. Isn't that what you said?

5 A. Again, it's for certain impact conditions, and there
6 could be problems for others. So it's -- it's just a
7 statement in the paper. Yes, sir.

8 Q. Okay. So if anyone tries to tell this jury that this
9 head won't work at 70 or 75 miles an hour, you would
10 disagree with that generally, would you not?

11 A. Could you reask your question, sir? I'm sorry.

12 Q. If somebody were to tell this jury over here that the
13 ET-Plus won't work at 70 or 75 miles an hour, you, Roger
14 Bligh, will say, wait a minute, that's not necessarily true,
15 wouldn't you?

16 A. No, sir. That's not what I said.

17 Q. All right. Well, will it work at those speeds?

18 A. We haven't done tests quite up to those speeds, so the
19 evidence that we have anecdotal as mentioned in the paper
20 that there are some anecdotal cases where it has been
21 performed successfully at higher speeds.

22 Q. Okay. Thank you.

23 And, of course, the anecdotes have to do with actual
24 crashes out on the interstate, don't they?

25 A. Yes, sir.

1 Q. Okay. Not that just anecdotal. That's real world,
2 isn't it?

3 A. Yes, sir.

4 Q. And they did just fine, didn't they?

5 A. Again, by -- by anecdotal, it means that there are just
6 certain instances that have been brought to our attention
7 without a full study. And in some of those instances, as I
8 mentioned, it has performed well.

9 Q. All right. Now, you were at TTI, were you not, when the
10 ET-2000 was changed to the ET-Plus?

11 A. Yes, sir.

12 Q. And you were there when they tested the ET -- the new
13 ET-Plus in 1999, were you not?

14 A. Yes, sir, I was.

15 Q. Okay. And did you help run those tests?

16 A. Yes. I was involved in the testing.

17 Q. Okay. Now, the critical test that you ran was the 3-31,
18 was it not?

19 A. At that particular time for that system, yes, sir, it
20 was.

21 Q. Okay. And you would agree that that was the critical
22 test?

23 A. For that system that was being evaluated at that time,
24 yes, it was.

25 Q. Well, that system happened to be the ET-Plus, was it

1 not?

2 A. Yes. There was --

3 Q. Tell the jury -- excuse me. Go ahead.

4 A. Thank you, sir.

5 Q. Finish.

6 A. It was an ET-Plus system in a certain configuration.

7 Yes, sir.

8 Q. Well, it was in a straight line, was it not?

9 A. That -- that was one characteristic of the system. It's
10 a tangent system which means that it's in a straight line.

11 Q. Okay. Any other specialities of that system that you
12 want to tell the jury about?

13 A. Well, there's a lot of components that comprise the
14 system, sir. So when I talk about a system, I'm talking
15 about the head that was used, the rail height, the posts
16 that were used, the post spacing, the offset blocks between
17 the posts and the rail, the anchor bracket that was used,
18 the types of connections between the posts and the rail.
19 And all of those are part of the system and can all have an
20 effect on the performance.

21 Q. And it is the system that eventually got installed out
22 on the highways, isn't it?

23 A. Yes, sir.

24 Q. Okay. All right. Now, to see if that change from the
25 ET-2000 to the ET-Plus worked, you said and TTI said that

1 the critical test was 3-31 with a pickup truck hitting it
2 head-on. Isn't that true?

3 A. That's correct. That was the critical test for that
4 system at that time.

5 Q. Well --

6 A. Yes.

7 Q. -- are you -- are you now trying to set me up for saying
8 when you test later on, you don't want to use a pickup
9 truck?

10 A. Well, sir, I'm going to say that we have a matrix of
11 tests in our standard, and it's appropriate to evaluate
12 those tests for each system that you're testing.

13 Q. Okay. For this system to see if the changes you made --
14 and what were those changes? Did you use less steel?

15 A. Yes, sir. That was one of the changes.

16 Q. Changed the faceplate so that it was rectangular instead
17 of square?

18 A. That was one of the changes. Yes, sir.

19 Q. Did you change the size of the guide channels?

20 A. At what point in time are we referring, sir?

21 Q. 1999. That's all we were talking about right now.

22 A. Thank you. I just needed a clarification.

23 The guide channels were 5 inches at that time.

24 Q. Okay. You didn't change them?

25 A. No, sir.

1 Q. All right. And so the critical test was the pickup
2 truck hitting it at 62 miles an hour; is that right?

3 A. That's correct. That's what we determined to be
4 critical based on what we were trying to evaluate.

5 Q. Okay. And, in fact, you wrote the Federal Highway
6 Administration that, did you not?

7 A. Yes, sir.

8 Q. Okay. And you said that was the critical test; is that
9 right?

10 A. Yes. As I think I've testified to, that's what we felt
11 was the critical test of that system at that time.

12 MR. BAXTER: Let me see Exhibit 47, if I could,
13 Mr. Diaz.

14 Q. (By Mr. Baxter) Now, this was a letter directed to -- at
15 the time, Mr. Dwight Home (sic), who is the director of the
16 Office of Highway Safety Infrastructure at the Federal
17 Highway Administration. Do you see that?

18 A. Yes, sir.

19 Q. December the 17th, 1999?

20 A. Yes, sir.

21 Q. The purpose of the letter was to advise them of a design
22 alternative for the previous ET-2000 system that's now going
23 to be known as the ET-Plus; is that right?

24 A. Yes, sir.

25 MR. BAXTER: Look at the second page, Mr. Diaz, if

1 we can.

2 Q. (By Mr. Baxter) You see where it says Test 3-31 with a
3 modified ET-LET system is believed to constitute the most
4 critical impact scenario as regards the evaluation of the
5 impact performance of the Plus head with the approved ET
6 systems?

7 A. Yes, sir, I see that.

8 Q. All right. Did you run any other tests besides the 3-31
9 in 1999 on the ET -- changed ET-Plus head?

10 A. No, sir. That was the only test determined to be
11 necessary.

12 Q. All right. And did the Highway Administration write you
13 back about the 3-31 test?

14 MR. BAXTER: Let's look at PX 51, Mr. Diaz.

15 Q. (By Mr. Baxter) Is this from the highway department to
16 Dr. Ross? Was Dr. Ross your boss at that time?

17 A. At -- at that time, I don't believe that he was, sir.

18 Q. All right. Let's look and see what it says. You stated
19 in the second paragraph that this end-on test with a 2,000
20 kg -- and that's the pickup truck, is it not?

21 A. Yes, sir.

22 Q. And 2,000 kilograms turns into 4500 pounds?

23 A. 4400 pounds, yes, sir.

24 Q. Was the most critical to demonstrate acceptable
25 performance of the modified extruder head and that

1 additional impacts on the end were not needed.

2 Is that what they said to you?

3 A. Yes, sir.

4 Q. And so you all agreed that the best test to use was the
5 pickup truck hitting it head-on; is that right?

6 A. That's correct. I think I've testified to that for that
7 system at that time, that is absolutely correct.

8 Q. And you issued a report, did you not, in December of
9 1999?

10 MR. BAXTER: If I can see the 2000 report,
11 Mr. Diaz.

12 Q. (By Mr. Baxter) Now, when you write these reports
13 they're sort of a guide to go by, are they not, Dr. Bligh?

14 A. We use our -- our testing standard to help guide the
15 contents of the report.

16 Q. Is that the 350?

17 A. Yes, NCHRP Report 350.

18 Q. Okay. And that document actually contains a little
19 guide of what ought to be in your table of contents and what
20 ought to be in the body of your report, does it not?
21 We're going to look at it after awhile, but I want to
22 confirm that it's true.

23 A. There's actually a chapter on documentation, and it has
24 an outline of things to include in the report.

25 Q. And one of the things that they want you to do is to

1 give a very detailed description of the test article
2 that you're testing; is that not right?

3 A. Yes, sir. It's -- it speaks to the test installation.

4 Q. Well, it talks about the test article, does it not?

5 A. Yes, sir. That's the test installation.

6 Q. Okay. And did you do that in this case at Page 3? In
7 your table of contents, you call it test article, design,
8 and construction. Do you see that?

9 A. Not yet, sir.

10 Q. All right.

11 MR. BAXTER: Go to the table of contents,
12 Mr. Diaz.

13 Q. (By Mr. Baxter) Do you see that now, under technical
14 discussion?

15 A. Oh, yes, sir, I see that.

16 Q. Okay. And if we went to Page 3 where you say it is --

17 MR. BAXTER: If we can go there, Mr. Diaz.

18 Q. (By Mr. Baxter) On 1999, you were able to write multiple
19 paragraphs over multiple pages about the test article, were
20 you not?

21 A. Yes, I see two paragraphs on this page.

22 Q. Okay.

23 A. That's our practice, to try and describe what was
24 tested.

25 MR. BAXTER: Go to the next page. Go to Page 4,

1 if you can, Mr. Diaz.

2 All right. And the next page.

3 Q. (By Mr. Baxter) Did you see that there were multiple
4 paragraphs about the design and construction of the test
5 article?

6 Let me show it to you on the ELMO, if I can.

7 MR. BAXTER: If I can get the ELMO.

8 Q. (By Mr. Baxter) I'm going to show you the back of Page
9 3, which is Page 4.

10 Do you see that the paragraphs continue when you're
11 describing the test article?

12 A. Yes, sir, I do see that.

13 Q. And that's the appropriate way to do it, is it not?

14 A. Well, as I said, we do try and -- and document the test
15 installation for every test.

16 Q. Well, isn't it very important that when you're writing a
17 report to the Federal Highway Administration that you
18 actually know what you're testing?

19 A. Well, there are -- there are certainly certain aspects
20 of the test installation.

21 Q. Just answer my question, Dr. Bligh.

22 A. Okay. Could you reask your question, please?

23 Q. Yes, sir.

24 Don't you think it's important that the Federal Highway
25 Administration, when you submit the report, actually know

1 what you're testing?

2 A. Yes. That's why we try and document what we're testing
3 to describe the test article.

4 Q. And that's what you did in 1999, isn't it?

5 A. We certainly attempted to do that, sir.

6 Q. All right, sir.

7 THE COURT: Mr. Baxter, if you believe the witness
8 is non-responsive, raise it with the Court.

9 MR. BAXTER: I will.

10 THE COURT: Don't admonish the witness directly.

11 MR. BAXTER: Sorry, Your Honor.

12 Q. (By Mr. Baxter) Did -- did the ET-Plus get approved?

13 A. You're -- you're -- to which circumstance are you
14 referring?

15 Q. In 1999, the only circumstance we're talking about, Dr.
16 Bligh.

17 A. Thank you. I'm just trying to make sure that I'm -- I'm
18 clear.

19 Q. All right.

20 A. Yes, sir. It received a federal acceptance letter.

21 Q. Okay. Now --

22 MR. BAXTER: Do we have the crash test, Mr. Diaz?
23 Can I --

24 Q. (By Mr. Baxter) Can we look at the crash test you ran?

25 This is the 3-31 test, I believe, Dr. Bligh. You correct me

1 if I'm wrong. Was that the crash test?

2 MR. BAXTER: Freeze it right there, Mr. Diaz.

3 Q. (By Mr. Baxter) Does that look like the crash test? I'm
4 going to tell you that I got it from your report.

5 A. Yes, sir. That -- that -- that appears to be the 1999
6 test on the ET-Plus system.

7 Q. And out here to the left, what is that shiny
8 metal-looking stuff?

9 A. What you're circling there on the screen is the extruded
10 rail. It's the rail that passed through the head during
11 that crash test.

12 Q. And so on this head -- and this is sort -- this is the
13 head that you used, isn't it, this 5-inch head?

14 A. I don't know what that head is specifically. The -- the
15 -- the head that was used in this test did have 5-inch guide
16 channels.

17 Q. Well, the testimony has been, Dr. Bligh, this was the
18 ET-Plus head from 1999 to 2005 that was installed on the
19 highways. And that's what you tested, wasn't it?

20 A. Yes, sir. I think I just said that. I just didn't know
21 exactly what that head was. I can't see the entire head
22 there, but I do want to say, yes, we did test the head with
23 5-inch channels at that time.

24 Q. The way it's orientated to you now, the guardrail would
25 have come out on this side over here closest to me, would it

1 not?

2 THE WITNESS: Am I permitted to stand, Your Honor?

3 THE COURT: You're permitted to stand so you can
4 see it, yes, sir.

5 MR. BAXTER: If it's okay, Your Honor, would he
6 like to come down and examine up close and personal?

7 THE COURT: I'll let him come as close as anybody
8 else, but...

9 MR. BAXTER: Okay. Come right here, Dr. Bligh.

10 THE COURT: Use that handheld microphone,
11 Dr. Bligh. And if you'll move right to this corner. I
12 don't want to get you between the jury and the article. But
13 right here at this corner (indicating).

14 THE WITNESS: Yes, Your Honor.

15 THE COURT: You ought to be able to see over that
16 ledge and see perfectly.

17 Q. (By Mr. Baxter) Can you see it? You want me to turn it
18 for you?

19 A. Yes, sir, I can see the head.

20 Q. Now, was that the ET-Plus head that you tested or one
21 just like it in 1999?

22 A. It certainly looks to be similar, yes, sir.

23 Q. And the guardrail shot out this extruder head, did it
24 not?

25 A. That would be where the guardrail, the extruded rail,

1 would exit the head. Yes.

2 Q. And it worked as intended and you passed it, didn't you?

3 A. That is correct.

4 Q. Okay. And you hit it head-on at 0 degrees, did you not?

5 A. That's correct.

6 Q. Okay. Do you know the size of the exit gap?

7 A. Yes, sir.

8 Q. How big was it?

9 A. It's been 1 inch during my entire career at TTI dating
10 all the way back to the ET-2000.

11 Q. Okay. You've never seen any with a larger -- you can
12 sit down, if you would like, sir.

13 A. Thank you, sir.

14 Q. Now, the rail is put together with splice bolts, is it
15 not?

16 A. Yes, that's correct.

17 Q. I'm going to hold one up here, and I realize it's a
18 distance, but is that sort of what one looks like?

19 A. Appears to look like a splice bolt, yes.

20 Q. And -- and this one's got Trinity stamped on the head.

21 Is that what they have? You've seen them.

22 A. They -- they -- they could have that, yes.

23 Q. Okay. And it's about an inch and a half long, isn't it?

24 A. Yes, sir.

25 Q. So if this head -- the exit gap is 1 inch, it's not

1 going to go through, is it?

2 A. I wouldn't expect it to.

3 Q. (Demonstrating.) Is that unexpected to you, sir, went
4 right on through and shot out?

5 A. I -- I would say somewhat.

6 Q. Okay.

7 A. Because I've known it to be 1 inch for the entire
8 duration of the extruder terminal products dating back to
9 the ET-2000, as I've said.

10 Q. Okay. That one just happened to go through.

11 Now, did there come a time, Dr. Bligh, when there was a
12 move to change the ET-Plus and may have a different
13 configuration?

14 A. Well, yes, sir.

15 Q. Okay.

16 A. It's -- it's continuous evolution and evolvement of our
17 safety product.

18 Q. And you decided to make it better; is that right?

19 A. We're always looking to make it -- make our products
20 better.

21 Q. All right. Now, did you get some communication from
22 Trinity Industries that they, in fact, wanted you to do
23 that?

24 A. I'm not sure what you're referring to, sir.

25 Q. Well, I'm referring -- did you get some communications

1 from Trinity that they would like for you to approve -- test
2 and approve a new design of the ET-Plus?

3 A. Well, we made recommendations to Trinity that -- that we
4 were recommending some changes to the product.

5 Q. And when did you do that?

6 A. That was in the 2003 timeframe.

7 Q. Is that the wobble issue?

8 A. I'm not sure what you mean by a wobble issue, sir.

9 Q. Well, I -- I -- I had a witness earlier today that said
10 that it was going to get changed because it was wobbling.

11 The guardrail was wobbling inside these rails. Have you
12 ever heard of that before?

13 A. That's not what I would describe myself personally.

14 Q. Okay. Well, your lawyers keep calling it wobble, so I
15 -- I want to use the same thing.

16 In 2003 or 2004 or 2005, did you conduct some wobble
17 test?

18 A. Again, sir, I'm not sure what you mean by that.

19 Q. Did you have any complaints that led you to have -- to
20 run some tests to see whether or not the guardrail wasn't
21 acting right between these 5-inch channels that it was
22 wobbling in there when it got hit?

23 A. No, sir. I wouldn't say that we received any
24 complaints, but we did make our own observations.

25 Q. Well, as a matter of fact, you've testified under

1 oath that prior to changing the ET-Plus in 2005, you had
2 absolutely no problems with it, haven't you?

3 A. That's what I testified to. We -- we did not have
4 indications of problems. We were always looking to improve
5 the product, take a good product, make it even better. We
6 had observations that led us to recommend certain changes.

7 Q. All right. Did you run any tests, simulations, crash
8 tests, static tests, pendulum tests to check out your theory
9 on the wobble with the 5-inch channels?

10 A. Again, that was based on -- on observations, sir, of
11 our -- of our installations.

12 Q. Okay. You observed those where? Out on the highway?

13 A. At our testing facility.

14 Q. Well, you had tested the ET-Plus in 1999. How many
15 times between 1999 and 2005 did you test it again with a
16 pickup truck?

17 A. Are you talk -- there -- there's different tests with
18 the pickup truck.

19 Q. The 3-31.

20 A. 3-31, it was not run during that time period that I can
21 recall, sir, no.

22 Q. Well, how many crash tests did you perform with the
23 ET-Plus from 1999 to 2005 where you hit it head-on with
24 anything?

25 A. I know there were -- that there was a least one

1 occasion. There might have been maybe more than that as we
2 continued to look at other configurations of the product.

3 Q. Dr. Bligh --

4 A. Yes, sir.

5 Q. -- how many times did you hit it with a car or a truck
6 head-on between 1999 and 2005 to get all these observations
7 you've just told the jury about?

8 A. Well, sir, the observations were not necessarily just
9 strictly for the end-on tests. Running a test and having
10 that observation, we were --

11 THE COURT: Dr. Bligh, you're going to have to
12 answer the question.

13 THE WITNESS: Yes, sir.

14 THE COURT: How many times between '99 and 2005?

15 A. I don't recall that -- that number. We were -- we were
16 doing tests of different configurations. I know there was
17 at least one occasion. There -- that we did that.

18 Q. (By Mr. Baxter) One. And so when you tell me there were
19 observations, you're talking about one?

20 A. No. What I'm saying is that there was one end-on test.

21 Q. Okay.

22 A. We were running many other tests of the system over that
23 period of time.

24 Q. Were they simulations? What were they?

25 A. No. They were full-scale crash tests.

1 Q. Okay. So you're going to swear that between '99 and
2 2005 you had full-scale crash tests on the ET-Plus? Is that
3 your testimony?

4 A. Yes, sir.

5 Q. Okay. Now, you had no problems out in the field, and
6 you had no complaints, did you?

7 A. Not that I recall, no, sir.

8 Q. Did you have any instances of it locking up and not
9 working when it gets hit out on the interstate, that the
10 wobble had caused a problem?

11 A. No, sir, not that I'm aware of.

12 Q. Did you ever hear the old motto if it ain't broke, don't
13 fix it?

14 A. I've heard the motto, yes, sir.

15 Q. You don't believe it?

16 A. I believe in continuously improving and evolving
17 products to make them even better.

18 Q. All right. So I can count on you to say that when you
19 changed the ET-Plus in 2005, you made it better; is that
20 right?

21 A. Yes, sir.

22 Q. You improved it?

23 A. Yes, sir.

24 Q. And you told Trinity that, didn't you?

25 A. Yes, sir.

1 Q. It's improved?

2 A. Yes, sir.

3 Q. And they launched a massive advertising campaign, didn't
4 they, to say we now have a new ET-Plus, and it's new and
5 improved, didn't they?

6 A. I'm not involved in that aspect, sir.

7 Q. Well, you get trade journals. You talked to Trinity.
8 They would have asked your advice.

9 Did you see them have a campaign to say new and
10 improved?

11 A. Sir, I am not involved in the sales and marketing of the
12 product at all.

13 Q. You didn't see any sales or marketing brochure. They
14 didn't ask you how to write them and how to explain it was
15 new and improved?

16 A. I'm -- again, I'll say that I'm not involved with the
17 sales and marketing of the product.

18 Q. Will it shock you to learn they didn't tell anybody
19 anywhere anytime from 2005 to 2012 that it was new and
20 improved?

21 A. I'm not sure I understand what you mean by --

22 Q. Well, have you ever seen anything, including the old
23 one, that got new and improved and somebody wasn't yelling
24 it from the rooftops?

25 A. Well, it depends on the situation, sir.

1 Q. Have you ever seen a product where someone said it was
2 new and improved and they weren't out trying to tell their
3 customers it's new and improved; buy my product?

4 A. I'm not a marketing or salesperson, sir.

5 Q. Sir, just in everyday, common life, have you known of
6 anybody that had a brand new new and improved product and
7 they kept it a secret?

8 MR. BROWN: Your Honor, I'm going to object. He's
9 testified several times he's not in sales and marketing.
10 And this is not everyday life that we're here talking about,
11 Your Honor.

12 THE COURT: Overruled. I'm going to direct the
13 witness to answer the question. The question is what have
14 you observed, Dr. Bligh, in that regard.

15 Q. (By Mr. Baxter) For any product.

16 A. I -- I've seen different levels of -- of advertising on,
17 you know, depending on the product, and the -- the nature of
18 the product.

19 Q. You agree that most companies that have a new and
20 improved product, they want to tell their customers about
21 it?

22 A. I think that's fair to say, sir. You know, again, it's
23 going to vary depending on the nature of the changes and the
24 product itself.

25 Q. Well, tell me the circumstances in which you'd want to

1 keep it a secret. New and improved; it's better; it's
2 safer; you want to buy it; you want to buy more of them.

3 Tell me under the circumstances when you keep that a
4 secret.

5 A. I wouldn't be able to say, sir.

6 Q. Okay.

7 MR. BAXTER: Let's look at some emails from
8 Trinity, if I can. And if I can first, Mr. Diaz, go to PX
9 133.

10 Q. (By Mr. Baxter) And these are emails that I don't know
11 if you've seen or not.

12 MR. BAXTER: I want to go to the second page from
13 the bottom.

14 Q. (By Mr. Baxter) And it's from Mr. Steve Brown. Do you
15 know Mr. Brown?

16 A. Yes, sir, I do.

17 Q. Who is he?

18 A. Well, he was formerly with Trinity, now retired, I
19 believe.

20 Q. Okay. Was he the president of the company at one time?

21 A. I think of the division.

22 Q. Okay. And he says in November of 2004: I'd like to
23 start pushing to change the ET to the 4-inch channel. How
24 much weight do we save each and what would be the
25 cost-savings each, assume 25-cent steel?

1 And he sent that to Mr. Malizia, the head of a plant up
2 in Ohio. Do you see that?

3 A. Yes, sir, I do.

4 Q. Now, it comes back. The answer is he could save \$2 a
5 head. Do you see that?

6 And this is all net weight, no scrap-adding, and it
7 says you're reducing your surface area a little, so you
8 should also save a little on zinc, right?

9 A. I see that, yes.

10 Q. \$2 a head and it says 8.01 pounds less material, right?

11 A. Yes, sir.

12 Q. And that's less steel, is it not?

13 A. Yes, sir. I believe that's what it's referring to.

14 Q. All right.

15 MR. BAXTER: Let's go to the first page.

16 Q. (By Mr. Baxter) Mr. Brown sends messages to Mr. Boyd who
17 at the time is president of the company. He says: If wage
18 numbers are good, we could save \$2 in ET. That's \$50,000 a
19 year and \$250,000 in 5 years by using the 4-inch channel for
20 the legs; is that right?

21 A. I see that in the email, yes, sir.

22 Q. Now, apparently, Trinity at least is making the decision
23 to get the 4-inch channel done because they could save
24 money; isn't that right?

25 A. I don't know. You'll have to ask them that question.

1 Q. Well, just reading the email, I'm -- it sets it out
2 right there. Do you see anything besides it's going to save
3 us money?

4 A. Yes, sir, I do.

5 Q. Okay. Is that the one where you could get a better ET?
6 Is that what he says? It will be lighter?

7 A. Yes, sir.

8 Q. And we'll save a few bucks, right?

9 A. It says that, yes, sir.

10 Q. Welding will be stronger at the juncture of the head and
11 the legs, and that's this juncture right here (indicating);
12 isn't that right?

13 THE WITNESS: May I stand, sir?

14 THE COURT: You may stand up if you need to see
15 it. Yes.

16 Q. (By Mr. Baxter) Is that right?

17 A. Where the connection is -- where the connection is of
18 the guide channels to the -- to the rest of the head.

19 Q. When you guys at TTI designed it, you designed it with a
20 butt weld so that it was metal on metal, didn't you?

21 A. That is the way that one was fabricated, yes, sir.

22 Q. Well, not fabricated. You designed it that way, didn't
23 you?

24 A. Yes, sir.

25 Q. And you approved it that way, didn't you? This was your

1 idea, wasn't it?

2 A. That -- that dates back to the ET-2000, sir.

3 Q. Well, are you saying you didn't have anything to do with
4 that? Did you change it when you changed from the 2000 to
5 the ET-Plus? Did you change it somehow?

6 A. Well --

7 Q. Did you keep doing the butt weld right there?

8 A. Initially, until we made the -- the change that we've
9 been discussing, sir.

10 Q. Okay. So five years later, you changed it?

11 A. Approximately.

12 Q. Okay. It also says, if TTI agrees, I'm feeling that we
13 could make the change with no announcement. We did pretty
14 good with the TRACC changes.

15 Do you see that?

16 A. Yes, sir, I do.

17 Q. Now, did they come to you and say we'd like to make
18 these changes with no announcement?

19 A. No, sir.

20 Q. Well, it says, if TTI agrees, so they must be asking
21 somebody at TTI, if they agree, they can make the change
22 with no announcement, right?

23 A. It's nothing that I recall, sir.

24 Q. All right. And then it says we did pretty good with the
25 TRACC changes. Does that indicate they had made some

1 changes to the TRACC system and didn't make an announcement?

2 A. I don't know. You'll have to ask them that.

3 Q. Well, did you have anything to do with the TRACC system?

4 Do you know what that is?

5 A. Yes, sir.

6 Q. Okay. And do y'all test the TRACC system?

7 A. We have run some tests on the TRACC, yes, sir.

8 Q. Okay. And did they do that without announcing the
9 changes?

10 A. I -- I don't know what this is referring to, sir.
11 You'll have to ask them.

12 Q. Okay.

13 MR. BAXTER: Now, let's go to the top of the
14 email, and it's from Mr. Boyd to Brian Smith.

15 Q. (By Mr. Baxter) And he says: Brian, start talking to
16 TTI about this. The 8 pounds lighter head may give us a
17 problem in travel distance with the pickup truck.

18 Do you see that?

19 A. Yes, I do, sir.

20 Q. Did they ever raise that with you?

21 A. I don't recall specifically.

22 Q. Well, did you know that the head that they wanted to
23 approve was 8 pounds lighter in steel?

24 A. Yes, sir.

25 Q. Did that make it stronger when you put less steel in it?

1 A. It -- it didn't affect the strength.

2 Q. I'm sorry. Do what?

3 A. It didn't affect the strength as it's used in the --
4 in -- on the system on the rail.

5 Q. So you took out 8 pounds of steel, and you're telling me
6 it had no effect?

7 A. Not from the -- not from the way the system performs.

8 Q. Is that a yes?

9 A. Could you reask your question? I'm sorry, sir.

10 Q. You're telling the jury that they took out -- you took
11 out 8 pounds of steel, and it had no effect. Is that a yes
12 or a no?

13 A. It would have a positive effect on the performance of
14 the system.

15 Q. Oh, it was good to take out the steel?

16 A. Yes, sir.

17 Q. Well, you should have taken out 15 pounds, shouldn't
18 you?

19 A. If we were able to, we may have considered it. You
20 know, that -- that is certainly one of the ways to improve
21 the safety performance of that system.

22 Q. You make it lighter; you use less steel, right?

23 A. Yes, sir. So in doing so, you're reducing the crash
24 impulse on the vehicle when it strikes the head.

25 Q. The problem, of course, isn't with the impulse on the

1 vehicle. It's whether or not this thing is going to run
2 down the tracks or lock up or not, isn't it? They've got --
3 they've got airbags and seatbelts for the crash impulse,
4 don't they?

5 A. Could you reask your question, sir? I'm not sure what
6 you're asking.

7 Q. Yes. Yes.

8 A. Thank you.

9 Q. Are you trying to tell me that what you really were
10 concerned with was the impact that the passenger was going
11 to feel when they hit this head and the lighter the touch,
12 the better?

13 A. That is not the primary reason why we recommended that
14 change. That was a secondary benefit.

15 Q. All right. Did they ever talk to you, sir, about, hey,
16 this may give us a problem with the pickup truck?

17 A. I think what's being referred to here is that there was
18 actually concern that it would work too well. He's talking
19 about the pickup truck going even further down the rail and
20 having even more rail extrusion with this particular head.

21 Q. Oh, you think that's what he was saying?

22 A. Yes, sir.

23 Q. Okay. You think it didn't have anything to do with
24 whether or not the head was going to pass the test or not?

25 A. No, sir. It specifically refers to the travel distance

1 in the -- in the -- in the email.

2 Q. Okay. Tell me, sir, the total number of times from
3 November of 2004 forward, you tested this head head-on with
4 a pickup truck?

5 A. We -- we have not done that.

6 Q. Is that zero?

7 A. Yes, sir.

8 Q. Okay. Now --

9 THE COURT: Counsel, approach the bench, please.
10 (Bench conference.)

11 THE COURT: I assume you've got more direct.

12 MR. BAXTER: I do, Your Honor.

13 THE COURT: We're going to break for the evening
14 and come back in the morning.

15 MR. BAXTER: 8:30 or earlier?

16 THE COURT: I'll be here earlier.

17 MR. BAXTER: Okay. Thank you, Judge.

18 (Bench conference concluded.)

19 THE COURT: Ladies and gentlemen, it appears this
20 examination has a ways to go. It's 6:00 o'clock. I'm not
21 going to hold you any later than that. We're going to
22 recess for the date.

23 Please leave your notebooks on the table in the
24 jury room. I remind you again, don't discuss the case with
25 anyone.

1 We'll try to maintain the same schedule in the
2 morning. If you'll be assembled about 8:15 or 8:20, we'll
3 try to start as close to 8:30 as we can. With those
4 instructions, you're excused until the morning.

5 COURT SECURITY OFFICER: All rise.

6 (Jury out.)

7 THE COURT: We stand in recess until tomorrow
8 morning.

9 (Court adjourned.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/ Shelly Holmes
SHELLY HOLMES, CSR, TCRR
Official Court Reporter
State of Texas No.: 7804
Expiration Date 12/31/14

10/14/14
Date

/s/ Susan Simmons
SUSAN SIMMONS, CSR
Deputy Court Reporter
State of Texas No.: 267
Expiration Date 12/31/14

10/14/14
Date

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

UNITED STATES OF AMERICA * Civil Docket No.
EX REL JOSHUA HARMAN *
VS. * 2:12-CV-89
* Marshall, Texas
*
* October 15, 2014
TRINITY INDUSTRIES, INC. & *
TRINITY HIGHWAY *
PRODUCTS, LLC * 8:36 A.M.

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE RODNEY GILSTRAP
UNITED STATES DISTRICT JUDGE

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14 P R O C E E D I N G S

15
16 (Jury out.)

17 COURT SECURITY OFFICER: All rise.

18 THE COURT: Be seated, please.

19 All right. Is the Plaintiff prepared to go to the
20 podium and read into the record the items from the list of
21 preadmitted exhibits used during yesterday's portion of the
22 trial? If you are, please proceed to do so.

23 MS. MONROE: Yes, Your Honor. Teresa Monroe for
24 the Plaintiff.

25 We have the following exhibits from October 14th,

1 2014: Plaintiff's Exhibit 5, P-7, P-26, P-27, P-33, P-40,
2 P-47, P-51, P-133, P-136, P-139, P-140, P-141, P-152, P-156,
3 P-244, P-245, P-276, P-264, P-403, P-463, P-688, P-956,
4 P-1069, P-1150, P-1175, and P-1209.

5 THE COURT: All right. Are there objections to
6 that rendition from the Defendants?

7 MR. SHAW: If I could ask her about one.

8 THE COURT: You may consult with opposing counsel.

9 MR. SHAW: Thank you.

10 (Pause in proceeding.)

11 MR. SHAW: Good morning, Judge. We have no
12 objections.

13 THE COURT: All right. Do you have a similar
14 rendition from the Defendants for documents they may have
15 used?

16 MR. SHAW: Yes, Your Honor.

17 For the trial exhibits used on day two of the
18 trial used by the Defendants would include: D-5, D-6, D-13,
19 D-14, D-52 -- oh, I'm sorry -- D-22, D-38, D-39, D-40, D-42,
20 D-47, D-48, D-63, D-161, D-162, D-291, D-289.

21 THE COURT: All right. Ms. Monroe, are there
22 objections from the Plaintiff?

23 MS. MONROE: No. No objections, Your Honor.

24 THE COURT: All right. Dr. Bligh, if you're in
25 the courtroom, if you'd return to the witness stand.

1 If he's not in the courtroom, let's bring him in.

2 You are?

3 THE WITNESS: Yes, sir.

4 THE COURT: Good.

5 Mr. Baxter, you may return to the podium.

6 MR. BAXTER: Thank you, Your Honor.

7 THE COURT: As soon as Dr. Bligh is seated,
8 Mr. McAteer, bring in the jury.

9 And, Dr. Bligh, if you want some water, be very
10 careful with that pitcher. It has a mind of its own.

11 MR. BROWN: Don't drink the water, Dr. Bligh.

12 THE WITNESS: I'll pour it now.

13 COURT SECURITY OFFICER: All rise for the jury.
14 (Jury in.)

15 THE COURT: Be seated, ladies and gentlemen.
16 Welcome back this morning.

17 We'll continue with the Plaintiff's direct
18 examination of the witness, Dr. Roger Bligh.

19 Mr. Baxter, you may proceed when you're ready.

20 MR. BAXTER: Thank you, Your Honor.

21 ROGER BLIGH, Ph.D., PLAINTIFF'S WITNESS, PREVIOUSLY

22 SWORN

23 DIRECT EXAMINATION (CONTINUED)

24 BY MR. BAXTER:

25 Q. Good morning, Dr. Bligh. We're glad to have you back,

1 sir.

2 A. Good morning, sir.

3 Q. Let me ask you this, Dr. Bligh: Eventually there came a
4 time when there was a decision made to have a prototype made
5 with a 4-inch channel; is that right?

6 A. Yes, sir.

7 Q. And was TTI involved in the design of that prototype?

8 A. Yes, sir.

9 Q. All right. Tell me what your involvement was. Did you
10 call up TI and talk to a draftsman to give them instructions
11 about how to draw it?

12 A. I don't recall the specific communications that were
13 that take -- that took place at that time.

14 Q. Well, you testified in your deposition -- you previously
15 swore under oath that y'all were involved in the design,
16 haven't you?

17 A. Yes, sir.

18 Q. All right. So tell me how you were involved in the
19 design. Did you give them drawings?

20 A. Again, I don't recall that we transmitted any drawings.

21 Q. Did you give -- did you talk to somebody at TI and tell
22 them how to do it?

23 A. Well, we had communications with Trinity on the -- on
24 the subject.

25 Q. Who did you talk to?

1 A. That would have been -- Brian Smith is -- is one person
2 possibly that we talked to, Mr. Steve Brown, perhaps others
3 at Trinity.

4 Q. How about the guy that actually made the prototype; did
5 you talk to him?

6 A. I don't believe so.

7 Q. Well, did -- are you the one that came up with the idea
8 to take the channel and stick it down in the throat of the
9 extruder head?

10 A. Yes, sir. That was our recommendation.

11 Q. Okay. And you communicated that to Trinity Industries,
12 right?

13 A. Yes, sir.

14 Q. And it was either Brown or Smith; is that what you're
15 telling me?

16 A. Those were individuals that we had regular
17 communications with. I don't recall exactly the -- the
18 nature of the communications.

19 Q. Did you ever talk to a draftsman?

20 A. I -- I personally did not.

21 Q. Well, did somebody draw it up and send it to them?

22 A. I -- I don't have any recollection of that.

23 Q. Did you do that?

24 A. No, sir, I did not.

25 Q. Did you have some draftsmen at TTI draw it up and send

1 it to them?

2 A. I don't know if anyone did. I -- I --

3 Q. Well, wouldn't that have been the prudent thing to do?
4 If you were going to be involved in the design, you'd draw
5 it up and communicate it to them, except by a phone call?

6 A. I think we were able to transmit the information that
7 was needed.

8 Q. Well, the information that was needed was to stick it
9 three-quarters of an inch down in that throat and do a
10 fillet weld; isn't that right?

11 A. Yes, sir.

12 Q. And that's what you told them, wasn't it?

13 A. We were involved in that process. Yes, sir.

14 Q. And somebody at TTI sat down in a group and decided that
15 was the best way to go, didn't they?

16 A. Yes. There was a collaborative decision amongst some
17 TTI research engineers.

18 Q. You. How about Dr. Buth; was he involved in that?

19 A. Yes, sir.

20 Q. All right. I can count on him to collaborate in that?

21 A. Yes, sir.

22 Q. All right. Who else? Who else at TTI?

23 A. It would have been Dr. Hayes Ross.

24 Q. Okay. Just so I'm clear and the jury knows what we're
25 all talking about, you told TTI, when you -- when you make

1 this channel 4 inches, be sure and stick it down into the
2 throat three-quarters of an inch, right?

3 A. Well, that is the way that channel would be connected to
4 the -- to the head.

5 Q. But that's what you told them, right?

6 A. That was the design. I can't recall the exact
7 communications --

8 Q. Okay.

9 A. -- that were made between the two groups.

10 Q. Okay. And you told them to do a fillet weld here
11 (indicating), too, didn't you?

12 A. Again, that would be the method of connection between
13 the head and the -- and the channels.

14 Q. What did you do about shortening the length of the
15 channels, because now the channel is shorter from the edge
16 of the throat out? What did you tell them about that?

17 A. I don't remember.

18 Q. Did you tell them to keep the same length they always
19 had or making it shorter was okay?

20 A. At what point in time, sir?

21 Q. Before they made the prototype.

22 A. I don't remember those communications.

23 Q. Well, do you remember a discussion that now we've got a
24 shorter channel we've either got to fix it or we've got to
25 live with it the way it is?

1 A. No, sir. I don't remember that.

2 Q. Okay. But you're pretty sure all that took place,
3 because this design is yours. The one on this 4-inch guide
4 channel, that's your design, isn't it?

5 A. Well, the ET-Plus is our design. Yes, sir.

6 Q. No, this one right here, sir, with the fillet weld
7 and the head being -- the head being three quarters of
8 an inch down and the channels being four-inch. That's
9 TTI's design, isn't it?

10 A. We participated in that design, yes, sir.

11 Q. Well, you're the one that told them how to do it, aren't
12 you?

13 A. We had -- we -- we discussed that with Trinity, yes,
14 sir.

15 Q. All right. Good. And they made you a prototype, didn't
16 they?

17 A. Yes, sir.

18 Q. And they sent it to you?

19 A. Yes, sir.

20 Q. And you eventually crash tested it, didn't you?

21 A. That's correct.

22 Q. Now, one of the things you did before crash testing it
23 is that you measured the thing to make sure it was right,
24 didn't you?

25 A. There was some inspection done of the product.

1 Q. No, no, that's not what I asked you. Did you measure
2 it?

3 A. I -- I don't remember if I measured it.

4 Q. Well, aren't you supposed to measure it?

5 A. Not necessarily.

6 Q. You're not supposed to measure it and see if they made
7 it the way you told them to?

8 A. Well, I mentioned that there was some inspection.

9 Q. No, sir. Did you measure it?

10 A. I don't remember if I did at the time.

11 Q. Well, if you did, you would have put it in your notes,
12 wouldn't you?

13 A. No, not necessarily.

14 Q. Okay. So -- so what you're telling me is that you get
15 this thing and you measure it and you go, well, I'm not
16 writing that down; is that -- is that what you did?

17 MR. BROWN: Objection, Your Honor.

18 A. No, sir, that's not what I said. I would inspect the
19 head --

20 THE COURT: Just -- just a minute, Dr. Bligh.
21 What's your objection, Mr. Brown?

22 MR. BROWN: Objection, mischaracterizes his
23 testimony, Judge.

24 THE COURT: It's cross-examination with an adverse
25 witness. I'll overrule it.

1 Q. (By Mr. Baxter) You're telling the jury you would
2 measure it, but you wouldn't write it down?

3 A. I will commonly go out and take some measurements of a
4 test installation to verify certain dimensions. I do not
5 necessarily write those dimensions down in the field.

6 Q. Now, you're supposed to compare the prototype to a
7 drawing, aren't you? Did you do that?

8 A. I don't remember that.

9 Q. Did you have a drawing before you did the crash test?

10 A. I don't remember.

11 Q. Well, isn't it a requirement of 350 that you compare the
12 actual head to the drawing that you had to make sure it's
13 right?

14 A. Well, it's a requirement to document what was tested.

15 Q. No, sir. Isn't that a requirement of 350? You want to
16 look at it?

17 A. Again, we would document what was tested, sir, and make
18 sure that that's what's reflected.

19 Q. But you didn't document it. You didn't write it down
20 anywhere, did you?

21 A. I don't remember what -- what notes may have been taken.

22 Q. Well, look at your file and they're bereft of the first
23 measurement, aren't they?

24 A. I could not say.

25 Q. All right. But you're pretty sure you had a drawing to

1 compare it to, aren't you?

2 A. I don't remember.

3 Q. Well, aren't you supposed to have a drawing?

4 A. We will put drawings in our -- in our test report to
5 document what was tested.

6 Q. No, sir. Aren't you supposed to have a drawing before
7 you actually test the thing to make sure it's right and
8 compare it? Isn't that required?

9 A. We had some drawings. We did not -- and -- and we
10 inspected that particular head, that particular prototype
11 when it arrived.

12 Q. You had drawings when you did it?

13 A. We had drawings of the test installation, and we had a
14 new head -- prototype that was delivered that we inspected
15 when it arrived.

16 Q. Did you have drawings of this head, sir, from TI?

17 A. I don't remember.

18 Q. Aren't you supposed to have them? Couldn't you have
19 waited until you got the drawings to do the test?

20 A. We didn't feel that was necessary.

21 Q. All right.

22 THE COURT: All right. Mr. Baxter, just for
23 purposes of the record, if you would avoid calling Trinity
24 Industries TI.

25 MR. BAXTER: Yes, sir, Your Honor.

1 THE COURT: Call them Trinity because with TTI and
2 TI, I'm afraid we're going to get confused -- confusion in
3 the record.

4 MR. BAXTER: Thank you, Your Honor. You're
5 absolutely right, and I apologize.

6 Q. (By Mr. Baxter) Now, you crash tested it, and you wrote
7 a report, did you not?

8 A. Yes, sir we did.

9 Q. And you wrote a report and you sent it not to the
10 Federal Highway Administration, but you sent it to Trinity
11 for them to send in; isn't that right?

12 A. That's correct.

13 Q. And that was a little bit unusual, wasn't it?

14 A. No, not --

15 Q. Usually TI -- TTI had just sent them straight to the
16 Federal Highway Administration, hadn't they?

17 A. I would not say that's a usual practice. There's no
18 policy on that, and it's been done both ways.

19 Q. But on this one, you sent to Trinity Industries for them
20 to send in?

21 A. Yes, we did.

22 Q. Okay.

23 MR. BAXTER: Let me look, if I can, at PX 156, Mr.
24 Diaz?

25 Q. (By Mr. Baxter) Which is the report, I believe, Doctor.

1 If I can get the first page up, it says: The NCHRP Report
2 350 testing of the ET-Plus for the 31-inch high w-beam
3 guardrail. Right?

4 A. Yes, sir.

5 Q. Does it anywhere on this first page mention that you
6 tested a new prototype head that had changes from the old
7 ET-Plus?

8 A. No, it does not.

9 Q. Is there a protocol about how to write these reports in
10 350?

11 A. There is a chapter on test documentation, and that
12 chapter provides an outline for reports of this nature.

13 MR. BAXTER: Can I go back to that just a second,
14 Mr. Diaz, DX 3, and go to page -- what is 57, which is on
15 the -- on the Bates stamp 16785?

16 Q. (By Mr. Baxter) I want to show you this little box here
17 and see if that shows you, in fact, how to write the report?

18 MR. BAXTER: It's 16785, Mr. Diaz. Have you got
19 that, or I'll put it on the ELMO?

20 I'll just put it on the ELMO, Your Honor, if I can
21 have that.

22 THE COURT: That's fine.

23 MR. BAXTER: You got it? No.

24 Q. (By Mr. Baxter) This is right from the 350, is it not,
25 and one of the things it tells you to do is to describe the

1 test article. Do you see that?

2 A. Yes, sir, I do.

3 Q. Okay. And that's one of the things you did in this
4 report, is it not?

5 A. Yes, sir, it is.

6 Q. All right. And you described it right on the front here
7 of the cover of the test article, did you not?

8 A. Well, I -- I would not refer to that as a test article
9 description. That's a title of the report.

10 MR. BAXTER: Now, let me go to the first page,
11 and -- well, let me go to the -- if I can to Page 77382, Mr.
12 Diaz. That's the Bates number. Where it says the test
13 article design and construction -- well, this is on the
14 report. I'm sorry, Mr. Diaz, I'm back on the report. I
15 switched on you.

16 THE TECHNICIAN: Can I have what the Bates number
17 is?

18 MR. BAXTER: Yes, it's 77382.

19 Q. (By Mr. Baxter) And this is the description of the test
20 article, is it not, when we finally get there? All right.
21 77382.

22 Suffice it to say, Doctor, that when you made the
23 description, you never once mentioned in this report that
24 you -- the test article was a four-inch head that had been
25 changed, had you?

1 A. No, we did not. That was a mistake on our part.

2 Q. Well, throughout the entire report, if I were to look at
3 it from izzard to gizzard, there's not one mention, is
4 there, Doctor, that you tested this new head, is it?

5 A. No. As I just testified to, we made a mistake and that
6 was left out.

7 Q. Well, why would you leave it out?

8 A. Well, all I can say is that we're human, and we made a
9 mistake.

10 Q. How many people wrote this report?

11 A. There were multiple authors.

12 Q. Well, there was you, there was Dr. Buth, there was Dr.
13 Alberson, and there was Mr. Bullard, at least are the
14 authors; is that right?

15 A. That's correct.

16 Q. Did other people read it as well?

17 A. That -- that may be.

18 Q. And is it your testimony to this jury that among the
19 four authors, I think all of which were at the crash test of
20 this head, you forgot to put it in there?

21 A. Yes, sir.

22 Q. There had been this big talk with Trinity about how
23 we're going to test this head and we're going to change the
24 design, and you, in fact, drew up the design and sent it to
25 them, and you forgot it?

1 A. Yes, we did.

2 Q. You left it out?

3 A. That's correct.

4 Q. And did you send a drawing of it along to the Federal
5 Highway Administration?

6 A. I'm not sure I understand the question, sir.

7 Q. When you sent the report, did you send a drawing of the
8 new four-inch head?

9 A. Well, we -- we sent the report to Trinity as a complete
10 report that we indicated to them was suitable for submission
11 to the Federal Highway Administration.

12 Q. Did it contain a drawing, sir?

13 A. Well, it contained drawings, yes, sir.

14 Q. Did it contain a drawing of the four-inch head, Dr.
15 Bligh?

16 A. No, sir, that's what I testified to. We -- we left that
17 out by mistake.

18 Q. Well, how could you leave that out?

19 A. It was a mistake.

20 Q. Who wrote this section right here that talks about the
21 test article, and it said a standard ET-Plus, doesn't it?

22 A. Yes, sir.

23 Q. And that's wrong, isn't it?

24 A. It would be incorrect for that -- that second test, yes,
25 sir.

1 Q. Wrong; is that right, Dr. Bligh? It's wrong?

2 A. Yes. We intended to have that in the report. We didn't
3 get it in.

4 Q. Well, somebody wrote something that wasn't true right
5 here, wasn't it? Didn't you?

6 A. No. Again, I would not say that that is not true.

7 Q. Well, it's not true, is it?

8 A. Well, sir, this report covers more than one test.

9 Q. On the test of the crash test where you hit it with that
10 little clown car, this is incorrect, isn't it?

11 A. Excuse me?

12 Q. The little, small car, that's what you hit it with,
13 right?

14 A. Well, there was a test with a small passenger car --

15 Q. All right.

16 A. -- per our testing standards. Yes, sir.

17 Q. And for that test, this is absolutely wrong, isn't it?

18 A. For that test, it is -- it is not entirely correct, so
19 we would have -- we had intended on putting more information
20 in there that did -- that did not make it into the report.

21 Q. Sir, for that test, it's not partially incorrect; it's
22 totally incorrect, isn't it?

23 A. No, sir. I'm -- I'm looking at this test article,
24 design and construction, and many of those features were
25 also in the second test.

1 Q. Sir, for the car test, when you hit it with the car, to
2 say you use a standard ET-Plus is totally wrong, is it not?

3 A. It does not --

4 Q. That's just yes or no.

5 A. Yes, it's not correct, sir.

6 Q. It's totally wrong? Did it say that?

7 A. It is wrong. We intended to have other information in
8 the report.

9 Q. And whoever wrote this, wrote it wrong. Did you write
10 it?

11 A. I was an author on this report. Yes, sir.

12 Q. So you wrote it totally wrong?

13 A. Again, we left out information that we intended to
14 include.

15 Q. Well, everybody read it, and you're telling me that
16 everybody at A&M got amnesia about running this prototype
17 head. Is that what you're telling me?

18 A. All I'm telling you is that we made a mistake, sir.

19 Q. No, sir. Did everybody at A&M all of a sudden get
20 amnesia that you ran the prototype head, and you couldn't
21 put it in the report? Is that what happened?

22 A. No, sir. We did not get amnesia.

23 Q. Well, you sat around and talked about the report, didn't
24 you? Didn't you go over it?

25 A. We did review the report. Yes, sir.

1 Q. The purpose of running that test was to see if the
2 4-inch head would work, wasn't it?

3 A. That was not the only objective of that test. No, sir.

4 Q. It was one of them, wasn't it?

5 A. That -- that prototype head was included in that test,
6 and the test thereby evaluated the head, but that was not
7 the entire system that's being evaluated.

8 Q. And that was really important to Trinity, wasn't it?

9 A. Sir, I'm not sure I understand the question.

10 Q. You don't understand that running the test on this
11 prototype head was important to Trinity?

12 A. I think you would have to ask them that, sir.

13 Q. Well, I'm asking you. Do you believe it was important
14 to Trinity?

15 A. Well, they -- I believe it was. They asked us to
16 include it in the test, and -- and we reviewed that, and --
17 and did include it in the test.

18 Q. So at least four of you and maybe five and maybe six
19 read this report. Didn't catch that you left out the
20 prototype head, didn't catch that you didn't attach a
21 drawing, and you sent it on; is that right?

22 A. That's correct, sir.

23 Q. Okay. You think it's a mere coincidence that there was
24 an email earlier in this case that said we'd like to do this
25 with no announcement if TTI agrees. Is that just a

1 coincidence?

2 A. I don't see any relation, sir.

3 Q. Okay. So Trinity wanted to make it with no
4 announcement. You tested it, and when it came time to write
5 the report, you didn't put it in. You told an untruth about
6 what you did. Everybody at TTI reviewed it. Nobody caught
7 it, and you sent it to Trinity.

8 Did I get it about right?

9 A. No, sir, you did not.

10 Q. Okay. Now, after you sent it to Trinity, did you
11 conduct some more tests on this new modified head?

12 A. There -- there have been other tests conducted on that
13 head. Yes, sir.

14 Q. Let me ask you this: Have you got a simulation program
15 down there at A&M?

16 A. Yes, sir, we do. We're -- we have --

17 Q. You can simulate this -- this prototype head in the
18 computer?

19 A. We can certainly attempt to model the head as well as
20 other types of safety devices.

21 Q. Before the test, just to make sure that safety was the
22 paramount thing, did you run any computer simulations on
23 this prototype head?

24 A. Could you reask the question, sir? I'm sorry.

25 Q. Did you run any simulations using a 4-inch guide channel

1 stuck down in the throat three-quarters of an inch, in your
2 computer, before you ran the crash test?

3 A. No, sir.

4 Q. Have you to this minute run a simulation on this 4-inch
5 channel with it stuck down in the throat head? Have you
6 ever run that in a simulation with a crash test, ever?

7 A. No. Not that I recall, sir, no.

8 Q. Did you ever run a simulation using a pickup truck to
9 hit it in a simulation, ever?

10 A. Not -- not that I recall. I don't remember that.

11 Q. Not even after you met with Mr. Artimovich and he told
12 you about all these wrecks, you didn't go back and say let's
13 at least put it in the computer and see how it does? You
14 didn't do that?

15 A. No, sir.

16 Q. Okay. That's because safety was the most important
17 thing to you?

18 A. Yes, sir, it is.

19 Q. All right. Now, you ran -- you ran this prototype in a
20 flare test; is that right? Five of them?

21 A. There was a research and development project, yes, sir,
22 to evaluate a flared ET system.

23 Q. Is that, yes, you did?

24 A. That's what I said. Yes, sir.

25 Q. All right. And when you ran into that, did you use a

1 truck or a small car?

2 A. In those tests, a small passenger car was used.

3 Q. Did you ever use a truck?

4 A. Not in that series of tests, no, sir.

5 Q. All right, sir. Well, have you ever hit this head with
6 a truck?

7 A. Not that exact configuration.

8 Q. Okay, sir. Now, when you ran the test on the flare, did
9 you hit it head-on; that is, you hit it at 0-degree angle?

10 A. I'm sorry. Could you ask -- reask the question, sir?

11 Q. Yes, sir. When you ran the flared test and you hit it
12 with the little car, did you hit it at 0 degrees; that is,
13 you ran the car right straight into it?

14 A. Yes, sir. It was a 0-degree impact, and I would say
15 relative to the -- the -- the tangent section of the
16 guardrail.

17 Q. All right, sir. And that's the same way you ran into it
18 when you tested it on May the 27th at 0 degrees with a small
19 car, right?

20 A. Yes. It was a similar impact condition, a similar test.

21 MR. BAXTER: Mr. Diaz, can you get up that first
22 test for me, sir?

23 Q. (By Mr. Baxter) I'm going to show you, I think, your
24 video of the crash test and see if this is what you did.

25 Is that what you did?

1 A. I'm not sure what your question means, sir.

2 Q. I'm representing to you this is the crash test you
3 furnished me that you ran on this prototype head in a flared
4 configuration, and that's the video of the very first one.

5 A. Okay, sir.

6 Q. Is that what you did? That test failed, did it not?

7 A. Yes, sir.

8 Q. Head locked up, didn't it?

9 A. No, sir. It did not.

10 Q. Well, it certainly didn't extrude it out the side very
11 far, did it?

12 A. There is rail extrusion there, sir, yes.

13 Q. But not enough, because it locked up and moved away and
14 crashed into the car, and you flunked that test, didn't you?

15 A. It was a flared configuration so --

16 Q. Did you flunk the test, sir? Yes or no?

17 A. The test did not pass.

18 Q. All right.

19 MR. BAXTER: Let me see the second one, Mr. Diaz,
20 if you would, please, sir.

21 Q. (By Mr. Baxter) Oh, that didn't have a good outcome, did
22 it?

23 A. No, sir, it did not.

24 Q. Failed?

25 A. Yes.

1 Q. Head locked up again?

2 A. No, sir.

3 MR. BAXTER: Let me see the third one, Mr. Diaz.

4 Q. (By Mr. Baxter) Uh-oh, happened again, didn't it.

5 MR. BROWN: Your Honor, I object to the sidebar
6 comments by Counsel.

7 THE COURT: Sustained.

8 MR. BAXTER: Thank you, Your Honor.

9 THE COURT: And I'm going to direct Counsel to
10 maintain their composure or we will recess and assess time
11 against the side that can't do that. This is --

12 MR. BAXTER: Excuse me.

13 THE COURT: These are serious points. There's
14 nothing funny going on here.

15 Q. (By Mr. Baxter) Did it flunk?

16 A. That test did not meet the criteria.

17 Q. All right. Failed with head locked up?

18 A. No, it did not.

19 MR. BAXTER: All right. Let me see the next one,
20 Mr. Diaz.

21 Q. (By Mr. Baxter) That one, the head slammed into the
22 passenger door, did it not?

23 A. No, I don't believe that to be the case, sir.

24 Q. That one failed, too?

25 A. Yes, sir.

1 MR. BAXTER: Is there one more, Mr. Diaz?

2 Q. (By Mr. Baxter) And that one failed too, did it
3 not?

4 A. That's correct, sir.

5 Q. All right. That one actually has a big gouge in the
6 passenger side where the rail went in, doesn't it? You
7 remember that?

8 A. I -- I don't recall, sir.

9 Q. Okay. Now, Doctor, after you ran these five tests, how
10 quickly did you notify the Federal Highway Administration
11 that you hit this prototype head five times head-on and it
12 flunked five times?

13 A. We don't submit our research and development tests to
14 FHWA.

15 Q. Is that zero?

16 A. Excuse me, sir?

17 Q. Is the answer zero times?

18 A. Maybe I didn't understand the question.

19 Q. How many times did you call the FHWA and say I've got
20 these five failed tests on this prototype head, and I just
21 wanted you to know what was happening? Did you do that?

22 A. No, we did not. We don't submit our R&D tests to FHWA.

23 Q. All right. Even when you've got a failure on a -- on a
24 product out in the highway and you hit it head-on just like
25 you did in your test, you decided not to say anything about

1 it, right?

2 A. No, sir. That is not a product that was on the highway.
3 That was a research and development product for a flare
4 terminal.

5 Q. Well, this head was on the highway, wasn't it?

6 A. The head is one component of a system.

7 Q. Doctor, did you run any simulation tests then?

8 A. I'm not sure what you mean, sir.

9 Q. After the five failed flared tests, did you go back and
10 run the simulations on the modified prototype?

11 A. I'm -- I'm still not sure what you mean by the modified
12 prototype.

13 Q. This head right here, sir.

14 A. Oh, I'm sorry. Okay.

15 Q. Did you go run any simulations then just to
16 double-check?

17 A. No, sir. We had run the crash tests.

18 Q. Okay. Let me see if I can sum up, Doctor. I'm going to
19 try to get to a board here if I can.

20 MR. BAXTER: I may have to get some help,

21 Ms. Walls, or somebody to help me move it out.

22 I'm going to knock it over, I feel sure, but I want you to
23 be able to see it.

24 Can I -- can I move it right here, Your Honor, if
25 the Court please?

1 THE COURT: That will be fine -- that will be
2 fine.

3 MR. BROWN: Your Honor, may I move where I can
4 see it?

5 THE COURT: You may.

6 Q. (By Mr. Baxter) I want to see if I can summarize your
7 testimony. I want to ask you how many measurements of the
8 head you made before testing, and I believe you told me you
9 don't have any of those, right?

10 A. I don't remember, sir.

11 Q. You don't have any in your file? There's zero in your
12 file?

13 A. I -- I could not say, sir.

14 Q. How many -- how many measurements did you make after you
15 tested the head?

16 A. There would be various measurements that would be taken
17 after the test, per our procedure, sir.

18 Q. How many are in your file?

19 A. I can't answer that. I don't know exactly what's --

20 Q. I've looked at it --

21 A. -- in the file.

22 Q. -- and there's not many.

23 THE COURT: Let's let the witness finish his
24 answer, Mr. Baxter.

25 MR. BAXTER: Thank you, Your Honor.

1 Q. (By Mr. Baxter) Did you really make some measurements
2 after the test?

3 A. Yes, sir, there's always measurements made after our
4 tests.

5 Q. Did you put them in your file?

6 A. I would suspect that they would be in the file, but...

7 Q. That's how many we found, Doctor, when we looked at your
8 file, zero. You disagree with that?

9 A. I -- I have not seen the file recently.

10 Q. How many drawings before the test did you get from
11 Trinity Industries?

12 A. I don't remember.

13 Q. Can I put a zero there, too, because you don't remember?
14 And Trinity said they didn't send you any? Sir?

15 A. Again, I don't remember, sir.

16 Q. How many comparisons did you make between the drawing
17 and the head, Doctor?

18 A. Well, we inspect -- we inspected the prototype.

19 Q. How many comparisons did you make between a drawing that
20 you had in the head? Is that zero?

21 A. I don't remember if we had the drawing.

22 Q. How many of the critical 31 pickup tests were run on the
23 prototype head?

24 A. We have not run that on the -- that particular
25 configuration.

1 Q. How many times have you ever run the 3-31 test on this
2 head with a pickup truck?

3 THE WITNESS: Your Honor, may I shift over? I'm
4 starting to lose sight of the board.

5 THE COURT: You can stand up.

6 THE WITNESS: Thank you, sir.

7 THE COURT: That will be fine. And we'll hand you
8 this microphone so you can be heard. If you want to step
9 around to this corner where you can see further, that will
10 be fine, too.

11 A. Go ahead, sir.

12 Q. (By Mr. Baxter) How many of the critical 3-31 pickup
13 tests have you ever run on this prototype head?

14 A. Again, we have not run that particular test on that
15 particular version of the ET-Plus.

16 Q. Did you do any static tests on the four-inch prototype
17 head before the crash testing?

18 A. No. That is not something that we would do.

19 Q. How about pendulum tests? Did you run those on the
20 four-inch prototype head before testing?

21 A. No, we did not. We ran the crash test.

22 Q. How many static tests have ever been run on it since May
23 of 2005?

24 A. None. That is not something we would do.

25 Q. How many pendulum tests have you run since 2005?

1 A. We have not run any on the head. We've conducted
2 full-scale crash testing.

3 Q. That's what we just saw? Is that the crash testing that
4 you're referring to?

5 A. That was one of them, sir, yes.

6 Q. How many simulations did you run in May of 2000 (sic) on
7 the product -- on the prototype head before crash testing?

8 A. We didn't simulate that. We were running the crash
9 test.

10 Q. How many simulations have you ever run on this head
11 since then? I asked you a while ago, and you told me none;
12 is that right?

13 A. Well, you asked in regard to a specific situation, sir.

14 Q. Okay. How many have you run on this head?

15 A. I'm not -- I don't know if we have. I don't know if we
16 have modelled that specifically.

17 Q. How many simulations have you run using a pickup truck?

18 A. We have not modelled that particular situation.

19 Q. How many times did you tell the FHWA in that 2005 report
20 you submitted to Trinity that went to the FHWA that you had
21 tested the new head? How many times did you tell them that
22 in that report?

23 A. We didn't. We -- we failed to have that in the report,
24 as I testified to, sir.

25 Q. How many times did it pass using the flared

1 configuration in the small car?

2 A. The flared test configurations, the different situations
3 that were tested were not successful.

4 Q. Zero? How many times did you notify the FHWA about this
5 -- these failures of the head using the small car?

6 A. We did not. That was an R&D product development.

7 Q. When you met with Mr. Artimovich, how many times did you
8 tell him you had never run the 3-31 test on the new head?

9 Did you ever tell him --

10 A. I'm not sure I understand that question, sir.

11 Q. Did you ever tell Mr. Artimovich, you know, we never
12 tested it with the critical pickup truck? Did you tell him
13 that?

14 A. No, sir. I wouldn't say that because I don't believe it
15 to be true.

16 Q. You did run it with a pickup truck?

17 A. I don't believe that to be the critical test.

18 Q. Okay.

19 A. We ran the critical test on the -- on the -- on that
20 configuration, sir.

21 Q. When you met with Mr. Artimovich, how many times did you
22 tell him the head had failed five times in the flared
23 testing?

24 A. We did not discuss the flared testing. That's a
25 different R&D product.

1 Q. How many times have you ever told the FHWA about these
2 failed tests?

3 A. Again, we have not submitted those to FHWA. It's R&D
4 testing.

5 Q. And after you saw the June 14th letter, the one that's
6 in evidence here where they're claiming that the head's been
7 approved by the FHWA, how many times did you notify the FHWA
8 about these five failed tests?

9 A. Sir, the -- the flared ET was not discussed with FHWA.
10 Again, I will say it's an R&D project. It was never
11 commercialized, never put on the highways.

12 Q. Okay. Doctor, thank you. You can have a seat.

13 A. Thank you.

14 Q. Dr. Bligh, let me get back to where I started. The most
15 important thing to you and to TTI is safety and saving
16 lives, is it not?

17 A. Yes, sir, it is.

18 Q. But on this new head, with an opportunity to sell more
19 heads, you didn't run the critical test, did you?

20 A. Yes, we did.

21 Q. You didn't run the pickup truck test, did you?

22 A. No, we did not.

23 Q. And when it came time to run the flared test and you hit
24 it head-on and it failed five times, you kept quiet, didn't
25 you?

1 A. I wouldn't say that. We were engaged in a research and
2 development project on a new product.

3 Q. And when you reported your results of the -- any
4 crash test you did do to the FHWA, you forgot to mention
5 you had used the new head. Is that your testimony?

6 A. Are you referring to the report, sir?

7 Q. Yes, sir.

8 A. Yes. We made a mistake and left that information out of
9 the report.

10 Q. Had you ever done that before?

11 A. We have certainly had other errors in our reports.

12 Q. Have you ever totally left out a whole series of tests
13 on a new product? Have you ever done that before?

14 A. We did not leave out a series of tests, sir.

15 Q. Can I -- can I count on you that safety is always first
16 with you, Dr. Bligh?

17 A. Yes, you can.

18 MR. BAXTER: Thank you, Your Honor. That's all I
19 have today.

20 THE COURT: You pass the witness?

21 MR. BAXTER: I do, Your Honor.

22 THE COURT: Cross-examination of the witness by
23 the Defendants.

24 MR. BROWN: Yes, Your Honor.

25 THE COURT: Let's clear out these demonstratives,

1 Counsel, before you take a seat.

2 MR. BAXTER: Can I put a sticker on them, Your
3 Honor, just so I can refer to them later? Just put a PX 1
4 and PX 2 so I can refer to them?

5 THE COURT: You can mark them for identification.

6 MR. BAXTER: Okay. I'll do that in just a little
7 while, Your Honor.

8 THE COURT: They are demonstratives, though.

9 MR. BAXTER: Thank you.

10 MR. BROWN: Mr. Baxter, I think you left your
11 book.

12 MR. BAXTER: Thank you, sir.

13 MR. BROWN: You're welcome.

14 MR. BAXTER: Appreciate it.

15 THE COURT: All right. Mr. Brown, whenever you're
16 ready.

17 MR. BROWN: May I proceed, Your Honor.

18 THE COURT: You may.

19 CROSS-EXAMINATION

20 BY MR. BROWN:

21 Q. Good morning, Dr. Bligh.

22 A. Good morning.

23 Q. Dr. Bligh, let's talk at the very beginning about why
24 you're here. You're here from College Station, Texas, to
25 testify in a False Claims Act case. Is that what you

1 understand?

2 A. Yes, sir.

3 Q. Do you understand, Dr. Bligh, that the issue in this
4 case is whether Trinity intentionally lied to the Federal
5 Government?

6 A. Yes, sir.

7 Q. Dr. Bligh, as you sit here today, given all the evidence
8 that you have seen and all the information that you know,
9 has Trinity Industries ever lied to the Federal Government
10 regarding this ET-Plus head?

11 A. No, sir.

12 Q. All right. Dr. Bligh, I want to ask you something very
13 directly. Mr. Baxter asked you several questions about what
14 you folks at A&M and TTI did in regard to this drawing.

15 Did you intentionally leave that drawing out of that
16 report in order to somehow con or lie to the Federal
17 Government?

18 A. No, sir.

19 Q. Dr. Bligh, I want to talk to you about the critical test
20 that you've heard Mr. Baxter explain to you.

21 Is the 3-31 pickup truck test the critical test of all
22 tests in NCHRP Report 350?

23 A. No, sir, it's not.

24 Q. How is it that the -- the folks at TTI determine, along
25 with Federal Highway Administration, what the critical test

1 to run in any crash test is, Dr. Bligh?

2 A. Well, it -- you take into account the feature that's
3 being tested. You look at the test matrices and the
4 possible outcomes in terms of what you're trying to
5 evaluate.

6 There's internal discussions amongst multiple research
7 engineers. There's discussions with Federal Highway
8 Administration. There's discussions with the sponsors. And
9 we arrive at a critical test condition.

10 Q. Does that discussion on arriving on a critical test also
11 involve the Federal Highway Administration?

12 A. Yes, sir, it does.

13 Q. When you-all did the first crash test on the ET-Plus,
14 the one that had the 5-inch guide channels in 1999, was
15 there a conversation with the Federal Highway Administration
16 as to which crash test to run?

17 A. Yes, sir.

18 Q. And what was decided amongst TTI and the Federal Highway
19 Administration?

20 A. The critical test at that time would be Test 3-31 with
21 the pickup truck.

22 Q. Dr. Bligh, please tell this -- this jury why in 1999 the
23 3-31 pickup truck test was critical for that test?

24 A. Yes, sir. The ET-Plus was a new product. It had -- the
25 head was considerably different from the -- from the

1 previous ET-2000. In particular, the housing thing, the --
2 the steel housing or reinforcement around the extruding
3 throat was changed. So -- and the head was considerably
4 lighter, considerably than it was before.

5 So the pickup truck was critical at that time, because,
6 one, we were trying to assess the integrity of the head in
7 an impact to make sure that it would hold up as we wanted it
8 to do from a design standpoint.

9 Further, because it was a lighter head, the pickup
10 truck would also have the farthest travel distance in the
11 test matrix, and we would use that travel distance to help
12 define the terminal length for the system.

13 Q. Dr. Bligh, was that, again, a decision reached
14 between -- jointly between TTI and the Federal Highway
15 Administration?

16 A. Yes, sir.

17 Q. Let's turn our attention to the May 27th, 2005 test on
18 this particular ET-Plus that contained the 4-inch guide
19 channels. In that system test, what was being evaluated in
20 that system test?

21 A. Well, in this particular configuration, there was a
22 31-inch guardrail mounting height. That was one of the
23 primary objectives of this particular testing sequence.

24 Q. And, Dr. Bligh, what were you-all attempting to
25 determine, when you ran the small car, suggested running the

1 3-30 small car test?

2 A. Yes. We -- we felt that was the most critical test for
3 that configuration.

4 Q. Dr. Bligh, you've heard Mr. Baxter describe the car that
5 you-all ran in that test as a clown car. Was that a clown
6 car?

7 A. No, sir. We use vehicles that are specified in our
8 testing standard.

9 Q. What kind of car did you run, Dr. Bligh; do you recall?

10 A. I don't know if I recall the make and model.

11 Q. If it was a Chevrolet car, do folks drive Chevrolets
12 that drive on the highways of America?

13 A. Certainly, sir.

14 Q. All right. Now, Dr. Bligh, one of the things that you
15 were asked in this particular set of questions of Mr. Baxter
16 were the questions about the flared ET.

17 Tell this jury, was the flared ET a commercialized
18 product?

19 A. No, it's not.

20 Q. What is the difference between an ET-Plus system that's
21 on the highways and the experimental tests you-all were
22 running down at TTI on a flared ET configuration?

23 A. Yes, sir. The commercial ET-Plus system is what we call
24 a tangent terminal system. And the -- if I can illustrate,
25 the -- if -- if this is the edge of the roadway, then what I

1 mean by a tangent system is that that terminal and guardrail
2 system would be parallel or in line with the edge of the
3 roadway.

4 And so when we're developing a flared system, it's a
5 completely different geometry and configuration. And, in
6 fact, in that particular situation, you would have the
7 terminal significantly flaring away from the roadway. So
8 it's quite a difference in the configuration.

9 Q. What were you-all attempting to research at TTI, when
10 you did these five flared ET tests, Dr. Bligh?

11 A. Well, at the most basic level, we were just trying to
12 determine if there was a configuration of components that
13 would provide acceptable performance under that particular
14 layout and configuration.

15 Q. Were you trying to ask the question, can we flare the
16 ET-Plus system in some way?

17 A. Yes, sir.

18 Q. And what was the answer to that question after five
19 crash tests?

20 A. The answer was, no, we did not recommend that that be
21 done.

22 Q. Did you ever attempt to somehow bundle up those flared
23 ET tests in some way to try to get the Federal Highway
24 Administration to accept those tests?

25 A. No, sir.

1 Q. What did you do at TTI, after you ran the five crash
2 tests, Dr. Bligh?

3 A. We would move on to other innovative solutions to the
4 problem.

5 Q. Did you make the decision that the ET-Plus system could
6 not be flared on America's roadways?

7 A. Yes, sir.

8 Q. And is it today installed -- the ET-Plus system that was
9 crash-tested on May 27, 2005, is that system installed on
10 flared configurations on the American roadways?

11 A. No, sir.

12 Q. As a matter of fact, Dr. Bligh, do you have any
13 knowledge as to what Trinity instructs the people who
14 install the ET-Plus systems?

15 A. Yes. It's intended to be a tangent system, not a
16 flared.

17 Q. And what does that mean, Dr. Bligh?

18 A. That means, again, that it would be installed parallel
19 to the roadway, in line with the edge of the roadway.

20 Q. It means it's not to be flared, doesn't it, Dr. Bligh?

21 A. Yes, that's correct.

22 Q. Those specific instructions are given to installers;
23 isn't that right?

24 A. Yes.

25 Q. Now, Dr. Bligh, this particular experiment you-all were

1 running on the flared ET, was that something that was
2 jointly run between Trinity and Texas A&M?

3 A. Yes, it was.

4 Q. Do you expect that Trinity will rely on the expertise of
5 TTI to determine whether that experimental flared ET can
6 actually be used to evaluate the test results?

7 A. Yes, sir.

8 Q. All right. Were you-all at TTI satisfied with those
9 flared ET tests that you ran?

10 A. No, we were not.

11 Q. Over the years that you've worked at TTI -- and I
12 believe you told Mr. Baxter it's some 28 years; is that
13 right?

14 A. That's correct.

15 Q. How many experiments as a research scientist at TTI have
16 you been engaged in personally?

17 A. I wouldn't know the exact number, but I would say it's
18 well over a thousand.

19 Q. And of all of those experiments that you did in the
20 roadway safety field that you work in, have you given all of
21 that information to the Federal Highway Administration to
22 evaluate?

23 A. No, sir.

24 Q. Texas A&M University's TTI down there, tell me what
25 the function of that particular group is, sir.

1 A. Well, we are a -- a research agency, part of the Texas
2 A&M University system, and we conduct research and
3 transportation, all modes of transportation.

4 Q. At a university, are you all engaged in experimentation
5 and research there?

6 A. Yes, sir. That is what we do.

7 Q. As a research scientist, do you expect that every single
8 test that you run is going to be successful?

9 A. No, absolutely not. Failure is part of the development
10 process, and we hope to learn from it as scientists and
11 engineers and -- and move forward.

12 Q. Would you agree, Dr. Bligh, that some of the best
13 products developments -- are developed, go through a process
14 of trial and error?

15 A. Yes, sir.

16 Q. Do you learn things from the failures that you have?

17 A. We absolutely do.

18 Q. Do you sometimes learn that that particular assembly or
19 configuration cannot be commercialized?

20 A. Yes.

21 Q. All right, sir. At any point in time -- any point in
22 time did Trinity ever try to submit to the Federal Highway
23 Administration that the ET-Plus that was tested in a flared
24 configuration should be commercialized?

25 A. No, sir.

1 Q. Was the Federal Highway Administration aware that Texas
2 A&M was doing research and development on the flared ET?

3 A. Yes, they were.

4 Q. And tell the jury, if you will, sir, how they knew that
5 you all were doing that flared experimentation.

6 A. We had consultations, communications with them regarding
7 the test matrix that they would want to see for such a
8 product.

9 Q. Were you consulting with them about the various tests
10 that you were running?

11 A. Yes.

12 Q. Were you in any way trying to hide the fact that you all
13 were experimenting with the flared ET?

14 A. No, sir.

15 Q. Do you know, as you sit here today, Dr. Bligh, whether
16 the Federal Highway Administration knew that TTI abandoned
17 the concept of a flared ET project?

18 A. I would say that they would, yes.

19 Q. At any point in time, did the Federal Highway
20 Administration ever ask TTI, would you please show us your
21 flared experimentation down there?

22 A. No, sir.

23 Q. All right, sir. Dr. Bligh, let's go back, if we can. I
24 believe you testified earlier that you hold all of your
25 degrees from Texas A&M; is that right?

1 A. That's correct.

2 Q. In addition to the crash testing that's done on products
3 like the ET-Plus, can you briefly tell this jury what other
4 projects or products or -- or activities that TTI is
5 involved in, please?

6 A. I work in the Roadside Safety and Physical Security
7 Division, so I'm engaged in research in both of those areas,
8 primarily the area of roadside safety.

9 Q. Is TTI, in fact, one of the largest transportation
10 research agencies in the United States?

11 A. Yes, it is.

12 Q. And when was TTI created?

13 A. It was in the 1950s.

14 Q. You've told us that you're currently a research engineer
15 at TTI; is that correct?

16 A. That's correct.

17 Q. What other positions have you held at TTI, Dr. Bligh?

18 A. Currently I'm also manager of the Roadside Safety
19 Program, and I'm also director of what's called the Center
20 for Transportation Computational Mechanics, which is a -- an
21 FHWA awarded center for modelling and simulation of roadside
22 safety features.

23 Q. Dr. Bligh, in addition to the work that you've done on
24 extruding terminals, can you please tell the jury what sort
25 of other projects that you have been involved in as -- in a

1 general sense, sir?

2 A. Yes, sir. It's a wide variety of projects in the
3 roadside safety area. We -- I've personally been involved
4 in the testing and design of breakaway sign supports, light
5 poles, guardrail systems, median barriers, bridge rails,
6 crash cushions, work zone barriers, mailbox supports, work
7 zone traffic control devices. It's a very extensive list.

8 Q. When you go to work every morning down at the Riverside
9 campus, do you exclusively work on guardrail-type products?

10 A. No, sir.

11 Q. Dr. Bligh, you've been asked about a product that is
12 patented; is that right?

13 A. That's correct.

14 Q. How much of your work would you say on a percentage
15 basis that you do on a day in and day out basis regards
16 patent or proprietary products?

17 A. Very small percentage. It would -- it would absolutely
18 be under 5 percent.

19 Q. So 95 percent of the work that you do are on products
20 that do not have a patent of any kind; is that correct?

21 A. That's correct.

22 Q. These are products that are generally available in the
23 public to be built and installed by anybody; is that
24 correct?

25 A. That's correct.

1 Q. Dr. Bligh, as part of your work and your experience, do
2 you, in fact, have an opportunity to speak and write
3 articles? In fact, we've seen one of your papers; isn't
4 that right?

5 A. Yes, numerous -- numerous occasions I've had that
6 opportunity.

7 Q. Do you serve on industry committees?

8 A. Yes, I do.

9 Q. If you would, and I know there are probably several, but
10 give us a brief list of the committees that you serve on and
11 any leadership positions that you may hold, sir?

12 A. Yes, sir. I -- I would say that one of the more
13 prominent is the Transportation Research Board Committee AFB
14 20, which is roadside safety design. Transportation
15 Research Board is part of the National Academy of Sciences.

16 I -- I've had various leadership positions on that
17 committee and was recently appointed to be Chair of that
18 committee. I'm also very active in ATSA, which is the
19 American Traffic Safety Services Association. I'm a member
20 of their Guardrail Committee and their Guardrail Education
21 Task Force. I'm also very involved in Task Force 13, which
22 deals with standardization of highway hardware, and I chair
23 one of their subcommittees on bridge rails and transitions.

24 Q. Dr. Bligh, if you were not testifying here today, would
25 you be somewhere else working?

1 A. Yes, in fact, I would.

2 Q. And what would you be doing, Dr. Bligh?

3 A. There is a TxDOT -- the Texas Department of
4 Transportation holds a transportation short course every
5 year. I'm a chair of -- of that short course, and that's
6 ongoing right now and so that's where I would normally be is
7 in the duties of serving as Chair of that particular
8 committee.

9 MR. BROWN: May I see Defendants' Exhibit No. 57,
10 please?

11 Q. (By Mr. Brown) Dr. Bligh, is TTI a facility that
12 engages in research projects?

13 A. Yes, sir.

14 Q. How many research projects do you all do a year on an
15 average?

16 A. As an agency, I would say we do over 600 projects a year
17 for more than 200 different sponsors.

18 Q. And are those sponsors spread through all levels of
19 government and also the private sector, as well?

20 A. That's correct.

21 Q. Is the TTI facility accredited or certified in any way?

22 A. Yes. The -- the testing laboratory is accredited for --
23 for that -- that type of crash testing.

24 Q. What we see before us in Defendants' Exhibit No. 57 is a
25 summary of the work of TTI; would that be a fair statement?

1 A. Yes, sir.

2 Q. And in the first couple of paragraphs, there is a
3 description of the work that TTI does; is that right?

4 A. Yes, sir.

5 Q. All right.

6 MR. BROWN: Thank you, Mr. Hernandez.

7 Q. (By Mr. Brown) Dr. Bligh, you've told us that TTI is
8 certified. By whom is it certified?

9 A. It's the International Standards Organization, ISO.

10 Q. How many other certified testing labs are there in the
11 world?

12 A. I believe there are 11 or 12 that are -- around the
13 world that are recognized by the Federal Highway
14 Administration.

15 Q. Does TTI work closely with highway authorities?

16 A. Yes, sir, we do.

17 Q. And tell me what highway authorities that you do work
18 closely with.

19 A. Texas Department of Transportation is, of course, one of
20 our largest sponsors, but we work with states across the
21 country. As a matter of fact, we have an ongoing project
22 with 11 different state DOTs to help them address their
23 roadside safety problems. I can -- I can list them off, but
24 I would say that at one point in time or another, we've --
25 we've assisted almost every state with their -- with their

1 roadside safety issues.

2 Q. Is Trinity Highway Products the only client or sponsor
3 of TTI's?

4 A. No, sir.

5 Q. And in terms of all the other work that you do, would
6 TTI be a large sponsor or a smaller one?

7 A. Well, Trinity would not be our largest sponsor, no, sir.

8 Q. All right, sir. Let's talk a little bit about end
9 terminals and guardrail systems. In their most basic terms,
10 Dr. Bligh, would you explain to the jury, please, what an
11 end terminal system is?

12 A. Yes, sir. In its most basic form, an end terminal is
13 placed on the end of a guardrail to try and mitigate, reduce
14 the severity of impacts with that guardrail end.

15 Q. And do you have knowledge, Dr. Bligh, as to why there
16 was an effort undertaken to put something on the end of
17 guardrails?

18 A. Yes, certainly. There was a time where guardrails were
19 not properly shielded or protected, guardrail ends, and the
20 results could be very catastrophic any time that that
21 particular end was impacted.

22 Q. During your work and your schooling down at Texas A&M,
23 were you involved in the first efforts to develop what's
24 called an energy absorbing terminal?

25 A. Yes, sir, I was.

1 Q. And could you tell the jury, please, sir, what was
2 trying to be accomplished in the development of an energy
3 absorbing terminal?

4 A. It was to improve the safety of the -- of the guardrail
5 ends to -- to shield motorists of those -- those -- those
6 end hazards on the guardrail by helping to dissipate the
7 energy of the vehicle, thereby reducing the severity of
8 those crashes.

9 Q. As you were doing your work in graduate school at Texas
10 A&M, can you generally describe for the jury the process of
11 how an end terminal device is actually developed, just very
12 briefly if you would, Doctor?

13 A. Certainly. We -- we have to start with an innovation
14 process. We would develop design concepts. We would try
15 and evaluate those various design concepts. In -- in
16 various stages of that process, we would perform various
17 engineering analyses. We might evaluate components of
18 those -- of -- of the system that we're intending to put
19 together. We would do that through various dynamic tests.
20 Then ultimately, we would bring that to the crash testing
21 stage.

22 MR. BROWN: May I see Defendants' Exhibit
23 No. 3, Mr. Hernandez, if you would, please. Page 13.

24 Q. (By Mr. Brown) Dr. Bligh, is the research and
25 development process on a product just a quick and simple

1 process?

2 A. No, sir, I wouldn't say it is.

3 Q. We've put on the screen Defendants' Exhibit 3, and it
4 says in that first sentence: Development of a safety
5 feature from inception to the time it becomes operational is
6 a long and arduous process.

7 Would you agree with that, sir?

8 A. I would agree with that.

9 Q. If we go to the third sentence, it says: During the
10 research and development phase, the design evolves and is
11 eventually subjected to a set of crash tests.

12 Do you see that, sir?

13 A. Yes, sir.

14 Q. And would you tell the jury what that means, Dr. Bligh,
15 the process of evolving and being subjected to crash tests?

16 A. Yes, sir. There's an experimentation process that
17 inevitably occurs when you reach that stage, and you begin
18 to assess the performance of that product through various
19 types of tests. Inevitably, you do have failures along the
20 way. You try and learn from those failures. You try and
21 design for those failures, and then you try to move that
22 product forward, hopefully, to the finish line.

23 Q. Are you familiar with NCHRP Report 350, Dr. Bligh?

24 A. Yes, sir.

25 Q. Is there anywhere in 350 where it requires a research

1 agency like TTI to submit all of their research and
2 development that leads up to a product for which someone is
3 seeking commercialization?

4 A. No, sir.

5 Q. Let's talk a little bit and very briefly about the
6 Federal Highway Administration.

7 When anyone, whether it be TTI or any other
8 crash-testing facility -- and there are several; is that
9 right, Dr. Bligh?

10 A. That's correct.

11 Q. When any crash-testing facility wishes to either send on
12 their own report to the Federal Highway Administration for
13 consideration or let one of their sponsors do it, is there a
14 period of time where that particular testing agency will
15 actually begin a development before it makes submission?

16 A. Yes, sir.

17 Q. And based upon your understanding, what is it that
18 Federal Highway Administration wants to see whenever a
19 report is submitted for its consideration?

20 A. They are interested in having a final product that is
21 ready for commercialization that you are requesting to place
22 on the national highway system, and they will review the
23 eligibility of that particular submission.

24 Q. Is the Federal Highway Administration trying to critique
25 in any way or evaluate your research and development?

1 A. No, sir.

2 Q. They're really trying to answer the question, does your
3 product meet the 350 requirements; is that correct?

4 A. That's correct.

5 Q. Let's talk just a second about what's called the
6 crash-testing criteria under Report 350.

7 Are you familiar with that?

8 A. Yes, sir.

9 Q. Tell the jury generally, what are the criteria for a
10 crash test, when done under Test Level 3?

11 A. Well, there -- there are some very objective criteria
12 based on data that's collected in the -- in the crash test.
13 There's various measures that we use to assess occupant
14 risk. There's various measures that we use to examine the
15 -- the vehicle structure itself.

16 Q. In the possible tests that can be run under Report 350,
17 the Federal Highway Administration require a testing
18 facility to run every test in every type of crash-testing
19 scenario?

20 A. No, sir.

21 Q. And how is that process arrived at to decide what crash
22 tests should we run?

23 A. Again, it's a -- it's a process of discussion among
24 various parties, including multiple researchers at -- at our
25 agency, if we're the ones doing the tests, as well as

1 Federal Highway Administration and the sponsor.

2 Q. Dr. Bligh, as you sit here today, given your experience,
3 if we want to evaluate a product for its real-world
4 crash-testing effectiveness, is it better to do it with a
5 computer simulation or a full-scale crash test?

6 A. The full-scale crash test is the definitive way of
7 evaluating that.

8 Q. Any question in your mind, as you sit here today, Dr.
9 Bligh, that this particular ET-Plus with 4-inch guide
10 channels was not subjected to a crash test on May 27, 2005?

11 A. No, sir, it was.

12 Q. All right, sir. You were asked some questions about
13 this computer modeling that you-all do down there. This
14 particular computer modeling, has it always stayed the same,
15 or has it developed over time?

16 A. Oh, the -- the -- the technology has improved
17 dramatically over the recent years. The -- the -- the rate
18 of improvement and advancement of the technologies is -- is
19 very rapid as it is in a lot of computer-based areas.

20 Q. Would it be fair to say that you did not need to run a
21 computer-based simulation on this particular head. You had
22 crash-tested it, full-scale, right?

23 A. That's correct.

24 Q. All right, sir. Does NCHRP Report 350 also give testing
25 and research engineers like yourself guidance on when

1 changes to a product should be retested?

2 A. Yes, it does.

3 MR. BROWN: May I see Defendants' Exhibit 3, Page
4 25?

5 Q. (By Mr. Brown) Dr. Bligh, in the right-hand column
6 that's highlighted in yellow, there is a statement made in
7 350 that says: It is not uncommon for a designer/tester to
8 make design changes to a feature during the course of
9 conducting the recommended test series or after successful
10 completion of the test series.

11 Did I read that correctly?

12 A. Yes, sir.

13 Q. Do you agree that the Federal Highway Administration is
14 recognizing that, in fact, there may be changes made to a
15 design?

16 A. Yes, sir.

17 Q. And, Dr. Bligh, you've told this jury, this design on
18 the ET-Plus, that is owned by TTI, correct?

19 A. Yes, sir.

20 Q. Does Trinity in any way own the design of the ET-Plus?

21 A. No.

22 Q. In fact, as you've testified before, that particular
23 patent that covers the ET-Plus system belongs to Texas A&M,
24 right?

25 A. That's correct.

1 Q. In the licensing that Texas A&M has given to Trinity,
2 that license gives them the right to make and sell the
3 product only. Would you agree with that?

4 A. Yes, I would.

5 Q. Is the patent that covers the ET-Plus just as good today
6 as when it was originally issued?

7 A. Yes, sir.

8 Q. So it's still intact and effect; is that right?

9 A. That's correct.

10 Q. Still belongs to Texas A&M University?

11 A. Yes, it does.

12 Q. All right, sir. As we read on in this section, it says:
13 Changes are often made to improve the performance or to
14 reduce cost of the design or both.

15 Do you agree with me that the Federal Highway
16 Administration is recognizing that changes can be made to
17 either improve performance or reduce costs? That's an
18 understanding by the FHWA, correct?

19 A. Yes, sir.

20 Q. Dr. Bligh, tell this jury, when you-all were doing the
21 reduction of the guide channel and that suggestion was made
22 by TTI, were you doing it to improve the performance or
23 reduce the cost?

24 A. We were doing it to improve performance.

25 Q. Dr. Bligh, would it be a fair statement that whatever

1 royalties that you might receive on the ET-Plus would be the
2 same whether it be a 5-inch or a 4-inch guide channel?

3 A. Yes, that's correct.

4 Q. All right. Dr. Bligh, it says -- in the next sentence,
5 it says: Questions then invariably arise as to the need to
6 repeat any or all the recommended tests. Good engineering
7 judgment must be used in such instances.

8 Did I read that correct?

9 A. Yes.

10 Q. As a general rule, a test should be repeated, if there
11 is a reasonable uncertainty regarding the effect the change
12 will have on the test.

13 Did I read that correctly?

14 A. Yes, sir.

15 Q. Dr. Bligh, does this particular statement in the NCHRP
16 350 vest you research engineers at TTI with the engineering
17 judgment to decide whether or not a test needs to be done or
18 not done?

19 A. Yes, sir.

20 Q. Does it also vest you with the understanding that you
21 should decide whether or not there is a reasonable
22 uncertainty regarding the effect of the change?

23 A. Yes, sir.

24 Q. In the mind of you research engineers at TTI, when you
25 and the other folks at TTI suggested to Trinity that the

1 vertical and horizontal widths be decreased, was there any
2 uncertainty in your mind regarding the effect of that
3 change?

4 A. No, sir, there was not.

5 Q. What did you think was going to be done, Dr. Bligh?

6 A. That was a performance improvement or enhancement.

7 Q. Now, you've heard Mr. Baxter describe wobbling or
8 something. What, in your mind, Dr. Bligh, were you-all
9 trying to address when you did this reduction?

10 A. Well, they -- there were various observations that were
11 made during the testing programs that were underway.

12 Dr. Hayes Ross, who was my mentor for many years, and I
13 were making these observations about how much play or slack
14 that head had on the guardrail itself.

15 We felt that the performance could be improved if we
16 could provide more positive guidance by removing some of
17 that slack and allowing those guide channels to be more
18 effective.

19 We engaged with Dr. Gene Buth. He was one of the other
20 inventors of the ET-Plus product, and we began to discuss
21 how we could make improvements. We realized that there was
22 plenty of space available to make those accommodations
23 without it all impeding or interrupting the extrusion
24 process.

25 And so that is what led ultimately to communications

1 with our recommendations in that regard to Trinity.

2 Q. Thank you.

3 MR. BROWN: Your Honor, may I briefly leave the
4 podium?

5 THE COURT: You may.

6 MR. BROWN: Thank you.

7 Q. (By Mr. Brown) Dr. Bligh, if I can step out here, and I
8 see this 5-inch guide channel and the 4-inch guide channel
9 installations here. Do you see those as well?

10 A. Yes, sir.

11 Q. When you're talking to the jury about -- about
12 slack, is that the word that you used?

13 A. Yes, sir.

14 Q. Are we talking about this distance in here?

15 A. Yes, there's a -- there's a -- well, there's a
16 side-to-side distance, a lateral distance, yes, sir.

17 Q. And is there also a distance this way, as well?

18 A. That's correct. And that would -- that's what I would
19 refer to as the vertical distance, if you consider how the
20 head is oriented on the guardrail system.

21 Q. Dr. Bligh, these things are not oriented this way in the
22 field, are they?

23 A. No, sir.

24 Q. In fact, they're installed this way as we see them on
25 the roadway, correct?

1 A. That's correct.

2 Q. All right. This particular guide channel, what is it
3 doing in terms of the functionality of this ET-Plus extruder
4 head? This component, what is it doing?

5 A. That -- that component helps keep the -- the head
6 aligned on the rail and helps guide it down the rail during
7 the impact.

8 Q. What would happen if you didn't have guide channels on
9 this particular head, Dr. Bligh?

10 A. It wouldn't function properly.

11 Q. And how do you know that?

12 A. Because that was explored in the very early development
13 stages of the ET-2000 product.

14 Q. Were you around when that was going on?

15 A. Yes, sir.

16 Q. And so you were around when a decision was made to
17 install guide channels on a head; is that right?

18 A. Yes, sir.

19 Q. Tell the jury, if you would, sir, how wide is the w-beam
20 guardrail, that rail that goes in this particular guide
21 channel and into this head, sir?

22 A. It's approximately three inches wide, and -- and it has
23 a curve shape to it.

24 Q. And when you say curve, does that mean it has peaks and
25 valleys in it?

1 A. That's correct.

2 Q. And those peaks and valleys that are in the w-beam, they
3 rest inside this particular head right here, don't they,
4 sir?

5 A. Yes.

6 Q. Is the peak up here in the guide channel?

7 A. No, sir.

8 Q. Where is the peak, Dr. Bligh?

9 A. It's out in that open section between the -- the top and
10 bottom guide channels.

11 Q. All right, sir. How tall is w-beam guardrail?

12 A. It's approximately 12 inches tall.

13 Q. Twelve inches tall. And so you all at -- at TTI made a
14 decision that you could reduce this by one inch; is that
15 correct?

16 A. Yes, sir.

17 Q. Did you believe you would have sufficient clearance,
18 room, if you reduced it to four inches?

19 A. Yes, sir.

20 Q. In fact, Dr. Bligh, you did a crash test on May 27, 2005
21 that demonstrated that you did have enough room; isn't that
22 right?

23 A. That's correct.

24 Q. It passed the 350 criteria, didn't it, sir?

25 A. Yes, it did.

1 Q. Let's talk about crash testing. And before I do that,
2 Dr. Hayes Ross, you said was your mentor; is that right?

3 A. That's correct.

4 Q. Is he still with TTI?

5 A. No, sir.

6 Q. Is he retired completely?

7 A. Yes, he is.

8 Q. All right. Let's talk about crash testing of guardrail
9 systems and how actually that occurs. You've talked to
10 Mr. Baxter already, and I won't repeat the fact that it's
11 set up and installed before a crash test; is that right?

12 A. Yes.

13 Q. And what is done to evaluate what happens in the crash
14 test, sir?

15 A. Well, there's a lot of instrumentation that's involved
16 -- that's inserted into the vehicle.

17 Q. Let me stop you, and I don't mean to interrupt. What
18 kind of instrumentation is put in there?

19 A. We have what we call accelerometers that are able to
20 measure the accelerations of the vehicle about different
21 directions or what we call axes of the vehicle. If you
22 think about maybe forward, sideways, and -- and up and down.

23 And we also have what we called rate gyros, and the rate
24 gyros are -- are kind of measuring the rotations of the
25 vehicle about its axes -- what we call roll pitch and yaw --

1 different -- different types of rotational configurations of
2 the vehicle.

3 Q. Dr. Bligh, in its simplest terms, is that
4 instrumentation designed to measure what happens inside the
5 occupant compartment of that car during the crash test?

6 A. Yes, sir.

7 Q. All right. And this particular data, is it collected by
8 those machines?

9 A. Yes, it's the -- the instrumentation -- data is
10 collected from the instrumentation.

11 Q. Those machines stay on during the crash test event; is
12 that correct?

13 A. That's correct.

14 Q. And what happens, sir, from -- for the data that's in
15 those particular things after the crash test? How is that
16 interpreted or downloaded?

17 A. Well, we have a -- a section at TTI that's responsible
18 for that. They will download that data to the computer
19 after the test is completed.

20 Q. Dr. Bligh, do you, as a research engineer at TTI, have
21 an ability to in any way manipulate that data?

22 A. No, sir. That's -- I'm -- I don't have access to that
23 process. That's handled by other people during the test.

24 MR. BROWN: Mr. Hernandez, on Defendants' Exhibit
25 3, could you please go to Page 63, sir, which will be Table

1 5.1?

2 Q. (By Mr. Brown) Dr. Bligh, starting on Page actual 53,
3 up in the right-hand corner of this document, are you
4 familiar with Table 5.1?

5 A. Yes, sir.

6 Q. And tell the jury what Table 5.1 is, Dr. Bligh.

7 A. Well, these are the evaluation criteria in Report 350 by
8 which we determine the success or failure of a particular
9 crash test.

10 Q. And when you say, we determine the success or failure of
11 a crash test, are you able to somehow change this criteria
12 that exists in Table 5.1?

13 A. No, sir. This is what we use to make that evaluation.

14 MR. BROWN: Can we go to the next page, Mr.
15 Hernandez?

16 Q. (By Mr. Brown) Is this a continuation of the evaluation
17 factors that are used in evaluating a crash test?

18 A. Yes, it is.

19 MR. BROWN: And would you go to the next page,
20 please, Mr. Hernandez?

21 Q. (By Mr. Brown) Dr. Bligh, Table 5.1 is the criteria
22 that the Federal Highway Administration uses to determine
23 whether or not your crash test has been a pass or a fail; is
24 that right?

25 A. Yes.

1 Q. If you do not meet this criteria, it's a failure, isn't
2 it, Dr. Bligh?

3 A. Yes, it is.

4 Q. And no matter how much you want it not to be a failure,
5 if it does not meet these criteria established by the
6 federal government, it won't pass; isn't that right?

7 A. That's correct.

8 Q. Is that what you're submitting to the Federal Highway
9 Administration for consideration?

10 A. Yes, sir.

11 Q. Dr. Bligh, does the Federal Highway Administration have
12 the ability to come back to you and say, we want you to do
13 more? We want you to do additional tests?

14 A. Yes, they do.

15 Q. All right. In the case of the ET-Plus with the
16 four-inch guide channels, has that been done to date?

17 A. No, sir.

18 Q. All right. Now, you've talked to Mr. Baxter about the
19 format of the report, the NCHRP 350 Report. Are you
20 required to have a certain form of a report?

21 A. There's not a -- a particular -- there's not a
22 particular requirement. There's guidance, though, that --
23 that suggests an outline for the report.

24 Q. And is that what you have attempted to follow all
25 through the years in doing that report?

1 A. Yes, sir.

2 Q. Does TTI, as a testing entity, have the ultimate
3 responsibility for deciding what the content of that crash
4 test report is?

5 A. Yes, sir.

6 Q. Does Trinity have any role at all in deciding what's
7 involved in that data that's transmitted to the Federal
8 Highway Administration?

9 A. No, they do not.

10 Q. Dr. Bligh, in the work that you do, do you have an
11 opportunity to work with individuals that work at the
12 Federal Highway Administration?

13 A. Yes, I do.

14 Q. Do you interact with them frequently?

15 A. Yes.

16 Q. Do you interact with them professionally and also at
17 these industry meetings that you've described?

18 A. Yes, I do.

19 Q. How often would you say that you interact with the
20 Federal Highway Administration, Dr. Bligh?

21 A. I would say it's at least on a monthly basis. It can be
22 more frequent than that, depending on the nature of the
23 projects that we're working on.

24 Q. Dr. Bligh, you've told us a little bit about an
25 extruding terminal, and I want to talk more now about the

1 various components that are involved in the extruding
2 terminal system, okay?

3 A. Yes, sir.

4 Q. And, Dr. Bligh, is the ET-Plus a system?

5 A. Yes, it is.

6 Q. Would it be fair to say that the ET-Plus is just this
7 extruder head?

8 A. No, not at all.

9 Q. And what other things are involved in deciding what an
10 ET-Plus system or what compose an ET-Plus system?

11 A. Well, the system, in addition to the impact head, you
12 have the guardrail itself, you have various support posts,
13 you have an anchor post, you have a cable anchor bracket,
14 you have the cable anchor assembly, you have what we call
15 offset blocks between the guardrail and the posts. There's
16 different -- various types of connection hardware that are
17 used to help assemble and put the -- the system together.

18 Q. Dr. Bligh, you've talked a little bit about the Federal
19 Highway's criteria in evaluating the crash test. Dr. Bligh,
20 do impacts that occur to an extrusion head like this, do
21 they have certain parameters by which they're evaluated?

22 A. Yes, sir.

23 Q. Is this particular terminal designed to take all impacts
24 in all conditions?

25 A. No, sir.

1 Q. Has the Federal Highway Administration ever anticipated
2 that the ET-Plus would be a terminal that would take all
3 impacts and all conditions?

4 A. No, sir.

5 Q. What is the maximum speed that the Federal Highway
6 Administration and the federal agencies have rated this
7 ET-Plus to be impacted?

8 A. The -- the impact speed for Test Level 3 for which that
9 is eligible is 62 miles per hour.

10 Q. Is that an end-on speed, Doctor?

11 A. Yes, sir.

12 Q. All right. In terms of striking this ET-Plus head not
13 end-on, is there another criteria they have established?

14 A. Well, there's -- there's other functions of the -- of
15 the terminal.

16 Q. Yes, sir. And that other function of the terminal, what
17 is it?

18 A. Well, one of the things that if it's not a direct
19 head-on impact, the other function is something that is
20 referred to as gating. That's a term that's used in our
21 testing standard, has a -- if I could explain, what happens
22 if you hit this at an angle, there may be some extrusion
23 that begins to take place, but that vehicle is carrying the
24 head out of alignment with the guardrail. So it will
25 eventually reach a critical angle where the extrusion

1 process can no longer occur. At that point, the guardrail
2 bends, and that little elbow that forms at that bend, it
3 acts like a hinge. And so that's why we call it gating
4 because the head then swings open, so to speak, about that
5 hinge in the guardrail, and the -- and the vehicle is --
6 pass -- passes through the system.

7 Q. So, Dr. Bligh, if folks in this courtroom, the
8 ladies and gentlemen of this jury, drive down the
9 roadway and they see an ET-Plus that's been impacted and
10 there is an elbow facing them on the roadway, does that
11 mean in any way that the ET-Plus has failed?

12 A. No, sir.

13 Q. In fact, does it mean perhaps that it's gated?

14 A. Yes, sir.

15 Q. Does Trinity Industries or Trinity Highway Products have
16 any role in the maintenance of ET-Pluses that are installed
17 out on the highways?

18 A. No, sir.

19 Q. Who does the ET-Plus belong to, once it leaves Trinity,
20 and it goes out and is installed on the roadways?

21 A. It would be the purchasing agency.

22 Q. And would the purchasing agency be typically a
23 Department of Transportation or other highway authority?

24 A. Yes, it would.

25 Q. Dr. Bligh, you've told us about the function when it

1 hits head-on and it extrudes. You've talked to us about
2 gating.

3 Would that be an angled impact, Doctor?

4 A. Yes, sir.

5 Q. Under the 350 criteria, what is the maximum angle for
6 in-criteria impacts that's been established by the Federal
7 Government?

8 A. Well, the testing standard, Report 350, prescribes a
9 15-degree angle for -- for certain types of test in the test
10 matrix.

11 Q. Is that 15-degree angle an angle that's selected down at
12 TTI?

13 A. No, sir.

14 Q. Where is that angle of 15 degrees? Where does that come
15 from, Dr. Bligh?

16 A. Well, it -- it was established in Report 350 and --
17 and -- which is also -- which is based on the review of
18 real-world crash data.

19 Q. Let's talk about the review of real-world crash data and
20 the evolution of Report 350 real quickly.

21 Dr. Bligh, we've seen the principal authors of Report
22 350, but to whom was 350 circulated before it was enacted as
23 a federal regulation?

24 A. Well, Report 350 was developed under a research project,
25 the NCHRP National Cooperative Highway Research Program.

1 There is a panel of experts that is formed for that project.

2 In addition to that particular panel of experts, that
3 document was also vetted and presented to the entire roadway
4 safety community at various industry meetings during its
5 development for review and comment.

6 Q. All right. So it's been circulated to state DOTs and
7 other parties before it was ever enacted. Is that a fair
8 statement?

9 A. Yes, sir.

10 MR. BROWN: Can we look at Defendants' Exhibit No.
11 308, please, Mr. Hernandez?

12 Q. (By Mr. Brown) Dr. Bligh, I believe this is going to be
13 a video from the 2005 crash test from the overhead view, and
14 I may ask Mr. Hernandez to stop as we go along.

15 (Pause in proceeding.)

16 Q. (By Mr. Brown) While he's doing that, to save time,
17 during the process of an impact, we've heard it described as
18 a train moving down the tracks. Does the head move down --
19 or excuse me -- the head move down the rail as it's
20 impacted?

21 A. Yes. The head is -- is -- is pushed down the rail by
22 the impacting vehicle.

23 (Video clip playing.)

24 MR. BROWN: Stop the tape, if you would, please,
25 sir.

1 (Video clip stopped.)

2 Q. (By Mr. Brown) Dr. Bligh, explain to the Ladies and
3 Gentlemen of the Jury what is happening here. We saw this
4 small car, this Chevrolet, make an impact with the ET-Plus
5 extruder head. Tell the jury what's going during this crash
6 test.

7 A. Well, this impact with the small car, initially there is
8 engagement with the head, and the vehicle begins to push the
9 head down the rail. As that progresses, that w-beam
10 guardrail shape is first flattened, and then it is deflected
11 away from the path of the vehicle. And that flattening and
12 deflection process helps dissipate some of the energy or the
13 speed of the vehicle in that process.

14 There is also a condition of this particular crash test
15 where the impact location on the front of the vehicle is not
16 directly centered. It's an offset impact. And so because
17 the crash impulse is occurring on the side of the vehicle
18 outside of its centerline, it will eventually induce some
19 rotation, what we call yaw of that vehicle, as it begins to
20 progress through the system.

21 Q. So down at TTI, did you-all decide to hit this not
22 centered-up but offset? Was that your decision, or was that
23 somebody else's criteria?

24 A. Well, we were following the NCHRP Report 350 testing
25 criteria.

1 Q. So just so we're clear, in this particular test, this
2 3-30 test, what you're testing is the ability of the vehicle
3 to move down the rail and also to test how it yaws off or --
4 or moves to the side; is that right?

5 A. Yes, sir.

6 MR. BROWN: Please continue, if you would, Mr.
7 Hernandez.

8 (Video clip resumed.)

9 Q. (By Mr. Brown) Is the car beginning to yaw?

10 A. Yes, sir.

11 MR. BROWN: Stop the tape if you would, please.

12 (Video clip stopped.)

13 Q. (By Mr. Brown) Dr. Bligh, we see this particular head
14 beginning to bend a bit. Do you see that?

15 A. Yes.

16 Q. Plaintiff has alleged in his pleadings that this
17 particular system throat locks. Are you familiar with the
18 term throat lock?

19 A. No, sir, not really.

20 Q. Is that an engineering term?

21 A. Not one that I've heard.

22 Q. Dr. Bligh, is this particular car engaged or this head
23 engaged in a throat lock as it begins to move out to the
24 side?

25 A. No, sir. I would not characterize it that way at all.

1 Q. As an engineer who's skilled in the art of
2 crash-testing, can you tell us what happened here? Why did
3 this car move off?

4 A. Yes, sir. The -- the forward energy of the vehicle is
5 being dissipated, and because of that off-center initial
6 crash impulse, it puts the vehicle in a rotation. So
7 eventually, as the vehicle starts rotating, there's no more
8 forward momentum or speed to the vehicle, so it just rotates
9 away.

10 In the process of rotating away, the front of the
11 vehicle kind of is -- is pushing the head outward, and you
12 see a slight bend in the rail at that point in time.

13 Q. This movement of the head, this alignment of the head as
14 the vehicle was coming in with this quarter-point offset,
15 was it kept in line by these guardrails, Dr. Bligh?

16 A. Yes, it was.

17 Q. All right, sir.

18 MR. BROWN: You may continue, Mr. Hernandez.

19 (Video clip resumed.)

20 MR. BROWN: And if you would, stop, please.

21 (Video clip stopped.)

22 Q. (By Mr. Brown) Dr. Bligh, if you look at the results of
23 this crash and you look at the things that you see in this
24 particular video screen, what do you see that's noteworthy
25 to you as you evaluate this particular test?

1 A. Well, it -- it looks like a very successful outcome. I
2 see a lot of rail extrusion. You can see by the difference
3 that the head has traveled. From -- from the initial point,
4 it -- it's -- I would say approximately 16 feet or so of
5 rail extrusion. In that process, over that length, we
6 certainly did see a -- a rail splice in the guardrail feed
7 through the head.

8 Q. I'm going to talk to you more about a rail splice in
9 just a minute.

10 Are you talking about those bolts that Mr. Baxter
11 showed the jury yesterday?

12 A. Well, that's a -- the -- the splice bolt is what is used
13 to make up a rail splice, and there's actually eight bolts
14 at that location that would splice two sections of rail
15 together.

16 Q. And you're actually talking about two pieces of rail
17 that are spliced together with those bolts going through
18 them; is that right?

19 A. That's correct.

20 Q. And what we see here in this crash test is those splices
21 and those bolts going through this extruder head; is that
22 right?

23 A. Yes, they do.

24 Q. We're going to talk about how that happens in a second.

25 MR. BROWN: Can I go, please -- or you can take

1 that slide off.

2 THE COURT: Approach the bench, counsel.

3 MR. BROWN: Yes, sir.

4 (Bench conference.)

5 THE COURT: How much more cross do you have?

6 MR. BROWN: About 40 minutes, Judge, maybe, at the
7 most.

8 THE COURT: All right. We're going to take a
9 recess.

10 By the way, we're going to talk about that in a
11 minute is an improper sidebar comment. Don't tell the jury
12 what you're going to talk about. Just ask the question --

13 MR. BROWN: I apologize.

14 THE COURT: -- and let them draw their
15 conclusions.

16 MR. BROWN: I apologize.

17 THE COURT: We'll take a short recess, Counsel.

18 (Bench conference concluded.)

19 THE COURT: Ladies and gentlemen, this examination
20 has some additional time to go, so we're going to pause,
21 given that we've been in here since about 8:30 -- 8:35. I'm
22 going to let you have a short recess at this time.

23 You may leave your notebooks in your chairs.

24 Don't discuss the case among yourselves. Stretch your legs,
25 get a drink of water. In about 10 minutes, we'll be back in

1 here to continue. You're excused for recess at this time.

2 COURT SECURITY OFFICER: All rise.

3 (Jury out.)

4 THE COURT: Let's be seated, please.

5 Mr. Carpinello, there will be no further laughing
6 or outbursts. You're an experienced trial lawyer, and it's
7 my assumption that anything like that is intentional. You
8 can tell me it's not, but you've been to too many trials and
9 had a poker face perfected too long for that to happen
10 accidentally. If it happens again, I will deduct time from
11 the Plaintiff's part of the case.

12 MR. CARPINELLO: I apologize, Your Honor.

13 THE COURT: All right. We stand in recess for 10
14 minutes.

15 COURT SECURITY OFFICER: All rise.

16 (Recess.)

17 (Jury out.)

18 COURT SECURITY OFFICER: All rise.

19 THE COURT: Be seated, please.

20 Let's bring in the jury, Mr. McAteer.

21 MR. BROWN: Your Honor, may I return to the
22 podium?

23 THE COURT: Yes, you may.

24 COURT SECURITY OFFICER: All rise for the jury.

25 (Jury in.)

1 THE COURT: Please be seated.

2 You may continue with your examination of the
3 witness, Mr. Brown.

4 MR. BROWN: Thank you, Your Honor.

5 Q. (By Mr. Brown) Dr. Bligh, we saw a videotape of the May
6 27, 2005 crash test from an overhead view; is that correct?

7 A. Yes, sir.

8 Q. The decision to use a small car in the May 27, 2005
9 crash test was obviously a decision that was reached by
10 whom, sir?

11 A. Again, that process would involve the TTI researchers,
12 consultation with FHWA, and the sponsor.

13 Q. Again, sir, you've heard Mr. Baxter ask you questions
14 about a 3-31 being the critical test. Why didn't you run a
15 3-31 test on May 27, 2005?

16 A. We -- we felt that the 3-30 with a small passenger car
17 was more critical and the critical test for that particular
18 configuration that we were trying to evaluate.

19 Q. And when you used the word we, who is we?

20 A. Again, that was a collective decision from the -- the
21 TTI researchers to make that determination of why that was
22 the critical test.

23 Q. Did you vet or ask the FHWA for its input on that?

24 A. Yes, sir.

25 Q. All right. Why was that the critical test on May 27,

1 2005, Dr. Bligh?

2 A. Well, one of the primary things that was being evaluated
3 in that particular testing sequence was this new guardrail
4 height, the height of the guardrail was being raised. It
5 was a 31-inch height, and so there was concern about the
6 small car potentially trying to underride or having some
7 other type of adverse interaction with that impact hit that
8 had now been raised by approximately 4 inches.

9 So it would still evaluate the extrusion process, but
10 it was more critical now to look at that small car
11 interaction.

12 Q. Is what you're telling the jury, sir, is that because of
13 the height of the pickup, you knew it would engage it at
14 that height?

15 A. Yes, sir.

16 Q. And you were testing to see if the smaller car would
17 ride under it; is that correct?

18 A. Yes, sir.

19 Q. During your time at TTI, did you have a role in the
20 initial development of the extrusion process that is part of
21 the ET-Plus?

22 A. Yes, sir.

23 Q. And can you tell the jury how you-all at TTI developed
24 this process that's known as extrusion?

25 A. Well, again, it was -- it was a research and development

1 project that was undertaken. It was at the time the very
2 first energy-absorbing guardrail end terminal. There was
3 nothing really like it. It was a series of experiments that
4 were conducted to try and find a configuration that would
5 perform and meet the testing criteria.

6 Q. In the process of deciding of what test to run in the
7 original development of the ET-2000, how was that process
8 developed, Dr. Bligh?

9 A. Well, it would be the -- the same process of looking at
10 what tests were critical, what tests needed to be run to
11 fully evaluate that system at that time.

12 Q. Dr. Bligh, I want to look at the ET-Plus head and the --
13 and the various components on it, and I want you to explain
14 to the jury what we have on an ET-Plus head.

15 MR. BROWN: And, Your Honor, may I leave the
16 podium?

17 THE COURT: You may.

18 Q. (By Mr. Brown) Dr. Bligh, if you would, sir, please on
19 this component of the ET-Plus extruder head, explain to us
20 what makes up this particular component, sir.

21 A. The -- the guide system, so to speak, is made up of two
22 channels, channel sections, steel channel sections, a top
23 and bottom section that are then separated by some steel
24 straps at the -- what we would call the downstream end, the
25 far end of the system.

1 Q. All right. That's the guide channel system. Let's move
2 down to the head portion of it.

3 Would you please explain to us what is involved in the
4 head portion here, sir?

5 THE WITNESS: Your Honor, may I please --

6 THE COURT: You may return to your same position
7 as before.

8 A. Could you ask your question again, sir?

9 Q. (By Mr. Brown) This particular section, what is it
10 composed of, Dr. Bligh?

11 A. The -- the-- that's what I would call the extruder
12 throat. There's -- inside the head, there are actually some
13 tapered steel plates. That's what actually does the
14 flattening of the rail. And then there's a curved plate
15 that goes beyond that, and that's what deflects the rail out
16 of the way. And then there's a steel housing that keeps
17 that together and positions it properly to do its job. And
18 then there's an impact plate or a face on the front of the
19 terminal system.

20 Q. All right, sir. You may return to your seat. I think
21 we're through with that portion.

22 A. Thank you.

23 Q. Dr. Bligh, we've heard these guide channels from time to
24 time referred to as feeder chutes. Do these guide channels
25 do any sort of feeding at all?

1 A. No, they don't.

2 Q. And so does rail actually somehow physically get grabbed
3 and pushed down into this hole by these rails in any way?

4 A. No, sir.

5 Q. And what is the function and the most basic terms of
6 these guide channels?

7 A. I -- I guess their name kind of implies it, but it's
8 actually to guide the head down the rail, to keep it aligned
9 with the rail during the impact so that the extrusion
10 process can take place.

11 Q. Dr. Bligh, you've testified about the decision to reduce
12 the guide channels from 5 to 4 inches.

13 MR. BROWN: If I could see Defendants' Exhibit No.
14 38, please.

15 Q. (By Mr. Brown) Dr. Bligh, this is an exhibit that has
16 been shown to the jury before, and I want to ask you a
17 couple of questions about the section that begins with Hayes
18 Ross.

19 MR. BROWN: If we could go down to the bottom,
20 please.

21 Q. (By Mr. Brown) Who is this particular email to,
22 Dr. Bligh?

23 A. This is sent to Mr. Steve Brown.

24 Q. And were you one of the individuals that was copied on
25 this email?

1 A. Yes, sir.

2 MR. BROWN: And if you'll go to the next page,
3 please, Mr. Hernandez.

4 Q. (By Mr. Brown) Let's look, if we could, please, at
5 Section 6. Dr. Ross is saying to Mr. Brown at Trinity: We
6 are thinking impact performance of the head may be improved.
7 Who is the we that he's talking about, Dr. Bligh?

8 A. That would be the -- the inventors of the ET-Plus
9 system. That would be myself and Dr. Ross and Dr. Buth.

10 Q. Dr. Bligh, do you recall the events which led to the
11 decision to ask Trinity if they would consider this
12 reduction?

13 A. Yes, sir.

14 Q. Were you personally involved in that?

15 A. Yes, sir.

16 Q. And how did that particular process begin? Very
17 briefly, how did it -- how did it evolve?

18 A. Well, it was a -- it was a matter of observation, based
19 on the test installations that were being assembled for
20 various tests that were being conducted. And we could very
21 plainly and easily see when we began to -- to look at that
22 fit, that there was a lot of -- of slack or play. And,
23 again, because the -- the purpose -- the primary purpose of
24 the guide channels is to keep it aligned and to -- and to
25 provide that guidance, we thought that impact performance

1 would be improved if we could reduce that amount of slack
2 without changing the rest of the extrusion process.

3 Q. Dr. Bligh, as we look at the remainder of this email,
4 and if I can read further, it says: May be improved by
5 reducing the available clearance between the downstream end
6 of the guide chute and the w-beam in both the lateral and
7 vertical directions. Did I read that correctly?

8 A. Yes, sir.

9 Q. What is actually being discussed for consideration with
10 Mr. Brown by Dr. Ross when he says vertical and lateral?

11 A. Well, again, the -- it's -- it's -- it's primarily the
12 clearance dimensions that exist between the two guide
13 channels and -- and inside the guide channels.

14 Q. So we're talking about a distance from here to here and
15 here to here; is that correct?

16 A. Yes, sir.

17 Q. That's vertical and lateral?

18 A. Yes, sir.

19 Q. All right.

20 MR. BROWN: Thank you, Mr. Hernandez.

21 Q. (By Mr. Brown) This particular email is a question to
22 Steve Brown at Trinity. Would you agree with that?

23 A. Yes, sir.

24 Q. And what is he asking his manufacturer licensee, from
25 your understanding and knowledge?

1 A. Well, I -- I think it's to make sure that there were not
2 any perceived issues from the manufacturer of the product in
3 implementing such a change.

4 Q. And just so the jury is absolutely clear on this, Dr.
5 Bligh, was the decision -- the suggestion to reduce the
6 clearance of that guide channel was TTI's or Trinity's?

7 A. It was TTI's.

8 Q. All right, sir. Now, you've heard Mr. Baxter ask you
9 questions about this being a new and improved ET-Plus head.

10 Do you recall those?

11 A. Yes, sir.

12 Q. Dr. Bligh, was there anything, from your understanding
13 of an inventor of this product, of it being new?

14 A. Well, it's -- it's not a new product. It's the same
15 product that's been enhanced or improved.

16 Q. It's an enhanced, improved product; is that your
17 testimony?

18 A. Yes, sir.

19 Q. In your mind, Dr. Bligh, as you evaluated this decision
20 to go from five to four inches, did you have any uncertainty
21 whatsoever that this would be anything but a positive
22 improvement?

23 A. No, sir, I did not.

24 Q. If you had that uncertainty, Dr. Bligh, what would you
25 have done?

1 A. We -- we either wouldn't have recommended it or we would
2 have recommended other types of evaluation and testing to
3 make sure that those uncertainties were -- were resolved and
4 evaluated.

5 Q. Dr. Bligh, you've heard questions about this particular
6 test that was done on May 27, 2005 was really not a test of
7 the head at all. Do you recall those questions?

8 A. Yes, sir.

9 Q. Did you find any reason in your good engineering
10 judgment to somehow independently test the ET-Plus extruder
11 head with the four-inch guide channels?

12 A. No, sir.

13 Q. Was the test done on May 27, 2005 an opportunity to see
14 that head installed on an ET-Plus system?

15 A. Yes, sir.

16 Q. And did TTI in any way somehow stop or try to stop
17 Trinity from including that head on the test?

18 A. No, sir.

19 Q. If you're going to reduce the vertical and the lateral
20 clearances, as Dr. Ross suggested, Dr. Bligh, do you agree
21 that it has to be inserted inside that throat?

22 A. Yes, sir.

23 MR. BROWN: If I could see Defendants' Exhibit No.
24 22?

25 Q. (By Mr. Brown) If we look at the --

1 MR. BROWN: If we go to the next page, please,
2 sir?

3 Q. (By Mr. Brown) If we look at the center of the page,
4 there is an email that we've seen before from Wade Malizia,
5 who's testified to this jury, where he includes a modified
6 Detail 7 with a four-inch channel. The overall length of
7 the chute is three quarters of an inch shorter than the
8 original five-inch. Did I read that correctly?

9 A. Yes, sir.

10 Q. The last sentence says: Let me know if TTI approves it,
11 and I'll revise these drawings. Did I read that correctly?

12 A. Yes, sir.

13 MR. BROWN: If we move up to the top of the page,
14 Mr. Hernandez?

15 Q. (By Mr. Brown) We have: Thanks, BS. Do you recognize
16 that as Brian Smith?

17 A. Yes, sir.

18 Q. It says: Gentlemen, please see attached and advise your
19 thoughts.

20 MR. BROWN: And if we can go to the first page
21 again.

22 Q. (By Mr. Brown) Did I read that correctly?

23 A. Yes, sir.

24 Q. And this is an email again from Brian Smith to whom?

25 A. That was copied to Dr. Dean Alberson, Dr. Gene Buth, Mr.

1 Lance Bullard, and myself.

2 Q. Is that all the principal researchers -- research
3 engineers at TTI that would be involved with the ET extruder
4 head?

5 A. Yes, sir.

6 Q. All right.

7 MR. BROWN: If you'll go back to the full email,
8 Mr. Hernandez?

9 Q. (By Mr. Brown) As we look up through this email, do we
10 see a response from Dr. Gene Buth?

11 A. Yes, sir.

12 Q. And what does he say, Dr. Bligh?

13 A. It states: The three quarter inch shorter chute is okay
14 by me.

15 Q. And if we look up, we see a response from Dr. Alberson;
16 is that right?

17 A. Yes, sir.

18 Q. And does he agree with Gene?

19 A. Yes, he does.

20 Q. And if we go to the top of the page, we see an agreement
21 by Dr. Ross; is that correct?

22 A. Yes. At the very top, yes.

23 Q. All right. So -- and we also see you agreeing with it;
24 is that right?

25 A. That's correct.

1 Q. So as we read these emails together, Dr. Bligh, do you
2 agree that that is a concurrence or an agreement by TTI that
3 it's okay with TTI that that chute remain three quarters of
4 an inch -- or that guide channel be three quarters of an
5 inch shorter due to its insertion?

6 A. Yes, sir.

7 Q. Did TTI specifically approve that?

8 A. Yes, they did.

9 Q. Thank you, sir. Dr. Bligh, the ET-Plus head that was
10 crash tested on May 27, 2005, you were asked specifically if
11 it had a four-inch guide channel. Do you recall that?

12 A. Yes.

13 Q. And how do you know that, Dr. Bligh?

14 A. I know that from personal experience, being at the test,
15 seeing the prototype. I know that from more recent review
16 of the photographs and the video and actually, in fact,
17 taking one of those photographs and scaling off that
18 particular dimension to conclusively demonstrate that.

19 MR. BAXTER: Excuse me, just a second, Your Honor.
20 Not something he's an expert in. We object to the testimony
21 about it, Your Honor.

22 MR. BROWN: Your Honor, he's the one that said he
23 scaled it. He'd be the one that would know best about how
24 it was scaled. I guess that's their objection?

25 MR. BAXTER: No, the objection is he's not an

1 expert. He doesn't have any competence do to it.

2 MR. BROWN: Your Honor, we'd disagree with that.
3 He's the one who has the Ph.D. in engineering and would know
4 how to do it.

5 THE COURT: I'll allow the question. The
6 objection is overruled.

7 MR. BROWN: May I have Defendants' -- well, let me
8 ask before you put this up.

9 Q. (By Mr. Brown) Dr. Bligh, in the part of the process in
10 submitting a crash test for Federal Highway Administration
11 for their consideration, is that particular crash test
12 photographed and videotaped, both?

13 A. Yes, it is.

14 Q. On the May 27 test, 2005, were there photographs and
15 videotaping during that particular test?

16 A. Yes, there was.

17 MR. BROWN: May I have Defendants' Exhibit 318,
18 please?

19 Q. (By Mr. Brown) Dr. Bligh, can you identify Defendants'
20 Exhibit 318?

21 A. Yes. That is a photograph of the -- the system set up
22 and -- and vehicle for the test that was conducted on May
23 27, 2005.

24 Q. Does this have the car positioned on the quarter point
25 offset that you've discussed before?

1 A. Yes, it does.

2 Q. And what is actually shown in this particular
3 photograph, Dr. Bligh?

4 A. Well, it's an installation of the ET-Plus system that we
5 were testing. You can see the impact head there, and you
6 can see that that's a four-inch channel on that particular
7 head.

8 Q. And how can you see that, Dr. Bligh?

9 A. It's very clear from the fabrication differences that
10 exist, the size and the fabrication details, the insertion
11 of -- of that particular channel into the extruder throat.

12 MR. BROWN: May I have Defendants' Exhibit No.
13 325, please?

14 Q. (By Mr. Brown) Dr. Bligh, is this, in fact, another
15 photograph that has been taken of the May 27, 2005 crash
16 test?

17 A. Yes, sir.

18 Q. And, Dr. Bligh, can you make any sort of conclusions as
19 to whether or not this had a five or four-inch guide channel
20 as you look at this photograph?

21 A. Yes, sir.

22 Q. And what are your conclusions, sir?

23 A. That is a four-inch channel on that head.

24 Q. And tell the jury how you can see that as you look at
25 this photograph.

1 A. Yes. Again, the -- the fabrication differences are very
2 evident. You can see that the channel has to be dropped
3 down and inserted into the -- into the throat, and so you
4 see that insertion. It's not just level across. There's a
5 -- a fillet weld that goes across the edge of the throat
6 plate, the top plate, across the -- the guide channel.

7 Q. Can you make those observations in the same way the jury
8 can look at this and see those observations?

9 A. Yes, sir.

10 Q. I'm pointing to the four-inch guide channel
11 demonstrative that Plaintiffs have in the courtroom, sir.

12 Do you see this?

13 A. Yes, sir.

14 MR. BROWN: Could I see Defendants' Exhibit No.
15 326, please?

16 Q. (By Mr. Brown) Tell the jury what's in this
17 photograph, Dr. Bligh.

18 A. This is showing the test vehicle in contact with the
19 head prior to the test. Again, you can see the impact head
20 and the first post. You can, again, see from the
21 fabrication details the insertion of the guide channel into
22 the throat plate. It's not up level with it, but it's
23 actually dropped down and inserted into it.

24 Q. Can you see both the vertical and lateral reductions
25 that Dr. Ross suggested in his suggestions to Steve Brown in

1 the previous email that we saw?

2 A. Yes, sir.

3 MR. BROWN: Thank you, Mr. Hernandez.

4 Q. (By Mr. Brown) Dr. Bligh, at the conclusion of this
5 crash test, you-all composed a report that you've already
6 been questioned about, correct?

7 A. Yes, sir.

8 Q. In your judgment as an engineer who submits crash test
9 reports to the FHWA for consideration, was it your belief
10 that this particular crash test met the 350 criteria?

11 A. Yes, it is.

12 Q. And how was that demonstrated?

13 A. The -- the -- the data that was collected in the test
14 was analyzed and -- and compared against the criteria that
15 we have in Report 350.

16 Q. Dr. Bligh, you were questioned about splice bolts
17 yesterday, and we talked briefly before our break about rail
18 being bolted together.

19 Do you recall those questions?

20 A. Yes, sir.

21 Q. At some point, do you anticipate with a head-on impact
22 that this particular device is going to potentially pass
23 down a rail splice?

24 A. Yes, sir.

25 Q. And, Dr. Bligh, you've heard questions asked of you

1 about the dimensions of that bolt. Do you remember those?

2 A. Yes, sir.

3 Q. Can you tell the jury what the dimension of that bolt is
4 that splices those two pieces of rail together?

5 A. The length of the bolt is approximately an inch and a
6 half. The width of the bolt is -- is somewhat less than
7 that. Just the head, I think, is about approximately an
8 inch and a quarter.

9 Q. Dr. Bligh, what is your understanding of what the exit
10 gap on a 4-inch guide channel ET-Plus head is?

11 A. It'd be a 1-inch exit gap.

12 Q. Are there any tolerances that are allowed in that, sir?

13 A. We would say that's a 1-inch minimum, so we -- we
14 wouldn't want to see anything smaller than that. Not
15 concerned about something being a little larger.

16 Q. Well, tell this jury, if you would, sir, how does a
17 1-1/2-inch bolt get through a 1-inch exit gap? That's the
18 question of the day, and I'd like for the jury to be
19 explained by you, the engineer involved in the process, how
20 that happened, sir.

21 THE COURT: Well, Mr. Brown, what you'd like to
22 have explained to the jury is improper, and these kind of
23 continued statements, which are of a sidebar nature, are not
24 subject to cross-examination, and they're not proper. And
25 if you continue to make them, I'll be compelled to take some

1 corrective action.

2 MR. BROWN: I apologize, Your Honor.

3 THE COURT: All right.

4 Q. (By Mr. Brown) Dr. Bligh, would you tell the jury,
5 please, how the splice bolt gets through the exit gap?

6 A. Yes, sir. When the -- when the head is impacted by the
7 vehicle, there's -- there's obviously a lot of force being
8 applied. As that rail splice with -- with all of the -- the
9 connected splice bolts begins to go through the -- the
10 extruder throat, there are forces that get generated on
11 those -- on those splice bolts. And they can actually have
12 some reorientation.

13 And what I mean by that is that they can actually move
14 or rotate due to the forces being asserted to them inside
15 the head. And -- and so as those bolts are being able to
16 reorientate -- or re -- reorientate, they combined with the
17 forces in the crash. There's obviously some force that's
18 applied to that. It can just push that bolt out through
19 the -- through the exit gap.

20 Probably -- maybe I can use an analogy. If -- if -- if
21 you're -- about the reorientation process, if you've ever
22 had a large sofa that you're trying to get through a narrow
23 door, it might not fit in one direction, but you can rotate
24 or turn it and you might be able to reorient that and get it
25 through that doorway, and that reorientation combined with

1 the force that's being applied to that bolt is enough to
2 push it through the head.

3 MR. BROWN: May I have Defendants' Exhibit 314?

4 Q. (By Mr. Brown) Dr. Bligh, do you recognize the
5 photograph that's before you?

6 A. Yes, sir.

7 Q. Is this, in fact, a photograph that's taken after the
8 crash test on May 27, 2005?

9 A. Yes, it is.

10 Q. Do you see evidence in this photograph of the splice
11 bolts passing through the exit gap in the ET-Plus extruder
12 head?

13 A. Yes, I do.

14 Q. Would you please tell the jury where that evidence is,
15 sir?

16 A. Yes. You can see -- if you -- if you follow the
17 extruded rail out of the -- out of the throat, you'll see
18 there's a little -- you can see the two laps of rail kind of
19 out to the left-hand side. And so that is the rail lap
20 splice with the eight series of bolts that is used to
21 connect the rails. And that's what passed through the head
22 in this particular crash.

23 Q. Dr. Bligh, do you see any evidence that those splice
24 bolts had any issue in being extruded through that exit gap,
25 based upon what you see here?

1 A. No, sir.

2 MR. BROWN: May I have Defendants' Exhibit 320?

3 Q. (By Mr. Brown) What is this, Dr. Bligh?

4 A. That is another photo of that same crash test, after the
5 test.

6 Q. Is this a photograph of the guardrail on the other side,
7 sir?

8 A. Yes. It's -- it's looking on the other side that --
9 from the previous photo. Yes, sir.

10 Q. Is that the eight-bolt splice pattern you just described
11 to the jury?

12 A. Yes. It is in the upper left-hand corner. That's what
13 that -- what that is.

14 MR. BROWN: May I see Defendants' Exhibit 322,
15 please?

16 Q. (By Mr. Brown) And what is this, Dr. Bligh?

17 A. That is a -- a closeup photograph of that same rail
18 splice.

19 Q. Do you see evidence that those splice bolts made it
20 through the exit gap?

21 A. Yes, sir.

22 MR. BROWN: Defendants' Exhibit 327, please?

23 Q. (By Mr. Brown) And what is this, sir?

24 A. This is, again, an after-test photo of that same test --
25 crash test.

1 Q. And do we see the extruder head, the orientation from --
2 as the vehicle impacts the head? Is that what this view is?

3 A. Yes, sir.

4 Q. Do you see evidence that the splice bolts have passed
5 through the extruder gap or the exit gap in this instance?

6 A. Yes. You can see the rail splice evident in this
7 photograph as well.

8 MR. BROWN: Thank you, Mr. Hernandez.

9 Q. (By Mr. Brown) Dr. Bligh, one of the complaints that Mr.
10 Harman has also made in this case is about the height, the
11 up and down height to the guide channels.

12 Are you familiar with that?

13 A. Yes, sir.

14 Q. From the photographs that you and the jury just looked
15 at, did you see evidence of the fractionally reduced height
16 of the guardrail or the guide channels being inserted into
17 the head itself?

18 A. There was no -- no evidence at all that that affected
19 the extrusion process.

20 Q. Thank you, sir.

21 Now, you testified earlier with Mr. Baxter that when
22 the report was put together in July 2005 that this report
23 was assembled at TTI; is that correct?

24 A. That's correct.

25 MR. BROWN: Could I see Plaintiff's Exhibit No.

1 165, please?

2 Q. (By Mr. Brown) Dr. Bligh, this is a letter addressed to
3 Brian Smith from Gene Buth at Texas Transportation
4 Institute; is that correct?

5 A. Yes, that's correct.

6 Q. And can you tell the jury what the substance of this
7 letter is here?

8 A. This is a transmittal letter of the report and other
9 video and photos that were generated from the testing that
10 was done in May 2005.

11 Q. Is this a statement by Dr. Buth that this report is
12 sufficient to be submitted to the Federal Highway
13 Administration for their consideration of approving this
14 terminal on the national highway system?

15 A. Yes, sir.

16 Q. And contained with this particular report, what else
17 besides the paper copies of the report were transmitted to
18 Trinity?

19 A. Well, there was a -- a CD, which contained the
20 photographs of the tests before and after, and also the
21 video that was recorded of the -- of the actual test.

22 Q. So if Trinity were to have submitted to the Federal
23 Highway Administration all of those things that were covered
24 in this letter, including the video and the photographs,
25 would that have been what TTI expected them to do?

1 A. Yes, sir.

2 Q. Did you-all at TTI have the expectation that Trinity
3 could rely on your crash test report, those videos, and the
4 photographs and submit all of that to the Federal Highway
5 Administration?

6 A. Yes, sir.

7 Q. We've talked a little bit about --

8 MR. BROWN: Thank you, Mr. Hernandez.

9 Q. (By Mr. Brown) We've talked a little bit about the crash
10 test itself, and I'm not going to go through the entire
11 document.

12 Can you tell us generally what sorts of things are in
13 the crash test report?

14 A. Yes. Generally speaking, we would have a description of
15 the test article. We would describe the test conditions, a
16 description of the test itself, what happened during the
17 test, and then draw conclusions about that particular test.

18 Q. In addition to the drawings that you would have in the
19 report itself, would there be any other kind of description
20 on how this particular device was laid out during the crash
21 test?

22 A. Yes. There is some descriptive text in addition to
23 drawings.

24 Q. If we were to look through this crash test report, would
25 we see several drawings of the layout of this test?

1 A. Yes, sir. There's -- there's numerous drawings included
2 in the report.

3 Q. Dr. Bligh, you were asked specifically about a
4 particular drawing that was left out of this crash test
5 report, correct?

6 A. That's correct.

7 Q. Did you all at TTI intentionally leave that drawing out
8 when you sent that report to Trinity and told them it was
9 okay to send it to the Federal Highway Administration?

10 A. We did not.

11 Q. When did TTI first learn that the drawing and -- and the
12 corresponding narrative description were not included in the
13 report, sir?

14 A. It wasn't until much later that matters surfaced
15 regarding allegations about the project -- the product.

16 MR. BROWN: May I see Defendants' Exhibit No. 42,
17 please?

18 Q. (By Mr. Brown) Well, this is an exhibit we've seen
19 before, and I want to look at the top of the page. We saw
20 where Mr. Malizia transmitted the drawing. Do we see
21 receipt of that drawing by TTI?

22 A. Yes, sir.

23 Q. And if you look at the top of the page, do you see an
24 attachment?

25 A. Yes, sir.

1 Q. And what is the attachment, sir?

2 A. The attachment name is -- is Sketch 12.dwg.

3 Q. And do you recognize that file attachment meaning. What
4 does that mean, dwg?

5 A. The dwg extension is an autoCAD extension. That's a --
6 it's a drafting package in which drawings are created.

7 MR. BROWN: Can I see Defendants' Exhibit 40,
8 please?

9 Q. (By Mr. Brown) Do you recognize this particular email,
10 Dr. Bligh?

11 A. Yes, sir.

12 Q. And what is it, sir?

13 A. It's -- it's an email from Dr. Dean Alberson to Dr. Gene
14 Buth that is attaching a PDF of a drawing of a four-inch
15 channel ET head.

16 MR. BROWN: May we see the second page of this?

17 Q. (By Mr. Brown) Dr. Bligh, do you recognize this
18 particular drawing?

19 A. Yes, sir.

20 Q. And is it, in fact, the drawing that Trinity sent to TTI
21 for use in the crash test report?

22 A. Yes, sir.

23 Q. Was this particular drawing ever included in the crash
24 test report?

25 A. No, it was not.

1 Q. Any question that Trinity did not send this to TTI?

2 A. No, sir.

3 Q. In fact, we have it right here and before us, don't we,
4 sir?

5 A. Yes, sir.

6 MR. BROWN: Could we see Defendants' Exhibit 14,
7 please?

8 Q. (By Mr. Brown) If we look at the top of the page, this
9 is an email from Dr. Alberson to a group of people, one of
10 whom's name is Chris Michalec. Do you see that?

11 A. Yes, sir, I do.

12 Q. Do you know who Chris Michalec is?

13 A. Yes. At the time he was a -- a student worker that --
14 that was working for us.

15 Q. And what was he doing?

16 A. His responsibility was to assist with drafting for
17 drawings for crash tests and so forth.

18 Q. Does he still work for TTI?

19 A. No, he does not.

20 Q. And what are the instructions that Dr. Alberson is
21 giving to Chris?

22 A. Well, you can see that it says: Chris, please work on a
23 drawing to reflect the new ET head on the upcoming terminal
24 test.

25 Q. Do you recognize this, Dr. Bligh, as an intent by

1 Dr. Alberson to even have the TTI group draw up its own
2 drawing of the head with a four-inch guide channel?

3 A. Yes, sir.

4 Q. Thank you, sir. This particular drawing is not in the
5 crash test report either, is it, sir?

6 A. No, sir, it's not.

7 Q. Was this drawing intentionally left out of -- out of
8 this particular report, sir?

9 A. No, sir.

10 Q. Dr. Bligh, as you sit here today, did the leaving out of
11 this drawing from the crash test report in any way affect
12 those test results that were reported to the Federal Highway
13 Administration?

14 A. No, it does not.

15 Q. In addition to the drawings that might be included in
16 the crash test report, is there any other evidence of a
17 successful crash testing of an ET-Plus with four-inch guide
18 channels?

19 A. Well, the -- in addition to the report, which has its
20 own test results, there are also photographs and video that
21 are -- that are sent along with that.

22 Q. Dr. Bligh, do you have any personal information as to
23 whether or not the FHWA looked at those particular
24 photographs and/or video in their consideration in
25 determining whether an ET-Plus with four-inch guide channels

1 would be acceptable?

2 A. Yes, I do.

3 Q. And what is that, sir?

4 A. I understand that they did examine and analyze the
5 photographs and video --

6 MR. BAXTER: Excuse me, Your Honor. It's hearsay.

7 MR. BROWN: Your Honor, it's not hear -- I'm
8 sorry.

9 THE COURT: What's your response?

10 MR. BROWN: Yeah, it's not hearsay, Your Honor.
11 The statement's already been made by the declarant -- that'd
12 be Nick Artimovich -- before this jury already.

13 THE COURT: I'll sustain the objection. I find it
14 is within the hearsay rule.

15 MR. BROWN: All right, sir.

16 Q. (By Mr. Brown) As you sit here today, Dr. Bligh, do you
17 have knowledge whether the ET-Plus has been eligible
18 continually since September of 2005?

19 A. Yes, sir.

20 MR. BROWN: May I see Defendants' Exhibit No. 2,
21 please?

22 Q. (By Mr. Brown) Dr. Bligh, have you had an opportunity
23 to examine Defendants' Exhibit No. 2?

24 A. Yes, sir, I have.

25 Q. Did you receive a copy of this, as well, sir?

1 A. Yes, sir.

2 Q. What is your understanding of what this memorandum from
3 the federal government is saying to someone like yourself?

4 MR. BAXTER: Objection, Your Honor. Not qualified
5 to do that.

6 MR. BROWN: Your Honor, I'm asking just his
7 personal knowledge on what the letter means to him.

8 THE COURT: You're asking him to speculate about
9 the meaning of the letter. The letter speaks for itself.
10 The objection is sustained.

11 Q. (By Mr. Brown) Dr. Bligh, in the first paragraph, it
12 says: The Office of Safety has received inquiries from the
13 Federal Highway Administration Division offices and state
14 DOTs regarding the federal aid eligibility of the ET-Plus
15 w-beam guardrail end terminal manufactured by Trinity
16 Highway Products, Trinity. Our September 2nd, 2005 letter,
17 FHWA No. CC 94, to Trinity is still in effect and the
18 ET-Plus w-beam guardrail end terminal became eligible on
19 that date and continues to be eligible for federal-aid
20 reimbursement.

21 Did I read that correctly, sir?

22 A. Yes, sir.

23 MR. BROWN: May I see Defendants' Exhibit No. 37?

24 Q. (By Mr. Brown) Dr. Bligh, do you know who Nick
25 Artimovich is?

1 A. Yes, sir.

2 Q. And who is he, sir?

3 A. He is an employee of the Federal Highway Administration
4 in their Office of Safety.

5 Q. Do you know who Daniel Hinton is?

6 A. No, sir.

7 Q. It has FHWA beside his name. Do you have any reason to
8 believe he's not with the FHWA?

9 A. No, sir.

10 Q. At the bottom of the page, Nick Artimovich says: Dan,
11 here is our response.

12 At the bottom of the page: The ET -- Trinity ET-Plus
13 end terminal with four-inch guide channels is eligible for
14 reimbursement under the Federal-Aid Highway Program under
15 the FHWA Letter CC-94 of September 2, 2005. Did I read that
16 correctly?

17 A. Yes, sir.

18 Q. Thank you. Dr. Bligh, did TTI conduct any other tests
19 on the ET-Plus with four-inch guide channels after 2005?

20 A. Yes, sir.

21 Q. And when did that occur?

22 A. Those tests were conducted in 2010.

23 Q. And you and Mr. Baxter have talked about those; isn't
24 that correct?

25 A. I believe we have, to some extent.

1 Q. In February of 2010, a crash test was done where a car
2 impacted the head at zero degrees. Do you recall that, sir?

3 A. Yes, sir.

4 MR. BROWN: May I see Defendants' Exhibit No. 361?

5 Q. (By Mr. Brown) Dr. Bligh, as you look at this -- this
6 particular videotape, are you able to make conclusions about
7 the extrusion of the rail?

8 A. Yes, sir.

9 Q. Did the rail pass through the extruder head in this
10 particular test?

11 A. Yes, it did.

12 Q. Are you familiar personally with the head that was used
13 in February of 2010?

14 A. Yes, sir.

15 Q. Did that head contain four-inch guide channels?

16 A. Yes, it did.

17 Q. Did it contain a fractional reduction of the height of
18 the vertical clearance?

19 A. Yes, sir.

20 Q. Did it have a three-quarter-inch insertion?

21 A. Yes, sir.

22 Q. Did it have fillet weld, sir?

23 A. Yes, sir.

24 Q. And this particular head, did it have, to your
25 knowledge, sir, an exit gap as you would have intended and

1 expected to see?

2 A. Yes, sir.

3 Q. Did you personally examine this particular head?

4 A. Yes, sir.

5 Q. Now, Dr. Bligh, would you agree with me that this

6 particular head that was tested in February of 2010

7 contained all of those elements, a reduced height, reduced

8 width, a shorter guide channel by three quarters of an inch,

9 an insertion, a fillet weld, and the exit gap?

10 A. Yes, sir.

11 Q. Dr. Bligh, when did you first learn that Mr. Harman was

12 making accusations about the ET-Plus with four-inch guide

13 channels?

14 A. That would have been in January of 2012, I believe.

15 Q. Did you have an opportunity to analyze the information

16 that was given to Nick Artimovich by Mr. Harman?

17 A. Yes.

18 Q. And, sir, did you have an opportunity to look at the

19 various accusations that Mr. Harman was making about this

20 device?

21 A. Yes, I did.

22 Q. And you recall that one of those accusations, sir, was

23 that this particular ET-Plus that was submitted to the

24 Federal Highway Administration had a four-inch guide channel

25 on it, and that was not revealed?

1 A. Yes, sir.

2 Q. Did you do any sort of investigation yourself to
3 determine whether or not that particular ET-Plus that
4 was submitted on May 27, 2005 had 4-inch guide channels
5 attached to the extruder head?

6 A. Yes, sir.

7 MR. BROWN: May I see Defendants' Exhibit No. 291?

8 Q. (By Mr. Brown) Dr. Bligh, can you identify this
9 photograph?

10 A. Yes, sir. That is a photograph that was taken as part
11 of the crash test that was conducted on May 27, 2005.

12 Q. Is this, in fact, a zoom-in or enlargement of one of the
13 photographs the jury has previously seen?

14 A. That's correct.

15 Q. There are numbers on this, Dr. Bligh. Can you relate to
16 the jury what those numbers are?

17 A. Yes, sir. We were trying to select a specific
18 photograph for this purpose so that we could have a
19 reference dimension in the same line or plane that we were
20 trying to measure the guide channel. So that -- that became
21 our reference.

22 So the -- the post that is used in the test is a
23 standard steel section. It's fabricated to tight
24 tolerances. And we know what the length of that -- the
25 width -- the width of that post is, and we were able to use

1 that as a reference then to determine the width of the guide
2 channel.

3 Q. Dr. Bligh, was the scaling that we see on this
4 particular picture done by you or at your direction?

5 A. Yes, sir.

6 Q. And what does the scaling reveal, sir?

7 A. It indicates a 4-inch channel.

8 MR. BROWN: May I see Defendants' Exhibit 286,
9 please? If we could go to the third page.

10 Q. (By Mr. Brown) Dr. Bligh, I will represent to you that
11 this is, in fact, a -- an item that we received in a request
12 that we made to the Federal Highway Administration.

13 Do you see a yellow highlight at the bottom right-hand
14 corner?

15 A. Yes, sir, I do.

16 Q. That says FHWA 008603. Did I read that correctly?

17 A. That's correct.

18 Q. The writing that's done on the -- the right-hand side --

19 MR. BROWN: Is there any way to reorient that, Mr.
20 Hernandez?

21 Thank you.

22 Q. (By Mr. Brown) This particular writing on here that says
23 TTI photos of the May 27, 2005 crash test, is that your
24 handwriting, sir?

25 A. No, sir.

1 Q. Is this, in fact, the same photograph that you sent
2 to --

3 MR. BAXTER: And I object to it. He can't
4 identify it. I object to him asking any questions about it.

5 MR. BROWN: Your Honor, I'm sorry.

6 THE COURT: Mr. Brown, you may question the
7 witness about the photograph but not the handwriting.

8 MR. BROWN: All right.

9 THE COURT: There's no identity of where it comes
10 from or whose it is.

11 MR. BROWN: Thank you, Your Honor.

12 THE COURT: And it's certainly not the witness',
13 so let's continue.

14 MR. BROWN: Thank you.

15 Q. (By Mr. Brown) Dr. Bligh, is this, in fact, a copy of
16 the photograph that you did the scaling on?

17 A. Yes, sir.

18 Q. Thank you, sir.

19 MR. BROWN: Thank you, Mr. Hernandez.

20 Q. (By Mr. Brown) You've heard Mr. Baxter describe to you a
21 -- a secret Valentine's meeting that occurred in 2012. Did
22 you hear that?

23 A. I don't know if I recall that term or not.

24 Q. Did you meet with Mr. Artimovich or anyone else
25 regarding the ET-Plus on February the 14th, 2012?

1 A. Yes, sir.

2 Q. And how did that come to pass, sir?

3 A. Well, again, there were allegations raised about the
4 ET-Plus' performance, various aspects of its design. We
5 reviewed that, and -- and there was a request for a meeting
6 with Mr. Artimovich to discuss that with him.

7 Q. Do you recall the circumstances of that meeting, what
8 was going on at that time?

9 A. Well, there was an industry meeting that was taking
10 place that we were all in attendance at, and so we took that
11 opportunity to be able to have a face-to-face meeting to
12 discuss the matter.

13 Q. Would it have been normal and typical for Mr. Artimovich
14 to be at that meeting?

15 A. Yes, sir.

16 Q. Would it be normal and typical for you to be at that
17 meeting?

18 A. Yes.

19 Q. And how about with Trinity representatives such as Brian
20 Smith, Barry Stephens, would that have been typically for
21 them to be there?

22 A. Yes, it is.

23 Q. Where did you-all actually meet with Mr. Artimovich, Dr.
24 Bligh?

25 A. It was at a hotel in the hotel meeting room.

1 Q. Was it done far away from the crowd?

2 A. No. It was just a -- a typical meeting room at -- at a
3 hotel.

4 Q. Like a ballroom/meeting room-type facility?

5 A. Right, just a just a meeting reference, conference room.

6 Q. Did you-all lock the doors when you went in there?

7 A. No, sir.

8 Q. And who all was in the meeting, sir?

9 A. That would be myself and Mr. Artimovich, Mr. Brian
10 Smith, Mr. Barry Stephens, Mr. Greg Mitchell.

11 Q. And tell us, if you will, Dr. Bligh, what was your role
12 at that meeting? What did you do?

13 A. I was there to help address technical issues related to
14 the design and performance of the system, to answer any
15 questions that Mr. Artimovich had, try and discuss with him
16 some of the various allegations that were being made.

17 Q. Did you provide Mr. Artimovich with any materials at
18 this meeting, Dr. Bligh?

19 A. Yes, I did.

20 Q. And what did you supply him with?

21 A. It was the scaled photograph that we just saw just a
22 moment ago.

23 Q. All right. Did you answer any other particular
24 questions from Mr. Artimovich at this meeting?

25 A. Well, it was an open discussion. There were many

1 questions that were asked and -- and we addressed all of
2 those questions.

3 Q. Did you-all have an opportunity to go through the
4 various allegations that Mr. Harman was making with regard
5 to the ET-Plus?

6 A. Yes, sir.

7 Q. And did you-all discuss those with Mr. Artimovich?

8 A. Yes, we did.

9 Q. Did you discuss them fully?

10 A. Yes, we did.

11 Q. Did you review the materials that Mr. Harman had given
12 to Mr. Artimovich?

13 A. Yes, we did.

14 Q. There was an accusation made in the information given to
15 Mr. Artimovich that these heads were failing. Do you recall
16 that, sir?

17 A. Yes.

18 Q. Did you look at examples of what he believed were failed
19 heads?

20 A. Yes.

21 Q. And did you and Mr. Artimovich have an opportunity to
22 discuss that?

23 A. We did.

24 Q. Were any conclusions reached as you reviewed those
25 photographs, Dr. Bligh?

1 A. Yes.

2 Q. And what were those?

3 A. Well, I noted that in --

4 MR. BAXTER: Objection. Objection, Your Honor.
5 It's all hearsay.

6 THE COURT: Sustained.

7 Q. (By Mr. Brown) Did you personally see, Dr. Bligh, in
8 those photographs any examples of failed heads?

9 A. No, sir.

10 Q. What did you personally see, Dr. Bligh?

11 A. I saw many instances of what I would classify as a -- as
12 a gated terminal where a terminal had been hit and
13 subsequently rotated out of the path of the vehicle.

14 Q. How did that meeting conclude, Dr. Bligh?

15 A. I think that Mr. Artimovich was satisfied with -- with
16 our discussion. He asked for a little follow-up from the
17 meeting, which we provided.

18 Q. Were you asked to provide anything to him as a
19 follow-up?

20 A. Yes, sir.

21 MR. BROWN: May I see Defendants' Exhibit 161?

22 Q. (By Mr. Brown) At the top of the page --

23 MR. BROWN: Well, let's go to the bottom first.

24 Q. (By Mr. Brown) Do you recognize this as an email that
25 was sent by Mr. Artimovich to you and Mr. Brian Smith?

1 A. Yes, sir.

2 Q. In this email, he thanks you for the time meeting on the
3 14th in Tampa. Did I read that correctly?

4 A. Yes, sir.

5 Q. It says: As a follow-on, I would like to ask for two
6 favors. One, Brian, would you please send me the package of
7 crash tests and other information we reviewed that morning.

8 Did I read that correctly?

9 A. Yes, sir.

10 Q. And No. 2 says: Roger, would you please confirm that
11 the feeder rails on the ET-Plus head tested in 2005 and
12 included in our FHWA letter CC-94, dated September 2, 2005,
13 were 4 inches wide rather than the original 5-inch-wide
14 rails.

15 Excuse me. Did I read that correctly?

16 A. Yes, sir.

17 Q. And did you respond, Dr. Bligh?

18 A. Yes, I did.

19 MR. BROWN: If we could move up the page, please.

20 Q. (By Mr. Brown) Is this your response, sir?

21 A. Yes, it is.

22 Q. And what did you do here?

23 A. I wrote an email response to Mr. Artimovich that
24 confirmed that the guide channels used in that particular
25 test were 4 inches wide. And I, once again, apologized for

1 that omission and any trouble that it might have caused.

2 Q. At that meeting or any time after that meeting, has Mr.
3 Artimovich or anyone from the Federal Highway Administration
4 asked you for the drawing that this jury has previously
5 seen?

6 A. No, sir.

7 Q. Would you have sent it to them, if they had asked, Dr.
8 Bligh?

9 A. Yes, sir.

10 Q. Dr. Bligh, the -- the ET-Plus that's on the roadway
11 today, the ET-Plus system that's installed tangentially to
12 the roadway, is that substantially the same ET-Plus system
13 that you-all crash-tested on May 27th, 2005?

14 A. Yes, sir, it is.

15 MR. BROWN: May I see Defendants' Exhibit No. 10,
16 please, Page 4?

17 If we go to the top of the page that says -- thank
18 you.

19 Q. (By Mr. Brown) If we look in the middle where it says
20 FHWA may revoke, do you see that?

21 A. Yes, sir.

22 Q. All right. It says: The FHWA may also revoke an
23 acceptance, if a device is promoted as acceptable under
24 conditions that are significantly divergent from the test
25 conditions. Any deliberate misrepresentation or withholding

1 of the conscience of the FHWA's acceptance of the feature by
2 the supplier of a feature will be cause for withdrawal of
3 acceptance.

4 Dr. Bligh, to this date, has the Federal Highway
5 Administration withdrawn the acceptance of the ET-Plus as
6 crash-tested on May 27, 2005?

7 A. No, sir.

8 MR. BROWN: Thank you, Mr. Hernandez.

9 Q. (By Mr. Brown) Dr. Bligh, are you a family man?

10 A. Yes, sir, I am.

11 Q. Do you have a wife and children?

12 A. Yes, I do.

13 Q. Does your wife drive on the highways?

14 A. Yes, she does.

15 Q. Are your children old enough to drive yet?

16 A. No, not yet.

17 Q. Dr. Bligh, as you sit here today, do you have any
18 concern whatsoever for your wife and your children, when
19 they become eligible, of driving on a highway with an
20 ET-Plus with 4-inch guide channels on the highway?

21 A. No, sir.

22 Q. Dr. Bligh, if you believe that to be a dangerous
23 product, would you allow it to remain on the highways?

24 A. No, sir.

25 Q. Very serious allegations have been made in this case

1 against you and the folks down at Texas A&M, Dr. Bligh, and
2 that's that you intentionally lied to the Federal
3 Government.

4 Dr. Bligh, I want you to turn to this jury, and I want
5 you to tell them, did you intentionally lie to the Federal
6 Highway Administration in any way about this product?

7 A. I absolutely did not.

8 MR. BROWN: Thank you, Your Honor. Pass the
9 witness.

10 THE COURT: Redirect?

11 MR. BAXTER: Thank you, Your Honor.

12 REDIRECT EXAMINATION

13 BY MR. BAXTER:

14 Q. Dr. Bligh, I need to find out now, sir, if I need to
15 apologize, because I heard you tell your lawyer that you had
16 a conversation on -- with the FHWA back in March of 2005
17 where y'all discussed the critical test.

18 Do you remember that?

19 A. Yes, sir.

20 Q. And you want the jury to believe that you got on the
21 phone with the FHWA and said we're considering doing these
22 tests, and we want to discuss with you the critical test.

23 Is that what you did?

24 A. Yes, sir.

25 Q. Okay. And so that's the conversation where you told

1 them, oh, and by the way, it's not just the height of the
2 guardrail; it's a new head.

3 So I need to apologize, because apparently you had told
4 them at that conversation, didn't you?

5 A. No, sir, not at that particular point. That was not --
6 that was not a decision that had even been made at that
7 time.

8 Q. Well, how in the world could the FHWA and you decide
9 what the critical test is, if you don't tell them what
10 you're testing?

11 A. Because we did tell them what we were testing in terms
12 of the system.

13 Q. Well, what you told them was you were going to use the
14 standard ET-Plus head and a 31-inch height, didn't you?

15 A. I don't know that that was what was discussed. We were
16 discussing the various installation details of the 31-inch
17 system.

18 Q. Did you tell them you were going to use a new head, a
19 new prototype head that had been changed?

20 A. No, sir. It was not known at that time.

21 Q. Well, let me ask you again. How could the FHWA weigh in
22 on what the critical test is, if they didn't know what you
23 were testing?

24 A. I believe they knew what we were testing sufficiently to
25 be able to help us make that determination.

1 Q. Oh, they -- they somehow divined you were going to use
2 this new prototype head?

3 A. It was of the aspects of the system that dictated what
4 the critical test was.

5 Q. Because the critical test was trying to see if a little
6 car would go under the 31-inch height, wasn't it?

7 A. That was -- yes, that was one of the objectives.

8 Q. Well, there was no other objective really, was there?
9 That was it?

10 A. Well, that -- that test has other aspects to it that you
11 do evaluate, sir. Yes.

12 Q. Okay. But you never told them that you were going to
13 use a new head, did you?

14 A. We did not have that discussion with them at that time.

15 Q. Well, that time. You didn't ever have it at any time,
16 did you, until 2012, right?

17 A. That's correct.

18 Q. Okay. So you don't want the jury to be misled that you
19 consulted with the FHWA about the critical test for May of
20 2005, because you didn't tell them what you were testing,
21 did you?

22 A. We told them at the time what we were testing, sir.
23 Yes.

24 Q. But it wasn't a new prototype head; is that right,
25 Doctor?

1 A. We did not know at the time that that 4 --

2 Q. Is that a yes or no?

3 A. I'm sorry?

4 Q. Is it a yes or no?

5 A. I'm sorry, sir. Could you please reask your question?

6 Q. Yes. You did not at that time tell them you were
7 testing a new head, did you?

8 A. No, sir.

9 Q. All right. Now, I believe they asked you about the
10 extruder head and who invented that. That actually was
11 Dr. Dean Sicking that investigated that, didn't he. You
12 didn't do it.

13 A. No, sir. There was a team of inventors, research
14 engineers at TTI that developed that product.

15 Q. Patented by Dr. Sicking, was it not?

16 A. No, sir, I wouldn't say that.

17 Q. Well, you weren't on the -- the patent, were you?

18 A. No, I was not.

19 Q. All right. Dr. Sicking is?

20 A. Yes, he is.

21 Q. Okay. Now, did I understand that you didn't have a
22 single document or a single complaint about the ET-Plus
23 before you changed it?

24 A. No, we did not.

25 Q. Okay. But you decided to change it anyway?

1 A. Yes. That's what we do as researchers.

2 Q. Now, I heard you tell your lawyer that this testing
3 program is a long and arduous process; is that right?

4 A. Yes, it can be.

5 Q. You got the prototype head on May the 12th. You tested
6 it on May the 27th, and you wrote a report in July approving
7 it, right?

8 A. Yes.

9 Q. And that was the long and arduous process to approve the
10 changes for the ET-Plus?

11 A. That was discussing about a product development. I
12 don't consider that to be a new product.

13 Q. Oh, well, it was a new, improved product and you changed
14 it?

15 A. No, I wouldn't say it's a new product.

16 Q. No?

17 A. It's the same product that has an enhancement or an
18 improvement to it.

19 Q. And when you got the email about can we lop off
20 three-quarters of an inch, that went out at 8:37, a reply
21 from Dr. Buth at 9:03; Alberson at 9:05; and you at 10:50.
22 Is that sort of the careful analysis you did on the
23 three-quarter-inch change?

24 A. Sir, that's an indication of the absolutely certainty in
25 our minds of the acceptability of the change.

1 Q. Well, I don't doubt that you have certainty, Dr. Bligh.
2 I'm just asking you if that's the careful consideration that
3 you folks down at TTI gave it. You gave it all of two hours
4 and no test, right?

5 A. That's because of the certainty -- yes, because --

6 Q. Is that right, sir?

7 A. -- of the certainty that was placed on that particular
8 change.

9 Q. The answer is, yes, we gave it almost two hours to
10 consider, right?

11 A. We gave it sufficient time to consider it.

12 Q. Okay.

13 A. And -- and I replied accordingly.

14 Q. Okay. Now --

15 THE COURT: Let me make it clear again. I want
16 the witness to have the opportunity to finish his answers,
17 and if Counsel believes the witness is non-responsive, he
18 should raise it with the Court, not with the witness
19 directly.

20 MR. BAXTER: Thank you, Your Honor.

21 THE COURT: Let's continue.

22 Q. (By Mr. Baxter) Now, I want to ask you, please,
23 Dr. Bligh, if on the 2010 test, neither one of those tests
24 were 350-compliant tests, were they?

25 A. No, I wouldn't say that.

1 Q. Well, you couldn't have submitted those and told the
2 FHWA they were compliant to 350, could you?

3 A. Yes, we could.

4 Q. Well, on the second test, the car was going, what, 42
5 miles an hour?

6 A. I -- I don't recall the exact speed, but it was -- it
7 was what we call a Test Level 2 impact. So it was designed
8 to be tested at a lower speed. There's different test
9 levels in Report 350.

10 Q. And it wasn't Test Level 3, which is what you had done
11 originally, right? It's going 42 miles an hour?

12 A. Yes, that's --

13 Q. Is that right?

14 A. Well, I don't remember -- recall the exact speed.

15 Q. Okay.

16 A. There is a nominal need, a target speed for that
17 particular test. Yes.

18 Q. And the head for the first test, you destroyed, right?
19 No one's ever seen it again?

20 A. We don't destroy any -- anything, sir.

21 Q. Oh, I'm sorry. What?

22 A. We don't -- we didn't destroy the head.

23 Q. You've still got it?

24 A. No, sir.

25 Q. You've still got the test from 2005?

- 1 A. No, sir.
- 2 Q. Did you throw them away?
- 3 A. Well, our policy is to --
- 4 Q. Did you throw them away, sir?
- 5 A. No, sir.
- 6 Q. Did you put them on the scrap heap?
- 7 A. Yes, we did.
- 8 Q. Were they destroyed?
- 9 A. We sold them for scrap per our policy.
- 10 Q. And destroyed?
- 11 A. I don't know what happened to them, sir.
- 12 Q. You don't have them, do you? We can't look at them.
- 13 This jury can't look at them today, can they? Either one of
- 14 those tests, can they?
- 15 A. No, sir. As I said, they were sold for scrap.
- 16 Q. Now, did I understand you to tell your lawyer that it
- 17 was simply a way to orient this bolt so it'd go through this
- 18 narrow gap? It was just I dropped it wrong? It was all the
- 19 orientation of the bolt? Did I understand that?
- 20 A. No, sir.
- 21 Q. Well, he was talking to you about orientation, and you
- 22 said orientation. Can you tell me how to orient this bolt
- 23 so it will go through this narrow gap?
- 24 A. Sir, what I testified to --
- 25 Q. Sir, can you do that?

1 A. I've never tried to do that, sir.

2 Q. Well, can you tell me how to do it? If it's just a
3 matter of orientation, can you tell me how to orient so I
4 can drop it right and it will slide right on through?

5 A. I didn't say it was just a matter of orientation, sir.

6 THE COURT: Dr. Bligh, can you tell him or can you
7 not tell him?

8 THE WITNESS: Oh, I'm sorry.

9 THE COURT: If you can't tell him, say you can't
10 tell him, but answer the questions as asked.

11 THE WITNESS: My apologies, Your Honor.

12 Q. (By Mr. Baxter) Can you tell me?

13 A. No, sir.

14 Q. It's never going through, is it, if I drop it?

15 A. I don't agree. Well, I -- you said if you drop it. I
16 -- I don't know. I've never done that.

17 Q. Okay. Now, when you decided to do the flare test,
18 Doctor, there was a series of emails about the critical test
19 you were going to perform on the flare, was it not?

20 A. Yes, sir.

21 MR. BAXTER: Can I have PX 185, Mr. Diaz, and go
22 to the end of that -- of that chain? And this is from -- go
23 -- go back just a little bit so I can pick up who Mr.
24 Bullard is. No, no, go -- go back to where you were, Mr.
25 Diaz, the very last -- the very first email chain, I just

1 want to pick the bottom up. That's it.

2 Q. (By Mr. Baxter) And this is an email from Lance Bullard
3 down at your place, right?

4 A. Yes, sir.

5 Q. And he says: Following up on our phone conversation
6 about the ET terminal on the straight flare, per our
7 discussion, TTI desires to obtain Report 350 acceptance for
8 rail mounting at heights above 27 5/8 and 31 inches for the
9 terminal flare. I believe during our conversation you
10 agreed that we should proceed to test the 820C. That's the
11 small car, right?

12 A. That's correct.

13 Q. Head-on at the quarter point in the 2000P redirect
14 test -- that's with a pickup truck, but not hitting the
15 head -- mounted at 31 inch with the belief that it should
16 also work good for the 20 (sic). After successful conduct
17 of these two tests, we'll discuss with you if any additional
18 testing will be required.

19 And did -- did FHWA approve that test protocol?

20 A. They had some revision to it, sir.

21 Q. Well, tell the jury what the revision was.

22 A. They agreed with the small car test, the test on the end
23 of the terminal. They told us that the pickup truck
24 redirection test was not necessary, and they recommended
25 that we run a pickup truck end-on test as part of that

1 development process.

2 Q. They said do the 3-31?

3 A. Yes, sir, as one of the tests.

4 Q. Okay. And here is what they actually said.

5 MR. BAXTER: If I can go up in that email to

6 Mr. Dick Powers on February the 1st, 2006, at 9:43?

7 Q. (By Mr. Baxter) Do you see that, sir?

8 MR. BAXTER: Go to the -- go to the one that

9 starts out at 9:43.

10 Q. (By Mr. Baxter) This is from Mr. Powers. Who is that?

11 A. Mr. Powers was an employee of the Federal Highway

12 Administration in the Office of Safety at the time.

13 Q. And he's Mr. Artimovich's boss?

14 A. No, I wouldn't say that.

15 Q. Well, certainly Mr. Artimovich is reporting to him, and
16 he's contradicting what he says, doesn't he? You know that.

17 A. No, sir.

18 Q. Okay. It says the FLEAT is the only significantly
19 flared energy -- energy-absorbing terminals that have been
20 tested head-on with a pickup truck. You agree with that?

21 A. Yes, sir. I see it there.

22 Q. The FLEAT is not a Trinity product, is it?

23 A. No, sir.

24 Q. Since I have made a big deal about the different sized
25 runout areas behind energy-absorbing versus non-energy

1 absorbing terminals, I believe the 3-31 with the flared ET
2 should be run. Do you see that?

3 A. Yes, I do.

4 Q. The ET is, I believe, quite a bit heavier than the FLEAT
5 and larger, and the FLEAT head-on resulted in the pickup
6 truck spinning out. I don't see the 3-31 being a guinea.
7 Maybe three tests should be run, the 30, the 31, and the 35.
8 But I would be willing to waive the 3-35 based on the FLEAT
9 test. The anchorages are about the same on both the ET and
10 the FLEAT.

11 And so they told you --

12 MR. BAXTER: And if I can go up to the next
13 email -- the one that says -- the very last one, Mr. Diaz.

14 Q. (By Mr. Baxter) And it says: Dick is probably right
15 about the 3-35. And this is from Lance Bullard, right? TI
16 will proceed with running the 3-30 and 3-31 at the 31-inch
17 height with the intention of asking you to accept it are for
18 the 257 (sic) mounting height. Let me know if I interpret
19 everything correctly. Have a great weekend.

20 So TTI committed to running the 3-31 test, didn't they?

21 A. Yes, sir.

22 Q. And did you?

23 A. No, sir. We never got to that point.

24 Q. You didn't ever run it?

25 A. We never got to that point in the development --

1 Q. Did you ever run it, sir?

2 A. No, sir.

3 Q. Okay. And that's because it kept failing with the
4 little car?

5 A. That's correct.

6 Q. Now, before you even ran any test at all, you entered
7 into agreement with Trinity about you were going to have two
8 tests, did you not, just two; isn't that right?

9 A. Yes, sir.

10 Q. Okay.

11 MR. BAXTER: If I can see PX 1106, Mr. Diaz?

12 Q. (By Mr. Baxter) And this is an email from Mr. --
13 Dr. Buth to Mr. Smith over at TI, and it says: Brian, the
14 current agreement between Trinity and TTI for the
15 development of the straight flared ET terminal includes two
16 crash tests. Right? You were just going to do two?

17 A. Yes, sir.

18 Q. End up doing five because you couldn't get it to work,
19 could you?

20 A. That's correct, sir.

21 Q. And the total budget is \$67,500. The budget is shared
22 50/50 by Trinity and TTI, 33,750 each. Can you tell me why
23 the taxpayers of the state of Texas were subsidizing Trinity
24 to run these tests?

25 A. It's a TTI technology, sir.

1 Q. No, sir. Let me ask it to you again. Can you tell me
2 why the taxpayers of Texas were subsidizing Trinity Industry
3 to run tests for a product they wanted to put out into the
4 field?

5 A. I don't feel that's what happened, sir.

6 Q. Were you splitting the cost?

7 A. Yes, sir.

8 Q. Was Trinity short of money and they couldn't pay for all
9 the tests? Why didn't you make them pay for the tests?

10 A. This was the agreement that we had.

11 Q. Why didn't TTI make Trinity pay for its own test? Why
12 are the taxpayers picking up for half of it?

13 A. It's a TTI design and technology and patent, sir.

14 Q. It's for a customer, is it not? It's for Trinity to put
15 it out on the roads; isn't that right? Isn't that what they
16 wanted it for, to sell more heads and make more money?

17 A. It's to develop a new product, sir.

18 Q. Was that not their purpose, they wanted to put it out on
19 the highways and sell more heads?

20 A. Yes, sir. If we can get a product out there that's
21 successful, then --

22 Q. And you guys picked up half the tab. Did you ever get
23 that money back?

24 A. I don't know, sir.

25 Q. Okay. And it says we performed two tests and have

1 expended the money. As you know, further testing is needed
2 and planned. Right?

3 A. Yes, sir.

4 Q. But the plan wasn't to use the critical 3-31 test. It
5 was to use the little car. And that's what you did, and it
6 flunked all five times, didn't it?

7 A. Yes. It did not pass the small car test which we
8 considered to be the critical test.

9 Q. Okay. And you've never considered to be -- the 3-31 the
10 critical test even though the Federal Highway Administration
11 told you to run it; isn't that right?

12 A. No. It was not the critical test for this
13 configuration.

14 Q. Did they not tell you to run it --

15 THE COURT: Gentlemen, we're going to do this one
16 at a time or I'm going to take steps to make sure it's one
17 at a time.

18 MR. BAXTER: Excuse me, Your Honor.

19 THE COURT: Ask your question, Counsel.

20 Q. (By Mr. Baxter) Did they not tell you the 3-31 wasn't a
21 guinea and that was the critical test to run?

22 A. No, they did not say that, sir.

23 Q. Okay. I read that email wrong while ago?

24 A. No. You -- you qualified your question, sir, with a
25 statement that was inaccurate.

1 Q. All right. Now, Dr. Buth -- Dr. Bligh, excuse me, my
2 understanding is --

3 MR. BAXTER: And if I can have up 886-1, Mr. Diaz?

4 Q. (By Mr. Baxter) If I understand it right, when you
5 talked to Mr. Artimovich, he gave you all the information
6 and more from Mr. Harman, including about all these wrecks
7 on the highways, right? Did you get that?

8 A. There were a number of photographs included in that,
9 sir, yes.

10 Q. Did you conduct any investigation of those wrecks?

11 A. No, sir.

12 Q. Okay. So if I understand it, prior to 2005, you had
13 none of the kind of wrecks you see here on Exhibit 886, and
14 you had no complaints from customers or DOTs is -- about the
15 original ET-Plus head; is that right?

16 A. Yes. There was nothing brought to my attention.

17 Q. And the thing that changed was you modified it and made
18 it this one with all sorts of changes and you put it out on
19 the highways and you started getting results like 886 with
20 that result, did you not?

21 A. No, I wouldn't say that, sir.

22 Q. Well, you know that's with an ET-Plus head, don't you?
23 And you know there's hundreds of them all over the country,
24 don't you?

25 A. Yes, sir.

1 Q. Okay. And the thing that's different is it worked
2 before, and you didn't get this result, and you changed
3 it, and now you get this result, right?

4 A. No, sir. I would not say that.

5 Q. Well, are you getting this result right now every day?

6 A. No, sir, not that I'm aware of.

7 Q. You know there are hundreds of them all over the
8 country, don't you, Dr. Bligh?

9 A. Yes, sir.

10 Q. And you didn't have it before, did you? You didn't have
11 it until you changed the head, did you?

12 A. No, sir, I wouldn't say that.

13 Q. Safety is still your paramount concern, Dr. Bligh?

14 A. It absolutely is.

15 Q. Thank you, sir. I appreciate it.

16 MR. BAXTER: That's all I have, Your Honor.

17 THE COURT: Further cross, Mr. Brown?

18 MR. BROWN: Briefly, Your Honor.

19 May I proceed, Judge?

20 THE COURT: You may.

21 RECROSS-EXAMINATION

22 BY MR. BROWN:

23 Q. Dr. Bligh, do you have any idea what the road conditions
24 were like when this particular accident occurred that was
25 depicted in this particular photograph?

1 A. No, sir. I do not.

2 Q. Do you know the angle in which this vehicle impacted
3 whatever system this was?

4 A. No, I do not.

5 Q. Do you know the speed that the vehicle impacted it with?

6 A. No.

7 Q. Do you know whether the particular vehicle was tracking
8 or not, sir?

9 A. No, sir.

10 Q. Do you know the soil conditions?

11 A. No, sir.

12 Q. Do you know the installation of this particular product?

13 A. No, sir.

14 Q. Basically, all we have here is a photograph. Would you
15 agree with that, Dr. Bligh?

16 A. That's correct.

17 Q. Are there many important facts that we need to look at
18 to consider, before we make a statement that this somehow is
19 an example of a failed ET-Plus product?

20 A. Yes, there is.

21 Q. Thank you, sir.

22 Now, Dr. Bligh, you were shown several emails of an
23 exchange between Dick Powers and Nick Artimovich of the FHWA
24 and TTI, correct?

25 A. Yes, sir.

1 Q. Would you agree with me, sir, that this indicates that
2 FHWA absolutely knew that TTI was doing the -- the flared ET
3 experimentation?

4 A. Yes, sir.

5 Q. You were suggested that if you continued with your
6 research and development that the 3-31 test would have been
7 run; is that right?

8 A. That's correct.

9 Q. If you had got a successful in-criteria crash test of a
10 small car with a flared ET, would you have proceeded and
11 done a 3-31 test?

12 A. Yes, we would have.

13 Q. And the reason you would have is because the Federal
14 Highway Administration said to do it; isn't that right?

15 A. That's correct.

16 Q. So any representation that you-all affirmatively just
17 decided not to run the test would be inaccurate, wouldn't
18 it, sir?

19 A. Yes, it would.

20 Q. What happened, in fact, sir, is you-all did your
21 experimentation. You determined that the small car itself
22 couldn't pass a flared configuration of the system, and you
23 knew that a flared system couldn't be commercialized, isn't
24 that right?

25 A. Yes.

1 Q. So there was no sense to give it to the FHWA. Wouldn't
2 that be a fair statement?

3 A. Yes, that's correct.

4 Q. All right. I believe you told Mr. Baxter you-all were
5 trying to develop a new product; is that right?

6 A. Yes.

7 Q. Because the FLEAT was the only flared product at that
8 time, correct, sir?

9 A. That's correct.

10 Q. There was no application in the field of another
11 extruding terminal that was anything other than tangent. Is
12 that a fair statement?

13 A. Yes, that's correct.

14 Q. The ET-Plus system has been and is today only a tangent
15 system. Is that a fair statement?

16 A. That's correct.

17 Q. All right. When you-all -- and you were asked questions
18 about talking to FHWA about the kind of test you were going
19 to run in May 27, 2005, in making a decision what to do in
20 that particular test, did you exercise the good engineering
21 judgment that 350 requires you to exercise?

22 A. Yes, we did.

23 Q. All right, sir. Now, there's been a representation made
24 in this case that when the ET-Plus is impacted with the
25 4-inch guide channels, that it somehow falls all apart.

1 Sir, you saw and this jury saw the impact that was done
2 in February of 2010. Did we see an ET-Plus head fall apart?

3 A. No, sir.

4 Q. Did we see an ET-Plus head fall apart on May 27, 2005,
5 when it was impacted?

6 A. No, sir.

7 Q. What did we see, Dr. Bligh?

8 A. We saw a test that met the NCHRP Report 350 criteria.

9 Q. And we saw rail extruding through that hit, didn't we,
10 Dr. Bligh?

11 A. Yes.

12 Q. Now, an allegation -- a statement was made that you-all
13 somehow destroyed the heads. Did TTI, Texas A&M,
14 intentionally somehow destroy a head in this particular
15 case?

16 A. No, sir.

17 Q. I believe you had testified that there was a procedure
18 that you-all used.

19 A. That's --

20 Q. Go ahead.

21 A. That's correct.

22 Q. Do you-all do a lot of crash tests out there?

23 A. Yes, we do.

24 Q. And do you consistently and uniformly with the debris
25 that's created by a crash test put it on a scrap heap and

1 sell it for scrap?

2 A. Yes, we do.

3 Q. Was this particular head that was done in February
4 2010 treated any differently than the other scraps that
5 you all have from other debris of crash tests?

6 A. No, it was not.

7 Q. All right. Now, one of the things Mr. Baxter said to
8 you is they didn't have the benefit of the drawing at the
9 FHWA of the May 27 crash test. What they did have, Dr.
10 Bligh, is they had video and they had photographs of that
11 crash test, correct?

12 A. Yes.

13 Q. And so even though they didn't have a head to inspect,
14 the one thing for sure and certain they had was a videotape
15 of that head performing when impacted by a car, just like
16 the Ladies and Gentlemen of this Jury saw, didn't they, sir?

17 A. Yes, sir.

18 Q. You were asked about these bolts, and -- and I don't
19 mean this facetiously, sir, but you all aren't at TTI
20 throwing bolts through a head out there, are you, sir?

21 A. No, sir.

22 Q. You all are running crash tests, aren't you?

23 A. Yes.

24 Q. You're splicing together rail and gaging whether that
25 rail, when impacted by a vehicle, will pass those splice

1 bolts through that extruder head; isn't that right?

2 A. That's correct.

3 Q. Have you explained to the Ladies and Gentlemen of the
4 Jury how it is that a one-half inch splice bolt passes
5 through that one-inch exit gap on this head?

6 A. Yes, I have.

7 Q. Have you explained to them that it's forces of the
8 impact, it's the flattening of the rail, it's the bolt going
9 through the system that causes it to pass through?

10 A. Yes. All aspects of that -- of that phenomenon.

11 Q. It's not just a force of throwing a bolt in a head, is
12 it, sir?

13 A. No, sir.

14 MR. BROWN: All right. That's all I have. Pass
15 the witness, Judge.

16 THE COURT: Additional direct?

17 MR. BAXTER: Yes, Your Honor.

18 REDIRECT EXAMINATION

19 BY MR. BAXTER:

20 Q. So since the FHWA knew about the five flared tests, you
21 must have told them that you had failures, right? Wouldn't
22 you think they'd want to know about that?

23 A. No, sir.

24 Q. Okay. When you went to see Mr. Artimovich, could you
25 have loaded up those five little tests like Mr. Diaz does on

1 his laptop back there and taken your laptop with you and,
2 said, and by the way, Mr. Artimovich, you need to see this,
3 click? Did you do that?

4 A. No, sir, did not.

5 Q. Could you have done it? Could you have done it, Doctor?

6 A. I could have. I didn't feel it necessary.

7 Q. Okay.

8 MR. BAXTER: Could I see 886-1 back up on the
9 screen for just a second, Mr. Diaz?

10 Q. (By Mr. Baxter) Now, you and your lawyers have said,
11 well, I don't know what the conditions were; isn't that
12 right? So maybe it's not our fault. Isn't that what you
13 said?

14 A. No, sir.

15 Q. Well, I feel sure after you saw all these hundreds of
16 accidents, that somebody at your place got concerned and
17 started looking into the accidents to see if it was soil
18 conditions or weather conditions or tracking conditions or
19 some other condition, didn't you? Didn't you -- at least
20 concerned enough to go look into it?

21 A. We -- we have not done that, no, sir.

22 Q. You saw these pictures and you went, way it goes?

23 A. No, sir, I wouldn't say that.

24 Q. Well, did you do an investigation to see if maybe there
25 was a safety concern that you ought to look into?

1 A. We -- we analyze -- sir, we analyze --

2 Q. Did you?

3 A. Could you re-ask the question, sir?

4 Q. Did you do an investigation of these accidents to see if
5 there might be a safety concern?

6 A. No, sir.

7 MR. BAXTER: That's all I have, Doctor.

8 THE COURT: Additional cross?

9 MR. BROWN: Very briefly, Judge.

10 RECROSS-EXAMINATION

11 BY MR. BROWN:

12 Q. What you have told this jury, Dr. Bligh, is that when
13 you and Mr. Artimovich looked through the presentation and
14 the actual allegations that Mr. Harman made to the Federal
15 Highway Administration is that you saw many examples of the
16 system gating, just as it was supposed to do; isn't that
17 correct, sir?

18 A. That is correct.

19 Q. All right. Now, Dr. Bligh, one of the things that's
20 been suggested to you is that somehow that this may be your
21 fault. This wreck occurred under the circumstances that it
22 occurred; would you agree with that?

23 A. Yes, sir.

24 Q. In any way, did Texas A&M or Trinity cause that person
25 to leave the highway under the conditions they left the

1 highway on?

2 A. No, sir.

3 Q. Dr. Bligh, as you sit here today, as an engineer who
4 spent his life doing highway safety work, do you have any
5 reason to believe that this ET-Plus system right here
6 performs any differently in the field just as you all crash
7 tested it at Texas A&M?

8 A. No, sir.

9 Q. Thank you.

10 MR. BROWN: Pass the witness.

11 THE COURT: Further direct?

12 MR. BAXTER: I have nothing further, Your Honor.

13 THE COURT: All right. You may step down, Dr.
14 Bligh.

15 THE WITNESS: Thank you, Your Honor.

16 THE COURT: Is there a request that this witness
17 be excused?

18 MR. BROWN: Your Honor, may the witness be
19 excused?

20 THE COURT: Is there objection by the Plaintiff?

21 MR. BAXTER: No, Your Honor.

22 THE COURT: You may be excused, Dr. Bligh. You're
23 free to stay. You're also free to leave.

24 THE WITNESS: Thank you, Your Honor.

25 THE COURT: Ladies and gentlemen, before I ask the

1 Plaintiff to call their next witness, we're going to break
2 for lunch and get you out before the usual Marshall lunch
3 crowd to give you a little advantage.

4 I'm going to ask you to be back in the jury room
5 and assembled and ready to go by 12:45. You may -- please
6 leave your notebooks on the table in the jury room. Don't
7 discuss the case among yourselves or with anyone else. And
8 we'll see you back for lunch at that time. You're excused
9 for lunch.

10 COURT SECURITY OFFICER: All rise.

11 (Jury out.)

12 THE COURT: All right. Be seated, please.

13 Mr. Maness, did I hear your cell phone sound
14 during the trial?

15 MR. MANESS: You did, Your Honor. I apologize.
16 I'll tender it to the Court.

17 THE COURT: Tender it to the CSO who will take it
18 from you at this time. After the verdict's returned and the
19 jury's has been dismissed, you may see the Court Security
20 Officers about getting it back.

21 Counsel, according to my calculations, at this
22 point in today's portion of the trial, Plaintiff's used 56
23 minutes. Defendants' used an hour and 49 minutes. As far
24 as total time calculations through the trial itself, if you
25 have further inquiries, you may check with my law clerks who

1 are helping me keep the time.

2 With that, we stand in recess for lunch.

3 MR. BROWN: May I have permission to work with a
4 witness after lunch?

5 THE COURT: I'll consider it and let you know.

6 MR. BROWN: Thank you, Judge.

7 (Lunch recess.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true
and correct transcript from the stenographic notes of the
proceedings in the above-entitled matter to the best of my
ability.

/s/ Shelly Holmes
SHELLY HOLMES, CSR, TCRR
Official Court Reporter
State of Texas No.: 7804
Expiration Date 12/31/14

10/15/14
Date

/s/ Susan Simmons
SUSAN SIMMONS, CSR
Deputy Court Reporter
State of Texas No.: 267
Expiration Date 12/31/14

10/15/14
Date

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

UNITED STATES OF AMERICA * Civil Docket No.
EX REL JOSHUA HARMAN *
VS. * 2:12-CV-89
* Marshall, Texas
*
* October 15, 2014
*
TRINITY INDUSTRIES, INC. & *
TRINITY HIGHWAY *
PRODUCTS, LLC * 12:45 P.M.

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE RODNEY GILSTRAP
UNITED STATES DISTRICT JUDGE

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15 P R O C E E D I N G S

16 (In-chambers hearing.)

17 THE COURT: All right. I've got a few things I
18 need to take up with you, and I'm going to try and do it as
19 expeditiously as possible so we don't delay getting the jury
20 back in the box.

21 First of all, when we recessed for lunch, the
22 Court Security Officer came to me in chambers and said that
23 one of the jurors, No. 2, Mr. Kirkland, came to him and told
24 him privately on the way out to the recess for lunch that
25 something was bothering him. And he told him that during

1 voir dire, he answered that he did not know any of the
2 lawyers. It since dawned on him that Kurt Truelove, who is
3 on the Plaintiff's side, but not at counsel table and hadn't
4 participated in the trial, wrote his will a year or so ago.

5 And I told Mr. McAteer, the Court Security
6 Officer, to tell Mr. Kirkland that if something needed to be
7 done, the Court would do it. Otherwise, for him just to go
8 on about his business as if nothing had happened.

9 Now, if -- if somebody wants to raise an objection
10 to Mr. Kirkland's continued service on that basis, I'm happy
11 to hear it. If not, it's been disclosed to counsel and you
12 know what I know.

13 MR. BAXTER: No problem from the Plaintiff, Your
14 Honor.

15 MR. MANN: That was easy. We probably need -- we
16 probably need to disclose that to the client.

17 MR. SHAW: Judge, can you -- do we need to give
18 you our argument and have a ruling right now, or will you
19 allow me to visit with our general counsel and people who
20 are unfortunately are grading Mr. Mann and I's -- Mr. Mann
21 and I's papers --

22 THE COURT: Well --

23 MR. SHAW: -- to see what their view is. If not,
24 I'm going to have to object now, and I don't want to waste
25 the time.

1 THE COURT: Let's do this, Mr. Shaw. Leave
2 Mr. Mann here so we can handle some of these other matters
3 that I know he's up to speed on --

4 MR. SHAW: Sure.

5 THE COURT: -- and you go talk to your folks and
6 come back.

7 MR. SHAW: Okay.

8 THE COURT: I can tell you this, there's been no
9 communication between the various members of the jury. The
10 jury's not tainted. I am not going to grant a mistrial --

11 MR. SHAW: We're not --

12 THE COURT: So don't ask for that.

13 MR. SHAW: Yeah, Judge, we're not going down that
14 path, trust me. We're not going down that path, so
15 permission to go, Judge, and do that?

16 THE COURT: Permission to go. Come back as soon
17 as you're ready.

18 MR. SHAW: All right. Thank you.

19 MR. MANN: Move up here.

20 THE COURT: Okay. Second thing, I've looked at
21 these deposition designations and counter designations on
22 Mr. Taylor and Mr. (sic) Arrons -- or Arrants, however it's
23 pronounced. I find that except for introductory questions
24 about name and address and so forth, that everything falls
25 within the motions in limine, excluding evidence of copying.

1 I don't find the door's been opened, and both of these are
2 excluded.

3 MR. MANN: Okay.

4 THE COURT: All right. We don't get to the other
5 questions.

6 MR. MANN: You want me to take those?

7 THE COURT: You may -- you may have them back.
8 We'll let me have them because they've got our notes --

9 MR. MANN: Yeah, why don't you keep -- and we'll
10 just -- when we make -- which I need to ask. On our bills,
11 Your Honor, did you want to do that? At what point do you
12 want to make bills, I mean?

13 THE COURT: Well, that's why we're on the record
14 back here. If you want to raise an objection or you want to
15 say that I've made a mistake, this is your chance to say it.

16 MR. MANN: Well, I do want to raise -- I honestly
17 didn't pay attention. I'm sorry. We do want to raise an
18 issue on Arrants and Taylor that we think it's relevant to
19 the door being opened. We think that Rule 32(b) applies, as
20 far as being able to subpoena them here. I understand the
21 Court's ruling that at least the substantive part of what we
22 would want to include from the depositions, the Court has
23 excluded.

24 THE COURT: Well, the Court never reaches the
25 question of whether they should appear live or appear by

1 deposition because I find that the deposition testimony that
2 you've tendered, which is what you would elicit from them if
3 they appeared live, is covered by the motions in limine and
4 is not proper.

5 MR. MANN: Okay. So, Your Honor, we would want to
6 tender as a bill the deposition designations that we have
7 given to the Court. And if I can -- I think maybe the best
8 way to do it, Your Honor, is to tender our actual Taylor
9 Tanner (sic) and Denise Arrants' deposition designations,
10 and how would you like me to designate them?

11 THE COURT: Why don't you mark them A and B
12 because everything else is numerical in this case. There
13 shouldn't be anything else with letters on it.

14 MR. MANN: Okay. So I'll -- I'll tender these to
15 the Court as our tender for us.

16 THE COURT: Trinity -- Trinity-A, Trinity-B, and
17 we'll put them in the record with that notation.

18 MR. MANN: All right. So I'm writing in the top
19 right-hand corner, Your Honor, both of them.

20 THE COURT: You need to put a B on that second
21 one. You just wrote Trinity.

22 MR. MANN: Thank you.

23 THE COURT: And I'll hand them to the court
24 reporter who will hand them to the courtroom deputy.

25 MR. MANN: And -- and I wrote MIL still apply at

1 the bottom of the circle. That's my handwriting, Your
2 Honor.

3 THE COURT: Okay. That's -- that's Arrants and
4 Taylor.

5 MR. MANN: And I'm assuming you're -- and those --

6 THE COURT: I'm overruling your objection.

7 MR. MANN: Yes, sir. Thank you very much.

8 THE COURT: All right. Secondly, there are issues
9 about two other witnesses and whether they may properly
10 appear by deposition only or whether they're required to
11 appear live, and that's Dr. Ross and -- is it Aarons?

12 MR. MANN: Alberson.

13 THE COURT: Albertson.

14 MR. MANN: A-l-b-e-r-s-o-n, Alberson.

15 THE COURT: Alberson is still employed by Texas
16 Transportation Institute?

17 MR. MANN: He is, Your Honor.

18 THE COURT: And Ross is retired?

19 MR. MANN: Yes, sir.

20 THE COURT: From that same company?

21 MR. MANN: From the same -- from TTI, and he's in
22 bad health, by the way.

23 THE COURT: And both -- both of them reside in or
24 around College Station?

25 MR. MANN: Yes, sir.

1 THE COURT: They're well within the state of
2 Texas?

3 MR. MANN: Yes, sir.

4 THE COURT: Okay. Under Rule 32, what's your
5 argument for why you should be allowed to present them by
6 deposition, as opposed to producing them live?

7 MR. MANN: Because by Rule 32(b), Your Honor, and
8 definition under 32(4)(b), maybe it is, the -- they are --

9 THE COURT: It's 32(a)(4)(b).

10 MR. MANN: B. Under 32(a)(4)(b), they're more
11 than a hundred miles from the courthouse, Your Honor, where
12 the hearing is taking place. So by definition, they're
13 unavailable. And because -- we think there's been a waiver
14 of that because -- now, let me check with counsel.

15 When did y'all raise Alberson and Ross as far
16 as --

17 MR. CARPINELLO: Yesterday -- when we got your
18 designations.

19 MR. MANN: Same time.

20 MR. CARPINELLO: When we got your designations.

21 MR. MANN: So, Your Honor, on -- I mean, the
22 designations are the same ones we had in the last trial,
23 Your Honor, for both Alberson and Ross. They were
24 designated on September 15th at pre-trial. They were listed
25 as witnesses with designations on October 7th, when we

1 disclosed witnesses and also exchanged the deposition
2 designations October 13th or 14th before -- you know, as the
3 Court's ordered two days in advance of when they're going to
4 be played -- put on. So --

5 THE COURT: Do you have -- go ahead.

6 MR. MANN: Yesterday is the first time that we'd
7 heard that objection, so we think it's been waived, also.

8 THE COURT: Do you have a basis under Rule 32 for
9 their exclusion other than they're more than a hundred miles
10 from the courthouse?

11 MR. MANN: Only on Dr. Ross, Your Honor, is that
12 he's not in good health. And that's -- I don't think that
13 necessarily is addressed in 32 that I remember, but he's 87.
14 He's not in good health.

15 THE COURT: Well, Rule 32(a)(4)(c) provides that
16 they may be deemed unavailable if they cannot attend or
17 testify because of age, illness, infirmity, or imprisonment.
18 You don't have any supporting documentation other than just
19 what you've been told --

20 MR. MANN: Well --

21 THE COURT: -- is that correct?

22 MR. MANN: -- that's correct today, Your Honor,
23 but what I will say is I -- I don't think that was really
24 disputed last time because that's what we raised in the last
25 trial and there was never a dispute. I'm not trying to put

1 Mr. Shelly under any type of oath, but, I mean, he went --
2 he took his deposition, and in his deposition, he told Mr.
3 Shelly, you know, I'm having a little bit of memory issues
4 and Alzheimer's and things such as that, so -- so it would
5 be in the deposition. That's the only place. Otherwise,
6 it's just my representation to the Court. You're correct.

7 THE COURT: Okay.

8 MR. CARPINELLO: If I may, Your Honor?

9 THE COURT: Plaintiff have a short response?

10 MR. CARPINELLO: Very short. I think he was in
11 reference to his lack of memory, but that's an issue that
12 whether he's here or by deposition, and I don't think that
13 makes him unavailable and there is no supporting evidence
14 that he couldn't come to the trial just as he came to his
15 deposition. He's clearly within the jurisdiction of the
16 Court and available. And these two people are within the
17 control of the Defendant or effectively in the control of
18 the Defendant, existing or former TTI people.

19 And I don't believe Ross was used in the last
20 trial at all, so I don't think there's any -- I mean, you
21 didn't designate him, but -- and so I think that they -- if
22 they want to elicit their testimony, they should appear. I
23 mean, I understand a party can use a counter party's
24 deposition for any purpose, but that's not true with
25 friendly witnesses. And I think if they want to elicit the

1 testimony, they should appear because we'll want to
2 cross-examine based on all the information we've learned
3 since taking their depositions.

4 MR. MANN: The only other thing I'd say is
5 Dr. Ross, when he appeared for his deposition, appeared in
6 College Station, and it had been put off twice because of
7 his health, so I do know that.

8 THE COURT: All right. Well, clearly, both of
9 these witnesses are, if not constructively within the
10 control of the Defendant through its associated entity,
11 though, not a party, Texas Transportation Institute, they're
12 very close to being under the control of them.

13 Rule 32(a)(4)(b) in defining an unavailable
14 witness says a witness more than a hundred miles from the
15 place of the trial. Unless it appears the witness's absence
16 is procured by the party offering the deposition, which
17 would be the Defendant in this case, Defendant could easily
18 subpoena these people. They're within the bounds of Rule 45
19 now because of statewide subpoena power. And even if they
20 were outside of the state of Texas and more than a hundred
21 miles because this is a False Claim Act case, and at the
22 Defendants' urging, I have not quashed subpoenas to require
23 Chris Harman to appear from Virginia.

24 The Defendant could have easily taken steps to
25 have him available. The rule clearly provides in Subpart

1 (a)(4)(e) where the catchall provision allowing the Court to
2 exclude live testimony in the interest of justice, it
3 directs -- the rule directs the Court to give due regard to
4 the importance of live testimony in open Court, which is the
5 same argument Defendants offered for why Chris Harman should
6 be produced at great inconvenience from Virginia because
7 they were entitled to have him live and present him to the
8 jury as a live witness.

9 I'm going to require that Dr. Ross and
10 Dr. Alberson be produced live. I see no reason under the
11 rule to allow them to be presented by deposition only. If
12 they can't be presented live, I'm not going to permit their
13 deposition only to be used.

14 MR. MANN: Okay. Thank you, Your Honor.

15 THE COURT: All right. What's the position on
16 Mr. Kirkland, Mr. Shaw, since you've talked with your
17 client?

18 MR. SHAW: Yes, Your Honor, I have. And first of
19 all, we appreciate obviously the Court bringing that to our
20 attention. We certainly do not -- we certainly do not
21 suggest directly or indirectly that there's any type of --
22 anything improper with Mr. Kirk -- Mr. Truelove or with
23 Mr. Kirkland or his wife. We have no evidence of that. We
24 don't know of anything like that. And I -- so we don't
25 suggest that.

1 However, Trinity Industries remains very concerned
2 that not necessarily the contact that he knows Mr. Truelove,
3 but the fact that he is a former client and presumably a
4 current client of Mr. Truelove, as I understand what the
5 Court understands, and that he had performed a -- drafted a
6 will for him.

7 It also concerns Trinity Industries that it's not
8 like it was a long time ago. It was only like about a year
9 or so ago. If we had known that when we were going through
10 the voir dire process, I think relatively certain we
11 probably would have struck Mr. Kirkland, just like Mr. Mann
12 and I struck Ms. Hagerty who also mentioned that she had a
13 relationship with Mr. Truelove that really was probably even
14 more attenuated than this one.

15 So, Judge, for those reasons, respectfully, we
16 need to object to Mr. Kirkland's continued presence as a
17 juror on this particular case. We think it is error under
18 the rules, as we understand them -- as have been told to me
19 by the people that I've gone and talked to. We are not
20 asking, Judge, for a mistrial. We're not asking for that.
21 But we are asking that he not be involved in the process of
22 deliberating in this particular case. We understand that --
23 at least I understand that two of the six are alternatives
24 anyway. Maybe I've got that wrong, and if I do, I
25 apologize, Your Honor.

1 THE COURT: No, there -- there are no alternates
2 on this jury.

3 MR. SHAW: Then I have that wrong. I apologize.
4 I thought I was told that early on.

5 THE COURT: But certainly we can return a verdict
6 with less than eight.

7 MR. SHAW: Sure. So anyway, Judge, the appearance
8 of it raises suspicions with our client. We want a clean
9 verdict. I know that's what this Court wants is a clean
10 verdict. We appreciate your candor in this matter. Please
11 understand the position that we're in with the -- of this
12 particular size case. If we go and try this particular case
13 and there is a big verdict and out the door walks
14 Mr. Kirkland carrying the jury -- as the foreman of the
15 jury, it's going to raise considerable problems, so we need
16 to object to it, Judge. We had no evidence of impropriety.
17 We appreciate Mr. Kirkland coming forward and saying what he
18 has said to the Court Security Officer and to -- vicariously
19 to you.

20 However, we are concerned, so we would object to
21 his continued presence, Your Honor.

22 THE COURT: All right. Anything from the
23 Plaintiff?

24 MR. BAXTER: No, except, Your Honor, I'm now
25 unhappy with Mr. Truelove because he doesn't remember he's

1 his client either. We kind of took him on a fly. You know,
2 he was the electrical engineer on the jury. They weren't
3 going to cut him come heck or high water. But clearly
4 there's no taint there, Your Honor. Mr. Truelove doesn't
5 have anything to do with the case. He's not going to utter
6 a word. He doesn't sit at counsel table. He hasn't even
7 been here the last day and a half. So I don't understand
8 how that could possibly affect Mr. Kirkland's unfair service
9 in this case.

10 THE COURT: Well, the Court has no concern that
11 Mr. Kirkland would serve other than honorably if he were
12 allowed to remain on the jury. However, the Court does
13 agree that the Defendants were entitled to accurate
14 knowledge when they exercised their peremptory challenges.
15 And I'm sympathetic to the argument that had we known what
16 we know now, we might have acted differently.

17 And for that reason, I'm going to grant their
18 objection, and I'm going to excuse Mr. Kirkland from the
19 jury. And it's my intention to bring him into the courtroom
20 before the jury returns, by himself, tell him on the record
21 that he's been excused, thank him for his service, and send
22 him on his way.

23 Does anybody have a problem with that?

24 MR. MANN: No, sir.

25 MR. SHAW: No, Your Honor.

1 MR. BAXTER: No, Your Honor.

2 MR. CARPINELLO: No, Your Honor.

3 THE COURT: Okay. That will be the ruling on
4 that. Is there anything else that you all are aware of
5 before we get into this afternoon's testimony?

6 MR. SHAW: Judge, one thing while we're here.
7 Are we going to get to Greg Mitchell today? What's our --
8 our thoughts?

9 MR. CARPINELLO: I can't guarantee. I don't know
10 how much cross you have, but there's a possibility. I think
11 it's probably unlikely, but I think there's a possibility.

12 MR. SHAW: All right.

13 THE COURT: You all talk in the courtroom.

14 MR. SHAW: At some point --

15 THE COURT: Do y'all need anything from me?

16 MR. SHAW: No, Your Honor.

17 MR. BAXTER: One other thing, Your Honor. I think
18 there is a possibility that during Dr. Coon's testimony,
19 there could be the request of a jury view of the -- like
20 last time, which I'm unfamiliar with.

21 THE COURT: That was raised this morning.

22 MR. CARPINELLO: We did that this morning.

23 THE COURT: That was raised this morning, but I
24 did have a question that I haven't had answered with -- in
25 regard to that since this morning, and that is there was a

1 question about whether the items on the trailer that were
2 the view was requested for were pre-admitted exhibits or --

3 MR. CARPINELLO: They were.

4 THE COURT: -- or were they not?

5 MR. CARPINELLO: I'm sorry. They were. Yes, I
6 confirmed.

7 THE COURT: They are pre-admitted exhibits?

8 MR. CARPINELLO: They are pre-admitted exhibits.

9 MR. SHAW: The ones on the trailer?

10 MR. CARPINELLO: Yes, they are.

11 THE COURT: All right. What I'm going to direct
12 is when the Plaintiffs are ready for that, that you approach
13 the bench and ask me at the bench, and then I've already
14 talked to the Court Security Officer about discreetly taking
15 the jury out viewing them, no comments, no input, no
16 discussions from anybody, and then bringing them back.

17 MR. BAXTER: Just so I -- I wasn't in the
18 discussion, but is it going to be out the back?

19 THE COURT: Yes.

20 MR. BAXTER: In the parking lot?

21 THE COURT: If you'll look out the window, I think
22 they're parked against the curb --

23 MR. BAXTER: Okay.

24 THE COURT: -- behind the courthouse.

25 MR. BAXTER: Is that -- is that fine, Your Honor?

1 THE COURT: That's fine with me. It's further
2 away from all the folks who are hanging out at the front
3 door.

4 MR. BAXTER: All right.

5 THE COURT: I want it to be as discreet as
6 possible.

7 MR. BAXTER: We will, Your Honor.

8 THE COURT: Okay. You'll approach the bench at
9 that time.

10 MR. BAXTER: We will. Thank you, Your Honor.

11 THE COURT: I'll see you this courtroom.

12 (In-chambers hearing concluded.)

13 (Jury out.)

14 COURT SECURITY OFFICER: All rise.

15 THE COURT: Be seated, please.

16 Mr. McAteer, would you bring Mr. Kirkland into the
17 courtroom, please, by himself.

18 COURT SECURITY OFFICER: Yes, sir.

19 THE COURT: Just have a seat on this first seat,
20 Mr. Kirkland. For the record, you're our Juror No. 2.

21 JUROR NO. 2: Yes, Your Honor.

22 THE COURT: The Court's aware that during jury
23 selection, when asked if you knew any of the attorneys in
24 the case, that you answered no and then realized, after you
25 were selected and seated and the evidence had begun, that

1 you knew Mr. Kurt Truelove.

2 JUROR NO. 2: That's right.

3 THE COURT: Who is one of the Plaintiff's counsel,
4 even though he's not at the table and has not actively
5 participated in the trial.

6 JUROR NO. 2: That's right.

7 THE COURT: I've raised that with both parties
8 over the lunch hour, and as is their right, there's been an
9 objection to your continued service. And it -- I want you
10 to understand that objection has nothing to do with you not
11 serving honorably or anybody having any doubts that you
12 would serve honorably. It's simply that both parties are
13 entitled to have accurate information when the jury is
14 selected.

15 JUROR NO. 2: I understand that.

16 THE COURT: And through nobody's fault, that
17 particular item of information was not accurate when the
18 jury was selected. And that's the reason and the only
19 reason I'm going to excuse you from jury service. But I
20 want you to know the Court very much appreciates you being
21 here. You probably don't know me. I've known your wife,
22 Linda, for 20 years --

23 JUROR NO. 2: Oh, my.

24 THE COURT: -- when she worked at the bank. And I
25 know you and she to be upstanding citizens in our community,

1 and I very much appreciate, and the Court as an institution
2 appreciates your service. But because of that issue -- and
3 all of us are human and not everybody remembers everything
4 all the time; that's certainly understandable.

5 But because both parties are entitled to know the
6 facts accurately when the jury's selected, I feel like I
7 need to excuse you from jury service --

8 JUROR NO. 2: I understand, Your Honor.

9 THE COURT: -- going forward. So with that, you
10 are excused. You're discharged from your service. You're
11 free to talk about your service with anybody you want to.
12 I'm releasing you from my prior obligations and directives
13 not to discuss the case.

14 You're not to go back in the jury room. You are
15 not to see any of the other jurors, which you won't
16 obviously. I want you to also understand, you're free not
17 to discuss this case with anybody that you don't want to.
18 Nobody can make you. If you want to discuss it with
19 anybody, you bring it up. Otherwise, you don't have to
20 discuss it with anybody. That's your call.

21 But thank you very much for your service. This is
22 just one of those unfortunate things that happens through
23 nobody's fault, but we do need to correct it at this point.
24 And we appreciate you bringing it to our attention.

25 JUROR NO. 2: Thank you.

1 THE COURT: You're excused. And if you'll exit
2 through those doors and go by and see the clerk and drop off
3 your button, we'll see you next time. Thank you, Mr.
4 Kirkland.

5 (Juror Kirkland out.)

6 THE COURT: All right. Be seated, please.
7 Is the Plaintiff prepared to call their next
8 witness?

9 MS. DYER: Yes, we are, Your Honor.

10 THE COURT: All right. Let's bring in the jury,
11 Mr. McAteer.

12 COURT SECURITY OFFICER: All rise for the jury.

13 (Jury in.)

14 THE COURT: Be seated, ladies and gentlemen.

15 Members of the Jury, I need to let you know that
16 I've excused Mr. Kirkland, Juror No. 2, for reasons that I
17 won't go into detail with you about now. I want you simply
18 to understand that he did absolutely nothing wrong, but an
19 issue was raised that was completely proper, in the Court's
20 view. And because of that and under our rules of civil
21 procedure, I felt like it was the appropriate thing to do.
22 So I want you to know he's not going to be with us for the
23 rest of the trial. He won't participate in your
24 deliberations. After this is all over and you're
25 discharged, if you run into him, you're certainly welcome to

1 talk with him about it. But he did absolutely nothing
2 wrong, and the Court has nothing but thanks and appreciation
3 for his service.

4 But because of particular rules under which we
5 must operate, the Court thought it the most appropriate
6 thing to excuse him. But you're entitled to know why your
7 number has gone down from eight to seven.

8 And you ladies on the front row are happy to
9 continue to sit that way. At some point if you want to
10 remove the gap between you, you're free to do that, too.
11 It's whatever you-all want to do.

12 So with that explanation, I'll ask the Plaintiff
13 if they're prepared to call their next witness.

14 MS. DYER: Your Honor, we're prepared to call the
15 next witness, and we call Dr. Brian Coon.

16 THE COURT: All right. If Dr. Coon will come
17 forward.

18 Dr. Coon, have you been sworn?

19 THE WITNESS: No, I have not, Your Honor.

20 THE COURT: Please raise your right hand.

21 (Witness sworn.)

22 THE COURT: If you'll come around, sir, and have a
23 seat here at the witness stand.

24 And once he's seated, Ms. Dyer, you may proceed.

25 MS. DYER: Thank you, Your Honor.

1 BRIAN COON, Ph.D., PLAINTIFF'S WITNESS, SWORN

2 DIRECT EXAMINATION

3 BY MS. DYER:

4 Q. Good afternoon, Dr. Coon.

5 A. My name is Brian Allen Coon.

6 Q. Could you just briefly describe your formal educational
7 background?

8 A. I have a bachelor's degree in mechanical engineering
9 from the University of Iowa, a master's degree in civil
10 engineering from the University of Nebraska at Lincoln. I
11 have a Ph.D. in engineering from the University of Nebraska.
12 And I have a law degree from the University of Nebraska
13 College of Law.

14 Q. What was your course of study for your Ph.D. or your
15 doctorate?

16 A. I did accident reconstructions of guardrails and
17 guardrail end terminals.

18 THE COURT: Dr. Coon, please pull the microphone a
19 little closer. You're a bit soft-spoken. I want to make
20 sure everybody hears you.

21 Continue, Counsel.

22 MS. DYER: Thank you, Your Honor.

23 Q. (By Ms. Dyer) And what did you do for your dissertation,
24 Dr. Coon?

25 A. I developed reconstruction techniques for guardrail end

1 terminals and energy-absorbing terminals like the ET-Plus
2 terminal.

3 Q. Can you describe your experience at the University of
4 Nebraska with end terminals, the ones that you just
5 described?

6 A. Certainly. I actually built, installed, and
7 crash-tested, and then we wrote reports determining the
8 performance of guardrail end terminals.

9 Q. As part of this work, were you involved with the
10 development of end terminals?

11 A. I was.

12 Q. Have you also worked with computer simulations?

13 A. I have. I've used LS-DYNA, which is a general purpose
14 finite element modeling program that allows the computer to
15 simulate what happens in real life.

16 Q. And can you tell me a little bit about your work in the
17 development of the guardrails that you did while you were at
18 University of Nebraska?

19 A. Certainly. One of the things I did at the University of
20 Nebraska was look at guardrail end terminals and how they
21 behaved in real life, how much energy and force they took to
22 drive down the line and extrude rail, how much energy was
23 taken into a crash into a guardrail from the side, and how
24 to reconstruct those accidents in real life.

25 Q. Let's go back, then, to the computer simulations that

1 you were talking about. I think you mentioned LS-DYNA. Did
2 you?

3 A. Yes.

4 Q. Okay. And can you tell the jury what LS-DYNA is?

5 A. LS-DYNA allows you to take a model, a mathematical
6 model, and then through the computer allows you to predict
7 how something would behave in real life.

8 Q. Does it apply in any way to guardrails?

9 A. It -- it does. It's a general purpose model, but you
10 can use it for roadside safety, simulating guardrails end
11 terminals, and how those terminals behave.

12 Q. Can you tell the jury what your primary employment is
13 now, Dr. Coon?

14 A. Traffic energy for the City of Wichita, Kansas.

15 Q. Do you do any teaching?

16 A. I teach a graduate physics course, energy environment
17 for the master of science program at Friends University.

18 Q. Where were you previously employed before going to
19 Wichita as the chief traffic engineer?

20 A. I was the director of the University Transportation
21 Center at Kansas State University.

22 Q. Dr. Coon, do you have any experience in welding?

23 A. I do.

24 Q. And have you taught welding?

25 A. I've taught welding at the University of Nebraska to

1 college students. I teach basically some welding for
2 engineers.

3 Q. Do you do any welding?

4 A. I do welding, yes.

5 Q. Can you tell the jury about your professional licenses,
6 Dr. Coon?

7 A. Certainly. I have a license to practice civil
8 engineering and mechanical engineering in Nebraska, a
9 license to practice engineering in Kansas. I'm a licensed
10 professional traffic operations engineer. I'm licensed to
11 practice law in Colorado, Kansas, and Nebraska.

12 Q. Any other licenses or certifications that --

13 A. Yes. I'm also a certified police officer.

14 Q. I'm sorry. Did you -- did you mention that you -- what
15 about with regard to accident reconstruction?

16 A. I also have -- I'm an accredited traffic accident
17 reconstructionist, ACTAR accredited accident
18 reconstructionist.

19 Q. Have you testified in other courts before?

20 A. Yes.

21 Q. And what courts are those?

22 A. Primarily municipal courts but some district courts.

23 Q. When you say district courts, are you talking about
24 federal district courts or state?

25 A. State courts.

1 Q. And how much experience have you had in accident
2 reconstruction for roadside terminals?

3 A. My doctoral dissertation was on guardrail end terminals,
4 so I've reconstructed most of the tests that were performed.
5 I've examined a lot of real-life crashes.

6 Q. That was my next question. Have you done it in the real
7 world?

8 A. I have.

9 Q. And can you tell me about how many times a year you
10 actually do accident reconstruction?

11 A. It varies. Around 5 to 15 times a year, I'll do a -- an
12 accident reconstruction privately.

13 Q. Have you done any work with the FHWA in that context?

14 A. Yes. As part of NCHRP Project 1722, I reconstructed
15 around 850 crashes.

16 Q. Dr. Coon, what were you asked to do in this case?

17 A. I was asked to examine the history and the performance
18 of the ET-Plus terminal, examine the FHWA acceptance
19 letters, perform static testing, and examine how the
20 terminals were manufactured and how the design had changed
21 in the 5-inch to 4-inch in the performance how it had
22 changed.

23 Q. And did you prepare any reports in connection with that
24 work?

25 A. Yes. I prepared one initial report and five

1 supplemental reports.

2 Q. Why so many supplemental reports?

3 A. I was preparing additional reports, supplemental
4 reports, as information became available.

5 Q. Do you know how highway devices are approved for use on
6 our national highways?

7 A. Yes, I do.

8 Q. Can you tell the jury, please?

9 A. Certainly. At the time in question, which was at the
10 time I was at the University of Nebraska, it was controlled
11 by a 1997 federal memorandum on the acceptance of roadside
12 safety features.

13 MS. DYER: Could we pull up Exhibit 20 at Bates
14 Page 110631, please?

15 Q. (By Ms. Dyer) Is this the memo you're referring to, Dr.
16 Coon?

17 A. Page 3 of it, yes.

18 Q. Page 631?

19 A. Yes, it is.

20 Q. Okay. And -- and what does this say? Where are you
21 looking?

22 A. The -- highway safety -- in the introduction, highway
23 safety features such as breakaway sign, luminaire supports,
24 longitudinal barrier, crash cushions, and work zone traffic
25 control devices must demonstrate acceptable crashworthy

1 performance to be accepted by the Federal Highway
2 Administration for use on the national highway system within
3 the clear zone or particularly for work zone devices within
4 the roadway.

5 Q. And how are they demonstrated to be acceptable and
6 crashworthy?

7 A. They're crash-tested.

8 Q. Who decides what crash tests are appropriate?

9 A. The Federal Highway Administration.

10 Q. Are there certifications that Trinity makes when it
11 sells units such as the ones we have in front of it,
12 certifying that they are crashworthy?

13 A. When roadside safety devices are sold, they certify that
14 they're NCHRP Report 350-certified.

15 Q. What's the significance of these certifications?

16 A. That's what's required for federal reimbursement or to
17 get federal dollars for those devices.

18 Q. Prior to your work here for this case, when was the last
19 time that you inspected an ET -- an ET-Plus terminal?

20 A. At the end of my dissertation, in the range of about
21 2003.

22 Q. And when you began your inspection of the terminals in
23 connection with this case, when was that?

24 A. It would have been in the fall of last year.

25 Q. What, if any, differences did you observe between the

1 2003 ET terminals and the ones that you were inspecting
2 beginning in the fall of last year?

3 A. There were numerous differences. The first one, I
4 noticed that the feeder channel had drastically changed in
5 size. It was a 4-inch channel instead of a 5-inch channel.

6 I also noticed before I was able to put my hand into
7 the exit gap of the 5-inch channels, when I was measuring
8 them in 2003 and before. And then after that, when I looked
9 at them again, now I was unable to get my hand in a much
10 more narrow exit gap, plus several other changes.

11 Q. Dr. Coon, would it be possible to show those changes on
12 the demonstratives we have here?

13 A. Yes.

14 MS. DYER: Your Honor, would it be possible for
15 Dr. Coon to step down and show those changes?

16 THE COURT: I'll make the same accommodation I had
17 with other witnesses. He may stand there with the handheld
18 microphone, and he can use a laser pointer, if he needs to.
19 But we're not going to have him down on top of the exhibits
20 themselves.

21 MS. DYER: Certainly.

22 THE COURT: Do you have a pointer, Mr. McAteer?
23 Do you have one, Dr. Coon? Okay.

24 Feel free to move them however you need to,
25 Ms. Dyer.

1 MS. DYER: Thank you, Your Honor.

2 Q. (By Ms. Dyer) Dr. Coon, can you tell me what this is?

3 A. That is a feeder channel, part of the feeder chute.

4 Q. And what's the change that you referred to in what you
5 call the feeder channel?

6 A. The feeder channel decreased from 5 inches, this larger
7 channel, to the smaller 4-inch channel.

8 Q. You talked about -- I think you talked about the change
9 in either the insertion or the weld; is that correct?

10 A. The insertion, what -- previously on the inside of
11 the feeder channel, this is a smooth transition.

12 Q. Right here (indicating)?

13 A. Yes, right there (indicating). It's a smooth
14 transition. There's not a ledge or any sharp edge to catch
15 against. On the 4-inch channel, there's a sharp edge where
16 the channel intrudes into the extruder throat, and the
17 extruder throat is the area where it squeezes the guardrail.

18 Q. Okay. This is right here (indicating)?

19 A. Yes.

20 Q. And you also talked, I think, about the change in the
21 throat inlet. Where is that?

22 A. The change in the throat inlet here is -- when I
23 measured them originally, which would be 2003 and prior, was
24 a 4-inch inlet, and the -- this is a 4-3/8-inch inlet.

25 THE COURT: Let me just say this: If Defense

1 counsel need to move so they can see better, they have leave
2 to do that.

3 All right. Let's continue.

4 Q. (By Ms. Dyer) I think one of the other changes that you
5 discussed was the exit gap or exit gate; is that right?

6 A. That's correct.

7 Q. What change are you -- let's do this. Where is the exit
8 gap on these --

9 A. You can't actually see it from where we are. It's down
10 inside. If you put your hand into the -- the 5-inch one,
11 you'll be able to reach out down through the bottom.

12 Q. So can you see my hand?

13 A. So I can see your hand there.

14 Q. Okay. Now, if I do that here?

15 A. You won't.

16 Q. Am I able to do that?

17 A. No. Your hand will catch.

18 Q. So I can't?

19 A. It's a smaller exit gap.

20 Q. Why is that?

21 A. The exit gap actually narrows due to the changing of the
22 extruder plates on either side. It actually is more
23 scrunched in.

24 Q. I think you talked about a change in the height of the
25 feeder chute, too. Where is that?

1 A. The height is from the inside dimension here to the
2 inside channel here (indicating). What that allows the
3 expanding guardrail to do as it's flattened, it goes from
4 corrugated out to flat, so it has to have room in order to
5 do that. The 4-inch channel intrudes into the extruder
6 throat and can catch on the extruder throat.

7 Q. Did you talk about the change in the length of the
8 channel?

9 A. The -- originally, the channel -- this channel here is
10 37 -- 37 inches long from top to bottom --

11 Q. Is that from here to here (indicating)?

12 A. -- where that weld is. The first revision of the 4-inch
13 channel had a three-quarter-inch insertion, so an extra
14 three-quarter inch was added, and then that three-quarter
15 inch was removed. So this is actually three-quarter of an
16 inch shorter than the original version.

17 Q. So this one actually, because of the three-quarter-inch
18 insertion, ultimately is shorter from here to here
19 (indicating). Is that what you're saying?

20 A. From the top --

21 Q. Top to --

22 A. To the bottom, yes.

23 Q. Are those the basic changes, Dr. Coon --

24 A. Yes.

25 Q. -- that you observed?

1 What's the -- you can go ahead and be seated. Thank
2 you.

3 Dr. Coon, what's the significance of the change from a
4 5-inch to 4-inch guide channel.

5 A. It has several effects. The 5-inch channel is stronger
6 in bending in both this direction and this direction, so
7 it's actually stronger in both of those. It's stronger in
8 compression, because there is just more steel. There's more
9 available to take the load.

10 And it's also important. It's stronger in twisting.
11 It's harder to actually twist the channel during impact. So
12 you have several effects just with the 5-inch to 4-inch
13 change.

14 Q. Can you give an analogy?

15 A. Yes. If you imagine a -- a football sled. The reason a
16 football sled is heavy when the players hit against it is
17 that you want to be able to drive it in a straight line. If
18 it were really light and you hit it, it would spin. So the
19 heavier channel would keep the end terminal from spinning as
20 easily.

21 Q. What's the significance of the change in the exit gap,
22 the thing that I put my hand down, and you could see it in
23 the 5-inch but not the 4-inch?

24 A. The change in the exit gap has a couple of different
25 effects. First of all, it changes where the guardrail

1 flattens out. It actually has to be flattened out 1 inch at
2 the exit gap versus an -- let's say an inch and a half where
3 the rest of it is flattened out while it bends.

4 It also increases the force level when a splice
5 connection goes through the terminal. And, in fact, that --
6 that really, really peak in the splice bolt connection, the
7 force level, can have a significant adverse effect on the
8 performance of the terminal.

9 Q. What is -- does Trinity claim that it ever made a
10 1-1/2-inch exit gap?

11 A. They claim it was never made or -- the inch-and-a-half
12 exit gap, they claim was never made.

13 Q. But yet we can we can see when we put our hand through
14 that it's greater than an inch. Is that your testimony,
15 sir?

16 A. That's my testimony. And my recollection from the 2000
17 to 2003, I was able to previously put my hand into that exit
18 gap and now I cannot.

19 Q. What about the throat inlet? What's the significance of
20 the change in the throat inlet, if any?

21 A. When you start to feed a splice connection, what you
22 need to be able to do is the splice bolts, before you can
23 pass them through, you have to grind them down. So as that
24 4-inch starts to engage that splice bolt earlier, it starts
25 grinding it down. And as it grows along, that nice 4-inch,

1 has a long distance to grind that splice bolt down.

2 When you start opening it up, the splice bolt gets in a
3 lot further, and it has a much shorter distance that you can
4 grind that splice bolt down and will lock up and the head
5 will fail.

6 Q. What about the change from what we have been calling a
7 butt weld here in the 5-inch to a fillet weld here in the
8 4-inch?

9 A. That has a couple of effects. The first effect is it
10 actually reduces the height available for the guardrail to
11 flatten out in the feeder chute. So it has to be able to
12 expand as it flattens out. The 4-inch channel interferes
13 with that, it's actually inside of the extruder throat. So
14 that bottom area actually has channels sitting inside of it.
15 The other effect that it has, when you put in the -- the
16 channel, is that it actually gives a nice edge for the
17 guardrail to catch on. And when that guardrail catches on
18 that edge, it locks up against that hard edge and fails
19 versus the 5-inch, which you can feel -- you'll be able to
20 feel a smooth transition between the channel and the
21 extruder throat.

22 Q. Dr. Coon, do changes in either the height of the channel
23 or the width of the channel have any effect, in your
24 opinion?

25 A. Of the feeder channel itself or the feeder chute? I'm

1 sorry.

2 Q. My apologies. The feeder chute. I misspoke.

3 A. Yes. The -- the -- the height of the feeder chute
4 affects the ability of the guardrail to extrude and expand,
5 and it also affects the overall length, affects its
6 stability or that wobble.

7 Q. Anything else, Dr. Coon? What about the weight?

8 A. The weight, also. There's about an 8 -- 8-1/2-pound
9 difference between the two. That doesn't seem like a lot,
10 but it's a -- a decrease in the mass that you have to bring
11 up to speed when the car is hitting into it.

12 So it actually, during that initial crush, takes --
13 knocks the vehicle's speed down, and whatever percent that
14 is -- it's around 2 percent -- you need all that you can to
15 get that speed down out of the car so you can safely impact
16 the end terminal.

17 Q. Dr. Coon, in your opinion, do each of these changes
18 represent -- that you've just described represent a change
19 in the geometry of the ET-Plus terminal?

20 A. Yes. Each change is a -- a change in geometry.

21 Q. And do you consider these changes to be significant,
22 particularly in light of the fact that some of them are less
23 than 1 inch even?

24 A. Yes. Each change is significant.

25 Q. Do you believe that the ET-Plus terminal with the 5-inch

1 channel is substantially different or the same as the
2 ET-Plus terminal with the 4-inch channel?

3 A. It's substantially different from the 5-inch to 4-inch
4 variation for not just the channel but the -- all of the
5 other design changes that went along with that.

6 Q. And what conclusions did you reach in view of all these
7 changes you've just described?

8 A. When I first saw the changes from the 5-inch to 4-inch
9 channel, I went to the FHWA website to look for acceptance
10 letters for the 4-inch channel, because I assumed that there
11 would be an acceptance letter documenting those changes and
12 that it had undergone crash-testing, and it had been
13 approved. And I was unable to find any such approval
14 letter.

15 Q. If you -- strike that.

16 If you were to look at the NCHRP 350 report, the one
17 that we were talking about just a few moments ago, is there
18 anything in there that addresses even small variations in a
19 guardrail like this?

20 A. My experience with roadside safety is that small changes
21 can have very significant effects, and that actually is
22 written in NCHRP 350 to advise people that sometimes changes
23 that you may not think would have a drastic affect on their
24 performance can actually have a drastic affect on
25 performance.

1 MS. DYER: Can we take a look at Exhibit 748 at
2 Bates Page 17770, please?

3 Q. (By Ms. Dyer) Dr. Coon, is there anything here that
4 addresses what you were just referring to with regard to
5 small changes?

6 A. I apologize. I'm reading through it.

7 Q. Well, you can tell me what it says.

8 A. What I would paraphrase before I hadn't gotten it
9 exactly right: Past research has shown that seemingly minor
10 variations in design details can adversely affect the safety
11 performance of a feature, which is the small feature or
12 small changes.

13 Q. And you're reading from Section 7.4, correct?

14 A. Yes.

15 Q. And is that towards the top of the -- the second column
16 there?

17 A. No. Actually, it is on the right-hand side in the
18 third, I believe, full par --

19 Q. Right-hand side, third full?

20 A. Yes. At the bottom, there it is.

21 Q. Okay. And can you tell us which -- I see.

22 MS. DYER: Okay. Can you scroll up, please, Mr.
23 Diaz, just a little bit? Is that the -- the best you can
24 blow it up, sir?

25 There we go.

1 Q. (By Ms. Dyer) Is that what you were referring to?

2 A. Yes.

3 Q. Okay. All right. And do you know if Trinity did any
4 testing in 2005, sir?

5 MS. DYER: You can take that down, Mr. Diaz.

6 Q. (By Ms. Dyer) After they actually crash-tested the
7 5-inch channel in 1999, did they do some additional
8 crash-testing in 2005?

9 A. Yes, they did.

10 Q. Okay. And did you look at that crash test?

11 A. Yes, I did.

12 Q. Do you understand that Trinity claims to have
13 crash-tested a 4-inch terminal?

14 A. I do.

15 Q. Okay. Were you able to look at the terminal at all to
16 determine what the dimensions of what was crash-tested in
17 2005 were?

18 A. No, I was not.

19 Q. Why not?

20 A. It had been destroyed.

21 Q. Let's assume that Trinity tested a 4-inch channel, as
22 they said. Does that mean to you that they necessarily
23 tested all of the changes that you've just described?

24 A. They couldn't have, no.

25 Q. Why not?

1 A. Some of those changes in the weldment drawings --
2 weldment drawings are the -- the design drawings that are
3 used to manufacture the device. Some of the changes in the
4 weldment drawings were actually after the testing. In fact,
5 those changes were, I believe, all made after the -- the
6 crash-testing.

7 Q. Well, let's take the -- just the -- the five-inch to
8 four-inch channel. What is the date of the weldment
9 drawing for this change?

10 A. I believe it was around July of -- July 28th of 2005,
11 around that date.

12 Q. Was it after the -- the May 27th test?

13 A. Yes.

14 Q. Okay. Do you know how many months or weeks after the
15 May 27th, 2005 test some of the changes were actually made?

16 A. That's sometime several months.

17 Q. And remind me again, weldment drawings, what are those?

18 A. Weldment drawings are the detailed designs that let you
19 know not just what parts go to it, but actually how to weld
20 it, how to put it together, and actually how to assemble it.

21 Q. So is that what is used to actually make one of these
22 things?

23 A. Yes.

24 Q. Are you aware of any test in 2010 that Trinity did where
25 they claimed they tested a four-inch?

1 A. Yes.

2 Q. And do you know, were those tests with a small car or
3 with a pickup?

4 A. Those were only with a small car.

5 Q. Did you look at the heads for -- how many tests were
6 there?

7 A. There were two tests, I'm aware of.

8 Q. In 2010?

9 A. Yes.

10 Q. Okay. Did you look at the heads that were crash tested
11 for those two tests?

12 A. I looked at one of the heads.

13 Q. How come you didn't look at the other one?

14 A. The other head had been destroyed.

15 Q. In your view, are either of those 2010 tests sufficient
16 for Trinity to receive acceptance of the four-inch product
17 that's at issue here?

18 A. No.

19 Q. Why not?

20 A. In the first test, in February, it's something called a
21 -- a TL-3 test, but it was not actually compliant with those
22 requirements. The first thing is that you have to have an
23 offset to your car. And what that's designed to do is to
24 see how the car behaves if there's a -- a spin induced in
25 the car. You can imagine you hit a pole offset with your

1 car, you spin around and it takes part of the energy out of
2 it. If you hit it straight on, all of the energy is
3 directed into your car.

4 The other part is that it was over speed. It was at
5 110.8, I believe, kilometers an hour, which is outside of
6 the window that -- there's a certain test parameters that
7 you have NCHRP Report 350, and it was too fast for those
8 conditions. And it has -- too low or too fast, you have to
9 be in the window of the speed and you can't be outside of
10 it.

11 Q. Now, for the one head that you were able to test, one of
12 the two that was tested in 2010, did the dimensions match
13 what Trinity claims the dimensions of the four-inch are
14 today?

15 A. No. When I measured it, the channels were about --
16 almost 15 and an 8th inches tall. It was 15 and 3/16 or so.
17 So it was actually taller, which is closer to the original
18 five-inch design, more clearance, which is -- is -- is a
19 good thing.

20 The other part is that they didn't extend three quarter
21 of an inch into the extruder throat. They weren't jammed in
22 as far. There were only a half an inch to 9/16. So they
23 weren't jammed in as far, and they weren't pressed in as --
24 as deep into the extruder throat.

25 Q. Why would that matter, Dr. Coon?

1 A. That's one of the critical changes in the design where
2 the extruder throat is encroached on by the channels, and
3 they cause the guardrail to catch, lock up, and the car
4 fail -- the -- the -- the guardrail lock up in the channel.

5 Q. Dr. Coon, did you do any of your own testing in this
6 case?

7 A. Yes.

8 Q. What kind of testing did you do?

9 A. I did static testing at the University of Illinois at
10 Champaign-Urbana in their large test machine.

11 Q. Can you just briefly describe your static testing, what
12 that means?

13 A. Certainly. You can test different items either
14 statically, which is quasi statically in slow motion or very
15 slow rates of force are applied that you don't impact it at
16 full speed.

17 The other way you can test something is dynamically
18 where you test it at a -- a fast rate of speed. So I tested
19 these under quasi static or static conditions and pushed the
20 guardrail through the ex -- through the channel and out the
21 extruder throat and inlet.

22 Q. Why did you perform a static test?

23 A. Static tests -- I was wanting to compare the performance
24 of the five-inch versus four-inch and what the effect those
25 changes had. So a static test would be an appropriate way

1 to examine the differences between the two.

2 Q. Have you used static testing before?

3 A. Yes, I've used static testing, and we used it
4 extensively at the Midwest Roadside Safety facility. When
5 we were performing testing, comparing design alternatives,
6 we would use static testing to give us an idea of how things
7 would work when they were hit.

8 Q. Does 350 talk about static testing at all?

9 A. Yes, it does.

10 Q. And what does it say about static testing?

11 A. Static testing is an option to compare design
12 alternatives in NCHRP Report 350.

13 Q. And do people in the industry besides you use static
14 testing?

15 A. Yes. It's -- it's commonly used. Midwest Roadside
16 Safety facility, University of Nebraska used it. The Texas
17 Transportation Institute uses it. It's a -- it's a commonly
18 used method to test design alternatives, the strength of
19 components, things like that.

20 Q. Turning back to your static testing, what did you do?

21 A. What I -- I had one of the original five-inch ET-Plus
22 terminals, and I had two of the four-inch terminals. And I
23 put the terminal, as they're configured right in the
24 courtroom, and pushed guardrail as they would feed through
25 the channel and then out the exit gap.

1 Q. And how did the two four-inch terminals do, as compared
2 to the five-inch terminal?

3 A. With the two four-inch channels as the -- the initial
4 forces that it takes to flatten it out was greater because
5 it had to go to a one inch exit gap versus a one and a half,
6 give or take, inch exit gap. So the initial forces were
7 higher. The forces levelled out until it hit the splice
8 connection, and when it hit the splice connection, the
9 guardrail buckled and broke against the feeder chute and
10 actually broke out the welds. And you can see where the
11 welds are broken.

12 Q. So if I understand you right, the four-inch terminals
13 broke basically?

14 A. Yes.

15 Q. What about the five-inch terminal?

16 A. The five-inch terminal passed the splice connection and
17 continued as far down as the machine could go, pushing rail
18 through it.

19 Q. Did you bring those heads with you today?

20 A. They were brought here, yes.

21 MS. DYER: Your Honor, may I approach?

22 THE COURT: You may. Approach the bench, Counsel.

23 (Bench conference.)

24 THE COURT: I thought you meant the exhibit.

25 MS. DYER: I'm sorry, what?

1 THE COURT: I thought you meant approach the
2 exhibit.

3 MS. DYER: I'm so sorry.

4 THE COURT: That's all right. No problem.
5 Yes, ma'am, what have we got?

6 MS. DYER: We'd like to have the jury at this time
7 with one question asked, then go out and see the -- the
8 terminals. They are here. They're in back. They are
9 indeed exhibits. I actually have -- they're part of 948. I
10 believe they're Sub 1, Sub 2, Sub 3 of --

11 THE COURT: You mean with one question asked.

12 MS. DYER: I would just like to ask -- I'd just
13 like to ask Dr. Coon to describe what they're going to see
14 and then ask them to go out.

15 THE COURT: Do you want to tell everybody in this
16 gallery what's fixing to happen because I can't control what
17 happens once they get outside of the courthouse?

18 MS. DYER: No, no, no, no. No, I'm happy to ask
19 if you were to look at them, what would you see? If I could
20 ask it that way --

21 THE COURT: All right.

22 MS. DYER: -- and then that way pause, I guess.

23 THE COURT: Yeah. This -- this time will be
24 charged to your time.

25 MS. DYER: Certainly.

1 THE COURT: But we'll do it.

2 MS. DYER: Thank you.

3 (Bench conference concluded.)

4 THE COURT: All right. Proceed.

5 MS. DYER: Thank you, Your Honor.

6 Q. (By Ms. Dyer) Dr. Coon if I were to look at those heads
7 that you did the static test on, what would I see generally?

8 A. What you would see is that as the splice bolt connection
9 on the guardrail met the one inch exit gap, the guardrail
10 head locked up and failed to continue feeding the guardrail.
11 The guardrail buckled and failed and -- and what you would
12 see in real life is the locking up of the guardrail in the
13 feeder chute.

14 Q. And just briefly, what would I see if I were to look at
15 the five-inch that you tested?

16 A. You would see the guardrail continue to have -- had
17 continued to extrude through the guardrail and you see a --
18 a pigtail of guardrail extruded and you see the extruded
19 splice bolt connection.

20 Q. And I have just one final question about this testing,
21 which is what did you conclude as a result of this testing?

22 A. This matched the -- what I had seen in real life crashes
23 as failure modes of the guardrail, either at buckling
24 downstream or that it buckled in the feeder chute and then
25 would damage the guardrail head making it not reusable.

1 Q. Thank you.

2 THE COURT: Ladies and Gentlemen of the Jury, I'm
3 going to excuse you at this time for just a minute. There
4 are exhibits which have been admitted in this case which are
5 physically too large to bring into the courtroom. The Court
6 Security Officer is going to take you and let you see them.
7 You're not to discuss them. You're not to talk to anyone.
8 And you'll be back here in a few minutes. Leave your
9 notebooks in your chairs and follow the Court Security
10 Officer at this time.

11 COURT SECURITY OFFICER: All rise.

12 (Jury out.)

13 THE COURT: Those of you in the courtroom, be
14 seated.

15 Mr. Lawrence, did your phone sound a few moments
16 ago?

17 MR. LAWRENCE: Yes, Your Honor, it did.

18 THE COURT: All right. You're to excuse yourself
19 and take it to the Court Security Officer at the front
20 entrance to the courthouse, you may get it back after the
21 jury has been discharged.

22 MR. LAWRENCE: Yes, Your Honor.

23 THE COURT: Let me remind those of you in the
24 gallery that while you are certainly free to come and go
25 during the course of the trial, it's the Court's policy and

1 it's my specific request to you that you do it as discreetly
2 and quietly as possible. There has been a lot of coming and
3 going. There are a lot of people here. I understand there
4 may be good reasons for that, but I would ask that as you go
5 and come, you not walk out, leave the door open, and let it
6 close on its own because it always makes a distractive
7 noise. Please close it by hand, and please limit your
8 coming and going to what's absolutely necessary. Be mindful
9 of avoiding any distractions to the jury.

10 Also, I don't think I need to say this, but I want
11 to make sure there's absolutely no doubt. Those of you in
12 the gallery are not permitted to eat and drink in this
13 courtroom. Do not bring any food or any drink or attempt to
14 do that into the courtroom. You can get up and go to the
15 water fountain outside. These lawyers can't. That's why
16 they're entitled to have water at the counsel table. I'm
17 not making any specific statements other than just give
18 everyone a general reminder that that is the Court's policy
19 and I expect you to follow it.

20 All right. I'm also going to direct that we're
21 going to take a short recess. But I don't want anyone to
22 follow the jury outside and look at them while they observe
23 these oversized exhibits. I want them to be as uninterfered
24 with as possible, but you may stay in the building. You may
25 go to the restroom. You may get a drink of water. But I'm

1 directing that until the jury's back in the box that you not
2 exit the building.

3 With that, we'll stand in recess for the next few
4 minutes.

5 (Recess.)

6 (Jury out.)

7 COURT SECURITY OFFICER: All rise.

8 THE COURT: Be seated, please.

9 Ms. Dyer, you may return to the podium.

10 MS. DYER: Thank you.

11 THE COURT: Mr. McAteer, bring in the jury,
12 please.

13 COURT SECURITY OFFICER: Yes, sir.

14 All rise for the jury.

15 (Jury in.)

16 THE COURT: Please be seated.

17 All right. Counsel, you may continue with your
18 examination of the witness.

19 MS. DYER: Thank you, Your Honor.

20 Q. (By Ms. Dyer) Dr. Coon, I -- I think before the jury
21 went out, you testified that in conducting the static test,
22 you found that the 4-inch channels locked up because of the
23 exit gap. Do you recall that?

24 A. That is correct.

25 Q. Are there any other changes that you believe contribute

1 to that lock-up?

2 A. You wouldn't see the dynamic -- it's called non-contact
3 deformation. Or when you bend something and you see it's
4 bending somewhere else when you push on it, like a soda, it
5 will bend in at the ends. Non-contact deformation, you
6 don't see that in a static test. That occurs mainly when
7 you start bending things at higher rates of speed.

8 So it can lock up with the -- against the feeder
9 channel, when you get it at a higher speeds. The guardrail
10 will flatten out and begin to actually extend into the
11 feeder chute and lock up against those feeder channels.

12 Q. And is that lockup, in your view, occurring more often
13 because of the change from the 5 to 4-inch channel, the
14 insertion of -- of the throat in the 4-inch ET-Plus product?

15 A. Before it was smooth, yes. Now, it locks up against it.

16 Q. So those are two changes that also contribute to this --
17 this locking up that you described in your static test; is
18 that correct?

19 A. That's correct.

20 Q. And what about the height and -- the changes in the
21 height and the length of the feeder chute, do those also
22 contribute?

23 A. The height of the feeder chute, it's closer to the
24 guardrail, so it impinges onto its ability to expand. The
25 length of the feeder chute affects its stability, and its

1 ability to not wander off and bend as you impact it, because
2 it's heavier. It's that football sled. So as you're
3 pushing it down, if you have a real light sled, it flips to
4 the side more easily.

5 So the length and the longer that it is, the more --
6 the longer that it is, the heavier it is, the more you're
7 able. To drive it like a sled down the rail.

8 Q. Dr. Coon, based upon your observant in measurements of
9 the 5-inch and 4-inch models of the ET-Plus, the static
10 testing you did, and the other things that you did, do you
11 believe that the changes that we've been talking about today
12 have a significant impact on the performance of this ET
13 test -- ET-Plus on the roadways?

14 A. Yes, they do.

15 Q. Before we talk about real-world crashes, I want to just
16 go back to the 2010 test that you described. Do you recall
17 those?

18 A. There were two of them, yes.

19 Q. Okay. And I believe you said that in one of those
20 tests, the speed was too high.

21 A. Yes. I believe -- the -- the dates are hard for me,
22 but -- I apologize. I believe it was February. TL-3 test,
23 which was not a compliant test, because it was too fast, and
24 it was off -- it was centered.

25 The other test in the fall, I believe it was September,

1 was not a TL-3 test, because it was a TL-2 test. It was at
2 70 kilometers an hour, which is in that 40/45 range miles
3 per hour.

4 Q. So -- so is the problem there with that second test that
5 it's too slow then?

6 A. It would be a compliance test for a lower speed road.
7 It was appropriate for a low-speed test.

8 Q. But it wasn't appropriate for being out on the highways
9 with the speeds that are actually posted on the highways.

10 Is that your view?

11 A. Yes. Yes.

12 Q. And, Dr. Coon, let's turn to some real-world crashes.
13 Did you observe any real-world crash photos and analyses?

14 A. I was presented with two different crashes that involved
15 4-inch ET-Pluses. Plus, I happened by several different
16 impacted heads, one just outside of here at Marshall, Texas,
17 about 8 miles east of town.

18 MS. DYER: Can we look at Demonstrative No. 30,
19 please?

20 Q. (By Ms. Dyer) Dr. Coon, can you tell me what you see in
21 this photo?

22 A. This is a photograph that I took just south of Tulsa,
23 Oklahoma.

24 Q. And what happened here?

25 A. A -- an ET -- 4-inch ET-Plus head was impacted nearly

1 end-on by a vehicle, and the occupant passed away.

2 Q. And did you actually look at the accident report?

3 A. I did.

4 Q. Okay. Who took this photo? You did?

5 A. I did.

6 Q. Okay. Did you see any similarities between this, the --
7 the guardrail and the condition of the guardrail in the
8 photo, and what you observed in your static testing?

9 A. I did. I believe there's a closer upshot where you
10 could see the guardrail buckling in the feeder chute.

11 MS. DYER: So if you go to Demonstrative 31,
12 please?

13 Q. (By Ms. Dyer) Is this the closeup shot you're referring
14 to?

15 A. Yes. You could see where the guardrail has expanded and
16 flattened out and has caught up against the ledge of the
17 feeder channels.

18 Q. So does this photo, in your view, represent what you've
19 referred to here today as buckling?

20 A. Yes, it does.

21 Q. Did you observe anything else at the crash site?

22 A. That the -- it had extruded some rail as it had gone up
23 before the throat locked up and -- and buckled.

24 MS. DYER: Could we go to Demonstrative Exhibit
25 32?

1 Q. (By Ms. Dyer) Is this what you're referring to?

2 A. Yes. The guardrail extruded some rail. It was impacted
3 from the accident diagram nearly -- under nearly ideal
4 conditions. And the guardrail had locked up the -- the
5 4-inch head locked up and then failed.

6 Q. I think you said you actually looked at some other
7 real-world accidents as well; is that correct?

8 A. Yes, I did.

9 MS. DYER: Let's turn to Demonstrative 66, please?

10 Q. (By Ms. Dyer) Dr. Coon, can you tell us what this
11 represents?

12 A. This is a crash involving a Jay Traylor. It was an
13 Isuzu Trooper that impacted. It was -- the NCHRP Report 350
14 requires testing at 15 degrees and at 0 degrees, and it's
15 supposed to work at every angle in between. This hit about
16 8 degrees, and the guardrail -- the terminal failed and
17 penetrated the -- the vehicle.

18 Q. And did you look at anything other than photos in
19 connection with this crash, sir?

20 A. Yes. This accident was reconstructed by an accident
21 reconstructionist. I also looked at his notes, his
22 reconstruction, and also at the accident report.

23 Q. And do you know based on that, was the trailer -- the
24 crash actually hit at an angle or head-on?

25 A. It was at about -- a slight angle, about 8 degrees.

1 Q. Based on your review of this report, did you reach any
2 conclusions?

3 A. My review of the -- this crash that it would be a -- a
4 typical crash where the terminal should have functioned, and
5 it failed to function. It locked up.

6 Q. I think you mentioned yet another crash that you looked
7 at; do you recall?

8 A. Yes. There is another one involving a Honda Frontline
9 (sic).

10 MS. DYER: Can we go to Exhibit -- Demonstrative
11 82? Excuse me.

12 Q. (By Ms. Dyer) Is this the crash you're talking about?

13 A. Yes.

14 Q. And can you tell me what happened here?

15 A. The -- this was nearly end-on impact. The terminal,
16 again, locked up. This was reconstructed by an accident
17 reconstructionist, Bryce -- Dr. Bryce Anderson. He
18 reconstructed it to determine that also that the terminal
19 specifically had failed to operate the way that it was
20 intended to produce.

21 And Dr. Anderson said that it locked, failed,
22 penetrated the occupant compartment. I reviewed his
23 analysis, and his analysis was correct.

24 Q. And so in both of these crashes that we've just seen --
25 I think you referred to them as Traylor and Carrier -- did

1 you review and rely upon the accident reports?

2 A. It -- it would be typical for a reconstructionist to
3 rely on the -- the work of other reconstructionists. Police
4 will take and document accidents in the case of Sabrina
5 Carrier and Jay Traylor, both of those -- yes.

6 Q. Based on your review of the -- this report, the one
7 pertaining to Carrier, did you reach any conclusions, sir?

8 A. The 4-inch terminal locked up, failed to function, and I
9 concurred with Dr. Anderson's review of the accident. It
10 failed to function as it was intended.

11 MS. DYER: Can we look at Demonstrative
12 Exhibit 83, the next one, please?

13 Q. (By Ms. Dyer) Is this a picture of the same accident?

14 A. Yes.

15 Q. Okay. In your view, was there something called gating
16 that occurred here with regard to the Carrier accident?

17 A. No. Gating is supposed to be the controlled passing of
18 the vehicle through the terminal, if it's impacted from the
19 side, so that you can safely pass and not have the guardrail
20 impale your car.

21 Q. And since the date -- strike that.

22 Did you reach any conclusions based upon all the other
23 work you did and your review of these real-life accidents?

24 A. I did.

25 Q. And what was that?

1 A. That the changes made from the 5-inch to 4-inch channel
2 not just the channel but all of the other dimensional and
3 geometric changes that were made did, in fact, affect the
4 performance of the guardrail system.

5 Q. And since the date that you did your initial report
6 containing the accidents that we've talked about, have you
7 looked at any other accidents?

8 A. There are -- I've also seen other accidents that have --
9 photographs of other crash scenes, and there's other
10 reports.

11 MS. DYER: Can we go to Exhibit 1248 at Page 5,
12 please, Mr. Diaz.

13 Q. (By Ms. Dyer) Is this an accident that you've looked at
14 since the time of your original report, sir?

15 A. Yes, it is.

16 Q. Okay. And can you tell me where this accident occurred?

17 A. I don't recall where this occurred. It may have been
18 North Carolina or -- I don't recall.

19 Q. And is -- do you know what happened here based upon
20 these photos?

21 A. This was an example of the terminal not gating. It
22 actually impaled the car. So there was no control, and
23 the -- it -- it speared the -- the car.

24 MS. DYER: And if you look at Exhibit 1249, Page
25 1, please, Mr. Diaz.

1 Q. (By Ms. Dyer) Is this another accident that you looked
2 at, Dr. Coon?

3 A. Yes. Examined it, didn't reconstruct it, but this would
4 be another example where the guardrail locked up. The --
5 the ET -- the 4-inch ET-Plus head locked up and impaled the
6 car. It was not -- not a gating crash.

7 Q. Do you have any idea where this accident occurred? Do
8 you recall?

9 A. I don't recall. I apologize.

10 THE COURT: Dr. Coon, can you speak up for me,
11 please?

12 THE WITNESS: Certainly. I apologize.

13 MS. DYER: If you look at Exhibit 1259, please,
14 Mr. Diaz, Page 11.

15 Q. (By Ms. Dyer) Is this another accident, sir?

16 A. It is.

17 Q. And do you know what occurred here?

18 A. This also involved a 4-inch ET-Plus terminal. The
19 guardrail extruded. You can see part of the extrusion, and
20 -- and can I draw on this monitor?

21 Q. If it works, yes.

22 A. It -- I -- you can see the flattened guardrail across
23 there, the extruded guardrail. So you know right off the
24 top that it impacted the end of the terminal, and then
25 impaled the vehicle.

1 Q. Dr. Coon, to your knowledge, are all these photos that
2 we've been looking at of ET-Plus terminals with the 4-inch
3 head?

4 A. Yes, they are.

5 Q. Dr. Coon, I'd like to talk a little bit about flared
6 testing. Did you look at any flared tests that were -- was
7 performed on behalf of Trinity?

8 A. There were five flared ET tests that were performed in
9 2005. Four of them were performed in 2005, and one was
10 performed in 2006.

11 Q. And --

12 A. Two -- two of them were before the 2005 report was
13 submitted to FHWA.

14 Q. And when we say -- say flared, what -- what do you mean
15 by that?

16 A. Angled away from the roadway.

17 Q. And when were these tests that Trinity did on the
18 flared, approximately?

19 A. They would have been in, I believe, July -- July,
20 September, October. I believe there was one in August and
21 then in March of 2006.

22 Q. Is a -- a flared configuration something that's provided
23 for in the NCHRP 350 report that we've talked about some
24 today?

25 A. You -- when you angle the guardrail away from the

1 roadway, you still hit it end-on, so you can consider it
2 either the vehicle departing the roadway at 15 degrees,
3 which is two of the tests under NCHRP 350 angling at 15
4 degrees that way. The flare, you impact it straight on and
5 then at 15 degrees.

6 Q. And is testing done at angles, as you've described them?

7 A. Yes. In NCHRP 350, it anticipates a 15-degree impact
8 angle, and it anticipates generally that the car penetrates
9 the barrier, meaning gating of controlled penetration where
10 it safely goes through the barrier, or at the end-on where
11 it should dissipate and extrude guardrail terminal and
12 safely slow the vehicle.

13 Q. Dr. Coon, if I'm testing a tangent -- a tangent
14 terminal, do I also have to test it at an angle in any way?

15 A. You have to test the tangent terminal at 15-degree
16 impact.

17 Q. So my -- my terminal is supposed to work not just at a
18 had-on but at a 15-degree angle -- up to 15-degree angle,
19 correct?

20 A. And NCHRP 350 says that if it's supposed to be installed
21 at any other angles it or orientations, it should be so
22 tested.

23 Q. Now, how do I get that angle? Do I -- do I actually
24 hit the car at an angle, or should I do anything else?

25 A. You'll have a guardrail installation. If you -- if your

1 test track is set up on the speed of the car, as ours was --
2 in Sweden, we had an -- a big electric motor to get the car
3 up to speed. We would have to flare or turn the test
4 article. If you have a test article that's installed
5 straight, then you can change the angle of the car to hit.

6 So it's just relative angles.

7 Q. So -- so a test article could be a guardrail, correct?

8 A. Yes.

9 Q. So I can either angle the guardrail or angle the car; is
10 that correct?

11 A. It generally be the same conditions.

12 Q. Okay. So you'd have -- you can -- you can do one or the
13 other necessarily to test that angle. Is that your
14 testimony, sir?

15 A. Yes, it is.

16 Q. Okay. And so if I have a flared, is it the same or
17 different as just testing the car straight on at an angle or
18 testing a tangent terminal at an angle? Excuse me.

19 A. A tangent terminal is expected to work anywhere from
20 end-on at 0 degrees all the way around to 15 degrees. So
21 when you test a -- a head, it should be safe for the
22 motoring public at those impact conditions.

23 Q. And would that be the same as testing a -- a flared
24 terminal at 15 degrees with a straight-on?

25 A. If you flare the terminal, depending on how much flare

1 there is, you can flare it, let's say, around 5 or 6
2 degrees, and that's in between the angles of 0 and 15. So
3 it should be expected to function.

4 Q. Did you look at the crash tests that Trinity performed
5 when they angled the -- what you called the test article or
6 the -- the terminal?

7 A. I did.

8 Q. And what did you find with regard to each of those --
9 each of those tests that Trinity did?

10 A. The first thing that happens when you -- the car impacts
11 the terminal is that it starts accelerating the terminal and
12 the front of the car starts crushing in, and the cars are
13 designed to crush in on the front end. They're designed
14 with crush points and crumple zones.

15 So as the terminal is being sped up, it also starts the
16 initiation process of extruding the rail. Starts flattening
17 the rail out the side.

18 And the next thing that occurs is the first post bends
19 down and releases the cable, which that's what holds the
20 whole guardrail in place and allows you to hold tension in
21 the guardrail. When that post breaks free, the guardrail
22 head is driven down the line.

23 So the first thing that the car sees is the first
24 initial extrusion forces and accelerating the head. The
25 next thing it sees is breaking the first cable release post

1 free, so it's actually not seeing any of the rest of the
2 installation until it's already started to crush the car,
3 started to accelerate the head, started to extrude the rail.

4 So your fate is almost already determined during that
5 initial few moments.

6 Q. And what is that fate determined by? Is it determined
7 by the angle of the posts that I've got down the line, or is
8 it determined by the head?

9 A. What my static test showed and what I can observe from
10 the terminal heads is that the initial impulse given to the
11 vehicle started to yaw the vehicle. That was what was also
12 found in TTI's DYNA quarterly reports is that the initial
13 extrusion forces caused the vehicle to start to yaw. And
14 once the vehicle starts to yaw, you're going to expose the
15 driver side to the guardrail and -- and spear the vehicle.

16 Q. And by yaw, you mean spin?

17 A. Yes.

18 Q. Okay. Can we just take a look at maybe one of the
19 tests? I'm not going to show you all of the tests.

20 MS. DYER: Can we take a look at one of them,
21 please? Mr. Diaz, 1074, the clip from there.

22 (Video clip playing.)

23 Q. (By Ms. Dyer) Dr. Coon, is this one of the crash tests
24 that you observed?

25 A. It is.

1 Q. And this is a flared test?

2 A. Yes.

3 Q. And did you see similar -- what happened here? Did it
4 pass or fail?

5 A. It failed.

6 Q. And did you see similar failures on the other tests that
7 Trinity ran with the fail -- with the flared ET?

8 A. Depending on the test, it either failed similar to this
9 and managed to stay upright, or the vehicle yawed -- spun --
10 spun to the side and then the vehicle rolled. So depending
11 on the different ways that it can fail, it would roll the
12 car.

13 Q. Was there a common denominator in all of these five
14 tests?

15 A. The -- the -- there were different posts that would be
16 what you could expect to see in the field. The only real
17 common denominator was the 4-inch ET-Plus head.

18 Q. And it was this 4-inch ET-Plus head that's out on the
19 road today; is that correct?

20 A. A lot of the 4-inch terminals are on the road. Yes.

21 Q. Have you seen any of the ET-Plus heads installed
22 actually on the roadway with a flare?

23 A. I have.

24 Q. How often?

25 A. It's -- it's not uncommon.

1 MS. DYER: If you could look at Demonstrative 132,
2 please, Mr. Diaz.

3 Q. (By Ms. Dyer) Can you tell me what this is, sir?

4 A. This is an ET-Plus terminal. This is installed in
5 Longview, Texas, and it's installed on -- on a flare.

6 Q. Okay. And if you look at -- did you -- did you provide
7 this photograph, or were you provided this photograph?

8 A. I was provided this photograph.

9 Q. Can you look at Demonstrative 128, please, and tell me
10 what that is?

11 A. It was another photograph I was provided. I -- also,
12 the geographic coordinates were on those. I looked them up
13 when I could on Google to confirm them. This was an ET-Plus
14 terminal also installed also on a flare.

15 Q. Do you know if Trinity ran a pickup truck test on any of
16 the flared tests that it did?

17 A. There was a -- there were no pickup trucks run that I
18 could find at all.

19 Q. Do you know the last time Trinity ran a pickup truck
20 test on an ET-Plus terminal?

21 A. End-on, 1999.

22 Q. Did you do any computer simulation modeling of the
23 ET-Plus, sir?

24 A. I reviewed what they had in 2003 to approximately 2006.
25 I did not rerun any of the -- the models.

1 Q. Okay. When you say what they had, you're referring to
2 what the -- what TTI did for Trinity; is that correct?

3 A. That's correct.

4 Q. Okay. And was that the LS-DYNA simulation model that
5 you talked about a little bit earlier?

6 A. That's correct.

7 Q. And do you know what test TTI modeled?

8 A. They had a model of the pickup available. It was in one
9 of the decks provided. When I -- when I say decks, that's
10 the input that they put into the computer. They used to be
11 in decks of paper cards, and we still call them decks.

12 One of the decks had a pickup truck in it, but there
13 was no evidence that it was ever simulated. The only thing
14 that was ever simulated was a small, little car.

15 Q. Did it use -- did these LS-DYNA models use 5-inch or
16 4-inch ET-Plus?

17 A. They simulated a 5-inch ET-Plus with an
18 inch-and-a-quarter exit gap.

19 Q. And what, if anything, did they show that you found
20 significant with regard to the 4-inch model here?

21 A. Several things. One is that it has an
22 inch-and-a-quarter exit gap in their simulation, which would
23 be -- a quarter larger than they said was ever made. The --
24 the non-contact deformation, the dynamic plume that goes
25 into the feeder chute, you can actually see it.

1 The original 5-inch terminal was nearly perfectly
2 designed. The flare as it comes out -- that plume as it
3 comes out, it nearly perfectly goes against the top and the
4 bottom edges of the channel. You can see from the modeling
5 that if you inserted a 4-inch channel and shrunk the channel
6 or the feeder chute, that it would rest up against the
7 guardrail and cut into the guardrail.

8 Q. And, Dr. Coon, I'm going to ask you to take a look
9 at Demonstrative Exhibit 154. Can you tell me what this
10 is, sir?

11 A. Yes. This is one of the LS-DYNA simulations. You
12 can -- when a simulation is running, you can just take off a
13 part for visual purposes so you can see what's happening
14 underneath.

15 The top picture is with the feeder chute in place, and
16 the bottom picture you can see the -- the extruder throat
17 was nearly perfectly designed to have it curve from the exit
18 gap and then out into the throat inlet. It's nearly
19 perfectly designed.

20 Q. And what, if anything, does this tell you, then, if
21 you -- if you decrease that exit gap, say, to 1 inch, like
22 we've got in -- in the current model?

23 A. The internal forces would be higher against the sides of
24 it, so it's kind of like a car. When you're going down the
25 road and braking, you don't know if you're messing with your

1 brakes by hitting them really hard, but you know you wear
2 out your brakes faster by hitting them hard.

3 The same thing is occurring on the inside of the
4 ET-Plus with a 4-inch -- or with a 1-inch exit gap on the
5 4-inch ET is that you're hitting the sides of the extruder
6 throat harder, because you're having to expand the guardrail
7 in a shorter distance. That increases the force levels, and
8 you can also see the -- the dynamic plume in the bottom
9 image, and you can see that if you shove a 4-inch feeder
10 channel in three-quarters of an inch against that guardrail,
11 you know what's going to happen.

12 Q. When you say dynamic plume, can you just briefly
13 describe what you mean?

14 A. Certainly. If you move the mouse up in the right along
15 that curve, that curve is what's been called a dynamic
16 plume, and you can also see it curves back in and then out.
17 What that's doing is actually it has to start bending in
18 advance of the exit gap. It has to start collapsing before
19 then. You can't just have it go from three and a quarter
20 inches to 1 inch instantly. It has to be end in advance.
21 And that's what you're seeing there.

22 Q. Dr. Coon, just briefly, going back to the actual
23 specimens here, does the change in the throat inlet from 4
24 to 4 and three-quarters that you talked about? Does that
25 have anything to do with the dynamic plume as well?

1 A. It -- it does. If you can imagine, when you have a
2 4-inch inlet in -- in a larger exit gap, you have a very
3 long time, a very long distance for it -- the guardrail to
4 be squeezed down.

5 When you widen out the inlet, the guardrail gets in to
6 the throat further, and that's when it first makes contact.
7 So it has less of a distance to be able to be squeezed down,
8 and then if you pull in the exit gap to 1 inch, it has a
9 much, much shorter distance to go from three and a quarter
10 inch to flatten down, ribbon out the side.

11 Q. Dr. Coon, did you visit any factories where the Trinity
12 heads were manufactured?

13 A. I visited two Trinity factories, one in Centerville,
14 Utah, and one in the Dallas/Fort Worth area.

15 Q. Did you do anything when you went to the factories?

16 A. When I went to the factories, I had wanted to see what
17 those fixtures could make, and I found that the fixtures
18 could make a 4-inch inlet, if you push in at the bottom.
19 And if the exit gap wasn't controlled at all, there were no
20 positive mechanisms to make sure it was only an inch.

21 And I happened to have some change with me at the time.
22 I used a -- to extend out the exit -- the exit gap, and you
23 could actually set it together and construct a 4-inch inlet
24 and a 1 -- and considerably larger than 1-inch exit gap with
25 their own fixtures.

1 Q. Well, why -- why were you interested in making a 4-inch
2 inlet and a larger than 1-inch exit gap?

3 A. It had been asserted that making a 4-inch inlet was
4 physically not possible to do, and it had never been done.
5 And the larger than 1-inch exit gap that I knew from 2000 to
6 2003 had been made, I was told that they had -- that had
7 never been made and couldn't be made with those fixtures.

8 Q. So Trinity was saying they didn't make ET-Plus models
9 with those dimensions because it was impossible; is that
10 correct?

11 A. Generally, yes.

12 Q. How long did it take you to make one of these at the
13 Trinity factory?

14 A. In the first factory, it was in the parking lot. I had
15 the first access to the parts, and I was able -- I -- I
16 didn't have any training to operate that equipment. There
17 wasn't an electrical power to operate any of the switches or
18 the air connectors. They just brought it out on the parking
19 lot for me.

20 I was able to assemble one with one -- my counsel
21 helping hold things in place in about 15 minutes to assemble
22 all of the parts.

23 And then at the Dallas/Fort Worth Trinity assembly
24 plant, it was raining. It took considerably longer. We
25 were out in the lot again. I didn't have any training on

1 the equipment, but I was able to figure out how the parts
2 fit into it. And it took considerably longer, because it
3 was raining. So it took about half an hour to assemble it.

4 Q. Dr. Coon, why were you out in the parking lot?

5 A. I was not allowed inside of the factory. I wasn't
6 allowed air to operate the air clamps. I didn't have power
7 to operate any of the equipment. And it was that real big
8 rainstorm that was coming down, and they actually shut down
9 the airport.

10 Q. So Trinity didn't let you into the factory?

11 A. No.

12 MS. DYER: No further questions. Pass the
13 witness, Your Honor.

14 THE COURT: Cross-examination?
15 Proceed when you're ready, Mr. Shaw.

16 MR. SHAW: Thank you, Your Honor.

17 CROSS-EXAMINATION

18 BY MR. SHAW:

19 Q. Dr. Coon, you and I have met before, have we not, sir?

20 A. Yes, we have.

21 Q. You remember I took your deposition?

22 A. Yes.

23 Q. Do you understand this is a False Claims Act case?

24 A. I do.

25 Q. Do you understand the issues that are before this jury

1 is whether or not a false claim has been presented to the
2 United States Government that has caused them to pay federal
3 tax dollars for the ET-Plus?

4 A. I don't really understand the False Claims Act.

5 Q. Okay. You don't understand that?

6 A. I don't understand the False Claims Act.

7 Q. Do you understand that in this particular case, there is
8 a claim that Trinity Industries committed fraud on the
9 Federal Government?

10 A. I don't know the False Claims Act.

11 Q. I'm not asking you that. I'm asking you, do you
12 understand in this particular case that Mr. Harman is
13 alleging that Trinity has committed fraud on the Federal
14 Government?

15 A. I would assume so, yes.

16 Q. So the answer to my question is, yes, you do understand
17 that?

18 A. I believe so, yes.

19 Q. Do you have any knowledge at all that you can give to
20 this jury about any intentional misrepresentation by Trinity
21 to the Federal Government?

22 A. Other than -- I don't understand the question.

23 Q. Well, let me ask it to you again. Do you have any
24 evidence that you can give to the Ladies and Gentlemen of
25 the Jury that Trinity intentionally misrepresented to the

1 Federal Government anything about the ET-Plus to receive
2 federal payment?

3 MS. DYER: Objection, Your Honor.

4 THE COURT: It's outside the scope of the direct.
5 And he's not an expert on legal issues. I'll sustain the
6 objection.

7 Q. (By Mr. Shaw) In this particular case, Dr. Coon, do you
8 remember your testimony about the testing by TTI?

9 A. Yes.

10 Q. Do you remember your testimony about the drawing that
11 was not submitted?

12 A. I do.

13 Q. Do you have any evidence at all that you can present to
14 the Ladies and Gentlemen of the Jury that TTI intentionally
15 omitted a drawing from a crash test report submitted to the
16 Federal Government?

17 MS. DYER: Objection again, Your Honor. Same
18 objection. Outside the scope. Also calls for --

19 THE COURT: Sustained.

20 Q. (By Mr. Shaw) Do you have anything that you can point
21 to, Dr. Coon, that the drawing that was -- you talked about
22 in your direct examination that should have been submitted
23 with the crash test report by Texas A&M, that that was
24 omitted intentionally?

25 A. I'm sorry. Which drawing?

1 MS. DYER: Objection, Your Honor. I don't
2 believe he testified --

3 THE COURT: Approach the bench, Counsel.
4 (Bench conference.)

5 THE COURT: He's a technical expert to talk about
6 engineering issues. Matters of mental state and intent were
7 not covered on direct that I can see. I'm confused why
8 you're taking the attack you are, Mr. Shaw.

9 MR. SHAW: Your Honor, one of the things that he
10 said on the direct examination is that the mistakes that
11 were made with the crash testing and with the reporting to
12 the federal government, I'm -- I'm entitled to ask him
13 whether or not he thinks he has seen any evidence he did it
14 intentionally. He was asked this in the last trial.

15 MS. DYER: He -- Your Honor, he was actually not
16 asked about the reports submitted to the federal government
17 on direct, and it really does go to an -- an intent
18 question. I don't think that's appropriate.

19 MR. SHAW: I'm just asking if he has any evidence
20 about that, Your Honor. He's already told me in his
21 deposition he doesn't. He said in the trial --

22 THE COURT: I understand, but this is not a
23 deposition. If --

24 MR. SHAW: He said it in trial last time we were
25 here. I understand your position, Judge.

1 THE COURT: It's a new day, Mr. Shaw. Let's limit
2 your cross to the direct.

3 MR. SHAW: All right. Thank you.

4 (Bench conference concluded.)

5 THE COURT: All right. Let's proceed.

6 Q. (By Mr. Shaw) In this particular case, Dr. Coon, you
7 were hired by the Plaintiff in this case to measure ET-Plus
8 heads to tell you -- to tell the difference among these
9 ET-Plus heads; is that correct?

10 A. That was one of the things, yes.

11 Q. I didn't mean to cut you off. I'm sorry. Are you
12 finished?

13 A. That -- that was one of the things, yes.

14 MR. SHAW: Let's take a look at your deposition on
15 Page 91 -- on Page 12.

16 Q. (By Mr. Shaw) Do you remember me asking you this
17 question in your deposition, Dr. Coon: Is that what you
18 would say the scope of your retention is, as you sit here
19 today, to look at the heads?

20 And answer beginning on Line 15 was: Determine -- to
21 determine the differences between the ET-Plus and the
22 ET-Plus systems.

23 Is that what you told me when we took your deposition,
24 Dr. Coon?

25 A. It is.

1 Q. And you understand, do you not, that the ET-Plus system
2 is comprised of things other than just the head? You
3 understand that?

4 A. Yes, I do.

5 Q. In fact, it has -- what all does it have, Dr. Coon,
6 bolts?

7 A. It would have the initial head. You have two bolts that
8 connect the head to the first breakaway post. Depending on
9 the type of post, you have either wooden posts and a -- a
10 steel breakaway post or a CRP type of post. That's a W6 by
11 9 that's made to break away for the cable bracket. There's
12 parts to it underneath the ground, and then there's a ground
13 blind strut across the bottom. There's a -- a second post
14 that hooks into that first post to give it the solid
15 connection, so that's important that you have a solid
16 connection between the first and second post. If you don't
17 have that, the first post may not release correctly. You
18 have a cable that goes up that holds on to the guardrail.
19 That's what allows the guardrail to start initiating the
20 extrusion. You have a cable anchor bracket that has to
21 release when it's hit by the reinforcing bar. So it has to
22 pull in one direction, but when you hit it end-on, it has to
23 release. You have guardrail posts.

24 But Trinity has -- you can basically Garanimals with
25 your parts that you have. If you have steel posts and wood

1 posts, there are acceptance letters where you can mix and
2 match those parts.

3 Q. Appropriately?

4 A. Yes.

5 Q. So there's anchors or bolts or posts, there's struts,
6 there's other things other than this -- this ET-Plus head?

7 A. Oh, absolutely.

8 Q. That comprise the entire system; is that correct?

9 A. Yes.

10 Q. All right. Now, you talked with Ms. Dyer about NCHRP
11 350. Do you remember that?

12 A. I do.

13 Q. And you're familiar with NCHRP 350?

14 A. I am.

15 Q. And you are familiar that -- and know that it sets out
16 the federal crash testing standards for roadside safety
17 devices, does it not?

18 A. At that time, yes.

19 Q. At that time, as applicable in this case?

20 A. Yes.

21 Q. And the 350 standards set forth how these devices --

22 MR. SHAW: Your Honor, may I just come forward?

23 THE COURT: Yes, you may.

24 Q. (By Mr. Shaw) These devices are supposed to be tested
25 to whether or not they can get approval to be placed onto

1 our nation's roadways; isn't that right? They set the
2 standards?

3 A. The Federal Highway Administration adopts NCHRP Report
4 350, so it -- the 350 doesn't set the standard, the Federal
5 Highway Administration does.

6 Q. You're correct, and you said it better than I did. The
7 Federal Highway --

8 THE COURT: We don't need those kind of sidebar
9 comments, Mr. Shaw.

10 MR. SHAW: Yes, Your Honor.

11 THE COURT: Don't -- don't comment on the
12 witness's testimony, just ask him questions.

13 MR. SHAW: Yes, Your Honor.

14 Q. (By Mr. Shaw) The Federal Highway Department -- FHWA
15 adopts those standards, correct?

16 A. That's correct.

17 Q. And then those standards are utilized to determine
18 whether or not roadside highway devices are crashworthy,
19 correct?

20 A. Yes.

21 Q. And if they are crashworthy, they are deemed to be 350
22 compliant; isn't that correct?

23 A. That -- depending on test level, yes.

24 Q. Depending on the test level. If the device, such as an
25 ET-Plus or some other type of safety device that's crash

1 tested, if it complies with the 350 standards and passes,
2 then it is determined to be 350 compliant. Is that a fair
3 statement?

4 A. Subject to FHWA approval, yes.

5 Q. If FHWA approves it?

6 A. Yes.

7 Q. All right. We know, do we not, that in May of 2005,
8 there was a crash test that took place at TTI?

9 A. Yes, we did.

10 Q. We know that. We know that that crash test was
11 conducted by the individuals at Texas Transportation
12 Institute, TTI, correct?

13 A. Yes.

14 Q. We know that whatever was crash tested on that
15 particular day passed the crash test? We know that, do we
16 not?

17 A. Yes.

18 Q. So whatever was crash tested by TTI in May of 2005 was
19 determined to be 350 complaint?

20 A. If it -- if it was a different article than prior
21 testing, it would have to undergo all of the tests. So I
22 can't make that statement.

23 Q. I'm asking you about what was crash tested in May of
24 2005, do you agree with me that whatever was crash tested on
25 that particular day passed the crash test and was determined

1 to be 350 compliant?

2 A. I can't make that assertion at all, no.

3 Q. If you could take a look at your testimony from July on
4 Page 73, Line 8?

5 MR. SHAW: Beginning on Line 8, Mr. Hernandez.

6 Q. (By Mr. Shaw) The question was asked of you, Dr. Coon,
7 sir: You don't contest that the crash test in 2005 was
8 successful, do you?

9 And your answer that day under oath, beginning on Line
10 10 was: It appeared to meet the NCHRP Report 350 criteria,
11 yes.

12 Is that still your answer today?

13 A. Absolutely.

14 Q. All right. So whatever was crash tested in July (sic)
15 of 2005 by TTI met the crash test criteria, and it was a
16 successful test?

17 A. It met the -- that crash test criteria for that specific
18 test.

19 Q. Meaning that it was 350 compliant?

20 A. Absolutely not.

21 Q. You disagree with that?

22 A. Yes.

23 Q. Did you perform any crash tests in this test?

24 A. I did not.

25 Q. Did you perform any crash tests of any of the heads that

1 you have located and are in your possession?

2 A. No, I did not.

3 Q. Have you ever asked to perform any crash tests?

4 A. No, I did not.

5 Q. Did you ever -- were you ever told not to perform any
6 crash tests?

7 A. No, I was not.

8 Q. So in this particular case, how many heads would you
9 say that you gathered up, Dr. Coon?

10 A. Gathered in --

11 Q. Oh, that you had access to?

12 A. I had access to thousands and thousands on the roadway.

13 Q. That you had -- how many heads would you say that you
14 had access to that you could have crash tested if you had
15 wanted to?

16 A. I would have had access to -- I believe we had about 12
17 or so ET terminals.

18 Q. And did you ever ask to crash test any of those heads?

19 A. No.

20 Q. Have you conducted crash tests in the past?

21 A. I have.

22 Q. Are you familiar with the NCHRP 350 standards concerning
23 crash testing?

24 A. I am.

25 Q. Did anybody ever tell you you weren't allowed to crash

1 test any heads?

2 A. No.

3 Q. Have you ever crash tested an -- an ET-Plus with a
4 four-inch guide channel?

5 A. No.

6 Q. Have you ever crash tested an ET-Plus with a five-inch
7 guide channel?

8 A. I have not.

9 Q. Have you ever asked to?

10 A. No.

11 Q. You worked, I think, or had access and involvement with
12 -- up in Nebraska, right, Dr. Coon, at the Midwest Safety
13 Testing Center, I believe? I may be saying it wrong. If I
14 am, I apologize.

15 A. No -- no problem. Midwest Roadside Safety facility.

16 Q. Do they do crash testing there?

17 A. Yes.

18 Q. Could you have had access, if you wanted to, to use
19 their facility and ask them to crash test the ET-Plus if you
20 had wanted to?

21 A. Yes.

22 Q. And you could have taken, for example --

23 MR. SHAW: Your Honor, if I may approach?

24 THE COURT: You may.

25 Q. (By Mr. Shaw) You could have taken a head like this

1 four-inch head with the -- that we find right here in the
2 courtroom and taken it right there and crash tested it if
3 you wanted to? You could have done that?

4 A. Yes.

5 Q. If you had been instructed to do that?

6 A. I could have.

7 Q. But that hasn't happened?

8 A. No.

9 Q. How much does it cost to do a crash test?

10 A. It depends, around \$50,000.

11 Q. \$50,000 to take, like, this head right here, this
12 four-inch head right here in front of me and -- and have it
13 crash tested?

14 A. Yes.

15 Q. And to set up all the parameters that Dr. Bligh talked
16 about in his direct examination?

17 A. Yes.

18 Q. Did you hear -- were you here during Dr. Bligh's
19 testimony?

20 A. I was only here for a portion of it.

21 Q. I -- I represent to you Dr. Bligh talked to us about all
22 that goes into setting up a crash test. You've done that
23 yourself, haven't you?

24 A. I personally set up crash tests and run them.

25 Q. And it costs about \$50,000, you say, to do that?

1 A. Give or take -- in that price range, yes.

2 Q. In this particular case, I think, as I understand it,
3 you performed static testing?

4 A. That's correct.

5 Q. Now, static testing is different from dynamic testing,
6 isn't it?

7 A. Yes.

8 Q. Dynamic testing is what occurred in July of 2005, isn't
9 it, or May of 2005?

10 A. I believe it was May.

11 Q. It was May. May of 2005. That would be more of a
12 dynamic test, correct?

13 A. That would be a full scale crash test, yes.

14 Q. Would that be in the category of a dynamic test?

15 A. Yes.

16 Q. As opposed to what you did in this particular case,
17 static testing?

18 A. That is correct.

19 Q. How much money does it cost to do that static testing?

20 A. I believe it -- I would have to look. I believe the lab
21 rented for about \$3,000, but that's an estimate. And I
22 apologize. I don't know the exact numbers.

23 Q. Well, how much money have you been paid in this case for
24 the work that you've done for Mr. Harman?

25 A. Minus travel expenses and everything, about 134,000, I

1 believe.

2 Q. \$134,000, and of that, your retention was to go -- to
3 drive around and/or look at to determine the differences
4 between ET-Plus -- ET-2000 Plus and ET-Plus systems, as you
5 told me?

6 A. That is correct.

7 Q. Did you ever say that for the amount of money that I'm
8 charging to go around and look at heads and measure them,
9 why don't we just go crash test it?

10 A. No.

11 Q. You never said that?

12 A. No.

13 Q. All right. But rather, you said let's do some static
14 testing?

15 A. Yes.

16 Q. But you -- you had help doing the static testing, didn't
17 you?

18 A. I did.

19 Q. In fact, you brought somebody in to do the static
20 testing, did you not, to help you with it?

21 A. I didn't have a test machine that size.

22 Q. That size. Let's look at the video from the static
23 testing.

24 MR. SHAW: Before you start, Mr. Hernandez --

25 Q. (By Mr. Shaw) Does this appear to be the facility where

1 the static testing took place?

2 A. It does.

3 Q. I -- is this the video that you produced in connection
4 with your involvement in this case?

5 A. It is.

6 Q. And this was at another facility that you weren't
7 involved with, correct, that you brought in to help you?

8 A. That we went to -- to test the heads, yes.

9 Q. And I think, as I understand it from your direct
10 testimony, you tested four heads?

11 A. Three.

12 Q. Three heads. Okay.

13 MR. SHAW: Let's -- let's roll the video, Mr.
14 Hernandez, please.

15 (Videoclip played.)

16 MR. SHAW: Stop it right here, Mr. Hernandez.

17 Q. (By Mr. Shaw) Am I looking at the head here in the
18 middle that's kind of faced -- the faceplate's facing down
19 on top of that big orange thing?

20 A. Yes.

21 Q. And -- and the guardrail is going up towards the top of
22 the screen; is that right?

23 A. Yes.

24 MR. SHAW: All right. Let's roll it from here,
25 Mr. Hernandez.

1 (Videoclip played.)

2 MR. SHAW: Stop that -- stop it right there, Mr.
3 Hernandez.

4 Q. (By Mr. Shaw) Is this the man here on the side to the
5 right that was waving his hands and -- to stop the test?

6 A. Yeah, Dr. Phillips.

7 Q. This is Dr. Phillips. And is he telling you right there
8 to stop this particular test or telling the operator of the
9 machinery to stop the test?

10 A. He's indicating to me to stop the test.

11 Q. And did you do that?

12 A. Yes.

13 Q. And did you start over?

14 A. Yes.

15 Q. Did you change out that head before you started over
16 again?

17 A. No.

18 Q. In fact, you mean you went ahead and you used this same
19 head in this test after Dr. Phillips came running around the
20 side waving his arms at you to stop?

21 A. I don't see him running, but yes.

22 Q. Oh, I said come around the side -- I'm sorry, waving his
23 hands. Did you see that?

24 A. He waved his hand, yes.

25 Q. And was he waving his hands because it wasn't lined up

1 correctly?

2 A. It -- it gauged, yes.

3 Q. And, in fact, when that happened, you stopped the test,
4 did you not?

5 A. That is correct.

6 Q. Did you ever tell anybody that you used that head again
7 in subsequent tests after it had been involved in a failed
8 experiment like this?

9 A. The ET heads are to be reusable. So we checked it and
10 inspected it, made sure it was in a reusable condition, and
11 then reused it.

12 Q. Did you understand my question?

13 A. I apparently did not.

14 Q. My question was: Did you ever tell anybody and disclose
15 in your connection with this particular case that the head
16 that you were using and the static testing had been involved
17 in a failed test?

18 A. The video was disclosed -- did I -- we disclosed the
19 video.

20 Q. Is that all you did, disclose the video when
21 Dr. Phillips comes around, and I think he's pointing down
22 right there. Do you see that?

23 A. I believe he's indicating that the rail is gauging.

24 Q. That it's gauging?

25 A. Yes.

1 Q. And that's not proper?

2 A. It actually is simulated by TTI in some of their DYNA
3 runs. It's not what you would test with the extruder
4 throat.

5 Q. Did you understand my question?

6 A. I'm sorry, can you --

7 Q. My question was: That's not proper, is it, for it to be
8 gauging?

9 A. It's -- it's not extruding rail properly, no.

10 Q. Because it's lined up incorrectly?

11 A. That's correct.

12 Q. And that was lined up by you and Dr. Phillips?

13 A. That is correct.

14 MR. SHAW: Can you continue, please, Mr.
15 Hernandez? Stop it right there, please.

16 Q. (By Mr. Shaw) Do you see him waving now for you to
17 stop?

18 A. Yes.

19 Q. Did you see him waving a couple of frames earlier than
20 that, or did you immediately see him waving to stop that
21 test when you were there operating it?

22 A. I was not operating the test equipment. I was observing
23 from the other side.

24 Q. Who was operating the test equipment?

25 A. One of Dr. Phillips' technicians.

1 Q. Do we know where he is?

2 A. If you look just to the right of the -- of that cage
3 area, he's protected in the cage rather than being exposed
4 to anything from the test equipment.

5 Q. In case it was to come apart?

6 A. Yes.

7 Q. In case it was to come apart because it was lined up
8 incorrectly?

9 A. For any reason, you would want adequate safety
10 precautions.

11 Q. Are you in there, too?

12 A. In the cage?

13 Q. Yes.

14 A. I'm not certified to operate that equipment.

15 Q. Okay.

16 MR. SHAW: Let's continue, Mr. Hernandez.

17 (Videoclip played.)

18 MR. SHAW: Stop it right there, please, Mr.
19 Hernandez.

20 Q. (By Mr. Shaw) Is that you, Dr. Coon?

21 A. It is.

22 Q. And is that you and Dr. Phillips looking at the damage
23 that's been caused as a result of this misaligned test that
24 you had constructed?

25 A. The test isn't misaligned, but the test article was not

1 aligned correctly.

2 Q. Did you ever do any type of static testing on any of the
3 heads that were provided to you by Mr. Harman and his legal
4 team?

5 A. I performed static tests on three heads.

6 Q. All right. Just those three?

7 A. Yes.

8 Q. And those heads were provided to you by Mr. Harman's
9 legal team?

10 A. Yes, they were.

11 Q. Did you pick those heads out?

12 A. Of the ones that were -- had been taken off the road, I
13 did.

14 Q. Well, which are the ones that were taken off the road?

15 A. The ones that were in their possession, I understand
16 those to have been on the road or generally on the road. I
17 did not pick those specifically.

18 Q. Oh, so the heads that you tested had already -- had been
19 taken off the roadway; is that right?

20 A. That's my understanding.

21 Q. Do you know if any of those heads had ever been impacted
22 before?

23 A. I inspected them. You can have impacts and reuse the
24 head. So, no, I don't know.

25 Q. My question is: Do you know whether or not any of those

1 heads had ever been hit before?

2 A. No.

3 Q. Were -- on some of these heads that you inspected, as I
4 remember, you -- you looked at them up at a restaurant in
5 Kansas or Wichita; is that correct?

6 A. Yes.

7 Q. Were those the heads that were involved in these tests?

8 A. They -- I believe either at the restaurant or ones at my
9 house.

10 Q. So at the restaurant, as I understand it, the name of
11 the restaurant, so -- was The Artichoke; is that right?

12 A. Yes.

13 Q. And you're at The Artichoke restaurant; is that right?

14 A. That is correct.

15 Q. Up in Wichita, Kansas?

16 A. Yes.

17 Q. And you walk out the door of The Artichoke restaurant,
18 and there's a Lowboy Trailer there; is that right?

19 A. I don't know what a -- it was a flatbed trailer.

20 Q. Okay. A flat bed trailer; is that right?

21 A. Yes.

22 Q. And was there anybody there with those heads when you
23 walked out of the restaurant?

24 A. No, there was not.

25 Q. They're just sitting there in a flatbed -- how many

1 heads, three?

2 A. I would have to look at my notes, but I believe three.

3 Q. And they're sitting there at the -- in the parking lot
4 of the Wichita, Kansas, restaurant at The Artichoke,
5 correct?

6 A. That's correct.

7 Q. And you're by yourself?

8 A. I -- I don't recall.

9 Q. And then you -- you go to this -- this trailer, and
10 there's nobody there with these heads, correct?

11 A. That is correct.

12 Q. You don't even know how those heads got there?

13 A. Driven.

14 Q. All right. They were driven. You don't know who drove
15 them?

16 A. No, I do not.

17 Q. You don't know how long they'd been there?

18 A. They were not in the parking lot when I pulled in.

19 Q. So sometime while you're inside the parking lot,
20 somebody drives up on a flatbed with heads and leaves them
21 there unattended and then you walk out of the parking lot
22 and find them there unattended; is that correct?

23 A. Yes.

24 Q. And then you -- you look at them and you measure them;
25 is that right?

1 A. Yes.

2 Q. And then you leave; is that right?

3 A. That is correct.

4 Q. Do you tell anybody that you're leaving?

5 A. No.

6 Q. Do you alert to anyone that, hey, I'm finished with
7 the -- I'm finished looking at these heads that have been
8 left here unattended in the parking lot, now I'm -- I'm
9 going back inside? Do you do anything like that?

10 A. I would have alerted counsel that I was finished.

11 Q. And some time later on, I guess the heads leave the --
12 Topeka, Kansas, or Wichita, Kansas, Artichoke restaurant
13 parking lot; is that right?

14 A. Yes, it is.

15 Q. Do they leave while you're still there?

16 A. I don't know.

17 Q. But you leave them unattended?

18 A. That is correct.

19 Q. And those are the heads that some -- that end up in
20 these static tests that you talked to the jury about?

21 A. Yes.

22 Q. Is that a very scientific way to go about evaluating
23 these types of products, Doctor?

24 A. I'm sorry. I didn't -- as far as random sampling or
25 whether I wanted to acquire other heads?

1 Q. Is that a very scientific way to go about examining and
2 -- and watching these particular heads for a matter such as
3 this?

4 A. It was -- I documented which heads I saw. I wrote on
5 the heads with my initials in my own handwriting so I could
6 track them and identify them later. I kept measurements of
7 them. And then when I saw the heads again, I had to drive
8 down specifically to Marshall for only the fact of verifying
9 that those were the heads that had been in Illinois, because
10 I did not take them from Illinois to Marshall. So I had to
11 come down on a special trip only just to look at the heads
12 to make sure they were the same ones.

13 Q. So you would say that is a scientific -- a sound
14 scientific way to -- to look at these -- this particular
15 matter?

16 A. The only method I had.

17 Q. That's not the question I'm asking you. I'm asking you
18 if you would say this is a very -- would you agree with me
19 that this is not a very scientific way to evaluate the
20 product?

21 A. No.

22 Q. You would disagree with me?

23 A. I would.

24 Q. Let's take a look at your testimony from July, Page 76.
25 That would be on Line 5 where we ask you under oath: It's

1 not a very scientific way about evaluating a product, is it?

2 And what's your answer?

3 A. No.

4 Q. So would you agree with me now, as we sit here
5 testifying about these heads that you looked at in the
6 parking lot in Wichita, Kansas, that that wasn't a very
7 scientific way to go about evaluating a product?

8 A. I would disagree with my prior testimony as to that
9 point.

10 Q. So the previous testimony that you provided to us under
11 oath, you would say, is incorrect now?

12 A. I've come to know additional information.

13 Q. You've come to change your viewpoint about what's
14 scientific and what's not scientific?

15 A. I have come to know that what you see in the field
16 varies a lot, and what test I would run and what test I
17 would pick to pick a four-inch head, there's so much out
18 there, I wouldn't even know what to test.

19 Q. Did you understand my question, Dr. Coon? My question
20 is --

21 THE COURT: Counsel, if you believe the witness
22 is nonresponsive, raise it with the Court. Don't instruct
23 him as to whether he's answered your question to your
24 satisfaction or not.

25 MR. SHAW: Yes, Your Honor.

1 THE COURT: Okay.

2 Q. (By Mr. Shaw) You have changed your view about what is
3 scientific and what is not scientific?

4 A. No.

5 Q. But at least we know that when we were testing about --
6 testifying about this matter back in July of this particular
7 year, less than four or five months ago, your testimony was
8 that you agreed that that wasn't a very scientific way to go
9 about evaluating products that were included in your static
10 testing; is that correct?

11 A. You lost me in the question. I apologize.

12 Q. And we know that at least back in July of this year,
13 your position was is that the testing -- or your
14 position was is that the way in which you were presented
15 these heads and examined these heads was not a very
16 scientific way to go about it. That's what you told me
17 earlier, wasn't it?

18 A. I -- I now believe the question can't be appropriately
19 answered.

20 Q. When we talk about static testing, Doctor, as I
21 understand it, when you're doing the static testing, you're
22 actually pushing the rail in backwards, isn't that correct?

23 A. No.

24 Q. Let's take a look at your testimony on this particular
25 matter -- I apologize, Dr. Coon. We'll come back to that.

1 MR. SHAW: I apologize, Your Honor. I need to
2 find the appropriate cite. I'm sorry.

3 Q. (By Mr. Shaw) Do you agree with me that static
4 testing -- you cannot perform static testing to determine
5 whether or not a product is -- complies with FHWA 3 -- or
6 NCHRP 350. Let me ask it for you again because I butchered
7 it up.

8 MR. SHAW: I'm sorry, I apologize to the Court.

9 THE COURT: Just ask it again. Don't tell us you
10 didn't ask it the right way. Stop and start over.

11 MR. SHAW: Yes, Your Honor.

12 THE COURT: All right.

13 Q. (By Mr. Shaw) You agree with me, do you not, Dr. Coon,
14 that you can't perform static testing to determine whether
15 or not an end terminal is compliant with NCHRP 350? Do you
16 agree with that?

17 A. That would be for FHWA to determine.

18 Q. So what I'm saying is correct?

19 A. No.

20 Q. Let's take a look at your testimony from June, Page 92,
21 Page 18 -- or Line 18.

22 You never -- the question was asked of you: You never
23 analyzed that, you never analyzed any of the heads in your
24 possession to determine whether or not they would pass an
25 NCHRP Report 350 crash test criteria?

1 And your answer was: That would require a crash test.
2 Correct?

3 A. That's correct.

4 Q. Kind of like the one that was conducted in May of 2005,
5 correct, that type of crash test?

6 A. I can't answer the question the way you phrased it.

7 Q. All right. Well, let's continue to -- let's read the
8 rest.

9 MR. SHAW: If you can open it up, please, Mr.
10 Hernandez?

11 Q. (By Mr. Shaw) And I asked you: I got it. And you
12 didn't perform crash testing?

13 And your answer was: Correct. I'm sorry.

14 And then: I'm just trying to get a clear answer. I'm
15 not arguing with you about it.

16 And you said: I'm really confused.

17 MR. SHAW: Let's open it up again.

18 Q. (By Mr. Shaw) I asked the question of you on Line 8:
19 You can't perform static testing to determine whether it
20 would pass?

21 And your answer is?

22 MR. CARPINELLO: Your Honor, may I -- he didn't
23 read the whole answer. He read one line of the answer and
24 then went on to the question. He didn't read the whole
25 answer. I ask that the whole answer be read.

1 MR. SHAW: You can open it up, Mr. Hernandez.
2 I'll certainly do that. Beginning on Line 6, I think -- if
3 you'll go back up, Mr. Hernandez. Thank you.

4 Q. (By Mr. Shaw) Your answer is: I'm really confused.
5 You can't do a visual examination and determine whether it
6 would pass or not.

7 And then I say: You can't perform static testing and
8 determine whether it would pass.

9 And what did you say?

10 A. Right.

11 Q. And that's the type of static testing that you did in
12 this particular case; isn't that right?

13 A. That is correct.

14 Q. And as -- you also say, you can't do a visual
15 examination and determine whether it would pass?

16 A. That is correct.

17 Q. So we can't look --

18 MR. SHAW: If I could approach, Your Honor, the
19 heads?

20 THE COURT: You may.

21 Q. (By Mr. Shaw) You -- you can't look at these heads and
22 -- and examine them and measure them and evaluate them to
23 determine whether or not they're crashworthy, can you?

24 A. I can't answer the question the way you're phrasing it.

25 Q. But we do know that in your deposition, you could say I

1 can't do a visual examination and determine whether it would
2 pass or not. That was your testimony, correct?

3 A. That was my testimony. I could clarify, if you'd like.

4 Q. And what -- and what we're trying to determine is
5 whether it would pass is whether or not it would pass a
6 crash test?

7 A. That is correct.

8 Q. Okay. In the static testing, the head isn't fixed, is
9 it?

10 A. The head --

11 Q. In the static testing, the head is fixed. It's secured,
12 isn't it?

13 A. It rolls up in one of the tests. It's just sitting on
14 the platen with bars around it.

15 Q. Well, in a real impact in a dynamic test, the head isn't
16 secured or fixed like it is in a static test, is it?

17 A. It -- it locks around -- the bumper locks around it and
18 helps secure it from rotating.

19 Q. In a real impact test, a dynamic test, the head is not
20 secured in a certain fixed position, is it, sir?

21 A. It is fixed on the guardrail, but it is not rigidly set
22 onto a -- a platen, no.

23 Q. And, in fact, in a static test, you can only evaluate
24 slight changes within the head itself; isn't that right?

25 A. You -- I don't understand the question.

1 Q. Okay. Let's take a look at your testimony from July of
2 2014, beginning on Page 28, Line 24.

3 If you would turn to Line 28 -- Line 24, the question
4 was asked of you: And so the static testing, if I
5 understand your testimony this morning, can only evaluate
6 slight changes within the head itself; is that right?

7 And your answer there on Line 2 from that sworn
8 testimony is: That is correct.

9 A. It can -- it depends on your definition of evaluate. If
10 you had a major change and it was drastically different, you
11 would know. If it's a minor change, it may look like a
12 minor change, but it's actually not a minor change. And you
13 determine that from the testing.

14 Q. Dr. Coon, your answer there and your sworn testimony in
15 response to my question about slight changes on Line 2 of
16 this -- of this deposition -- read it for us again, please.

17 A. That is correct.

18 Q. Thank you. In fact, Dr. Coon, you know of no instances
19 in which end terminal products -- energy-absorbing end
20 terminal products have ever received approval from FHWA
21 based upon static testing; isn't that true?

22 A. No end terminal energy-absorbing internals have been
23 engrained in 350 static testing, that's correct.

24 Q. Based upon static testing?

25 A. No end terminals based on static testing.

1 Q. So the testing that you performed in this case, if you
2 were to utilize that testing to try to get approval, you
3 would be the first person in the history of -- of the world
4 to ever have that accepted by the federal government; isn't
5 that correct?

6 A. If it were for energy-absorbing end terminals only, yes.

7 Q. Do you remember talking with Ms. Dyer about the insert
8 of the four-inch guide channel into the feeder head or the
9 feeder chute?

10 A. I do.

11 Q. You recognize that static testing does not test whether
12 the insertion of the guardrail three quarters of an inch
13 would affect its performance. Do you understand that?

14 A. No.

15 Q. What test, if any, have you done to determine
16 whether or not placing the guide channel three quarters
17 of an inch into the extruder throat affects the
18 performance of the ET-Plus?

19 A. What testing?

20 Q. Yes.

21 A. I've only examined real-world crashes and DYNA
22 simulation. I've not performed crash tests on the four-inch
23 head with the one-inch exit gap.

24 Q. So the static testing would not evaluate the performance
25 of the ET-Plus as far as the three quarter inch insert into

1 the feeder chute, would it?

2 A. I performed static testing to determine how much the
3 dynamic plume or whether dynamic plume actually did come
4 into contact with it, just at static levels. I knew at
5 dynamic levels it did.

6 Q. Let's take a look at your deposition testimony from June
7 of 2014 on Page 161, beginning on Line 11, I asked you:
8 Your original, have you done any test to determine whether
9 or not placing the guide channel three quarters of an inch
10 into the extruder throat affects performance?

11 And you said: I would have to do a study on that.

12 Is that correct?

13 And your answer is: I have seen --

14 And then the question is: Is that correct?

15 And the answer is: Whether I have tested it.

16 The question I then asked you: You have not tested it?

17 And your answer at that time under oath was, what, Dr.

18 Coon?

19 A. I have not crash tested the terminals.

20 Q. What's your answer on Line 21, Doctor?

21 A. I have not tested it.

22 Q. Thank you. You're not an expert on welding, are you?

23 A. I have taught welding and understand the mechanics of
24 it. I'm not a certified weld inspector.

25 Q. Are you an expert on welding or not?

1 A. No.

2 Q. Did you ever perform any crash testing on any of the end
3 terminals that Mr. Harman made that had four-inch guide
4 channels?

5 A. The -- the custom -- I apologize, I don't remember the
6 name of them. No, I did not.

7 Q. So you never performed any type of crash testing, static
8 testing on any of the end terminals with four-inch guide
9 channels that were made by Mr. Harman?

10 A. No, I did not.

11 Q. Did you ever measure them?

12 A. No, I did not.

13 Q. Did you ever ask for one?

14 A. No, I did not.

15 Q. Did anybody ever tell you that Mr. Harman made end
16 terminals with four-inch guide channels and placed them onto
17 the roadway?

18 A. I became aware of that at some point, yes.

19 Q. When you became aware of it, did you ask to look at them
20 and -- and see how they compared to what you were saying to
21 the -- in your reports and in your testimony?

22 A. No, I did not.

23 Q. Let's talk about the flared ET testing. You understand
24 there's a difference between a tangent ET -- or a tangent
25 end terminal and a flared end terminal? Do you understand

1 the difference?

2 A. The -- the implementation, yes.

3 Q. Do you understand that the flared ET terminal test that
4 you were looking at have never been commercialized, the
5 product?

6 A. The entire terminal, as in --

7 Q. The system?

8 A. -- the posts and the line -- that is my understanding
9 that it has not been specifically marketed.

10 Q. In fact, it's never been commercialized and placed into
11 the market to -- to be sold, has it?

12 A. Not to my knowledge.

13 Q. And is that because the people at TTI determined that
14 those are failed tests?

15 A. That would be my assumption, yes.

16 Q. So when you're talking to the Ladies and Gentlemen of
17 the Jury about fail -- about a failed test for a flared ET
18 end terminal, you understood and understand now, do you not,
19 that that product has never been commercialized and has
20 never been placed on the roadway by Trinity Highway
21 Products; is that correct?

22 A. Trinity doesn't install guardrails, so no.

23 Q. Has it ever been placed on the roadway by anyone that
24 you're aware of with Trinity's approval, blessing of any
25 nature?

1 A. No blessing to my knowledge.

2 Q. Okay. And you understand that Trinity doesn't install
3 end terminals on the roadway, do they?

4 A. I apologize, I misanswered the last question.

5 Q. Okay. Do you understand that Trinity doesn't install
6 end terminals on the roadway? You understand that?

7 A. I do.

8 Q. You understand that Trinity fabricates metal and creates
9 an end terminal at its facilities. You understand that?

10 A. That's my understanding, yes.

11 Q. You understand that TTI is the designer of highway
12 safety products, including end terminals, such as the
13 ET-Plus. You understand that?

14 A. Yes, to -- it's my understanding generally.

15 Q. You understand, do you not, sir, that there are
16 differences between the experimental, never commercialized
17 flared ET end terminal and the ET-Plus like we have here in
18 front of us. You understand that, do you not?

19 A. The terminal heads were identical to what we have in
20 front of us.

21 Q. You understand, do you not, Dr. Coon, that an end
22 terminal is comprised of something more than just the head?

23 A. I can't -- the answer you asked me for was misphrased.
24 You said the terminal before us, and it's the -- the head
25 before us.

1 Q. Let's make sure. You understand, do you not, Dr. Coon,
2 that an end terminal system is comprised of more than just
3 what we see here in front of us today?

4 A. That is correct.

5 Q. And you understand, do you not, that a flared
6 experimental ET end terminal, never commercialized, has
7 components to it that are more than just this head that we
8 see here in front of us?

9 A. Yes.

10 Q. You understand that they're different anchors, correct?

11 A. Anchor brackets and anchors -- posts, yes.

12 Q. There's different -- different cable attachments?

13 A. That is correct.

14 Q. And how many parts would you say, Dr. Coon, comprise
15 a -- an end terminal system -- component parts, would you
16 say?

17 A. Individual or repeated parts?

18 Q. Well, for example, if I was going to take an ET -- an
19 ET-Plus system and all of the components it went with and I
20 was to separate them all and put them in a box, how many
21 parts would you say would be in that box? 50?

22 A. That would probably not be a bad number.

23 Q. All right. But if I was going to take apart an
24 experimental ET -- flared ET non-commercialized end terminal
25 and break it down and put all those parts and put them in a

1 box, how many parts would be in that box, 50 or so?

2 A. Probably around that number.

3 Q. They're not going to be the same parts in each box,
4 though, are there? You're going to have different parts in
5 every -- in each box?

6 A. You could have the same parts, but when you put them
7 on -- you have -- the flared ET is an ET-Plus four-inch head
8 at an angle with, you know, wooden posts with blockouts,
9 with the components that you would see installed on the
10 roadway.

11 Q. So there's going to be some parts that are different for
12 the ET-Plus system than there are for the flared ET?

13 A. No, not necessarily.

14 Q. You disagree with me about that?

15 A. Yes. You can flare an ET, put it at a -- a regular ET
16 terminal. If you put it at an angle, it would have a flare
17 to it and then when you hit it, it would lock up and --

18 THE COURT: Dr. Coon, he just asked you if you
19 agreed with it or not.

20 THE WITNESS: Sorry.

21 THE COURT: Try to limit your answers to the
22 questions that are asked. And if you don't know, say you
23 don't know.

24 A. I don't know.

25 THE COURT: Let's -- let's move along, Counsel.

1 MR. SHAW: Thank you, Your Honor.

2 Q. (By Mr. Shaw) Let me talk to you about geometry. Do you
3 remember the testimony when you said that the changes with
4 the ET-Plus had affected the geometry of the head? Do you
5 remember that?

6 A. Yes.

7 Q. Are you familiar with Report 350 definition of geometry?

8 A. If you can bring it up, that would probably be helpful.

9 MR. SHAW: Let's look at Defense No. 3, Section
10 4.223.

11 Q. (By Mr. Shaw) Do you see this, Dr. Coon, on 4.2.2.3,
12 terminals and crash cushions? Do you see that?

13 A. I do.

14 Q. And we see this first sentence under these standards for
15 end terminals and safety devices called geometrics. Do you
16 see that?

17 A. I do.

18 MR. SHAW: And if we can enlarge that for us with
19 the word beginning mounting, Mr. Hernandez.

20 Q. (By Mr. Shaw) Mounting heights of rail elements, post
21 spacing, length of test installation, including backup
22 structure, if used, position of energy-absorbing elements,
23 targeted point of impact relative to end of article. Do you
24 see that?

25 A. I do.

1 Q. Do you see anywhere in that particular part of NCHRP 350
2 where we're talking about feeder chutes or exit gaps or feed
3 channels or windows or anything else dealing with the
4 product?

5 A. I do.

6 Q. Tell me the word that you're looking at.

7 A. The position of energy-absorbing elements.

8 Q. That's your position on this? You interpret position of
9 energy-absorbing elements to mean feed chute, exit gap,
10 window, that type of thing?

11 A. Through the -- the -- yes. The -- through the extruder
12 throat is how energy is dissipated.

13 Q. Is it dissipated through the feed channel? I mean,
14 through the -- the window, as we call it?

15 A. Not through the window but through the extruder throat.

16 Q. Is it dissipated --

17 A. It is dissipated.

18 Q. I'm letting you finish. I'm sorry.

19 A. It's dissipate -- the angle that you have the plates,
20 the inlet size, the exit gap size, those would be
21 controlling the position of the rail. And the rail feeding
22 down the -- the head feeding down the rail is how you
23 dissipate energy, so they would be energy-absorbing
24 elements.

25 Q. Dr. Coon, do you remember the ET-2000?

1 A. I did.

2 Q. Do you understand that the ET-2000 has been described as
3 a 350-compliant product?

4 A. It is.

5 Q. You understand that it has a 1-inch exit gap?

6 A. It does.

7 Q. So the -- the ET-2000 had a 1-inch exit gap, correct?

8 A. That is correct.

9 Q. You understand that I believe it has been described in
10 some of the paperwork as a work of art or something of that
11 nature. You've heard that before?

12 A. I have.

13 Q. In fact, the ET-2000 with the 1-inch exit gap, just like
14 this terminal here, you understand this has a 1-inch exit
15 gap?

16 A. I believe I -- I would have to measure the exit gap.

17 Q. Okay. You understand that the ET-2000 was a design end
18 terminal designed by the engineers at Texas A&M, correct?

19 A. Yes.

20 Q. Of which Dean Sicking, I think, was one of them?

21 A. Generally attributed the inventor, yes.

22 Q. And Dean Sicking is someone you studied under, is he
23 not?

24 A. He is.

25 Q. And Dean Sicking is also a competitor of Trinity; isn't

1 that right?

2 A. I know so, yes.

3 Q. And he has also an end terminal energy-absorbing device
4 that's marketed in this country, does he not?

5 A. More than one.

6 Q. And the one that would be comparable to the ET-Plus
7 would be called the SKT?

8 A. Yes.

9 Q. On the real-world crashes that you talked about that's
10 described by you, I think you mentioned four of them that
11 you've looked at.

12 A. At least four.

13 Q. At least four of them. Like the one in North Carolina?

14 MR. SHAW: If we could pull up P-1248.

15 Q. (By Mr. Shaw) Do you even know where that happened?

16 A. I looked at it on aerial images.

17 Q. Oh, you haven't been there?

18 A. No, I have not.

19 Q. Now, I notice in your resume that along with being a
20 safety engineer, a city engineer, and a lawyer and a police
21 officer, you also are an accident reconstructionist,
22 correct?

23 A. I am.

24 Q. Have you ever been involved in any kind of cases in
25 which you rendered opinions based upon accident scenes when

1 you never have even been to the scene?

2 A. In specific cases, I don't believe so.

3 Q. So in all other cases in which you've been retained as
4 an expert to opine about how accidents happen, you went to
5 the scene of the accident to make sure that you had all the
6 facts right, correct?

7 A. If the vehicle in the situation would allow that, it's
8 beneficial to go to the scene.

9 Q. Have you ever gone into court ever and provided
10 testimony at an accident case when you're an accident
11 reconstructionist when you've never even been to the scene
12 of the accident to even look at it?

13 A. Other than this case, I don't believe I've given
14 testimony on a crash before involving -- in a court case in
15 a courtroom. No.

16 Q. Any case when you're using your accident reconstruction
17 skills, Dr. Coon, any case where you're doing that, have you
18 ever testified to a jury anywhere or testified under oath
19 anywhere about opinions that you had in which you had never
20 even visited the scene of the accident? Have you ever done
21 that?

22 A. I believe this is my first time in court testifying
23 about crashes.

24 Q. How about the case when -- for example, I know from your
25 testimony, you testified about the -- the mirrors at the

1 Sonic drive-in. Do you remember that case?

2 A. Yes.

3 Q. Did you go to the scene to investigate the drive-through
4 at the Sonic drive-in?

5 A. Yes.

6 Q. How about the case when you testified about the speed in
7 the park, the speed limits in the park? Do you remember
8 that?

9 A. Yes, I do.

10 Q. Did you go to the scene to investigate and to look at
11 what the speeds ought to be in the park in that case?

12 A. No, I did not.

13 Q. How about the case that you testified about the bicycle
14 crossing; did you go and evaluate that crossing and look at
15 it?

16 A. Is that the Sonic case?

17 Q. Was there more than one case about Sonics?

18 A. I believe there is only the Sonic case with the
19 bicyclist.

20 Q. Well, did you go there to look at that scene?

21 A. The same one you asked me about, yes.

22 Q. Okay. How about the case that involved the culvert; do
23 you remember that case?

24 A. Yes.

25 Q. Did you go to the scene and investigate the culvert?

1 A. I did.

2 Q. And you went there to the scene to investigate about
3 that culvert, because you want to be accurate about what
4 you're saying; is that right?

5 A. The -- I wanted additional information.

6 Q. You wanted to make sure that you had all the information
7 about however that accident had occurred so that you could
8 opine on it correctly?

9 A. I -- I needed engineering eyes on the situation. Yes.

10 Q. Had you engineering eyes on the scene on the crash
11 that I was just talking to you about in North Carolina
12 that you opined about to this jury?

13 A. We've had accident reconstructionists, Dr. Bryce, and
14 another accident reconstructionist actually were on scene
15 doing the -- the accident reconstruction, so I relied upon
16 their expertise and their eyes on the situation. Dr. Bryce
17 Anderson was actually physically on the scene.

18 Q. Did you go?

19 A. I did not go.

20 Q. Are you the expert in this case?

21 A. I am.

22 MR. SHAW: That's all I have right now. Thank
23 you, Your Honor.

24 THE COURT: Approach the bench, Counsel.

25 (Bench conference.)

1 THE COURT: How much do you expect your redirect
2 to be?

3 MS. DYER: About 20 minutes.

4 THE COURT: Okay. Let's go.

5 (Bench conference concluded.)

6 THE COURT: All right. Redirect by the Plaintiff.

7 MS. DYER: Thank you, Your Honor.

8 REDIRECT EXAMINATION

9 BY MS. DYER:

10 Q. Dr. Coon, are you seeking to act as an accident
11 reconstructionist in this case?

12 A. No, I am not.

13 Q. Dr. Coon, did you rely upon other accident
14 reconstructionists?

15 A. I relied on other engineers and experts. Yes.

16 Q. I think you testified that one of the things that you
17 have to do is to disclose to the FHWA what changes are being
18 made to an ET terminal like this, correct?

19 A. If you make changes, you need to disclose them.

20 Q. And that's in addition to any crash-testing that you
21 have to do, correct?

22 A. Yes.

23 Q. And if you do the crash-testing that -- and then take it
24 to the FHWA, in your experience, do they always agree with
25 you?

1 A. No.

2 Q. Do you know of any instance where they disagreed with
3 Trinity?

4 A. In -- I've seen email correspondence between Trinity
5 and -- well, correction. TTI and FHWA where they had seen
6 if they could avoid running the pickup truck test and only
7 run the small car and a redirection test.

8 Q. And what did the FHWA say?

9 A. They said it wasn't a gimme, and I'm paraphrasing. It
10 wasn't a gimme and that they needed to run the pickup truck
11 test. They couldn't just assume it's going to work.

12 Q. And Trinity didn't do that, did they?

13 A. Not to my knowledge, no.

14 Q. And this was with regard to your knowledge to a flared
15 product, a flared ET?

16 A. Could you repeat the question? I'm sorry.

17 Q. Sure. The situation that you just described, was that
18 with regard to a flared?

19 A. Disclosing that they were --

20 Q. The request that they run the pickup truck test?

21 A. Yes. That was specifically requested on the flares,
22 that they run the pickup truck test and the smaller car test
23 on the flared system. If it passes one time, they would
24 take that information and submit it to the FHWA.

25 Q. Now, does -- does Trinity actually tell people in their

1 marketing materials that you can use this 4-inch head in a
2 flared or angled configuration?

3 A. They do.

4 Q. So they don't call it a flared ET necessarily, but they
5 tell you Trinity says that it can be flared?

6 A. There's very specific guidance. Is that you can install
7 it on a 2-foot flare. You can take the tangent terminal and
8 install it on a 2-foot flare. Don Gripne their marketing --
9 I don't know his position; I apologize. The person said in
10 an email that you could install it on a 1 and 15 flare and
11 keep the same terminal that they were commercially
12 marketing.

13 And by terminal, I mean the head plus all of the other
14 components.

15 MS. DYER: Mr. Diaz, could we look at
16 Exhibit 1257, Page 2?

17 Q. (By Ms. Dyer) If you look at the bolded paragraph, which
18 is the third paragraph down, where it starts with based on,
19 do you see that?

20 A. I do.

21 Q. Dr. Coon, is that the statement by Mr. Gripne that
22 you're talking about?

23 A. It's -- it says that the flared for length of need
24 calculations on the same flare rate, yes, it says a 15 to 1
25 or flatter test level, so that would be the corresponding

1 email saying that the 15-to-1 flare was just fine.

2 Q. So just because Trinity doesn't call it a flared ET
3 doesn't mean they're not telling people they should use it
4 as a flared ET, correct?

5 A. That's correct.

6 Q. And they're telling people that they should use this
7 one, correct?

8 A. Yes, that is correct.

9 Q. And we know from the crash tests of those flared ETs
10 that it doesn't even pass even with a little car, correct?

11 MR. SHAW: Objection, Your Honor. Objection.
12 Leading.

13 THE COURT: Sustained.

14 Q. (By Ms. Dyer) What do you know from the crash tests, if
15 anything, with regard to how this 4-inch operates on a
16 15-to-1 flare?

17 A. The -- during the crash test, the flare, I believe, was
18 at 10 to 1, and the small car was either impaled or rolled.

19 Q. Dr. Coon, why did you do static testing in this case as
20 opposed to the crash testing?

21 A. I wouldn't have an idea of which of the different
22 designs to use. The feeder channel heights varies. Their
23 design documents say that it is 14-7/8. When I measured
24 what they tested in the TL-2 test in 2010, it was basically
25 15-1/8. I wouldn't know which version of their -- 4-inch ET

1 to use.

2 Some of the ones in Arizona have inch-and-a-quarter
3 exit gaps, which match the finite element simulation, but
4 other terminals have 1-inch exit gaps. And I've seen ones
5 as large as 1.9 inches with the original 5-inch. So with
6 the 4-inch, I wouldn't know which one to crash-test. I
7 would need to crash-test several of them in order to figure
8 out which one would be appropriate.

9 Q. You aren't seeking to get approval under 350 or with the
10 FHWA for any of the heads that you tested, correct?

11 A. That is correct.

12 Q. And you're not suggesting that that would be the way
13 that one would go about seeking approval?

14 A. No.

15 Q. You were trying to determine what the differences were
16 between these two heads; is that correct?

17 MR. SHAW: Objection, Your Honor. Leading.

18 THE COURT: Sustained.

19 MS. DYER: I'll rephrase.

20 Q. (By Ms. Dyer) What were you trying to determine?

21 A. Static testing, which has been used previously in other
22 situations to gain NCHRP Report 350-certification. With, I
23 believe, luminary posts, static testing was used solely.
24 Not on energy-absorbing terminals, but they did allow it
25 with luminaries based on solely static testing.

1 I was wanting to use that same approach to examine the
2 differences between what the 5-inch and the 4-inch design
3 configurations that they had that I knew were on the road.

4 Q. Now, the heads delivered to the Artichoke Restaurant,
5 how did you know they were Trinity heads?

6 A. My experience with terminal heads, I recognized what is
7 the ET -- excuse me -- faceplate and the shape of the
8 terminal itself.

9 Q. And did you inspect the heads at all for signs of them
10 being in any sort of accident?

11 A. I inspected the heads, looked for sign of damage. I
12 photographed them. I confirmed that they had, I believe in
13 all cases, had a SYRO/Trinity logo on the side. SYRO was
14 the original manufacturer of the ET-2000 Plus.

15 Q. Did you make arrangements for the heads to be delivered
16 to the Artichoke Restaurant?

17 A. Yes, I did.

18 Q. Why -- why the Artichoke Restaurant? Why a parking lot?

19 A. It was a place where we could park a large flatbed
20 trailer and have access to it with concrete around it
21 without blocking someone's -- someone else's parking lot.

22 Q. Now, in cross-examination, Mr. Shaw asked you some
23 questions about whether it was scientific or not. Do you
24 recall that?

25 A. I do.

1 MS. DYER: If you could, Mr. Diaz, put up Pages 75
2 and 76 of the July afternoon session, please.

3 Q. (By Ms. Dyer) And is this what he showed you, sir?

4 A. It is.

5 Q. Okay. And were you referring in any way to the heads at
6 the Artichoke Restaurant?

7 A. On -- I'm sorry. Could you rephrase the question?

8 Q. When he was asking you about whether something was
9 scientific or not, were you referring to the heads at
10 The Artichoke restaurant, or are you -- were you
11 referring to something else?

12 A. The -- the sampling method I identified the heads that I
13 recognized from the field had substantially larger than
14 one-inch exit gaps, so these matched -- what I saw at The
15 Artichoke matched what I saw in the field.

16 Q. But you were referring actually to some heads when --
17 when you were talking about scientific or non-scientific,
18 were you referring to the heads that you saw in the field,
19 the one in Globe, Arizona?

20 MR. SHAW: Objection, Your Honor, leading.

21 THE COURT: Sustained. Avoid leading, Counsel.

22 MR. SHAW: Thank you, Your Honor.

23 A. Those are the ones I'm referring to --

24 THE COURT: Dr. Coon, I sustained the objection.

25 THE WITNESS: Sorry.

1 THE COURT: Wait until Counsel asks her next
2 question.

3 Q. (By Ms. Dyer) My question is simply: What were you
4 referring to? What heads were you referring to when you
5 talked about it being not a very scientific way of
6 evaluating?

7 A. I had observed heads in the field. I had an assistant
8 in Globe, Arizona, go out along two different interstates,
9 find heads in Globe, Arizona, that had substantially larger
10 exit gaps than one inch.

11 Q. And are those the same heads that you tested in your
12 static testing, or are those different heads?

13 A. The -- the ones in Arizona?

14 Q. Correct.

15 A. I did not test the heads in Arizona.

16 Q. So you weren't talking about the heads at The Artichoke
17 when you said that that's not a scientific way; is that
18 correct?

19 A. That's correct.

20 Q. Mr. Shaw asked you about the ET-2000. Do you recall
21 that?

22 A. I do.

23 Q. Okay. And I think he may have just gestured to this.
24 Is this an ET-2000 or an ET-Plus?

25 A. It was originally referred to as an ET-2000 Plus, but

1 it -- it's commonly referred to -- now the name has changed
2 to ET-Plus.

3 Q. So this is an ET-Plus with a five-inch?

4 A. Yes.

5 Q. And what is this?

6 A. That is an ET-Plus with a four-inch.

7 Q. And this ET-Plus with a five-inch, how big is the exit
8 gap here?

9 A. I -- I would have to -- to measure it to confirm how
10 wide that exit gap is.

11 Q. Do you know if it's bigger than the exit gap on this
12 one?

13 A. It -- it -- it's substantially bigger. I watched a
14 splice bolt pass through it earlier.

15 Q. Have you ever measured ET-Pluses with five-inch that
16 have a larger than one-inch exit gap?

17 A. Many, yes.

18 Q. Now, going back to what Mr. Shaw referred to as the
19 ET-2000, that's actually a different product than what we
20 have here in the five-inch, or the same?

21 A. It's the same family, but a different product.

22 Q. Is it earlier in time or later?

23 A. It's -- it's earlier in time.

24 Q. And what exit gap did that earlier in time product that
25 we don't have here have?

1 A. It had a one-inch exit gap.

2 Q. Now, Mr. Shaw asked you a little bit about the May crash
3 test -- the May 2005 crash test. Do you recall that?

4 A. Yes.

5 Q. We don't know what the dimensions were of that head that
6 was crash tested in May of 2005, correct?

7 A. No.

8 Q. And in order for any crash test to actually be compliant
9 in the way that Mr. Shaw asked you, do you have to do
10 something else in addition to just crash testing it?

11 A. You have to document the crash test appropriately, and
12 you have to disclose that -- what was tested to the Federal
13 Highway Administration?

14 MS. DYER: Your Honor, may I have a moment?

15 THE COURT: You may.

16 MS. DYER: Thank you.

17 Q. (By Ms. Dyer) Dr. Coon, you were asked a little bit
18 about the geometrics as that term is used in the NCHRP 350.
19 Do you recall that?

20 A. I do.

21 Q. And one of the things that was discussed was the energy
22 absorbing terminal?

23 A. Yes.

24 Q. Are you familiar with a term called geometry that's used
25 also in the 350 test?

1 A. I would have to refresh my recollection of exact wording
2 of paragraphs.

3 Q. Have you ever seen any place where --

4 MS. DYER: If you can actually just pull up, Mr.
5 Diaz, Exhibit 748 at 17731 through 32.

6 Q. (By Ms. Dyer) Do you know if the term geometry is used
7 here? Do you see where that is on the -- on the bottom, Dr.
8 Coon?

9 A. Yes. The vehicles in relation to the geometry of the
10 test article and elements.

11 Q. Do you know what that relates to?

12 A. I'd have to look at that, and the full context part of
13 it is cut off.

14 MS. DYER: Can you blow that up, Mr. Diaz, where
15 he's looking? Mr. Diaz, is it possible to get back to --
16 thank you.

17 Q. (By Ms. Dyer) Can you see it now, Dr. Coon?

18 A. Yes.

19 Q. Are you able to say, Dr. Coon, what geometry refers to
20 there?

21 A. And on to the next -- the geometry of the test article
22 is referring to the actual test article.

23 Q. And in this case, the test article would be what?

24 A. The ET-Plus head and installation.

25 Q. So it would be all of this, then?

1 A. It would include -- the test installation in the
2 terminal includes not just the post, but it includes most
3 probably critically the -- the head itself.

4 Q. So the geometry would include, for example, if you
5 changed this or would it not include it?

6 A. It -- it -- it's -- the geometry of the test article, if
7 it's relevant and significant, it should be disclosed to
8 FHWA and tested appropriately.

9 Q. And -- and my only question is: Would the geometry then
10 include, for example, the height of the guardrail if you're
11 testing this guardrail head?

12 A. If -- if you changed the height of the guardrail, it
13 would be a change in geometry.

14 Q. And I misspoke. Would it also include the height of
15 this window box or feeder chute, as we call it, if you're
16 testing this guardrail?

17 MR. SHAW: Objection. Objection, Your Honor,
18 leading.

19 THE COURT: Sustained.

20 Q. (By Ms. Dyer) What would it include -- if you're
21 testing this head, what would geometry include as you see it
22 in this provision of the -- of the exhibit that's before
23 you, 748?

24 A. The energy absorbing elements in the ET-Plus head is an
25 energy absorbing element and part of the system.

1 Q. Thank you.

2 MS. DYER: No further questions.

3 THE COURT: Do you have additional cross,
4 Mr. Shaw?

5 MR. SHAW: Briefly, Your Honor.

6 THE COURT: We need to take a recess. How brief
7 is brief?

8 MR. SHAW: Five minutes.

9 THE COURT: All right. Let's go.

10 MR. SHAW: Tell me at one minute, Judge, if you
11 would, please.

12 THE COURT: I'm not going to time you, just go.

13 MR. SHAW: Okay. Thank you.

14 RECROSS-EXAMINATION

15 BY MR. SHAW:

16 Q. Dr. Coon, do you remember that your static testing where
17 you -- the static testing pushed a rail backwards, as
18 opposed to forwards into the terminal, do you remember that?

19 A. That mis -- mischaracterizes the testing.

20 Q. Let's take a look at your deposition on -- or your
21 testimony from July 20 -- on Page 27, Line 23. You see the
22 question there that's asked of you: In your static testing,
23 sir, the fixture -- the ET-Plus head was sitting on the --
24 on a plate and the guardrail is coming through the head
25 backwards, right?

1 And your answer is: It's being pushed into the
2 terminal.

3 And then my next question is, what, on the next line,
4 Line 2, backward, and you say what?

5 A. Yes.

6 Q. And the next question after that: And the head is
7 fixed, right?

8 And your answer is, what, Dr. Coon?

9 A. That's correct.

10 Q. Now, is the guardrail going through the head backward in
11 a dynamic test like the ones conducted by the engineers at
12 TTI?

13 A. It -- I'm sorry, it goes in the inlet and out the exit.

14 Q. As opposed to the way that you did it, you put it
15 through the exit to go out the inlet?

16 A. That's a complete misstatement.

17 Q. But never -- but it says here in your sworn testimony
18 you gave earlier is it's going in backward.

19 A. Oh --

20 Q. Isn't that what it says, Dr. Coon?

21 A. It's -- mischaracterizes it.

22 Q. The answer, yes, I'm mischaracterizing the answer, yes?

23 A. No, sir, you're not stating the question correctly or --

24 MR. SHAW: That's all I have. Thank you.

25 THE COURT: All right. Do you have anything

1 further?

2 MS. DYER: Just briefly.

3 REDIRECT EXAMINATION

4 BY MS. DYER:

5 Q. Dr. Coon, what are you trying to explain? You didn't
6 necessarily have a chance to explain.

7 A. Certainly. When I said backwards, it -- or a question
8 is asked backwards is the head stayed still, and the
9 guardrail was pushed through the inlet and came out the
10 exit. It -- it didn't go in the exit and come out the inlet
11 somehow. It went in the correct direction. But the head
12 remained stable, and it could rock back and forth. And, in
13 fact, it did. But it went in the inlet, out the exit. It
14 depends on how you describe it as backwards. If you want to
15 get that conclusion, it wouldn't be appropriate. It went in
16 the inlet and out the exit.

17 Q. Thank you.

18 THE COURT: Anything further, Mr. Shaw?

19 MR. SHAW: No, Your Honor. Thank you.

20 THE COURT: You may step down, Dr. Coon.

21 THE WITNESS: Thank you, Your Honor.

22 THE COURT: May this witness be excused?

23 MS. DYER: Yes, Your Honor.

24 THE COURT: All right. You are free to stay or
25 you're also free to go, Dr. Coon.

1 THE WITNESS: Thank you, Your Honor.

2 THE COURT: Ladies and gentlemen, we're going to
3 take a recess at this time. You may leave your notebooks in
4 your chairs. Don't discuss the case among yourselves, and
5 we'll be back here shortly to continue with the next
6 witness. You're excused for recess at this time.

7 COURT SECURITY OFFICER: All rise.

8 (Jury out.)

9 THE COURT: Court stands in recess.

10 (Recess.)

11 (Jury out.)

12 COURT SECURITY OFFICER: All rise.

13 THE COURT: Be seated, please.

14 Let's bring in the jury, Mr. McAteer --

15 COURT SECURITY OFFICER: Yes, sir.

16 THE COURT: -- please.

17 Mr. Miller, don't let that make any noise back
18 there. I'll add it to my collection.

19 MR. MILLER: I've turned it off.

20 COURT SECURITY OFFICER: All rise for the jury.

21 (Jury in.)

22 THE COURT: Please be seated, Ladies and Gentlemen
23 of the Jury.

24 Plaintiff, call your next witness.

25 MR. CARPINELLO: Thank you, Your Honor. Mark

1 Stiles, adverse witness, Your Honor.

2 THE COURT: If you'll come in, Mr. Stiles, and
3 come forward. You'll be sworn in by our courtroom deputy.

4 (Witness sworn.)

5 THE COURT: If you'll come around and have a seat
6 here at the witness stand.

7 Once he's seated, you may proceed, Mr. Carpinello.

8 MR. CARPINELLO: Thank you, Your Honor.

9 MARK STILES, PLAINTIFF'S WITNESS, SWORN

10 DIRECT EXAMINATION

11 BY MR. CARPINELLO:

12 Q. Good afternoon, Mr. Stiles.

13 A. Good afternoon.

14 Q. Sir, are you currently employed by Trinity Industries?

15 A. Yes, I am.

16 Q. What position, sir?

17 A. I'm an employee and advisor.

18 Q. And how long have you been an advisor, sir?

19 A. Since March of 2010.

20 Q. And prior to March of 2010, did you hold a different
21 position with Trinity?

22 A. Yes, I did.

23 Q. What was that position, sir?

24 A. I was the senior vice president from 2000 to 2010, when
25 I retired.

1 Q. And were you senior vice president of what's known as
2 the CEM Group, sir?

3 A. That was one of the business groups, yes.

4 Q. What does CEM stand for?

5 A. Construction, Energy, and Marine.

6 Q. And was Trinity Highway Products under your supervision,
7 sir?

8 A. Yes, it was.

9 Q. Now, was there a period of time when Trinity Highway
10 Products was a division of Trinity Industries?

11 A. I'm not sure.

12 Q. Did there come a time, sir, when Trinity Highway
13 Products became a wholly owned subsidiary of Trinity
14 Industries?

15 A. I'm not sure.

16 Q. Was there any change, sir, in -- in the role that you
17 played as supervisor of Trinity Highway Products when it
18 went from a division to an LLC?

19 A. Well, I'm not sure that occurred, but from the time that
20 I started, when I became the head of the company, of that
21 division, I had that under me. I stayed until I retired.

22 Q. And during that entire period of time, you had Trinity
23 Highway Products under your supervision?

24 A. Yes.

25 Q. And during the entire period of time, the president --

1 the president of Trinity Highway Products reported to you,
2 correct?

3 A. That's correct.

4 Q. And you were the final decision-maker for major
5 decisions for Trinity Highway Products, correct?

6 A. No.

7 Q. Well, you hired and fired the president, correct?

8 A. Yes.

9 Q. And so the president reported to you, correct?

10 A. Yes.

11 Q. And the president -- if you disagreed with decisions of
12 the president, you could overrule the president, correct?

13 A. If that was to occur, yes.

14 Q. Okay. And you hired Rodney Boyd as president of Trinity
15 Industries at some point in time, right?

16 A. Yes.

17 Q. And at some point in time, Rodney Boyd left, correct?

18 A. That's correct.

19 Q. And then you hired someone else in his place, correct?

20 A. That's correct.

21 Q. And who was that?

22 A. Steve Brown.

23 Q. Okay. And at some point in time, Steve Brown left as
24 president of Trinity Highway Products, correct?

25 A. Not while I was in that position.

1 Q. Okay. Is Steve Brown still president of Trinity Highway
2 Products?

3 A. Not to my knowledge.

4 Q. Okay. But it's true, sir, that if either Mr. Boyd or
5 Mr. Brown made decisions that you did not agree with or
6 failed to follow your orders, you had the authority to fire
7 them, correct?

8 A. Yes.

9 Q. Okay. Sir, Trinity Highway Products makes the ET-Plus,
10 correct?

11 A. Yes.

12 Q. Do you understand, sir, that various states do work on
13 highways, and if they're doing work on federal highways,
14 they can get reimbursed by the Federal Government for a
15 significant portion of the cost of the work and the products
16 used?

17 A. Yes.

18 Q. And you understand that in order to get reimbursed for
19 the work done, if they use equipment or items such as the
20 ET-Plus, in order to get reimbursed by the Federal
21 Government for those products, the products must be
22 certified and approved by the FHWA? Are you aware of that,
23 sir?

24 A. Yes.

25 Q. Okay. And Trinity provides a certification when it

1 sells an ET-Plus for a federally reimbursed highway,
2 correct? A certificate of compliance that it has been
3 tested in compliance with Report 350?

4 A. Yes.

5 MR. CARPINELLO: Could I have Exhibit 218, please?

6 Q. (By Mr. Carpinello) Sir, this is -- this is an example
7 of a certificate of compliance, correct, sir?

8 A. Well, the only other time I had seen it was once before,
9 and this is, I believe, the same thing that I saw. Yes.

10 Q. And you testified once before that this was a
11 certificate of compliance which was necessary in order for
12 the state to get reimbursed by the Federal Government for
13 the purchase of these ET-Plus terminals, correct?

14 A. I testified before that it said certified for compliance
15 for Trinity Industries. Yes.

16 Q. And it says Trinity Highway Products, LLC. I'm
17 sorry. Let me just --

18 A. Go ahead.

19 Q. Trinity Highway Products, LLC, certificate of compliance
20 for Trinity Industries, Inc., ET-Plus extruder terminal,
21 NCHRP Report 350-compliant, correct, sir?

22 A. That's what it says, yes.

23 Q. And this one is going for use in the state of Texas;
24 isn't that true, sir? You see in the upper right-hand
25 corner.

1 A. Yes. Uh-huh.

2 Q. And just to follow this up, this is dated September 14,
3 2007, correct?

4 A. That's correct.

5 Q. Okay. Now, let me show you Exhibit 174, sir.

6 And this is another certificate, and this says Trinity
7 Industries, Inc., certificate of compliance for Trinity
8 Industries, Inc., ET-Plus extruder terminal, NCHRP Report
9 350, TL-3 tested and approved.

10 Do you see that, sir?

11 A. Yes, I do.

12 Q. And that's dated October of 2005, correct?

13 A. That's correct.

14 Q. Okay. And this is shipped to Structural and Steel
15 Products, Fort Worth, Texas, correct?

16 A. Yes.

17 Q. Okay. I'd like to show you another example from
18 admitted Exhibit 1146.

19 MR. CARPINELLO: May I have that, Mr. Diaz?

20 Q. (By Mr. Carpinello) And this is another example of an
21 NCHRP Report 350-compliant certificate, correct? Trinity
22 Highway Products, LLC, certificate of compliance for Trinity
23 Industries, Inc., correct?

24 A. Yes.

25 Q. And it's dated January 12, 2007, correct?

1 A. That's correct.

2 Q. And this is shipped to California for use in the state
3 of Hawaii, correct?

4 A. Yes.

5 MR. CARPINELLO: Can I have another example? And
6 if I could -- thank you.

7 Q. (By Mr. Carpinello) Again, that's another certificate of
8 compliance, Report 350-compliant by Trinity Highway
9 Products, LLC, certificate of compliance for Trinity
10 Industries, Inc.

11 Do you see that, sir?

12 A. Yes, I do.

13 Q. And, again, this is -- this is being shipped to the
14 state of Nevada, and this is dated 2009, correct?

15 A. Yes, it is.

16 Q. Okay. Do -- do you know what a qualified products list
17 is, sir?

18 A. Doesn't come to mind, no, sir.

19 Q. Do you know whether in order to sell the ET-Plus to
20 certain states, Trinity must certify that the product has
21 been approved by the Federal Government and thereby get on
22 what's call a qualified products list? Are you generally
23 familiar with that?

24 A. No, but I understand what you said.

25 Q. Okay. Now, sir, you've previously testified that you --

1 when you were asked to produce documents relevant to this
2 case, you had no documents, correct?

3 A. That's correct.

4 Q. And that's because you shredded all your emails and
5 documents; isn't that correct?

6 A. No. I shredded my financial -- personal financial
7 information is what I stated, and we went over that last
8 time.

9 MR. CARPINELLO: Okay. Could I have Deposition --
10 Page 44, Lines 21 to Page 46, Line 12, starting on Line 21.

11 Q. (By Mr. Carpinello) Did you have paper documents you
12 took with you, sir? Do you recall you were asked that
13 question?

14 A. That's correct.

15 Q. You said no.

16 And then the question was: No? What happened to your
17 paper documents when you left Trinity?

18 ANSWER: I shredded my paper documents on a daily
19 basis. I didn't keep documents. I had no records, except
20 my personal records of my own financial things or time
21 things. I didn't keep records, never did.

22 QUESTION: What about emails; did you keep those?

23 No.

24 QUESTION: No? You got rid of them on a daily basis?

25 Yes.

1 So when it was time to produce documents for this case,
2 despite the fact that you had been the head over Highway
3 Products -- Trinity Highway Products for 10 years, you had
4 no documents to produce; isn't that correct, sir?

5 A. Sir, as -- I had 13 business units.

6 MR. CARPINELLO: Your Honor, I ask the witness to
7 answer the question.

8 THE COURT: You need to answer the question, Mr.
9 Stiles.

10 A. I did not have any documents.

11 Q. (By Mr. Carpinello) Okay. Thank you.

12 MR. CARPINELLO: No further questions.

13 THE COURT: You pass the witness, Counsel?

14 Mr. Carpinello, you pass witness?

15 MR. CARPINELLO: Oh, yes, Your Honor. I'm sorry.

16 THE COURT: Cross-examination by the Defendants?

17 MR. BROWN: Yes, Your Honor.

18 THE COURT: Proceed.

19 MR. BROWN: Thank you, sir.

20 CROSS-EXAMINATION

21 BY MR. BROWN:

22 Q. Mr. Stiles, you were just asked by Mr. Carpinello about
23 retaining your documents. At any time that the company
24 placed your documents on a litigation hold, did you attempt
25 to hold in compliance with the company's procedure?

1 A. Certainly.

2 Q. Mr. Stiles, you also testified that you had several
3 business units working for you; is that correct?

4 A. Yes. I had 12 or 13 business -- different business
5 units and over 10,000 people that reported up the chain to
6 me at Trinity.

7 Q. Mr. Stiles, was it your practice as the head of those
8 groups to retain all the documents that were generated by
9 those groups?

10 A. Absolutely not. It would fill this room up. There were
11 chief financial officers and there were presidents of those
12 business units, and the legal counsel that we had, they kept
13 those things and those informations. If I needed to, I'd
14 refer to them.

15 Q. In fact, did you depend upon your business unit heads to
16 retain their own documents, sir?

17 A. Absolutely. I didn't run their businesses day-to-day.

18 Q. And just so we're very clear to the jury, Mr. Stiles,
19 when you said you shredded your documents, were you talking
20 about your own personal financial documents that you may get
21 at the office?

22 A. Yes. That came up because our family had had some
23 identity theft, and it was just something we were advised to
24 do. And because I got a lot of the mail there because I
25 spent a lot of time there, I shredded my personal

1 information.

2 Q. Thank you, sir. Mr. Stiles, you were asked about a
3 product called the ET-Plus. You're aware of that product?

4 A. Yes.

5 Q. And do you have an idea, sir, where the ET-Plus was
6 designed and actually developed?

7 A. At Texas A&M.

8 Q. Do you know how it is that Trinity got a license to make
9 and sell that product?

10 A. I'm not exactly sure of the process. I believe they
11 bought a company.

12 Q. In the process of managing the highway products
13 business, did you rely upon the folks at TTI to do all the
14 design work related to the ET-Plus?

15 A. Absolutely. We -- Trinity did not invent the product,
16 and Trinity did not engineer the product. We didn't have
17 people that could do that. We manufactured products and --
18 and then sold them.

19 Q. In fact, the ET -- ET-Plus product actually belongs to
20 Texas A&M, doesn't it, Mr. Stiles?

21 A. Yes, it does.

22 Q. Did you rely upon the engineering expertise of the
23 engineers down at TTI in terms of how to recommend any
24 particular changes to this product?

25 A. I rem -- I relied upon the business units to do what

1 they were supposed to do in the normal course of business,
2 which the design was done by Texas A&M, and those engineers
3 handled those products.

4 Q. Mr. Stiles, at any time, did you ever have an experience
5 where the folks down at TTI in any way would ever compromise
6 their integrity for anyone?

7 A. Absolutely not.

8 Q. In fact, sir, you send your son to school down at Texas
9 A&M, don't you, sir?

10 A. My son is a junior there.

11 MR. BROWN: Pass the witness.

12 THE COURT: Redirect?

13 MR. CARPINELLO: Yes, Your Honor.

14 REDIRECT EXAMINATION

15 BY MR. CARPINELLO:

16 Q. Mr. Stiles, who certifies the product to the states and
17 contractors that the product has been approved by the FHWA?
18 Is that Trinity or TTI?

19 A. I'm -- can you ask me that question one more time?

20 Q. Let me rephrase the question. I just showed you about
21 eight certificates of compliance.

22 A. Okay.

23 Q. Who certified those certificates?

24 A. If you're referring to the things you showed me, it
25 would be Trinity Industries.

1 Q. All right. And Trinity has been selling the ET-Plus for
2 how many years?

3 A. I'm not -- I'm not sure for many years.

4 Q. And, sir, it was Trinity, was it not, and not TTI that
5 certified to the states from 2005 to today that there were
6 no significant changes in the ET-Plus and that the ET-Plus
7 had been approved by the FHWA; isn't that correct?

8 A. Sir, I don't know if they certified that. You were
9 showing me certified shipments that Trinity had issued on
10 the products that were shipped. That's -- that's what I
11 saw.

12 Q. You understand, sir, that in order for a state to get
13 reimbursed for the purchase of an ET-Plus that the
14 configuration of the ET-Plus must be disclosed and approved
15 to the FHWA. You're aware of that, aren't you?

16 A. Yes.

17 Q. Are you aware that Trinity in 2005 changed the
18 configuration?

19 A. No.

20 Q. You're not aware of that?

21 A. I wasn't aware of that until this trial.

22 Q. You were the head -- you were the person who oversaw the
23 president of Trinity Highway Products and you were unaware
24 of that fact?

25 A. I was unaware of that.

1 Q. None of your subordinates told you that they changed the
2 configuration of that product?

3 A. As I stated before.

4 Q. But if Trinity did change the configuration and didn't
5 tell the FHWA and sold the product without telling the FHWA,
6 that would be Trinity's fault, not TTI's, wouldn't it?

7 A. Sir, that's your statements. That's not mine. Like I
8 just told you, I never knew that happened.

9 MR. CARPINELLO: Can I ask the witness to answer
10 the question, Your Honor?

11 THE COURT: You need to answer the question, Mr.
12 Stiles.

13 THE WITNESS: Judge, I don't understand the
14 question?

15 THE COURT: Ask the question again,
16 Mr. Carpinello.

17 Q. (By Mr. Carpinello) If, in fact, Trinity changed the
18 ET-Plus in 2005, did not tell the FHWA that it had changed
19 it, certified to the states for seven years that the product
20 had not been changed, sold the product without
21 certification, that would be Trinity's fault, right, not
22 TTI's?

23 A. All the things that you said, I'm not totally aware of
24 or will admit that that happened.

25 Q. I'm not asking you to admit it, sir. I'm not asking you

1 to admit that it happened.

2 I'm asking if the jury believes that that happened, are
3 you saying to the jury that it would be TTI's fault and not
4 Trinity's?

5 MR. BROWN: Your Honor, I would object that that's
6 an improper hypothetical being placed to this witness.

7 THE COURT: Overruled. It's a hypothetical
8 question, and it should be answered. If those things
9 happened, would it be Trinity's fault or TTI's fault?
10 He's not asking you to admit those things did happen. The
11 question is, if they did, would it be TTI's fault or would
12 it be Trinity's? That's the question.

13 THE WITNESS: So, Judge, if there was a
14 certification and Trinity certified it wasn't true?

15 THE COURT: Ask it again, Mr. Carpinello.
16 Listen, Mr. Stiles. It's going to be a hypothetical
17 question. It's going to call for an answer.

18 THE WITNESS: Okay.

19 THE COURT: And you need to give an answer to the
20 question.

21 THE WITNESS: All right, Judge.

22 THE COURT: Ask it one more time.

23 Q. (By Mr. Carpinello) If in 2005, the dimensions of the
24 ET-Plus were changed by Trinity, Trinity did not tell the
25 FHWA that they had changed the dimensions, Trinity sold the

1 product without telling the FHWA they had changed the
2 dimensions, and Trinity certified to the states that there
3 had been no changes to the ET-Plus, would that be Trinity's
4 fault or TTI's?

5 A. Trinity's.

6 Q. Okay. Thank you.

7 THE COURT: Anything further, Counsel?

8 MR. CARPINELLO: Nothing further, Your Honor. I
9 pass the witness.

10 MR. BROWN: Very briefly, Judge.

11 THE COURT: All right. Additional cross.

12 RECROSS-EXAMINATION

13 BY MR. BROWN:

14 Q. Mr. Stiles, given the license that Trinity had, would
15 you agree with me that only Texas A&M University could
16 change something that they owned?

17 A. Absolutely.

18 Q. And did Trinity rely upon Texas A&M to tell Trinity
19 whether or not the ET-Plus was 350-compliant or compliant
20 with federal standards?

21 A. That's correct. They tested these. I mean, Texas A&M
22 and their inventors admitted it. Texas Transportation
23 Institute owned it, tested it. Trinity built it.

24 Q. Is that what Trinity relied on, Mr. Stiles?

25 A. Absolutely.

1 MR. BROWN: Pass the witness, Your Honor.

2 THE COURT: Additional direct?

3 REDIRECT EXAMINATION

4 BY MR. CARPINELLO:

5 Q. Sir, do you have any knowledge of the changes that were
6 made in 2005?

7 A. No.

8 Q. So you have no idea who suggested the changes; is that
9 correct?

10 A. Only from what I have heard in these -- this -- these
11 trials.

12 Q. Okay.

13 MR. CARPINELLO: Thank you, Your Honor. No
14 further questions.

15 THE COURT: Additional cross, Mr. Brown?

16 MR. BROWN: No further questions, Judge.

17 THE COURT: You may step down, Mr. Stiles.

18 THE WITNESS: Thank you, Judge.

19 THE COURT: May Mr. Stiles be excused?

20 MR. CARPINELLO: Yes, Your Honor.

21 THE COURT: Mr. Stiles, you're free to stay;
22 you're also free to leave.

23 THE WITNESS: Thank you, Judge.

24 THE COURT: Plaintiff, call your next witness.

25 MR. GRAVANTE: Plaintiffs call William Chandler.

1 THE COURT: All right. If you'll come forward,
2 please.

3 MR. BROWN: Your Honor, may Ms. Teachout and
4 myself switch places?

5 THE COURT: Sure.

6 MR. BROWN: Thank you, sir.

7 THE COURT: Come forward, please sir.

8 (Witness sworn.)

9 THE COURT: Please come around, sir, and have a
10 seat.

11 All right. You may proceed, Counsel.

12 MR. GRAVANTE: Thank you.

13 WILLIAM CHANDLER, PLAINTIFF'S WITNESS, SWORN

14 DIRECT EXAMINATION

15 BY MR. GRAVANTE:

16 Q. Mr. Chandler, have you been retained to offer an expert
17 opinion on Plaintiff's damages in this case?

18 A. Yes, I have.

19 Q. Did you reach an opinion?

20 A. Yes, I did.

21 Q. Who retained you?

22 A. I was retained in January of 2014 by Boise Schiller &
23 Flexner.

24 MR. GRAVANTE: Mr. Diaz, please show Demonstrative
25 No. 1.

1 Q. (By Mr. Gravante) Mr. Chandler, can you please give the
2 jury a brief overview of your background and qualifications?

3 A. Yes. I graduated from Manhattan College with a bachelor
4 of science degree in 1970 and a major in accounting. I
5 initially worked with a large international accounting firm
6 in New York City, Pricewaterhouse, until 1973. 1973, I went
7 to Albany Law School. I graduated in 1976 from Albany Law
8 School with a juris doctor degree.

9 During my professional career subsequent to that, I was
10 a partner in a large -- what is now a large international
11 firm known as UHY Advisors. During the years, I have been a
12 certified public account. I've been a certified public
13 accountant for over 40 years. I became a chartered
14 financial analyst, and I'm an accredited senior appraiser
15 with the American Society of Appraisers.

16 I'm certified by the American Institute of Certified
17 Public Accountants in financial forensics and in business
18 valuation. I have had a very active career.

19 My professional societies, I'm a member of the New York
20 State Society of Certified Public Accountants. I have
21 served on the Board of Directors of the New York State
22 Society. I've served as president of this chapter. I've
23 served as chair of the Tax Division of the New York State
24 Society of CPAs. I'm a member of the American Institute of
25 Certified Public Accountants. I've served as a steering

1 committee member of the educational programs. I've written
2 educational programs for them as well.

3 I've also spoken frequently and performed continuing
4 education programs for the New York State New York City Bar
5 Associations.

6 Q. Have you written or published any articles?

7 A. I have. I've written articles that have been published
8 on subjects such as accounting, taxation, and valuation.

9 MR. GRAVANTE: Mr. Diaz, please show Demonstrative
10 2.

11 Q. (By Mr. Gravante) Mr. Chandler, what are some examples
12 of other cases in which you have testified about damages
13 that may be similar in some respects to this case?

14 A. Well, the False Claims Act damages that I've calculated
15 in this case are applied to the benefit of the bargain
16 analysis. And that is that you begin with a calculation of
17 the amount the U.S. Government reimbursed the states for the
18 ET-Plus units and subtract from that whatever benefit they
19 may have received. The net amount is the damages.

20 That benefit of the bargain analysis I have applied in
21 other litigations that I've testified. I was retained by an
22 investment partnership. They were the Defendants, being --
23 defending a claim against a -- an investment partner. He
24 claimed that he had lost a portion of his investment that,
25 in fact, he actually got less back than he had invested in

1 the partnership. And I calculated the net damages pursuant
2 to that claim.

3 I was retained by Boise Schiller to represent, Move,
4 Inc., who was a company that had purchased auction rate
5 securities that had declined after the financial crisis, and
6 I was asked to calculate the difference in the value of
7 those securities before when there was an active market and
8 after the market failed in 2008.

9 I was retained by Rusty Hardin, who is a Houston-based
10 law firm, to calculate damages -- the value of services
11 actually for the services performed by a person who was
12 influential in getting the Las Vegas Sands a license to --
13 gaming license to operate in Macau.

14 I was also was retained by Sullivan Cromwell to
15 calculate damages for the Defendants J.C. Flowers for
16 alleged breach of contract for failure to acquire insurance
17 company and the measure of damages was the difference
18 between J.C. Flowers offer price and what they later were
19 able to resell the insurance company for.

20 Q. In approximately how many courts or other proceedings
21 have you testified as an expert witness?

22 A. I have testified most likely between 50 and 60 different
23 times.

24 Q. In approximately how many of those manners did you offer
25 an opinion on damages?

1 A. Substantially all of those. All of my testimony would
2 have related to a damage calculation and an opinion on
3 damages.

4 MR. GRAVANTE: Your Honor, Plaintiff tenders Mr.
5 Chandler as an expert witness on the calculation of damages
6 in this case.

7 THE COURT: Is there objection?

8 MS. TEACHOUT: No objection, Your Honor.

9 THE COURT: The Court will recognize Mr. Chandler
10 as an expert. Proceed.

11 Q. (By Mr. Gravante) Mr. Chandler, what precisely were you
12 asked to do in this case?

13 A. I was asked to calculate damages incurred by the United
14 States Government relating to its reimbursement to the
15 states for the purchase of ET-Plus -- modified ET-Plus units
16 during the period of March 6th, 2006 and December 31st,
17 2013.

18 Those were units that were manufactured by Trinity, and
19 claimants contend were falsely certified by Trinity to be
20 compliant with Federal Highway Administration standards.

21 MR. GRAVANTE: Mr. Diaz, please show Demonstrative
22 No. 3.

23 Q. (By Mr. Gravante) Can you describe for the jury what
24 opinion you reached?

25 A. Yes. This is an analysis that I just described of the

1 benefit of the bargain damages. The period of damages is
2 March 6, 2006 through December 31st, 2013.

3 The total amount that I calculated that the United
4 States Government reimbursed the states for their purchase
5 of ET-Plus units is 218,003,273. You would -- you would
6 next subtract the value that the Government actually
7 received for those units.

8 Since there is no ascertainable market value for a
9 non-compliant ET-Plus unit, I was not able to calculate a
10 value. Counsel informed me that the evidence in this case
11 will show that the units have either no value or potentially
12 a scrap metal value. There is an active market for scrap
13 metal, and I was able to calculate a -- for the Court and
14 the jury to consider a measure of potential benefit to the
15 government.

16 And I calculated that to be \$42,965,383. If the jury
17 were to accept that and consider that as a measure of the
18 benefit to the U.S. Government, you would subtract that
19 value from the \$218 million, and the net damages to the
20 Government would be \$175,037,890.

21 Q. Let's take a step back for a minute. Does your
22 conclusion in this case assume that this jury finds that
23 Trinity has made false claims to the Federal Government?

24 A. Yes, it does.

25 Q. And what happens to your conclusion, if the jury does

1 not find that Trinity made false claims?

2 A. Well, if -- if Trinity has not made false claims, there
3 would be no liability and no damages under the False Claims
4 Act.

5 Q. What if the jury determines that the allegedly
6 non-compliant ET-Plus units at issue have no value?

7 A. Well, then the subtraction from the \$218 million would
8 be 0, and the actual net damages would be \$218,003,273.

9 MR. GRAVANTE: Mr. Diaz, please show Demonstrative
10 No. 4.

11 Q. (By Mr. Gravante) Did Trinity sell the ET-Plus units
12 that it modified in 2005 and after that directly to the
13 United States Government?

14 A. No, it did not.

15 Q. Can you explain to the jury how the U.S. Government came
16 to pay reimbursement amounts for ET-Plus units manufactured
17 by Trinity?

18 A. Yes. Initially, Trinity sells most of its units to --
19 directly to contractors or to distributors or resellers who
20 later sell to contractors. The contractors will then
21 install the ET-Plus unit and bill -- on state highways and
22 bill the states for cost.

23 The states will pay the contractors for the
24 ET-Plus units, and the states will then seek reimbursement
25 from the United States Government for ET-Plus units that

1 have been installed on federal-aid highways, and the United
2 States Government will then reimbursement to the states a
3 portion of the cost of the ET-Plus unit to the extent it was
4 installed on a federal aid highway.

5 Q. Does Trinity certify to the contractors and the states
6 that the ET-Plus units that it sells to contractors meet
7 Federal Highway Administration requirements?

8 A. Yes. Trinity certifies either to the contractors or to
9 the states or both that the ET-Plus units are compliant with
10 Federal Highway Administration standards.

11 Q. How does Trinity provide this certification to the
12 contractors?

13 A. The -- Trinity has a bill of lading file that it
14 maintains for shipping of the ET-Plus to contractors, and
15 that file contains the certifications that have been
16 provided to the contractors.

17 Q. What exactly is a bill of lading?

18 A. A bill of lading is a shipping document. It would
19 describe the contents of the shipment, the address of the
20 person to whom it's being shipped, and that file would --
21 would contain the certifications.

22 Q. How else does Trinity certify that the ET-Plus unit --
23 that it meets FHWA requirements?

24 A. Well, it's my understanding that the states maintain
25 qualified products lists, and these are products that are

1 qualified for reimbursement by the Federal Government to the
2 extent they are used on federal aid highways.

3 And Trinity would certify to the states or provide
4 certifications to the states to have the ET-Plus unit listed
5 as a qualified products on the state's qualified products
6 list.

7 Q. Is the certification that Trinity makes to the states
8 and contractors important?

9 A. Yes, it is important, because without the certification,
10 the states could not claim reimbursement for the cost from
11 the United States Government.

12 Q. Do the contractors charge for installing ET-Plus units?

13 A. Yes, they do.

14 Q. Have you included those amounts in any of your damage
15 calculations?

16 A. No, I have not.

17 Q. When the states seek reimbursement from the U.S.
18 Government for ET-Plus units installed on their federal-aid
19 highways, what percentage of the cost does the U.S.
20 Government reimburse the states?

21 A. The U.S. Government reimburses the states between 80 and
22 100 percent.

23 Q. What is the basis for that response?

24 A. The Federal Highway Administration publishes a -- has a
25 publication that's called A Guide to Federal-Aid Highway

1 Programs and Projects, and that publication indicates the
2 classification of reimbursable items and the rate -- range
3 of reimbursement.

4 Q. And what rate of -- what range of reimbursement does
5 that show?

6 A. It shows for these products between 80 and 100 percent.

7 MR. GRAVANTE: Mr. Diaz, please show Demonstrative
8 No. 5.

9 Q. (By Mr. Gravante) Mr. Chandler, in simple terms, how did
10 you calculate damages in this case?

11 A. In simple terms, I began with the total sales of Trinity
12 ET-Plus units during the damage period. That's the period
13 of March 6, 2006 through December 31st, 2013. That's
14 approximately \$328 million of unit -- of sales.

15 I multiplied that by a reimbursement rate. That's
16 really a two-part rate. One is how many of those units were
17 installed on eligible highways, and then once installed,
18 what's the percentage that the Government would reimburse
19 for those installed units on eligible highways.

20 The product of that multiplication is the cost of the
21 ET-Plus to the -- or the reimbursed cost by the United
22 States Government. That's the \$218 million that I addressed
23 earlier.

24 MR. GRAVANTE: Mr. Diaz, please show Demonstrative
25 6.

1 Q. (By Mr. Gravante) What does this show -- slide show?

2 A. Well, Trinity produced a file containing all of its
3 invoices relating to the sales of ET-Plus units during the
4 damage period. You can see that these are the annual sales
5 of those units. This totals the \$328,273,254 of sales.
6 That was the first part of that calculation slide that we
7 had just looked at.

8 Q. And, again, from what source did you derive these
9 figures?

10 A. I derived these from material -- or information that was
11 produced by Trinity in this litigation.

12 Q. Now, I'd like to ask you some questions about the
13 reimbursement rate you applied to Trinity revenue.

14 Are all ET-Plus units sold by Trinity installed on
15 federal-aid highways?

16 A. No, they were not.

17 Q. Where are others installed?

18 A. They may be installed on highways that are not eligible
19 for federal reimbursement, county roads or local roads.

20 Q. Did the information produced in this litigation allow
21 you to calculate how many ET-Plus units were installed on
22 federal-aid highways?

23 A. It did not allow me -- it was not sufficient for me to
24 directly trace a sale of an ET-Plus unit, an invoice, if you
25 will, for a particular sale, all the way through directly to

1 a reimbursement by the United States Government.

2 However, the information was sufficient for me to make
3 a reliable estimate of the amount that the United States
4 Government did, in fact, reimburse the states for the cost
5 of those units.

6 Q. Could you explain to the jury how you reached that
7 estimate?

8 A. Yes. I reached that estimate by -- as I just indicated
9 before, first taking the actual Trinity sales of the
10 units -- that's the \$328 million -- and then I obtained data
11 from the federal highway statistics that are maintained by
12 the Federal Highway Administration. And I was able to use
13 those statistics to allocate the Trinity sales to eligible
14 federal highways.

15 And then the third component of that was to take a look
16 at the Federal Highway Administration's publication, the
17 Guide to Federal Aid Highway Programs and Projects, which
18 contains the other reimbursement rate, which is the 80
19 percent to 100 percent. I selected the lowest range in that
20 rate of 80 percent to estimate the amount that the United
21 States Government reimbursed to the states.

22 Q. So what was the source of your information to determine
23 those ratios for each state for each year?

24 A. Well, the source of that information was the highway
25 statistics that are compiled by the Federal Highway

1 Administration pursuant to a program that they administer.

2 Q. How -- I'm sorry?

3 A. No, the states each year will submit their highway
4 revenue sources and expenditures to the government, and the
5 government will then -- the Federal Highway Administration
6 administers this program and will review these documents
7 when they are received for reasonableness, completeness, and
8 consistency, and -- and compliance with their reporting
9 guidelines, and then will -- will publish these on their
10 website.

11 Q. Do -- are you aware how the FHWA compiles these
12 statistics that you relied on that are available on their
13 website?

14 A. How they -- how they compile them?

15 Q. Yes.

16 A. They obtain them from the states -- the states report
17 the data to them pursuant to the guidelines that they've
18 established for the program, and they do that on an annual
19 basis.

20 Q. And the FHWA reports the results of that on its website
21 where it's publicly available?

22 A. Yes, that's correct.

23 Q. Who relies on the FHWA's highway statistics and for what
24 are they relied upon?

25 A. Well, the highway statistics are a measure of the -- you

1 know, the health of the National Highway System. They --
2 they are relied upon by the Department of Transportation and
3 Congress to plan for the development and improvement of the
4 highway system.

5 MR. GRAVANTE: Mr. Diaz, could you please show
6 Demonstrative 7?

7 Q. (By Mr. Gravante) What does Demonstrative 7 show?

8 A. This is just a description of the program that is
9 administered by the Federal Highway Administration to gather
10 data from the states concerning their highway spending and
11 sources of revenue.

12 MR. GRAVANTE: Mr. Diaz, please show Demonstrative
13 8.

14 Q. (By Mr. Gravante) What does this slide show, Mr.
15 Chandler?

16 A. Well, this is the first portion of the reimbursement
17 rate that we had discussed before. We start, of course,
18 with Trinity's invoiced amount, and then we have to
19 determine how many of those sold ET-Plus units were actually
20 installed on federal-aid highways -- that is, highways that
21 are eligible to be reimbursed by the federal government.

22 And if you take a look at this slide, I've calculated
23 how the states have spent their money. The -- first -- the
24 first column obviously is the year, and you can see that's
25 the annual amount each year. The -- under the second

1 column, which is the state expenditures on federal-aid
2 highways, the 61 -- that's billions -- that's
3 \$61,263,093,000. That's the amount that the states spent on
4 federal-aid highways. The total amount that the state spent
5 on all highways was \$71,549,293,000. And the -- the
6 calculation at the right shows that the states spent 85
7 percent of their dollars in -- in 2006 on federal-aid
8 highways. Those would be highways that would be eligible to
9 have the ET-Plus unit reimbursed.

10 Q. Let me take a step back. You identified the figure of
11 -- in Column 2 for 2006 as being 61 billion and change?

12 A. Yes.

13 Q. And I think you used the word millions in describing the
14 figure 71,549?

15 A. 71.5 billion.

16 Q. Okay. So these numbers on this chart reflect billions
17 of dollars, correct?

18 A. That's right.

19 Q. Now -- so the 85 percent is simple math, correct?

20 A. Yes.

21 Q. The \$61 billion in Column 2 is simply approximately 85
22 percent of the \$71 billion in Column 3?

23 A. That's correct.

24 Q. Now, why is there no expenditure data -- data in the
25 columns at the bottom of the chart for the years 2012 and

1 2013?

2 A. The Federal Highway Administration has not yet published
3 the -- the highway data for those years. The 83 percent
4 that you see in the far right-hand column of those years,
5 2012 and 2013, is a weighted average of all of the preceding
6 years from 2006 through 2011.

7 Q. And the reason why you took the average of the years
8 between 2006 and 2011 is because of the absence of FHWA
9 published data at this point for those years?

10 A. That's correct.

11 Q. Okay.

12 MR. GRAVANTE: Mr. Diaz, would you please show
13 Demonstrative 9?

14 Q. (By Mr. Gravante) Mr. Chandler, what does this slide
15 show?

16 A. Well, this slide shows the actual calculation of the
17 dollars that I estimated that the U.S. Government reimbursed
18 to the states during this damage period for their purchase
19 of the ET-Plus units. You see on the far left-hand column,
20 again, we have the annual designation. And then the next
21 column is the Trinity annual sales. That is -- also
22 references a prior slide that we saw. That's the total
23 \$328,273,254 that is the total of ET-Plus sales during the
24 period.

25 In the prior slide, we had just calculated how the

1 states spent their money, and these percentages were from
2 that prior slide that shows that 85 percent in 2006, 86
3 percent in 2007, 87 percent in 2008, and going down to 2013,
4 83 percent. They spent this percentage of their total
5 spending on federal-aid highways. Those would be highways
6 that would be eligible for reimbursement by the federal
7 government.

8 The next column, which is the ET-Plus sales
9 attributable to federal-aid highways is the product of
10 Trinity sales at each year, multiplied by the 85 percent in
11 2006, for example, which is the spending on federal-aid
12 highways to get a number that the states would be eligible
13 to submit for reimbursement to the federal government. And
14 that is -- for 2006, as we can see here, is \$29.5 million
15 and goes all the way down to the yellowed column at the
16 bottom of \$272,504,091.

17 Q. Let me stop you there. So in the first four columns,
18 the number for 2006 in Column 4, again, this is simple math,
19 29 -- the 29-million-dollar figure is approximately 85
20 percent of the 34-million-dollar figure in Column 2,
21 correct?

22 A. That's right.

23 Q. Okay. What is reflected in the fifth column, which is
24 entitled Estimate of Federal Reimbursement Rate?

25 A. Well, this is the rate I derived from the Federal

1 Highway Administration publication, a Guide to Federal-Aid
2 Highways Programs and Projects. That states that the
3 reim -- the eligible rate for reimbursement for highway
4 safety devices -- devices, such as the ET-Plus unit, range
5 between 80 percent and 100 percent. I selected the lowest
6 reimbursement rate for each year, and I used that to
7 estimate the amount that the U.S. Government would reimburse
8 the states for the -- for the cost to install ET-Plus units
9 on eligible highways.

10 Q. Now, if the reimbursement rate published by the FHWA
11 shows that it ranges between 80 and a hundred percent, why
12 did you use 80 percent for each of the years at issue?

13 A. Because that was a conservative estimate of the amount
14 that the government would reimburse.

15 Q. And what gives you confidence that an 80 percent
16 federal reimbursement rate is conservative when applied
17 to ET-Plus units installed on federal-aid highways?

18 A. Well, the one state that produced complete data of its
19 purchases of ET-Plus units during the period was Arkansas,
20 and Arkansas showed that it installed ET-Plus units that it
21 had purchased from Trinity. 95 percent of them were
22 actually allocated to eligible highways. That compares to
23 the lesser percentages you see in the third column here of
24 85 percent, 86 percent, and an overall rate of 83 percent
25 that we see at the bottom.

1 The -- so that's a -- this is actually first a
2 conservative allocation relative to the allocation to
3 eligible highways relative to the Arkansas data. Of the
4 units that Arkansas installed on eligible highways, they
5 received a reimbursement of 88 percent for -- for those
6 units, which is 8 percentage points higher than the -- than
7 the rate that I've used to estimate the reimbursement.

8 Q. And just to be clear, when you use the term conservative
9 in describing the manner in which you calculated damages,
10 does that mean that the damages you calculated are lower or
11 higher than they would otherwise be had you not been
12 conservative?

13 A. They would be lower. A conservative estimate is -- is a
14 lower estimate.

15 Q. Can you describe the -- what -- a summary of this chart
16 using the figures in the yellow boxes at the bottom of the
17 chart?

18 A. Yes. To the far left-hand column, we start with the
19 Trinity invoiced amounts. That's the \$328,273,254. We
20 multiply that first by the federal-aid highway spending
21 percentages to allocate those unit -- those sales to
22 highways that are eligible for reimbursement by the federal
23 government. That's \$272,504,091. We then multiply that by
24 80 percent to estimate the amount of that 272-million-dollar
25 installation cost that the U.S. Government would

1 reimbursement to the states. That's the \$218,003,273.

2 MR. GRAVANTE: Mr. Diaz, please show Demonstrative
3 10.

4 Q. (By Mr. Gravante) Mr. Chandler, did you perform a scrap
5 value calculation?

6 A. I did.

7 Q. Why did you do a scrap value calculation?

8 A. I did a scrap value calculation because I was advised by
9 counsel that the evidence in this case will show that there
10 is either no value for the ET-Plus units, but since the
11 ET-Plus unit does have a metal content, it's possible that
12 the jury could find that there is a -- an economic benefit
13 resulting or related to the value of that scrap metal.

14 Q. Do you have an opinion on the value of a non-compliant
15 ET-Plus unit?

16 A. I do not have -- there is no ascertainable market for a
17 non-compliant ET-Plus unit that I'm aware of that I could
18 provide an estimate of its value.

19 Q. Could you explain to the jury how you calculated the
20 scrap value of the allegedly non-compliant ET-Plus units?

21 A. Yes. From the Trinity files, I was able to determine
22 that the ET-Plus units sold during the period were 284,153
23 units. I looked at the shipping documents to obtain the
24 weight of the ET-Plus systems. I estimated then that the
25 weight was 1,065 pounds, and I converted those to metric

1 tons. I then -- and so that became the 137,269 metric tons
2 of ET-Plus units that were reimbursed by -- or -- or sold
3 during the period.

4 I then went to the U.S. geological survey to get the
5 highest scrap metal price for heavy metal steel. That's the
6 averaged over the period -- the damage period to be \$313.
7 \$313 times 137,269 metric tons produces the scrap value you
8 see in the yellow column of \$42,965,383.

9 Q. Were you asked to calculate the number of false claims
10 Trinity is alleged to have made in this case?

11 A. Yes, I was.

12 Q. What were you asked to assume by counsel when you
13 performed your calculation?

14 A. I was asked to assume that each invoice that Trinity
15 issued for a non-compliant ET-Plus unit represented a false
16 claim.

17 MR. GRAVANTE: Mr. Diaz, please show Demonstrative
18 11.

19 Q. (By Mr. Gravante) Mr. Chandler, looking at
20 Demonstrative 11, where and what is the total number of
21 Trinity invoices for certified ET-Plus units?

22 A. Well, Trinity provided information in their invoice file
23 showing their various invoices by year. So you see on the
24 very far left-hand column, again, that is the count of
25 invoices that they submitted for -- for each year.

1 At the bottom, you will see that the total in the
2 second column is 21,836 invoices that were -- were issued.
3 In the third column, the column to the right of that, some
4 of those invoices appear to have been -- or were apparently
5 issued on more than one occasion. So they would have the
6 same invoice number. For example, Invoice No. 25 may have
7 been issued three times, for example. And that would be
8 because the -- the description of the product or the
9 quantity changed on each of those invoices.

10 The far left-hand column here and the number of claims
11 originally counts all of the invoices issued even though
12 they have duplicate issuances of certain invoices. The
13 invoices with multiple records, with a total 1,597, are
14 subtracted from those issuances to get a unique number of
15 invoices that were issued, rather than having the -- they
16 eliminate the count of any of those duplicate invoices that
17 I just described. So that --

18 Q. Is that how you arrived at that figure of 20,239 at the
19 bottom of Column 4 and that number of claims?

20 A. Yes, that's -- the 20,239 eliminates the 1,597 duplicate
21 invoices.

22 Q. Now, in the fifth column, you make an adjustment to
23 arrive at the numbers in the final column. What is the
24 basis for that adjustment?

25 A. The basis for that adjustment is the same basis that I

1 had described earlier for allocating Trinity sales to
2 federal-aid highways. Those percentages are the same --
3 essentially the same percentages that were used to allocate
4 sales to federal eligible highways. So I multiplied the
5 20,239 invoices -- net invoices by the -- and I did this on
6 an annual basis so you can see the amounts in the far
7 right-hand column for each year. And the sum total of those
8 invoices, after multiplying them by the -- the highway
9 percentage, is 16,771 alleged false claims.

10 Q. So your calculations and your conclusion in this case is
11 that the proper number of false claims that the jury should
12 consider if it finds liability is the 16,771 claims that are
13 described in the lower right-hand box on this slide?

14 A. That's correct.

15 Q. Okay.

16 MR. GRAVANTE: Mr. Diaz, please show Demonstrative
17 12.

18 Q. (By Mr. Gravante) Mr. Chandler, using this slide, can
19 you please summarize your opinions in this case regarding
20 total damages and number of alleged false claims?

21 A. Yes. Again, the damages that range from the period
22 March 6, 2006 through December 31, 2013, the total amount
23 that I estimate that the U.S. Government reimbursed the
24 states for their purchase of ET-Plus units is \$218,003,273.
25 That value will be reduced by the jury's finding of what the

1 value of a non-compliant ET-Plus unit will be, assuming
2 there is a finding of liability in this matter.

3 One value that they could consider is the value of the
4 scrap metal that I've indicated before is a value of
5 \$42,965,383. You would subtract whatever value the jury
6 finds, but in this illustration here the scrap metal value
7 being subtracted from the 218-million-dollar amount is a net
8 damage to the U.S. Government of \$175,037,890. And as I
9 just testified in the prior slide, the alleged false claims
10 in this matter total 16,771.

11 Q. Going back to damages, what would be the damage
12 calculation that you would conclude would be applicable in
13 this case if the jury determines that a non-compliant
14 ET-Plus unit has no value?

15 A. Well, then the amount that's in the scrap value row
16 would be zero, and the net damages would be \$218,003,273.

17 Q. Thank you.

18 MR. GRAVANTE: I pass the witness.

19 THE COURT: Cross-examination.

20 CROSS-EXAMINATION

21 BY MS. TEACHOUT:

22 Q. Mr. Chandler, what if the jury in this case finds that
23 the ET-Plus at issue has the value of what was paid by the
24 federal government?

25 A. You mean that there's a finding that there's no false

1 claim?

2 Q. My question, sir, was: What if the jury finds that the
3 ET-Plus has the value of what was paid by the U.S.
4 Government?

5 A. Oh, okay. The -- well, then whatever value they find
6 will be subtracted from the \$218 million. So if they find
7 that that was \$218 million, that difference would be zero.

8 Q. And so in that circumstance, Mr. Chandler, the damages
9 would be zero; is that correct?

10 A. That's correct.

11 MS. TEACHOUT: Mr. Hernandez, could you pull up
12 for me Mr. Chandler's Demonstrative Slide 12, please?

13 Q. (By Ms. Teachout) You testified, sir, that the 218
14 million in damages, the top number, is your estimate of the
15 amount the federal government has paid the states for
16 ET-Pluses; is that correct?

17 A. That's correct.

18 Q. And not all ET-Plus sales and end terminals that have
19 been sold by Trinity are eligible for federal reimbursement,
20 correct?

21 A. Only if they're installed on federal-aid highways,
22 that's correct.

23 Q. So there's many that are not eligible for federal
24 reimbursement; isn't that correct?

25 A. Yes. My estimate was about 17 percent or 48,000 units

1 or so would not be eligible for reimbursement.

2 Q. And your number here of \$218 million, that is an
3 estimate, is it not?

4 A. That is an estimate based on three actual factors.
5 That's the actual Trinity amount that was provided to me,
6 the actual ratio of spending by the states on federal-aid
7 highways relative to their total spending, and the actual
8 rate -- the lowest rate, the 80 percent rate, that is
9 published as the reimbursable rate for those units by the
10 Federal Highway Administration.

11 Q. And what that estimate is not based on, Mr. Chandler --
12 what that estimate is not based on is any specific payments
13 by the federal government for any reimbursements for the
14 ET-Plus; isn't that correct?

15 A. Well, that's correct. Because I testified Trinity does
16 not sell directly to the U.S. Government, it sells to
17 contractors, and they go through the chain of -- so there is
18 no direct reimbursement by the U.S. Government on a Trinity
19 invoice, that's correct.

20 Q. You haven't, though, calculated \$218 million based on
21 any specific payments by the federal government to the
22 states for any ET-Pluses; isn't that correct?

23 A. The -- the data was not sufficient to make that tracing
24 analysis that you're suggesting. I couldn't do it. No one
25 could do it.

1 MS. TEACHOUT: Could I see, Mr. Hernandez, Mr.
2 Chandler's deposition at Page 58, Line 17?

3 Q. (By Ms. Teachout) And you were asked, sir, in your
4 deposition, you have not seen specific payments by the
5 Federal Government for any reimbursement for ET-Pluses. And
6 your answer was: I haven't seen any payments -- any
7 specific payments by the Federal Government itself, no. You
8 gave that testimony; isn't that correct?

9 A. That's correct. The only -- the only qualification I
10 would make to that is I have seen the information that was
11 provided to me by Arkansas that does specifically state its
12 reimbursement for ET-Plus units, Trinity -- purchased from
13 Trinity during the period.

14 Q. And you also testified, sir, earlier that you have not
15 tried to obtain information concerning actual payments that
16 were made by the United States Government to state DOTs for
17 ET-Pluses; isn't that correct?

18 A. Actual payments for ET-Plus units, they -- I'm not sure
19 I understand your question.

20 Q. Well, the damage amount we're talking about here are
21 reimbursements from the Federal Government to states; isn't
22 that correct? That's what the \$218 million you're trying to
23 estimate is?

24 A. That's correct.

25 Q. And you have testified you have not tried to obtain

1 information concerning actual payments made by the Federal
2 Government to the state DOTs for ET-Pluses; isn't that
3 correct?

4 A. No, I don't think that's correct. I've asked counsel --
5 conferred with counsel for many months on -- on the type of
6 discovery deceit. It's my understanding that counsel has
7 made numerous requests and efforts to obtain documents, and
8 it's my understanding that they have produced me all of the
9 relevant documents for the calculation of damages and
10 reimbursements by the government.

11 MS. TEACHOUT: Mr. Hernandez, could I see Mr.
12 Chandler's deposition at Page 58, Line 22?

13 Q. (By Ms. Teachout) Have you sought to try to obtain
14 information concerning the actual payments, if any made, by
15 the Federal Government to state DOTs for ET-Pluses?

16 MS. TEACHOUT: And if you'd go to the next page.

17 Q. (By Ms. Teachout) Your answer, sir, in your deposition
18 was: No, I don't. I have not.

19 A. Let --

20 Q. That's testimony you gave; is that correct?

21 A. That's correct. That's -- counsel did. I did not.

22 Q. And you don't know, sir, whether or not a specific
23 federal payment on any particular product has even occurred;
24 is that correct?

25 A. I'm sorry?

1 Q. You don't know whether or not a specific federal payment
2 on any particular product has occurred?

3 A. Well, I know that they are eligible for reimbursement.
4 As I've indicated before, and I've seen those reimbursements
5 by Arkansas, so with respect to Arkansas's data where they
6 did produce it, I can see precisely what was reimbursed by
7 the government.

8 MS. TEACHOUT: Can we look at your deposition at
9 Page 57, Line 23?

10 Q. (By Ms. Teachout) You were asked, Mr. Chandler: In
11 your view, because a state highway expenditure is eligible
12 for federal share reimbursement, does that mean a
13 reimbursement from the federal government actually occurred
14 in each instance?

15 And your answer was: At different rates, if they're
16 eligible projects. I don't know whether or not a specific
17 federal payment on any particular product (sic) has
18 occurred, so I can't answer that precisely.

19 Did I read that correctly?

20 A. Yes, that's correct.

21 Q. And, sir, you have not reviewed the request for payment
22 or the claims for payment that the states actually made to
23 the Federal Government for reimbursement for the ET-Pluses,
24 have you?

25 A. That information has not been provided in this

1 litigation, so I have not reviewed it.

2 Q. So you have not reviewed either what the Federal
3 Government has supposedly paid the states for ET-Pluses, nor
4 have you reviewed any information as to what the states
5 supposedly asked the Federal Government to pay for
6 ET-Pluses; is that correct?

7 A. That information has not been produced.

8 Q. So your damage number of \$218 million is not based on a
9 project-by-project or ET-Plus head by ET-Plus head analysis
10 at all, is it?

11 A. It is not based on a specific tracing of a direct dollar
12 reimbursement by the U.S. Government on either a project --
13 a specific project or a specific sale of an ET-Plus unit,
14 that is correct, except to the extent that Arkansas has
15 provided that information. And I did not utilize the
16 Arkansas data in my damage calculation other than to
17 corroborate the analysis that I was -- I was performing.

18 Q. So that \$218 million is not based on any data from
19 Arkansas, is it?

20 A. That's based on -- that's based data from Arkansas as
21 it's reported in the highway statistic data.

22 Q. And that highway statistic data does not identify
23 specifically any ET-Plus sales, does it?

24 A. Not on the highway statistic data. It's included in the
25 statistical information, but it doesn't separately disclose

1 it, that's correct.

2 Q. And this allocation or highway data that you used, what
3 you've done is you've looked at the total amount that all
4 states have spent on all projects on all federal-aid
5 highways and you've compared that to the total amount states
6 have spent on all roads in the United States; is that
7 correct?

8 A. Yes. I said I calculated the percentage of -- of funds
9 that were expended by the states on federal-aid highways
10 relative to their total spending and estimated that the
11 ET-Plus units would be allocated to the states in that same
12 proportion.

13 Q. And this data that you're using on the Internet, this
14 data is for all projects -- all transportation projects; is
15 that correct?

16 A. Yes, it is.

17 Q. And it's the state's total spend on all highways; is
18 that correct?

19 A. It's the state's total spend on all highway -- total
20 highway spending for each year, yes.

21 Q. And you have no data concerning what the projects
22 actually were that they were spending on; isn't that
23 correct?

24 A. I don't have the detail behind those highway statistics
25 to disclose a specific project, that's correct.

1 MS. TEACHOUT: Mr. Hernandez, could you pull up,
2 please, the table, Demonstrative No. 1, please?

3 Q. (By Ms. Teachout) Mr. Chandler, this is one of the
4 tables that you used that you got from the Internet to
5 calculate your \$218 million; is that correct?

6 A. Yes.

7 Q. And it's called State Highway Agency Capital Outlay and
8 Maintenance. And this is for 2006?

9 A. Yes.

10 Q. And it says federal-aid highways's total for all
11 areas; is that correct?

12 A. Yes.

13 Q. And this table just lists states to the left, and then
14 it lists all capital outlays?

15 A. Capital outlays on the left, and the maintenance
16 expenditures are on the -- on the right-hand side.

17 Q. And what are capital outlays?

18 A. Capital outlays can consist of any project that is
19 defined in the program as a capital outlay. Those would be
20 specific project -- projects that would be identified in the
21 program as -- as a capital outlay.

22 Q. So it could be building bridges?

23 A. Oh, sure.

24 Q. Building overpasses or tunnels?

25 A. Sure.

1 Q. Building roads or interstates?

2 A. Yes.

3 Q. Mass transit?

4 A. To the extent it is for buses or items of transportation
5 of that type and not for a subway system or something of
6 that nature, but, yes, for highways, correct.

7 Q. And there's no numbers on this -- there's a lot of
8 numbers on this table, but no numbers that identify any
9 specific actual reimbursements by the FHWA for an ET-Plus;
10 is that correct?

11 A. No, that's not separately categorized here.

12 Q. And there's no numbers anywhere on this table that you
13 could find that would identify even a specific claim for
14 payment by a state to the FHWA for an ET-Plus? That's not
15 anywhere on this table?

16 A. No, this is just expenditure data. It doesn't include
17 any information about a request for reimbursement by the
18 state for their expenditures.

19 Q. So these expenditures are not specific to the ET-Plus;
20 is that correct?

21 A. Well, the ET-Plus expenditures would be included here,
22 as would all other expenditures.

23 MS. TEACHOUT: Mr. Hernandez, can we pull up Mr.
24 Chandler's deposition at Page 159, Line 7, please? At Line
25 7, please?

1 Q. (By Ms. Teachout) So these expenditures are not
2 specific to the ET-Plus, and your answer, Mr. Chandler, in
3 your deposition was: No, they are not specific to the
4 ET-Plus.

5 You gave that testimony; is that correct?

6 A. That's what I just stated here. They're not specific.
7 It's not separately categorized, but the ET-Plus
8 expenditures are included in that data.

9 Q. But you wouldn't know how much those actual expenditures
10 are because that's not included on the table; is that
11 correct?

12 A. Well, it's whatever the states paid for those units
13 during that -- during each of those periods of time. That
14 was a 2006 year, so whatever Trinity sold and the
15 contractors installed on state highways would be included in
16 those expenditures.

17 Q. And those are numbers that you don't know because you
18 haven't reviewed what the states actually submitted to the
19 Federal Government to get reimbursement for, so you don't
20 know those numbers?

21 A. I -- I have those numbers because I have the actual
22 amount that Trinity invoiced. I have the actual amount that
23 they're eligible for reimbursement to the extent that they
24 are installed on a federal-aid highway. That's in the
25 Federal Highway Administration publication. That's the 80

1 percent number that I talked about. And I made an estimate
2 that the ET-Plus units would be installed and the states
3 would expend monies for the ET-Plus in proportion to the way
4 that they spent their overall dollars.

5 MS. TEACHOUT: Mr. Hernandez, can we go back to
6 his deposition at Page 61, please? Let's look at Line 8.

7 Q. (By Ms. Teachout) Mr. Chandler, I asked you
8 specifically if you have reviewed documentation that the
9 states made to the Federal Government for reimbursement of
10 highway safety products, if you actually looked at what they
11 asked to be reimbursed. And I asked in your deposition, I
12 think you testified that you have not reviewed the
13 documentation that the states make to the Federal Government
14 for reimbursement for federal highway safety products; is
15 that correct?

16 A. That information has not been produced, and I have not
17 seen it, that's correct.

18 Q. And you have not reviewed it; is that correct?

19 A. I don't have it. It hasn't been produced. I couldn't
20 -- couldn't review it.

21 Q. And so then there's no way for you to know what's in
22 those actual requests; is that correct?

23 A. I don't have the information that's contained in the
24 actual requests, and I didn't -- didn't review them, so I --
25 I can't speak about them.

1 MS. TEACHOUT: Mr. Hernandez, could you pull up
2 Mr. Chandler's demonstrative at Page 12, please?

3 Q. (By Ms. Teachout) The second number that you've
4 testified about, the scrap value, this is the 42,900,000
5 number; is that correct?

6 A. That is the value of the scrap metal, that's correct.

7 Q. And this is what you have said in this chart could be a
8 reduction for the value that the FHWA received for ET-Plus
9 units from March 6, 2006, through December 2013?

10 A. It's one of the possible values or benefits to the U.S.
11 Government that the jury could consider, that's correct.

12 Q. And you were instructed by Mr. Harman's counsel to
13 assume for purposes of your damage numbers here on this
14 chart, you were told to assume that the value to the Federal
15 Highway Administration of all of the ET-Pluses that they
16 have paid money on from 2006 to 2013 was just scrap value?

17 A. No. I was advised by counsel that the evidence
18 presented in this trial will show that the units themselves
19 have no value, but that I should provide and I was requested
20 to provide a calculation of the scrap metal value simply to
21 present to this Court and jury for their consideration.

22 MS. TEACHOUT: Could we look at Mr. Chandler's
23 deposition at Page 188, Line 7?

24 Q. (By Ms. Teachout) Mr. Chandler, you were asked in your
25 testimony: So your role was to assume that the ET-Plus had

1 no other value other than scrap value and calculate what
2 that value would be.

3 And your answer, sir, was: That's correct.

4 Did I read that correctly?

5 A. You read that correctly.

6 Q. And you have done no independent analysis of your own
7 about what value to the FHWA -- what value they received
8 concerning the ET-Pluses at issue, did you?

9 A. There's no ascertainable market for a non-compliant
10 ET-Plus unit that I could identify, so I cannot render an
11 opinion with respect to what the actual benefit to the
12 United States Government would be. That is a legal issue
13 for the Court and the jury to consider and decide.

14 Q. And you have not independently undertaken any analysis
15 to do that, have you, to look at any information concerning
16 what the FHWA thinks the value of the ET-Plus units are?

17 A. My understanding is that is a legal issue, and the Court
18 and the jury considering all of the evidence, potentially
19 including the information you're addressing here, will
20 consider in reaching a conclusion about the value, if any,
21 of the ET-Plus units to the U.S. Government.

22 Q. So the answer would be, no, you have not taken an
23 independent analysis; is that correct?

24 A. I have not taken an independent analysis beyond what I
25 have already performed. And since there's no ascertainable

1 market, I have no expertise and -- and render no opinion
2 with respect to the actual benefit those units have to the
3 United States Government.

4 Q. And your opinion that the Federal Government, the FHWA,
5 has been damaged rests on another assumption that you've
6 made, does it not? And that assumption is that the ET-Plus
7 has not been properly approved by the FHWA; is that correct?

8 A. That's my assumption. The premise of my calculations is
9 that the ET-Plus is not compliant with the Federal Highway
10 Administration standards and that Trinity has certified
11 that, in fact, during the damage period, it was compliant
12 with the FHWA standards.

13 MS. TEACHOUT: Mr. Hernandez, could you pull up
14 Defendants' Exhibit No. 2?

15 Q. (By Ms. Teachout) And, sir, this is a memo, is it not,
16 from the Federal Highway Administration -- specifically from
17 Michael Griffith, the Director, Office of Safety
18 Technologies and the Office of Safety? Do you see that?

19 A. Yes.

20 Q. And it's dated June 17th, 2014. Do you see that?

21 A. Yes.

22 Q. And if you go down, it states: The FHA states on
23 September 2nd, 2005 letter, FHWA No. CC-94 to Trinity is
24 still in effect, and the ET-Plus w-beam guardrail end
25 terminal became eligible on that date and continues to be

1 eligible for federal-aid reimbursement.

2 Did I read that correctly?

3 A. You did. You read that correctly.

4 Q. And the federal-aid reimbursement that is being
5 referred to in this memo by FHWA, that's the federal
6 money that you're talking about in your charts, is it
7 not?

8 A. Yes.

9 MS. TEACHOUT: Could you please go to Page 2, Mr.
10 Hernandez?

11 Q. (By Ms. Teachout) The FHWA also states that
12 Trinity's -- the Trinity ET-Plus with 4-inch guide channels
13 became eligible for federal reimbursement under FH -- FHWA
14 Letter CC-94 on September 9th, 2005 -- or September 2nd,
15 2005, excuse me.

16 Did I read that correctly?

17 A. You did.

18 Q. And the last sentence by FHWA: The agency has stated
19 that an unbroken chain of eligibility for federal-aid
20 reimbursement has existed since September 2nd, 2005, and the
21 ET-Plus continues to be eligible today.

22 Did I read that correctly?

23 A. You did.

24 Q. So you understand that the FHWA has taken the position
25 that the ET-Plus is approved for federal-aid reimbursement;

1 is that correct?

2 A. I'm --

3 MR. GRAVANTE: Objection, Your Honor. It's beyond
4 the scope of his expert testimony, and I think it calls for
5 a legal conclusion.

6 THE COURT: I'll sustain.

7 Q. (By Ms. Teachout) You are aware, sir, that the FHWA has
8 not revoked or changed its acceptance of the ET-Plus as
9 eligible for federal-aid reimbursement?

10 MR. GRAVANTE: Your Honor, objection. Beyond the
11 scope.

12 THE COURT: Sustained.

13 Q. (By Ms. Teachout) When you, sir, were calculating what
14 you thought a potential value to the FHWA was of the ET-Plus
15 end terminals that had been sold from 2006 to 2013, did you
16 consider in your analysis whether the FHWA had, in fact,
17 revoked or changed its eligibility determinations concerning
18 the ET-Plus? Is that a factor you considered?

19 A. It's a -- yes, my understanding is that that is a legal
20 issue that will be decided by the Court and the jury
21 considering all the evidence presented in this litigation.

22 Q. Sir, how much has the FHWA said, to your knowledge, that
23 they -- they are estimating that they're owed for ET-Plus
24 end terminals from 2006 to 2013?

25 MR. GRAVANTE: Objection.

1 THE COURT: Calls for hearsay. So I'll sustain
2 the objection.

3 Q. (By Ms. Teachout) Your Honor, or I'm sorry,
4 Mr. Chandler, the FH --

5 MS. TEACHOUT: Could we put Defendants' 2 back up
6 on the screen, Mr. Hernandez? And could we go to the second
7 page, and could you highlight an unbroken chain of
8 eligibility for federal-aid reimbursement has existed since
9 September 2nd, 2005, and the ET-Plus continues to be
10 eligible today.

11 Q. (By Ms. Teachout) And earlier, this memo on the first
12 page, Mr. Chandler, was issued by the Federal Highway
13 Administration in June of 2014; is that correct?

14 A. I don't have the date, but it -- that's my recollection
15 of the date it was issued. Correct.

16 Q. And the period of damages that Mr. Harman is claiming
17 for amounts that the FHWA supposedly paid for unapproved
18 ET-Pluses, that period of damages is 2006 to 2013; is that
19 correct?

20 A. March 6th, 2006 through December 31st, 2013, that's the
21 correct period.

22 Q. So the FHWA's unbroken chain of eligibility would cover
23 that entire damage period, wouldn't it?

24 MR. GRAVANTE: Objection, Your Honor.

25 THE COURT: Counsel, approach the bench.

1 (Bench conference.)

2 THE COURT: Ms. Teachout, the letter speaks for
3 itself. It's certainly in evidence, and I've certainly
4 allowed you to read it. But this line of questioning seems
5 to me to be perilously close to violating one of the motions
6 in limine.

7 If you can tell me where you're going and what you
8 intend to do, I think we need to figure out where this line
9 of questioning is going, rather than just let you continue
10 to object.

11 MS. TEACHOUT: I think, Your Honor, he can -- he
12 can rely as an expert both on agency documents which is the
13 agency's position on the value of the ET-Plus. He's
14 certainly allowed to rely on hearsay. He's testified as to
15 hearsay concerning Arkansas data. As an expert, he can rely
16 on that. I would just have a few more questions concerning
17 the memo, and then I am moving on.

18 THE COURT: I mean, you can certainly show him the
19 memo. It's in evidence. You can read it. But asking him
20 to construe it or to offer legal conclusions, I think, is
21 not -- not permissible.

22 MR. CARPINELLO: I might add, Judge, that we were
23 -- we had this almost exact conversation at the last trial
24 with the exact same line of questioning. And I think this
25 is exactly covered by the motion in limine.

1 MR. MANN: Your Honor, can I ask -- so can he --
2 can she not ask whether he took into consideration the
3 letter at all in his evaluation? I mean, he did --

4 MR. CARPINELLO: It was asked and answered.

5 THE COURT: I think that's a proper question if it
6 hasn't already been asked.

7 MR. MANN: Okay.

8 THE COURT: But she can't ask him to tell the jury
9 what the letter means.

10 MR. SHAW: And we kind of agree with that, Judge.

11 THE COURT: Okay. Well, let's see if we can move
12 on.

13 MR. CARPINELLO: She asked that question, and he
14 answered it.

15 (Bench conference concluded.)

16 THE COURT: All right. Let's continue.

17 Q. (By Ms. Teachout) Mr. Chandler, in your damage
18 calculations, did you consider the Federal Highway
19 Administration's June 17th, 2014 letter?

20 A. I did not. That letter was also issued after my reports
21 had been issued.

22 MS. TEACHOUT: Mr. Hernandez, could you pull up
23 Mr. Chandler's demonstrative at Slide 11 -- yes, Slide 11?

24 Q. (By Ms. Teachout) Mr. Chandler, you also testified
25 about what you said is alleged false claims and the number

1 that you think of false claims that you think Trinity --
2 Trinity submitted to the Federal Government for federal
3 reimbursement; is that correct?

4 A. Yes.

5 Q. And you've estimated that the number of these alleged
6 false claims is 16,771?

7 A. That's correct.

8 Q. And the alleged false claims that you're counting, these
9 are the number of Trinity customer invoices; is that
10 correct?

11 A. That's correct.

12 Q. So you have said for purposes of your counting, that a
13 customer invoice equals a false claim, in your view?

14 A. That's the -- I've been asked by counsel to accept that
15 as a -- the definition of a false claim, as representing the
16 issuance by Trinity of a -- of an invoice. That's correct.

17 Q. Trinity invoices are not submitted to the Federal
18 Government for payment; is that correct?

19 A. No, they are not.

20 Q. And Trinity customer invoices do not contain a
21 certification that the ET-Plus is NCHRP 350-compliant; isn't
22 that correct?

23 A. The invoice themselves do not, but they reference --
24 specifically the bill of lading on -- on the -- the invoice
25 for which an -- and the bill of lading file does have the

1 certification.

2 Q. So the actual document that you're using to count the
3 alleged false claims does not contain the certification that
4 Mr. Harman is saying is false in this case; is that correct?

5 A. No. It references the bill of lading. It directly does
6 reference the bill of lading that was delivered in
7 connection with the shipping documents, and that is -- is on
8 -- on the Trinity invoice.

9 Q. So it references a bill of lading number. The bill of
10 lading doesn't contain the certification that's at issue in
11 this case?

12 A. The certification accompanies the bill of lading. It's
13 in the bill of lading files at Trinity that were produced in
14 this litigation.

15 Q. And you did not perform any testing or review with
16 respect to certifications made allegedly by Trinity
17 concerning the ET-Plus; is that correct?

18 A. I didn't contain -- I didn't render any opinion with
19 respect to the certification account, for example. I know
20 that the majority of the -- the bill of lading files contain
21 the certifications, and I saw literally thousands of them.

22 Q. You didn't count them for your chart, did you. You
23 didn't --

24 A. I didn't --

25 Q. -- count the actual document that Mr. Harman is

1 asserting contains the alleged false representation; is that
2 correct?

3 A. I've seen them, and I -- I did count them. They were
4 not part of my report. I mean, I tested them.

5 MS. TEACHOUT: Could we look at Mr. Chandler's
6 deposition at Page 18, Line 12, please?

7 Q. (By Ms. Teachout) In your deposition, sir, you were
8 asked: Do you have a list compiled of these elsewhere of
9 the bills of lading or certifications you've reviewed?
10 Your answer, sir, in your deposition was: Not necessarily,
11 since I didn't -- I didn't utilize them. I didn't perform
12 any testing with respect to certifications.

13 Is that correct?

14 A. At that time, that was correct. The testing that I
15 performed and the analysis I performed continued after --
16 after my deposition.

17 Q. And this supposed testing and analysis is nowhere in
18 your opinions today, because you haven't taken any
19 effort to count the actual certifications. You're just
20 counting invoices; is that correct?

21 A. Well, in my -- in what I'm testifying here to, what
22 you're asking me about is beyond what I testified to, but
23 I'm happy to tell you what I -- what I did do.

24 Q. And so the number of false claims that you're asserting
25 is based on a document that doesn't even contain the alleged

1 false representation in this case; is that correct?

2 A. The files -- as I said before, the invoice file
3 references the bill of lading, which contains the
4 certification, so I don't think that's correct.

5 Q. Is it your testimony, sir, that the invoice, the
6 customer invoice that you counted contains the certification
7 that the ET-Plus is NCHRP 350-compliant? Is that your
8 testimony?

9 MR. GRAVANTE: Objection, Your Honor. Asked and
10 answered.

11 A. It's a legal issue --

12 THE COURT: I'll allow it. Go ahead and answer
13 the question.

14 A. It's a legal issue that will be decided by this Court
15 whether or not it's a false claim. What I'm telling you,
16 though, is that the Trinity invoice file does reference the
17 bill of lading. The bill of lading documents that were
18 provided to me by Trinity contains the certifications.

19 Q. (By Ms. Teachout) And my question to you, sir, is
20 simple. On the invoice that you counted -- on the invoice
21 that you've counted, is there any reference to the statement
22 that an ET-Plus is NCHRP 350-compliant?

23 A. I'm saying it references the bill of lading which
24 contains that certification. That's the only reference that
25 I can see, but that's my answer to you.

1 MS. TEACHOUT: Could we look at D-230, please?

2 Q. (By Ms. Teachout) This is a Trinity customer invoice, is
3 it not?

4 A. Yes.

5 Q. And this is the document that you've counted, is that
6 correct, to get at this 21,836 number?

7 A. Yes.

8 Q. And where on this invoice can you show me a
9 representation by Trinity that an ET-Plus is NCHRP
10 350-compliant?

11 A. The bill of lading file, as you can see here, is No.
12 15499. In that bill of lading -- in the documents
13 maintained in that bill of lading file contains the
14 certification.

15 Q. Does this document, sir -- does this document --

16 A. Indirectly it does, yes. That's my answer.

17 Q. Does this document state anywhere --

18 A. Indirectly -- I'm sorry.

19 THE COURT: Let her finish the question.

20 Q. (By Ms. Teachout) Does this document state anywhere --
21 and point it out to me if I'm missing it. Does it state
22 anywhere that an ET-Plus is NCHRP 350-compliant?

23 A. I'm saying that the bill of lading file is incorporated
24 by reference on this document.

25 Q. And so --

1 A. It does not directly state or contain a certification,
2 but it does indirectly incorporate the bill of lading number
3 and the reference to that file, which contains the
4 certification.

5 Q. So the answer to my question is, no, this document
6 doesn't have those words on it; is that correct?

7 A. It does not have those words. It has the reference.

8 Q. And the bill of lading actually does not have those
9 words either, sir; is that correct?

10 A. It's in the bill of lading file.

11 Q. In the file?

12 A. And the -- and the bill of lading file, which was
13 produced by Trinity, contains the bill of lading documents
14 together with the certification.

15 Q. And those would be the files that you haven't counted;
16 is that correct?

17 A. What do you mean I haven't counted?

18 Q. You have not provided a number of alleged
19 certifications, have you, sir?

20 A. No, I haven't done that. I said that's not part of my
21 opinion.

22 THE COURT: Let's move along.

23 Q. (By Ms. Teachout) When trying to count your false
24 claims, sir, you don't know whether a state who's actually
25 the entity that's submitting the claim for payment to the

1 Federal Government -- you don't know whether they submit a
2 claim for payment for every single ET-Plus sale individually
3 or whether they would bundle those together and bundle
4 multiple purchases of ET-Pluses into just one claim for
5 payment; isn't that correct?

6 A. I don't have any information on how the states submitted
7 their claims to the Federal Government.

8 Q. And you don't know the process specifically of invoices
9 at all after they leave Trinity; isn't that correct?

10 A. I don't have that documentation. That wasn't produced
11 in this litigation.

12 Q. And with the Trinity customer invoices, you have not
13 identified or tracked whether an ET-Plus sale on an invoice
14 was paid with state money and did not even involve federal
15 reimbursement dollars; isn't that correct?

16 A. I've accounted for that in my percentage allocations.

17 Q. You've not tracked that as to each individual invoice,
18 have you?

19 A. I've not tracked that with each individual invoice.
20 I've accounted for it in my percentages.

21 Q. So you couldn't tell me out of the 21,000 how many of
22 these invoices or which ones may have been paid entirely
23 with state money; is that correct?

24 A. No. You can see the difference between the 21,836 and
25 the 16,771 represent thousands of invoices that would not be

1 part of the false claim.

2 MS. TEACHOUT: Could we look at Mr. Chandler's
3 deposition at Page 179, Line 11?

4 Q. (By Ms. Teachout) And you've made no effort to track, in
5 fact, whether ET-Plus installations were paid with state
6 money, local money, city money, private money, or federal
7 money. Is that accurate?

8 And your response was: I don't have the data to make
9 that allocation or determination.

10 Did I read that correctly?

11 A. That's correct. I don't have -- all I have is the Ohio
12 data to make the allocation, and that's what I relied on. I
13 don't have specific, you know, city money or private money
14 or local money to make that calculation. I relied on the
15 percentage that the states would spend on federal-eligible
16 highways to calculate that percentage.

17 Q. So it's the same data concerning bridges and tunnels and
18 overpasses; you used that same data?

19 A. However the states spent their money and how they
20 decided to allocate their resources, their spending
21 resources was the same allocation percentage. The actual
22 allocation percentage that they used is what I used to
23 allocate Trinity sales to eligible highways.

24 Q. So of these 21,000 Trinity customer invoices, you don't
25 know what the number of invoices would be that actually

1 involved federal money?

2 A. I don't have a specific tracing. I can -- I've made my
3 allocations. The 16,771 includes an allowance for the
4 references to local or city sales that you're addressing.

5 Q. So the answer would be, no, you don't have -- you don't
6 know of these 21,000 invoices the number that actually
7 involved federal money, do you?

8 A. Well, as I said before, the calculation is based upon an
9 actual percentage. I didn't manipulate or come up with a
10 hypothetical allocation. That is based on precisely how the
11 states spent their money, so that is an actual allocation.
12 I do not have a specific tracing to each of those, because I
13 didn't do it and the information wasn't available to do it
14 on a -- on a sale-by-sale basis.

15 Q. Mr. Chandler, with regard to your opinion on damages in
16 this case, the bottom line is you have talked to no one at
17 FHWA, have you, concerning the ET-Plus?

18 A. I have not talked with the Federal Highway
19 Administration. That's correct.

20 MS. TEACHOUT: I'll pass the witness, Your Honor.

21 THE COURT: Additional direct?

22 MR. GRAVANTE: Very brief, Your Honor.

23 REDIRECT EXAMINATION

24 BY MR. GRAVANTE:

25 Q. Mr. Chandler, have you had access to anyone at the FHWA

1 in order to speak with them in the formulation of your
2 opinions expressed in this court today?

3 A. I -- I don't -- I have not -- to the best of my
4 knowledge, I've had no access to the Federal Highway
5 Administration.

6 Q. Have you reviewed all of the available federal data that
7 you have had access to in connection with the preparation of
8 your report and testimony here today?

9 A. I did, yes.

10 Q. Did you review every single piece of paper that Trinity
11 produced in this litigation in preparation for your expert
12 report and your testimony here today?

13 A. I reviewed all of the relevant information that Trinity
14 produced in connection with -- relating to the damage
15 calculation that I performed. Yes.

16 Q. How many hours did you and your staff spend trying to
17 get additional relevant data?

18 A. Several hundred hours for sure, maybe more.

19 Q. More than several hundred hours?

20 A. I'm sure.

21 Q. Okay. Is there anything that Ms. Teachout asked you
22 about during your cross-examination that was not factored
23 into your original damages calculation that you testified to
24 on direct?

25 A. That was not factored into it? Well, I could not make

1 the direct tracing that she had made allegations I should
2 have made. But I've factored in -- in the analysis that I
3 performed, I accounted for many of the other purchases that
4 would not be eligible for federal funding by my allocation
5 percentages that I calculated.

6 Q. Is there anything -- anything that she raised with you
7 during cross-examination that was not factored into your
8 calculation which you testified is an estimate based on the
9 available data?

10 A. No, she did not.

11 Q. Is there at this point, after hearing her
12 cross-examination of you, any reason for you to want to
13 reconsider or change your conclusion regarding the total
14 damages you've testified to or the total number of alleged
15 false claims you've testified to?

16 A. No.

17 Q. Thank you.

18 MR. GRAVANTE: No further questions.

19 THE COURT: Additional cross?

20 MS. TEACHOUT: No further questions, Your Honor.

21 THE COURT: All right. You may step down,
22 Mr. Chandler.

23 MR. GRAVANTE: Your Honor, I'd ask if the witness
24 could be excused.

25 THE COURT: Is there objection?

1 MS. TEACHOUT: No objection, Your Honor.

2 THE COURT: Mr. Chandler, you're excused. You're
3 free to stay; you're also equally free to go. Thank you
4 very much.

5 All right. Ladies and gentlemen, we're going to
6 recess for the day at this juncture. Please leave your
7 notebooks on the table in the jury room. Travel safely to
8 your homes.

9 Do not discuss the case with anyone, including
10 each other, and we will try to maintain the same schedule.
11 Please be in the jury room assembled at about 8:20. We'll
12 try to start at 8:30 in the morning as we can.

13 With those instructions, you are excused for the
14 evening.

15 COURT SECURITY OFFICER: All rise.

16 (Jury out.)

17 THE COURT: All right. Is the Plaintiff aware of
18 anything we should take up before recessing for the evening?

19 MR. CARPINELLO: One issue, Your Honor.

20 THE COURT: I've learned to assume there's
21 something.

22 MR. CARPINELLO: I do my best.

23 We need to know, Judge, so we can prepare, whether
24 Alberson and Ross are going to be offering their testimony.
25 They were originally on their witness list as depositions.

1 Your Honor ordered if they're going to appear, they appear
2 live. So in order to prepare, we need to know if they're
3 coming in.

4 MR. MANN: We'll let them know by the designated
5 time the Court's given us, Your Honor, tonight.

6 MR. CARPINELLO: With all due respect, live
7 witnesses are supposed to be produced last week. I
8 understand they didn't know until today they had to be live,
9 but I think we do need to know within a reasonable hour
10 tonight.

11 THE COURT: Until 7:00 o'clock this evening,
12 Mr. Mann.

13 MR. MANN: I think we can --

14 THE COURT: Let them know by 7:00 this evening.

15 MR. CARPINELLO: Thank you, Your Honor.

16 THE COURT: Anything else, Mr. Carpinello?

17 MR. CARPINELLO: No, Your Honor.

18 THE COURT: Anything from the Defendants we need
19 it take up before we recess for the evening?

20 MR. SHAW: No, Your Honor.

21 THE COURT: All right. Ladies and gentlemen, we
22 stand in recess until tomorrow morning.

23 COURT SECURITY OFFICER: All rise.

24 (Court adjourned.)

25 *****

CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/_Shelly Holmes_____
SHELLY HOLMES, CSR, TCR
Official Court Reporter
State of Texas No.: 7804
Expiration Date 12/31/14

10/15/14
Date

/s/_Susan Simmons_____
SUSAN SIMMONS, CSR
Deputy Court Reporter
State of Texas No.: 267
Expiration Date 12/31/14

10/15/14
Date

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

UNITED STATES OF AMERICA * Civil Docket No.
EX REL JOSHUA HARMAN *
VS. * 2:12-CV-89
* Marshall, Texas
*
* October 16, 2014
TRINITY INDUSTRIES, INC. & *
TRINITY HIGHWAY *
PRODUCTS, LLC * 8:19 A.M.

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE RODNEY GILSTRAP
UNITED STATES DISTRICT JUDGE

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14 P R O C E E D I N G S

15
16 (In-chambers hearing.)

17 THE COURT: All right. I understand we have
18 another recently issued letter to take up. I'm holding in
19 front of me what appears to be a letter from Virginia
20 Department of Transportation dated October 15th. That would
21 be yesterday, I guess. And I assume for identification,
22 it's marked as Plaintiff's Exhibit 1293.

23 I've also been given another document marked for
24 identification as Plaintiff's 1294, which looks like a
25 qualified products list with a clarification contained

1 within it regarding Trinity ET products. This appears to be
2 12 pages and shows an October 10, 2014 date.

3 Since these are marked for identification with
4 Plaintiff's numbers, I'll have the Plaintiffs tell me what
5 they are and what their request is.

6 MR. CARPINELLO: Your Honor, these were both
7 received last night. These were issued from the
8 Commonwealth of Virginia Department of Transportation.

9 1293 states that the ET-Plus has been removed from
10 the qualified products list, effective immediately -- that
11 the four-inch -- the one with the four-inch channel has been
12 removed, effectively immediately.

13 And 1294, as Your Honor stated, is the qualified
14 products list. And that has been revised to allow only the
15 five-inch channel and other qualifications, as well, but
16 effectively, only allowing the five-inch channel to be used
17 on the Virginia highways, effectively immediately.

18 We -- they came in late last night. We ask that
19 they -- for the reasons that the Court allowed 1292 in
20 yesterday, we think 1293 and 1294 should be admitted for the
21 same reasons. And I won't -- I won't belabor -- take up the
22 Court's time with repeating the arguments that we made
23 before, but we do think these are clearly relevant and
24 should be admitted.

25 THE COURT: What's the Defendants' response?

1 MR. SHAW: Your Honor, Ethan Shaw for the
2 Defendant Trinity Industries and Trinity Highway Products.
3 The same arguments that we had presented as to the previous
4 exhibits have come out during the course of the trial. Of
5 course, they're not on the pre-admitted list because they
6 were not in existence apparently.

7 We think it's, of course, appropriate to try the
8 case on the evidence that we were prepared to try the case
9 on. Nevertheless, Your Honor, we would object that -- as we
10 have objected to the previous exhibits of this nature, that
11 what state DOTs determine about their qualified product list
12 is not a relevant inquiry into a False Claims Act as to what
13 the Federal Government is determining about federal
14 reimbursement. It is the FHWA -- the FHWA who is the
15 authoritative agency in this particular matter.

16 So if we follow the law as we believe, Your Honor,
17 it applies to a False Claims Act case, what is occurring at
18 the state levels with QPLs is irrelevant under Rule 401.

19 It's, of course, prejudice under Rule 403 as a
20 result.

21 So we would assert those objections to -- excuse
22 me, Your Honor -- 1293 and 1294, just like we had previously
23 to exhibits that came in yesterday of a similar nature.

24 Additionally, Your Honor, in the letter, Document
25 1293, there appears to be a rendition from the state -- from

1 Virginia giving the reasonings of why they did it in the
2 first couple of paragraphs, concerning disclosure of
3 documents. As part of the design submitted, 2005, Trinity
4 changed the channels and did not notify the department of
5 the modification. We would object to this as being
6 conclusory. We have not had an opportunity to go behind the
7 course of their investigation to determine how they have
8 determined that.

9 What was told to Virginia is not an issue as to
10 what was provided to the FHWA. We believe that section in
11 and of itself, of course, is prejudicial in addition to the
12 rest of the document. And that's the basis of our
13 objection, Your Honor.

14 THE COURT: Anything additional from the
15 Plaintiff, Mr. Carpinello?

16 MR. CARPINELLO: I would just -- I would just
17 observe that the suggestion that they haven't had a chance
18 to do discovery and go behind the letter applies equally to
19 the FHWA letter that is their primary defense in this case.
20 And I don't think that's a grounds for not admitting it.
21 It's being admitted because it's a -- it's a -- it's a
22 determination made by the state of Virginia. It's a public
23 document, and it speaks for itself.

24 THE COURT: Well, the timeliness issue is
25 unavoidable since it was only generated yesterday. As with

1 the other late breaking letters the Court has been presented
2 with, the Court views this as clearly relevant to the issues
3 in the case, and the Court's going to overrule the
4 Defendants' objections and pre-admit 1293 -- Plaintiff's
5 1293 and 1294.

6 I also understand we have disputes about
7 demonstratives to be used --

8 MR. BAXTER: Yes, sir.

9 THE COURT: -- during today's portion of the
10 trial?

11 MR. BAXTER: Yes, Your Honor. This is damage
12 demonstrative from their damage expert. There's a couple of
13 them we object to.

14 The first one is No. 3, Your Honor, and we object
15 to the Points 2, 3, 4, and 5 because they're legal
16 conclusions.

17 THE COURT: I might -- excuse me, Mr. Baxter.

18 MR. BAXTER: Yes.

19 THE COURT: Before I forget, I might always -- I
20 might also note on 1293 and 1294 we just dealt with, that
21 it's not lost on the Court that during the pre-trial process
22 the Defendants vehemently urged the admission of certain
23 communications from state Departments of Transportation in
24 light of arguments from the Plaintiff that they were not
25 relevant and the Court pre-admitted those. And the

1 arguments today that a late breaking communication from
2 another state Department of Transportation that's not deemed
3 as helpful would be argued to be improperly pre-admitted.

4 I think the Defendants have blown both hot and
5 cold on this issue. But that notwithstanding, I believe the
6 relevance is unassailable. And while both sides are limited
7 in their ability to address it given the timely -- the --
8 the recent time in which it's generated, that falls equally
9 both on Plaintiff and Defendant. My ruling remains the
10 same.

11 Now, with that, we'll transition back to these
12 demonstrative disputes. Tell me again what your points are.

13 MR. BAXTER: Slide -- Slide 3, Your Honor, Points
14 2, 3, 4, and 5 are legal conclusions. The Court has said
15 that Mr. Matthews couldn't state his legal opinions. We
16 think that those three -- the first one, we don't object to.
17 The second -- 2, 3, 4, and 5 we do.

18 THE COURT: So as I read Point 2, here, again, we
19 have the Plaintiff's ex -- I mean, excuse me, the
20 Defendants' expert proposing to use a demonstrative that
21 holds up communications from state Departments of
22 Transportation which favor the Defendants in the case, and
23 their expert is purporting to use that as part of this
24 demonstrative.

25 I -- I don't see that these points on this

1 demonstrative contradict or counter to the evidence that the
2 Defendants have admitted in the case. These are recitals
3 that come from D 2, and D 2 speaks for itself and can be
4 challenged with later letters and other evidence from the
5 Plaintiff. I don't think this is improper for demonstrative
6 purposes.

7 MR. BAXTER: All right.

8 THE COURT: I'll allow this Slide 3 as it stands
9 for the Defendants' use.

10 MR. BAXTER: Thank you, Your Honor.

11 No. 7, which is down at the bottom. We object to
12 that one because that it goes beyond his expert report and
13 contains opinions he didn't state in his report, Your
14 Honor -- Mr. Matthews, that is, the expert.

15 THE COURT: Okay. Are we talking about Matthews
16 or Chandler?

17 MR. BAXTER: We're talking about Matthews did not
18 have these in his expert report.

19 THE COURT: Oh, okay. Chandler is your expert.
20 Matthews is theirs?

21 MR. BAXTER: Yes, Your Honor.

22 THE COURT: Are you objecting to both subparts or
23 just the second one?

24 MR. BAXTER: Both of them.

25 THE COURT: What's the Defendants' response as to

1 whether there's support for this in your expert's report?

2 MS. TEACHOUT: Your Honor, Mr. Matthews in his
3 report did analyze the Arkansas data that Mr. Chandler
4 reviewed and used to corroborate his percentages that were
5 used. He both analyzed the -- the underlying sales that
6 were able to be traced to Trinity invoices, and looked at
7 those sales -- I've marked some of the pages.

8 THE COURT: Let me ask you this, Ms. Teachout.

9 Does his report at any point say the Arkansas
10 expenditures for ET-Plus sales in Arkansas are immaterial?

11 MS. TEACHOUT: He has a chart, Your Honor, where
12 he compares Trinity sales in the different observation
13 states as a percentage of total sales by year for Trinity.

14 THE COURT: Well, if they were immaterial, I doubt
15 he would have compared them in his chart. If he doesn't say
16 in his report they're immaterial, then this -- this is out.

17 If you can show me where he says they are
18 immaterial, which would support this demonstrative, I'll
19 reconsider my ruling.

20 MS. TEACHOUT: Okay, Your Honor.

21 MR. BAXTER: While she's looking for that --

22 THE COURT: Then -- then Slide -- Slide 7 is
23 acceptable.

24 What's next?

25 MR. BAXTER: 10 and 11 we're objecting to for the

1 very same reason that Mr. Matthews' expert report didn't
2 contain it. He didn't state it, and it's outside the scope
3 of what he did.

4 THE COURT: All right. Slide 10, again, says
5 Trinity Arkansas sales are immaterial. For the same reason,
6 I'll exclude 10. But 11 seems to be part of what would be
7 the comparison that Ms. Teachout's referenced in the report.
8 And if, in fact, he does compare them, then 11 looks to be
9 proper.

10 MR. BAXTER: Then the last one, Your Honor, is 13.
11 And the vice here is that 13 talks about Exhibit D 2, which
12 was an exhibit from Mr. Chandler. It was excluded by the
13 Court. He didn't testify about it. The Court struck it.
14 So we don't think it's fair for them now to refer to an
15 exhibit that was struck by the Court in our expert's report
16 and his testimony.

17 THE COURT: Defendant have any basis to counter
18 that?

19 MS. TEACHOUT: Your Honor, Mr. Chandler did, in
20 his testimony, use the same Arkansas -- information from
21 Arkansas to support and corroborate the percentages that he
22 used of state highway data, and this is a critique from
23 that, that you can't -- the data he used -- the Arkansas
24 data doesn't specify ET-Plus units. And when you look at
25 the actual tracing that was done by Mr. Chandler and what he

1 was actually able to trace back to a Trinity invoice, it
2 raises serious questions about whether the data he did rely
3 on, the Arkansas data, actually represents ET-Plus units or
4 not. And so we think that Mr. Matthews should be able to
5 look at the actual data that was traced back to a Trinity
6 invoice to be able to say the data for Arkansas he did use
7 to corroborate or to testify was a basis for corroboration,
8 really isn't all ET-Plus units because it doesn't make
9 sense. And on the face of that document he used, it just
10 says all guardrail in Arkansas.

11 THE COURT: Well, Mr. Chandler did testify
12 yesterday that the only state he had precise information on
13 was Arkansas, and he used that for verification purposes.
14 If that was outside his report due to this D 2 having been
15 struck, I would have thought Defendants would have objected
16 to it. They obviously didn't because it obviously came in
17 yesterday.

18 MS. TEACHOUT: Yeah, I -- I don't think
19 Mr. Chandler has previously used the Arkansas data for
20 multiple purposes, both to try to corroborate an
21 installation factor and when that was struck, to also
22 corroborate, in his mind, the percentages that he used for
23 his percentage allocation.

24 THE COURT: Well, given that Chandler Report D 2
25 has been struck, I'll allow this demonstrative, but remove

1 the source reference off the bottom of the page.

2 MR. BAXTER: That's all -- that's all of that,
3 Your Honor.

4 THE COURT: Okay. What else do we have, Counsel?
5 It's 8:30.

6 MR. MANN: We have the demonstrative -- we have a
7 four-inch and a five -- you've already said we could use the
8 four-inch and five-inch heads that are mounted, and we
9 deferred the four-inch and five-inch head that we have cut
10 in half for -- the jury can see inside the four-inch and
11 five-inch. They're our heads. They're -- they're a
12 four-inch Trinity head, a five-inch Trinity head, and we
13 want to use them as demonstratives. We've disclosed them,
14 and they've looked at them. We've been putting them on our
15 list since Monday.

16 THE COURT: These -- these will be brought into
17 the courtroom?

18 MR. MANN: Yes, sir.

19 MR. CARPINELLO: We object, Your Honor.

20 THE COURT: What's your objection?

21 MR. CARPINELLO: First of all, we don't know
22 whether these heads were actually manufactured for the
23 trial. We don't think the alleged two halves actually
24 match. When we presented heads to be brought into the
25 courtroom, they were able to extensively examine our experts

1 and our people about where they came from, what was done to
2 them. These show marks -- they have marks on them that
3 appear that they may -- they may have been tampered with.
4 We never had an opportunity to depose anybody as to their
5 source.

6 We do know -- I think already we know Dr. Ray -- a
7 special head was made for Dr. Ray that was the basis of his
8 report. And we've never had any opportunity to get into
9 discovery of these. There's -- I think there's absolutely
10 no excuse that -- you know, we had a year-long discovery
11 process. They're the ones that make them. They never
12 brought them to our attention where we could actually depose
13 somebody about them, and I think it's -- even if they call
14 them a demonstrative, the jury's going to view them as an
15 exemplar of what's manufactured and put on the road. And I
16 think that's highly prejudicial to us since we haven't had
17 an opportunity to take discovery on them.

18 I just think there's absolutely no excuse for at
19 the last minute -- at the beginning of trial to roll stuff
20 into the courtroom and say we're going to use it as a
21 demonstrative when we're never had any discovery on it.

22 THE COURT: When was it first made available to
23 you, Mr. Carpinello, or to the Plaintiff?

24 MR. CARPINELLO: I believe it was this -- was it
25 Monday or was -- was it -- was it Friday?

1 MR. MANN: Whatever day --

2 MR. CARPINELLO: Saturday morning.

3 THE COURT: Don't talk together, Counsel. We've
4 got one court reporter in the room.

5 MR. MANN: Mann here, Your Honor. The day of
6 pre-trial when we brought these up, we -- they were
7 available that day. They wanted to look at them on
8 Saturday. We showed them to them on Saturday.

9 THE COURT: That was Friday before Monday's jury
10 selection was the last day of pre-trial?

11 MR. MANN: Well, actually it was before -- well, I
12 -- it was like on a -- it was on a Tuesday before we --

13 THE COURT: Well, the week before voir dire we
14 spent most of the week handling --

15 MR. MANN: Yes.

16 THE COURT: -- pre-trial matters.

17 MR. MANN: And it was the first day of pre-trial.
18 It was that Tuesday, I think. But bottom line is, Your
19 Honor, they're demonstratives. It's no different than what
20 they did to -- did -- and they ours. We have a guy here to
21 sponsor it. They -- we've given them their chain of
22 custody. They have that.

23 THE COURT: You're representing to me they've not
24 been tampered with?

25 MR. MANN: No, sir, they have not been tampered

1 with. These are -- these were pulled, as I understand, off
2 the road. They were in use. They are --

3 THE COURT: Pulled off the road, cut in half, and
4 that's all that's been done with them?

5 MR. MANN: Yes, sir. Now, they have been tampered
6 in that they've been cut in half, but as far as --

7 THE COURT: Other than that.

8 MR. MANN: -- as far as anything else, they're --

9 THE COURT: All right. Objection --

10 MR. MANN: If they've been tampered with, it's not
11 with my knowledge and I've asked and made sure.

12 THE COURT: I'm -- I'm not asking for a
13 conditional representation. I'm asking for an unconditional
14 representation.

15 MR. MANN: I'm giving you an unconditional that
16 they've not been tampered with. They're off the roads of --
17 and he can explain that, and they've seen it.

18 THE COURT: Objection is overruled. They're --
19 they're permissible as demonstratives only. They're not
20 exhibits. They're not part of the record.

21 MR. MANN: Right. We understand that.

22 THE COURT: Are there other issues?

23 MR. BAXTER: I think, Your Honor, they wanted to
24 -- to get some clarification on Sicking and Matthew -- I
25 mean, Sicking and Mitchell.

1 MR. CARPINELLO: Before we move on, Judge, there's
2 a separate issue with regard to the demonstratives. They've
3 -- they've put in a w-beam, and I think they intend to bring
4 it in with the w-beam. It's not attached, as it would be on
5 the road. I think it's highly prejudicial because when it's
6 not attached as it would be on the road, you can take the
7 guardrail and move it up and down, which I think they're
8 going to try to use to corroborate their alleged wobble
9 theory. And if it's not attached to the guardrail as it's
10 attached on the road, I object to bringing in that
11 guardrail.

12 THE COURT: What's your response?

13 MR. MANN: Our response, Your Honor, is that it --
14 it lets the jury -- I mean, they've never actually seen an
15 actual product where -- how the guardrail goes in. It's --
16 it's strictly a demonstrative. We've got like a four-and-a-
17 half feet -- foot -- four-and-a-half-foot piece and a
18 shorter piece to show that it -- how it goes in. There's
19 not going -- we're not going to do an experiment. I mean,
20 we couldn't push the guardrail through if we all pushed on
21 it.

22 So we'd just like to show that's what it looks --
23 would look like to a jury on the road. Obviously, we didn't
24 bring in a 12-and-a-half-foot section because it would be
25 hard, hard, hard --

1 THE COURT: Is it attached to the head as the
2 guardrail on the road would be attached to the head?

3 MR. MANN: Excuse me just a minute, Your Honor.

4 THE COURT: If you're going to represent this is
5 what they would see on the road, it's going to have to be
6 attached like it would on the road.

7 MR. MANN: Well, Your Honor, I mean, it --

8 THE COURT: Even if it's not as long a piece.

9 MR. MANN: The bolt's not attached, and they've
10 been throwing a bolt inside this head, and that's not
11 attached either like that.

12 THE COURT: Well, the bolt's an admitted exhibit,
13 and nobody's objected to it.

14 MR. MANN: Well, I mean --

15 THE COURT: I'm dealing with the objection in
16 front of me.

17 MR. MANN: Well, there should be no objection.
18 It's -- it is a -- it is a -- it is a piece that goes in and
19 the head sits on top of it. The only difference is we don't
20 have the cables and the bolts and all that to hold
21 everything in place because we can't possibly do that in the
22 courtroom.

23 THE COURT: My question is, is the guardrail
24 inserted in the head as it would be on the road?

25 MR. MANN: I think so. Wouldn't it?

1 MR. CARPINELLO: It's not --

2 MS. TEACHOUT: It's not attached to posts, but it
3 would be the same orientation.

4 MR. MANN: I mean, the difference is we can't put
5 posts in the courtroom, but it's in like --

6 THE COURT: When -- when is this going to be used,
7 potentially?

8 MR. MANN: Our first witness.

9 THE COURT: All right. Well, I assume you have --
10 Plaintiff's have Mr. Mitchell and Dr. Sicking?

11 MR. CARPINELLO: Correct, Your Honor.

12 THE COURT: I assume by the time we're through
13 with them and cross-examination, we'll be ready for a
14 recess. I'll look at it -- I'll look at this demonstrative
15 during recess and I'll give you a ruling after I've seen it.

16 MR. MANN: Okay.

17 THE COURT: All right. With regard to Dean
18 Sicking and Greg Mitchell, I don't know how I could have
19 been any clearer about what's permissible and what's not
20 permissible.

21 Dean Sicking is not here to testify about
22 guardrail systems and how they operate and what's wrong with
23 Trinity's and what's right with anybody else's. The area of
24 examination is confined to his interaction with Mr. Mitchell
25 leading up to and including the alleged act of intimidation

1 in his office in Birmingham, Alabama, and what follows from
2 that. That's -- that's what he's permitted to testify
3 about.

4 MR. CARPINELLO: I think we have agreement on
5 that. I think we wanted to make sure that -- and Mr. Shaw
6 and I talked yesterday about the scope and I -- we just
7 wanted to -- because we don't want to transgress Your
8 Honor's order. What I intend to ask Dean Sicking is whether
9 he had concerns about the ET-Plus and Mr. Mitchell was aware
10 of the concerns. I -- I -- I told -- I've told Dean
11 Sicking -- Dean Sicking that -- of Your Honor's directive
12 and he's not to go into it. And I told Mr. Shaw that if
13 Mr. Mitchell -- and Mr. Mitchell testified in his deposition
14 that Dean Sicking told him he had, quote, no problem with
15 the current ET-Plus, and I've told Mr. Shaw that if Mr.
16 Mitchell testifies to that, then I feel he's opened the door
17 to Dean Sicking saying all that he told. I think it would
18 be totally unfair to allow Mr. Mitchell to testify that Dean
19 Sicking had no problem with the current one without
20 describing his problems with the other.

21 And I think Mr. Shaw and I both agreed neither of
22 us want to go there. We just want -- I can get into the
23 fact there were concerns, and we're not going to get into
24 the concerns. And I'm going to ask Mr. Mitchell about what
25 he said to Dean Sicking about coming or not coming to the

1 trial.

2 THE COURT: Mr. Shaw, do you have any questions?

3 MR. SHAW: Your Honor, as Mr. Carpinello said, we
4 just want to make sure we're not causing a problem.

5 THE COURT: Right.

6 MR. SHAW: It was -- the -- the concern that I
7 had, Your Honor, was not so much what was going to be asked
8 of Dean Sicking, but what was going to be asked of Mr.
9 Mitchell. And I did not want -- I wanted to make sure that
10 if Mitchell -- Mr. Mitchell was questioned about the Dean
11 Sicking issue, he didn't say something that was in violation
12 of the Court's order because as we understood the Court's
13 order that Mr. Sicking was -- Dr. Sicking was going to be
14 able to say that he had concerns.

15 THE COURT: And stop there.

16 MR. SHAW: And stop there. As I understand it,
17 and Mr. Carpinello and I -- as he has represented, have been
18 trying to make sure we're all on the same page, and that's
19 what we're trying to do here, quite frankly, Your Honor,
20 because we don't want a repeat of what happened before.

21 If he asks Mr. Mitchell if he -- did Dr. Sicking
22 express concerns to you, Mr. Mitchell is going to say yes,
23 and he's going to -- and I understand at that particular
24 point, Mr. Carpinello is going to leave that alone.

25 MR. CARPINELLO: Correct.

1 MR. SHAW: Then he's going to go into -- in all
2 probability at that point you intimidated him or threatened
3 him or whatever it may be, okay?

4 Mr. Mitchell also will probably say that as -- as
5 you have indicated, the lead up to that, he will testify
6 that he was there for business and he asked him if he was
7 participating with Mr. Harman. I want to make sure that's
8 okay. And he -- and Dr. Sicking told him he was not or he
9 was not a consultant or whatever the testimony may be about
10 that. I want to make sure that doesn't open the door to
11 anything else. That's all we're trying to do, quite
12 frankly.

13 And are you okay with that, Mr. Carpinello?

14 MR. CARPINELLO: We're -- we're okay with that,
15 Your Honor.

16 MR. SHAW: All right. Well, then, I just want to
17 make sure we're on the same page, Judge.

18 THE COURT: Okay. It sounds like to me it's
19 clarified.

20 MR. SHAW: Thank you.

21 THE COURT: If there's not anything else, I'll see
22 you in the courtroom.

23 MR. CARPINELLO: There's one other item, Judge.
24 I'm sorry.

25 THE COURT: Leave it to you, Mr. Carpinello.

1 You're always the first and always the last.

2 MR. CARPINELLO: Sorry. I hope I don't
3 disappoint.

4 Defendants' Exhibit D-151 we object to because --
5 and I don't know whether they're planning to use it with
6 Chris Harman. It's an unofficial transcribe -- it's a
7 bankruptcy hearing that was taped, and I -- I assume that --
8 that Trinity had someone transcribe it from the tape. It's
9 a very bad tape. It's not an official tape. It's very
10 inaccurate. It's filled with question marks that the
11 transcriber put in here, and we -- it's not an official
12 transcript and we object to its use.

13 It's -- it's also -- in fact, it identifies people
14 as being there that -- that weren't even there. It's a very
15 bad transcription. It's not an official one.

16 THE COURT: This -- this relates to the bankruptcy
17 plan by SPIG and Selco?

18 MR. CARPINELLO: Exactly.

19 MR. MANN: It's a pre-admitted exhibit, Your
20 Honor.

21 MR. CARPINELLO: I can leave it with Your Honor --

22 THE COURT: Is it a pre-admitted exhibit? If it's
23 a pre-admitted exhibit, it's a pre-admitted exhibit.

24 MR. BAXTER: The issue, Your Honor, is -- is that
25 the one they gave us is pre-admitted and the one they want

1 to use today, we think, are not the same one.

2 THE COURT: Well --

3 MR. MANN: We --

4 THE COURT: -- let's get to the bottom of it
5 before the Defendants begin their case-in-chief. I mean,
6 that's -- that's just simply a matter of comparison.

7 MR. MANN: Our notes are off the pre-admitted one,
8 aren't they?

9 MS. TEACHOUT: I don't know about that.

10 MR. MANN: As far as I know. We'll check that.

11 THE COURT: You all meet and confer about that.
12 Bring it up to me, if necessary, later.

13 (Hearing concluded.)

14 (Jury out.)

15 COURT SECURITY OFFICER: All rise.

16 THE COURT: Be seated, please.

17 Is the Plaintiff prepared to read into the record
18 the preadmitted exhibits used by the Plaintiff during
19 yesterday's portion of the trial?

20 MR. CARPINELLO: Yes, Your Honor.

21 THE COURT: All right. Please proceed to do so.

22 MS. MONROE: Good morning, Your Honor. Teresa
23 Monroe for the Plaintiff.

24 The exhibits that were used October 15th, 2014
25 are: P-156, P-185 -- I'm sorry -- P-886, P-1106, P-1172,

1 P-1173, P-1174, P-1175, P-1176, P-20, P-174, P-1 -- I'm
2 sorry -- P-218, P-248, P-1146, P-1248, P-1249, P-1257,
3 P-1259. That's it.

4 THE COURT: All right. Are there any objections
5 to Plaintiff's rendition?

6 MR. SHAW: Let me check, if I may, with her about
7 one, Your Honor.

8 (Pause in proceeding.)

9 MR. SHAW: No objection, Your Honor.

10 THE COURT: All right. Do the Defendants have a
11 similar rendition to offer?

12 MR. SHAW: Yes. D-57, D-30, D-286, D-308, D-314,
13 D-318, D-320, D-322, D-325, D-326, D-327, D-361.

14 THE COURT: Is there objection from the Plaintiff
15 as to Defendants' rendition?

16 MS. MONROE: There's no objection by the
17 Plaintiff, but we do have a correction to our exhibits. And
18 I apologize. I read in P-1172 through P-1176, and it should
19 be P-1072 through P-1076.

20 THE COURT: Do you agree, Mr. Shaw?

21 MR. SHAW: Yes, Your Honor, I do.

22 THE COURT: Okay. That correction is noted.

23 All right. Is the Plaintiff prepared to call
24 their next witness?

25 MR. CARPINELLO: We are, Your Honor.

1 THE COURT: All right. Let's bring in the jury,
2 Mr. McAteer.

3 COURT SECURITY OFFICER: Yes, sir.

4 All rise for the jury.

5 (Jury in.)

6 THE COURT: Good morning, and welcome back, Ladies
7 and Gentlemen of the Jury. Please be seated.

8 Plaintiff, call your next witness.

9 MR. CARPINELLO: Mr. Greg Mitchell, Your Honor,
10 adverse witness.

11 THE COURT: All right. Mr. Mitchell, as I
12 understand it, you've been previously sworn, correct?

13 THE WITNESS: Yes, sir.

14 THE COURT: Please come around to the witness
15 stand.

16 All right. Mr. Carpinello, you may proceed.

17 MR. CARPINELLO: Thank you, Your Honor.

18 GREGORY MITCHELL, PLAINTIFF'S WITNESS, PREVIOUSLY SWORN

19 DIRECT EXAMINATION

20 BY MR. CARPINELLO:

21 Q. Good morning, Mr. Mitchell.

22 A. Good morning.

23 Q. Sir, can you state your position, please, with Trinity
24 Highway Products, LLC?

25 A. I am the president of Trinity Highway Products, LLC.

1 Q. And how long have you been president, sir?

2 A. Exactly four years.

3 Q. Okay. And prior to that, what position did you hold, if
4 any?

5 A. I held the position of president of Trinity Logistics
6 under the umbrella of Trinity Industries as well.

7 Q. How many years did you hold that position, sir?

8 A. Three years.

9 Q. Prior to that, what position did you hold?

10 A. I was responsible for international transportation and
11 distribution -- I'm sorry. I've gone back two jobs. I was
12 responsible for supply chain operations for the Glazer
13 family in Dallas.

14 Q. And is the Glazer family related to Trinity?

15 A. No, they're not.

16 Q. When did you -- when did you actually start working for
17 Trinity?

18 A. In 2007.

19 Q. Sir, you're familiar with the ET-Plus, correct?

20 A. I am.

21 Q. And the ET-Plus is the successor to a terminal known as
22 the ET-2000; is that correct?

23 A. That's correct.

24 Q. And you're aware, sir, that the ET-2000 was marketed as
25 the reusable ET-2000, correct?

1 A. I am aware that's been stated. Yes.

2 Q. Okay.

3 MR. CARPINELLO: Could I have Demonstrative 1,
4 please?

5 Q. (By Mr. Carpinello) See this document, which has been
6 produced by Trinity, entitled The ET-2000 Summary, and it
7 states that the ET-2000 has a reusable head, correct? That
8 the most expensive part of the component is reusable; and,
9 in fact, it advertises after seven hits, it's still
10 functioning, correct?

11 A. Correct.

12 Q. Okay.

13 MR. CARPINELLO: May I have Demonstrative 2,
14 please?

15 Q. (By Mr. Carpinello) And this states another -- another
16 document from Trinity states the advantages of the ET-2000
17 as the most expensive components are reusable 99 percent of
18 the time. Do you see that, sir?

19 A. I do.

20 Q. Do you have any basis to object or criticize the
21 representation that was made that the ET-2000 was reusable
22 99 percent of the time?

23 A. I do not. I'm seeing this for the first time.

24 Q. Okay. You've never seen this before, sir?

25 A. I have not.

1 Q. Okay. Are you aware that the ET-2000 was first marketed
2 by SYRO, correct?

3 A. I believe that to be correct. Yes.

4 Q. And what's Trinity's relationship to SYRO, sir?

5 A. My understanding is that Trinity acquired SYRO Steel in
6 1992.

7 Q. Okay. So SYRO is now part of Trinity, correct?

8 A. It is.

9 Q. Okay.

10 MR. CARPINELLO: Could I have Demonstrative No. 3,
11 please?

12 Q. (By Mr. Carpinello) And I'm showing you, sir, an
13 advertisement from SYRO for the ET-2000, which states: The
14 reusable extruder head means lower maintenance and repair
15 costs and allows reduced parts inventory.

16 Do you see that, sir?

17 A. I do see that.

18 MR. CARPINELLO: May I have Demonstrative 4,
19 please?

20 Q. (By Mr. Carpinello) This is from the manual of SYRO
21 for contractors. You understand that, sir; this is the
22 installation instructions from SYRO for the ET-2000.

23 A. I believe so. I'm seeing this for the first time, yes.

24 Q. You've never seen this before either?

25 A. I have not.

1 Q. Okay. And this states: The first thing to do is
2 check -- let me read the top of the page there, 15.
3 Procedures immediately following an accident, and it says
4 the first thing to do is check the extruder head for damage.
5 It is normally reusable.

6 Do you see that, sir?

7 A. Yes.

8 Q. Okay.

9 MR. CARPINELLO: Could I have Demonstrative 5,
10 please?

11 Q. (By Mr. Carpinello) This is a Trinity advertisement, is
12 it not, sir?

13 A. Yes, it is.

14 Q. And it states that the ET-Plus head is typically
15 reusable after an impact, does it not, sir?

16 A. Yes.

17 Q. Now, let me show you Trinity's July 2005 manual.

18 MR. CARPINELLO: Demonstrative 6, please?

19 Q. (By Mr. Carpinello) And, again, this manual, Trinity's
20 own manual from July 2005, says after an accident or with
21 regard to repair, check the extruder head for damages; it is
22 normally reusable, correct?

23 A. Correct.

24 Q. All right. Now, let me show you Trinity's 2008 ad, sir,
25 and this states: The ET-Plus head is sometimes reusable,

1 after an NCHRP Report 350-criteria impact, correct, sir?

2 A. I don't see the year 2008.

3 Q. 2000 --

4 MR. CARPINELLO: Could we -- could we focus on the
5 top, please, Mr. Diaz?

6 Q. (By Mr. Carpinello) I believe the date there is May 13,
7 2008.

8 A. Okay.

9 Q. Do you have an understanding, sir, that, in fact,
10 Trinity advertising in 2008 said that the head was sometimes
11 reusable?

12 A. Yes.

13 Q. Okay. May I show you another Trinity ad, sir?

14 MR. CARPINELLO: Demonstrative 8.

15 Q. (By Mr. Carpinello) This says the ET-Plus extruder head
16 has the potential to be reused after impact. The ultimate
17 decision of reusability rests with the specified
18 transportation authorities.

19 So that's been a change in the advertising, correct,
20 sir?

21 A. Yes.

22 Q. Okay. Let's take a look at Trinity's 2008 manual for
23 the ET-Plus with regard to maintenance and repair, and this
24 says: Check the ET-Plus extruder head for damage. The
25 determination as to whether or not the head is reusable

1 rests entirely within the discretion of the DOT or other
2 appropriate highway authority.

3 Before reusing a head, please make sure that an
4 experienced, trained engineer for the highway authority
5 inspects the head to his or her satisfaction and authorizes
6 its reuse.

7 Now, sir -- it's a fact, then, sir, that Trinity's
8 position with regard to the reusability has changed
9 significantly since the ET-2000 was put on the record; is
10 that not correct, sir?

11 A. Yes.

12 Q. Sir, are you aware that the ET-Plus was, in fact,
13 changed in 2005?

14 A. I am aware, yes.

15 Q. There were several changes in dimensions that were made
16 to the ET-Plus in 2005; is that correct?

17 A. Yes, sir.

18 Q. Are you aware that those changes were not disclosed to
19 the FHWA until 2012?

20 A. Yes, I am aware.

21 Q. Now, one of the changes that was made was to go to --
22 from a 5-inch to a 4-inch channel; is that correct, sir?

23 A. That's correct.

24 Q. And that was Trinity's idea, correct?

25 A. That's not correct.

1 Q. All right. Sir, I'm going to show you -- who is Brian
2 Smith, sir?

3 A. Brian Smith is the vice president of international sales
4 that reports directly to me.

5 Q. Sir, I'm going to show you the affidavit of Brian Smith.

6 MR. CARPINELLO: Can I have Demonstrative 21,
7 please?

8 Q. (By Mr. Carpinello) Dated February 23, 2012. And I'm
9 going to direct your attention to Paragraph 8 of Mr. Smith's
10 sworn declaration.

11 In 2005, Trinity -- Trinity suggested a manufacturing
12 improvement of the ET-Plus to include an end terminal with a
13 4-inch top and bottom channel on the feeder chute versus a
14 5-inch rail feeder chute in prior versions of the ET-Plus.

15 That's a sworn statement of Mr. Smith, is it not?

16 A. Yes, it is.

17 Q. Okay. And he -- he's saying that Trinity suggested a
18 manufacturing improvement to go from 5 to 4 inches, did he
19 not, sir?

20 A. Yes, he did.

21 Q. Was -- was his sworn statement that he submitted to the
22 Court in Virginia incorrect, sir?

23 A. I can't speak to that, other than what I'm seeing in
24 front of me.

25 Q. Was it incorrect?

1 A. I think it was a collaborative effort between Trinity
2 and TTI.

3 Q. Was the statement incorrect, sir?

4 A. I don't believe the statement to be incorrect.

5 Q. So you agree that Trinity suggested a manufacturing
6 improvement to go from 5 to 4-inches for the feeder channel
7 in 2005?

8 A. I believe that ultimately Trinity did, yes. But I think
9 the original idea was suggested by TTI in 2003, as I recall.

10 Q. Sir, you were here when Mr. Malizia testified, correct?

11 A. Yes.

12 Q. And you were here when I put up on the screen the email
13 from Mr. Brown to Mr. Malizia saying we want to push the 5-
14 to 4-inch, how much would it cost.

15 You remember that, right?

16 A. I do remember that, yes.

17 Q. And you remember Mr. Brown saying if TTI agrees, I hope
18 we can do that with no announcement. You recall that also,
19 sir, don't you?

20 A. I do recall that.

21 Q. Now, sir --

22 MR. CARPINELLO: You can take that off, Mr. Diaz.

23 Q. (By Mr. Carpinello) Before Trinity suggested the change
24 from 5- to 4-inch, were there any reports coming to Trinity
25 of problems with the performance of the 5-inch ET-Plus?

1 A. Not that I'm aware of, no.

2 Q. Had Trinity done any study of how the ET-Plus was
3 performing on the road, before it decided to change from 5-
4 to 4-inch and change the other dimensions in the ET-Plus?

5 A. Not that I'm aware of.

6 Q. Was Trinity aware of any accidents where the ET-Plus had
7 actually speared a car similar to what we saw in the various
8 pictures we've seen in this trial prior to 2005?

9 A. I'm not aware of any.

10 MR. CARPINELLO: Could I have Exhibit 573,
11 Mr. Diaz?

12 Q. (By Mr. Carpinello) Now, in 2012, Mr. Harman disclosed
13 to the FHWA for the first time that Trinity had made these
14 changes; is that correct, sir?

15 A. That is correct.

16 Q. Trinity had never disclosed the changes to the FHWA; is
17 that correct, sir?

18 A. That's correct.

19 Q. And after these disclosures were made, you wrote a
20 letter to the entire industry, all your contractors and to
21 whom it may concern, a general letter for public
22 distribution explaining Trinity's position, correct?

23 A. That's correct.

24 Q. All right, sir. And you say in this letter, dated
25 February 21, 2013 --

1 MR. CARPINELLO: If we could go down to the first
2 full paragraph under the ET-Plus system remains accepted for
3 use by the FHWA.

4 Q. (By Mr. Carpinello) You say -- you reference an earlier
5 March 2012 letter, to whom it may concern: Do you see that,
6 sir?

7 You say: You will recall that in March 2012 -- and
8 that was three months after Mr. Harman made his disclosures,
9 correct?

10 A. That's correct.

11 Q. Okay. And you say -- further down: In that letter,
12 Trinity Highway also included --

13 MR. CARPINELLO: If we could have that
14 highlighted. Thank you, Mr. Diaz.

15 Q. (By Mr. Carpinello) Also included the reason that is TTI
16 suggested this improvement to enhance the already
17 demonstrated performance of this system in the field. One,
18 improved alignment of the extruder head, and, therefore,
19 enhanced rail extrusion during head-on impacts.

20 What studies did you consult or did TTI consult to
21 conclude that the change from 5- to 4-inch would improve the
22 alignment of the extruder head during head-on impacts?

23 A. I'm not aware of any studies that were completed by
24 Trinity, but I think Dr. Bligh spoke to that, that they were
25 making observations of the head.

1 Q. What studies did you consult, sir, or did TTI consult to
2 your knowledge to determine that a change from 5- to 4-inch
3 would improve the alignment of the extruder head, and,
4 therefore, enhance the extrusion -- extrusion during a
5 head-on impact?

6 A. I'm not aware of any studies.

7 Q. What field studies were done, sir?

8 A. I'm not aware of any field studies.

9 Q. What computer analysis was done, sir?

10 A. I'm not aware of any computer analysis.

11 Q. Was anyone consulted other than TTI and Trinity?

12 A. Not that I'm aware of.

13 Q. Did you go to any contractors and ask them, sir, whether
14 they saw anything in the field that indicated that Trinity
15 should change from a 5- to 4-inch to enhance the rail
16 extrusion during head-on impacts, sir?

17 A. I'm not aware of field studies that were done. No.

18 Q. Did you consult any public officials, any DOT officials,
19 state police, or outside experts to ask if there was a
20 problem with regard to the extrusion during head-on impacts
21 so that we should change it from 5- to 4-inch?

22 A. I'm not aware of any.

23 Q. Okay. The second reason you gave is reduction of
24 the impact impulse on the occupants during the head-on
25 collision with the system.

1 What studies were done, sir, by either Trinity or TTI
2 to show, first, that there needed to be a reduction in the
3 impact impulse on the occupants during head-on collisions?

4 A. Again, I'm not aware of studies that were complete.

5 Q. What field research was done, sir, to determine that
6 there needed to be a reduction on the impact impulse on
7 occupants during a head-on collision?

8 A. I'm not aware of studies.

9 Q. What state officials, DOT officials, state police, or
10 outside experts did you consult to determine that there
11 needed to be a reduction in the impact impulse in a head-on
12 collision?

13 A. I'm not aware of any studies.

14 Q. What studies did you do, sir, to determine that changing
15 from 5- to 4-inch would, in fact, reduce the impact impulse
16 on occupants during a head-on collision?

17 A. I'm not aware of any studies.

18 Q. What computer analysis did you or TTI do to determine
19 that, in fact, making the 5 to 4 change and all the other
20 changes would, in fact, reduce the impact impulse on
21 occupants during a head-on collision?

22 A. Again, I'm not aware of any studies.

23 Q. Well -- and what do you have today, sir, that shows that
24 this change from 5- to 4-inch would reduce the impact
25 impulse on occupants during a head-on collision?

1 A. We rely on the advice and recommendations of TTI t that
2 time and today.

3 Q. I don't think I asked that question.

4 MR. CARPINELLO: I'm sorry, Your Honor.

5 Q. (By Mr. Carpinello) I'm asking the question: What
6 studies have you done today that show that, in fact, the
7 change that you told the world would result in a reduction
8 of impact impulse? What studies have you done to verify
9 your statement there that -- that this change was going to
10 do that?

11 A. I'm not aware of any studies.

12 Q. Okay. Your third reason was it created a stronger weld
13 of the extruder head to the guide channels. What studies
14 did you do, sir, to determine that this would create a
15 stronger weld of the extruder head in guide channels?

16 A. I'm not aware of any studies.

17 Q. Okay. And what studies did TTI do to determine that?

18 A. I'm not aware of a study.

19 Q. What computer analysis did TTI do to determine that?

20 A. I'm not aware of a computer analysis.

21 Q. Today, sir -- what studies do you have today, sir, to
22 tell the jury that, in fact, the change from 5- to 4-inch
23 and the change in the weld and the change in the height of
24 the channel and the change in the length of the guide
25 channel had any impact on the strength of the weld?

1 A. I'm not aware of a study.

2 Q. Sir, when you saw the accidents that were on the screen
3 here and you saw the fact that the guide channel had impaled
4 these cars, did that lead you to believe that maybe we
5 should do a study to see, one, whether we're improving the
6 alignment; two, whether we're reducing the impact impulse;
7 three, whether we're creating a stronger weld?

8 A. No.

9 Q. Okay. Now, TTI does have elaborate facilities for
10 computer analysis, doesn't it?

11 A. Yes, they do.

12 Q. And they do computer analysis on all kinds of products,
13 right?

14 A. Yes, they do.

15 Q. In fact, they're one of the leading facilities in the
16 world on computer analysis of highway safety devices, aren't
17 they?

18 A. Yes, they are.

19 Q. Okay. And you're telling me that they have never, ever
20 done a computer analysis of the effect of these changes
21 which you made in 2005 and did not disclose to the FHWA. Do
22 I understand that, sir?

23 A. That is my understanding.

24 Q. Okay. Now, you say in the first --

25 MR. CARPINELLO: 573, please.

1 Q. (By Mr. Carpinello) You say in the first -- second
2 paragraph of this letter: While both Trinity Highway and
3 Texas A&M have attempted to respond to these disparaging
4 assertions -- and you're referring to Mr. Harman's
5 disclosure when you say that, correct, sir?

6 A. Yes.

7 Q. You're referring to the fact that Mr. Harman for the
8 first time was the first person to go to the FHWA and say
9 Trinity made changes which it did not tell you, correct?

10 Those are the disparaging assertions you're referring to
11 there, correct?

12 A. No. The disparaging assertions are claims made about
13 killing people and the accusations that were being made --

14 Q. Are you saying --

15 THE COURT: Let him finish the answer,
16 Mr. Carpinello.

17 MR. CARPINELLO: Sorry. I'm sorry.

18 Q. (By Mr. Carpinello) Are you telling the jury that people
19 have not died as a result of these changes?

20 A. I don't know.

21 Q. And you never went to find out, did you?

22 A. That is not our belief today, that people are dying
23 because of these changes.

24 Q. How many of the accidents that the jury saw in the
25 photos did Trinity investigate?

1 A. I'm seeing the photos as part --

2 Q. How many of the accidents --

3 MR. SHAW: Your Honor --

4 THE COURT: Mr. Carpinello, let him finish the
5 answer.

6 MR. CARPINELLO: I'm sorry.

7 THE COURT: Go ahead, Mr. Mitchell.

8 A. We have not investigated the accident photos.

9 Q. (By Mr. Carpinello) I didn't ask you that question, sir.
10 I said how many of the accidents --

11 THE COURT: Mr. Carpinello --

12 MR. CARPINELLO: I'm sorry, Your Honor.

13 THE COURT: -- if you believe he's not responsive
14 to your question, you raise it with me and I'll take it up
15 with the witness. Do not continue to tell him he's not
16 answered your question.

17 MR. CARPINELLO: I apologize, Your Honor.

18 THE COURT: Let's move forward.

19 Q. (By Mr. Carpinello) How many of the accidents that were
20 demonstrated in the photos did Trinity investigate?

21 A. We were investigating the accidents during pending
22 litigation, so I'm not sure which those are.

23 Q. Before Trinity was sued by the victims, how many of the
24 accidents did Trinity investigate?

25 A. I don't know.

1 Q. It's zero, is it not, sir? It's zero, correct?

2 A. I don't know.

3 Q. You're president of the company. People -- there are
4 accidents occurring on the highways. Whether -- whoever's
5 fault it is, it's an ET-Plus that's involved. You heard
6 about accidents in South Carolina. You heard about
7 accidents in North Carolina. You heard about accidents in
8 Tennessee.

9 And you as president of the company did not call an
10 immediate meeting and say, listen, we have to find out
11 what's going on. We have an excellent product. We stand
12 behind our product. We have to find out.

13 You didn't do that, sir?

14 A. We took the allegations very seriously.

15 MR. CARPINELLO: Your Honor, I ask that he answer
16 the question.

17 THE COURT: Did you try to find out, Mr. Mitchell?
18 That's the question. You need to answer that question, not
19 whether you took him seriously or not. Did you try to find
20 out?

21 A. Can you ask the question again, please?

22 Q. (By Mr. Carpinello) When you heard about all these
23 accidents that involved the ET-Plus, did you call a meeting
24 of all your senior executives and say: We have to stand
25 behind our product; if we -- if our product is at fault, we

1 need to find out and we need to fix it? Did you call such a
2 meeting?

3 A. We've had a lot of meetings with discussions about these
4 accidents, and we're trying to determine the legitimacy of
5 them.

6 Q. Did you call such a meeting?

7 A. Yes. We've had lots of discussions in my company about
8 the allegations.

9 Q. So you called -- when you heard about these accidents,
10 you called a meeting and you said to your executives: We
11 need to find out. We need to go out; we need to investigate
12 these accidents. Whether we're sued or not, we need to get
13 an answer of what's causing these accidents.

14 Did you do that, sir?

15 A. No, we did not.

16 Q. Okay. Let me get back to your letter here, sir.

17 While both Trinity Highway and Texas A&M have attempted to
18 respond to these disparaging assertions through a pending
19 litigation, these individuals have now carried their
20 misleading allegations beyond the courthouse directly to
21 various highway authorities and even media outlets.

22 Now, what -- you're referring to that, sir, about
23 pending litigation, the fact that Trinity had sued
24 Mr. Harman, after Mr. Harman made these disclosures. Your
25 reaction was not to call the meeting that I suggested but to

1 sue Mr. Harman, wasn't it?

2 A. Yes, we did have litigation against Mr. Harman.

3 Q. Yes.

4 MR. CARPINELLO: Could I turn to the second page,
5 please?

6 Under the heading no other design changes. I'm
7 sorry. I'm sorry, Mr. Diaz. I've got the wrong -- third
8 page, please. Second paragraph under the heading, please?

9 Could you highlight that?

10 Q. (By Mr. Carpinello) In February 2012, that's, what, 30
11 days after Mr. Harman disclosed to the FHWA that you did not
12 disclose these changes. Trinity and Texas A&M, TTI, sued
13 Mr. Harman, didn't they?

14 A. Yes.

15 Q. And they filed a defamation and commercial disparagement
16 lawsuit in the Eastern District of Texas, correct?

17 A. That's correct.

18 Q. Instead of calling the group together and saying
19 Mr. Harman's made these allegations, and we stand behind our
20 product, but we've got to find out. Your very first
21 reaction, after meeting with Mr. Artimovich, was to sue Mr.
22 Harman for defamation, correct?

23 A. That wasn't our first action, but, yes, we did sue Mr.
24 Harman.

25 Q. Second action. Second action.

1 A. Okay.

2 Q. Tell the jury what happened with that lawsuit, sir.

3 A. We dropped the lawsuit.

4 Q. With prejudice, correct?

5 A. With prejudice.

6 Q. Tell the jury what that means.

7 A. That means that we would not sue him again for that is
8 my understanding.

9 Q. You sued Mr. Harman; Mr. Harman hired lawyers; the
10 lawyers asked for documents. And you dropped the
11 lawsuit, isn't that correct, sir? That's the exact
12 sequence of events, correct?

13 A. I don't recall the details of that.

14 Q. Did you make a production of documents in that case,
15 sir?

16 A. I don't recall.

17 Q. Okay. But that wasn't all you did, was it, sir? You
18 also sued Mr. Harman in Georgia, didn't you?

19 A. Yes, we did.

20 Q. For defamation?

21 A. Yes, we did.

22 Q. What happened on that lawsuit, sir?

23 A. We dropped it as well.

24 Q. Immediately, correct? As soon as a lawyer appeared in
25 the courtroom for Mr. Harman, you dropped the lawsuit,

1 correct?

2 A. I don't recall at the time.

3 Q. Okay.

4 MR. CARPINELLO: Now, could I have Exhibit 156 on
5 the screen, please?

6 Q. (By Mr. Carpinello) You're familiar with this document,
7 aren't you, sir?

8 A. Yes, I am.

9 Q. This is the report that was submitted in 2005 to the
10 FHWA, correct, sir?

11 A. Yes.

12 Q. And this is the test -- this is a report of the test
13 that your lawyers have been telling the jury about since we
14 started this case, correct? This was the May 27, 2005 test,
15 correct?

16 A. That's correct.

17 Q. And what the title of the report is -- is NCHRP Report
18 350 Testing of the ET-Plus for 31-inch-high W-Beam
19 Guardrail. Do you see that, sir?

20 A. Yes, I do.

21 Q. And the test that was done was the test recommended by
22 the FHWA to test the 31-inch height of the ET-Plus, correct?

23 A. That's correct.

24 Q. And when you had a conversation -- when you had a
25 conversation with the FHWA before you did the test, you and

1 the people from TTI got on the phone with Mr. Artimovich to
2 talk about what kind of test the FHWA was going to want, you
3 told them all we want to test is changing the height,
4 correct?

5 A. That's what I understand.

6 Q. Yeah. You didn't tell them that you were going to
7 change from 5 to 4-inch, correct?

8 A. That's correct.

9 Q. And the test that you did was only a test to see if the
10 small car would go under a higher head, correct?

11 A. That's my understanding, yes.

12 Q. Okay. And -- and when the report was finally done, the
13 report told the FHWA that we used a standard ET-Plus,
14 correct?

15 A. That's correct.

16 Q. And that was false, correct?

17 A. It didn't consider the 5- to 4-inch change. It was a
18 standard ET-Plus, yes.

19 Q. It was false, correct?

20 A. I don't know how to answer your question other than the
21 fact than it was a standard ET-Plus.

22 Q. Was it true?

23 A. No.

24 Q. Okay. So it would be false?

25 A. Yes.

1 Q. Okay. Now, when you met with Mr. Artimovich -- you met
2 with Mr. Artimovich, right?

3 A. I did.

4 Q. You told him -- after Mr. Harman blew the whistle, you
5 went in and you said: Yeah, we changed it from five to
6 four; we didn't tell you, but we tested it in 2005, right?

7 A. That's correct.

8 Q. But you didn't tell them about the other changes, did
9 you?

10 A. I don't recall the details of the discussions.

11 Q. You were there.

12 A. I was.

13 Q. You don't recall any details other than 5 to 4, correct?

14 A. I was fairly new to my role, still trying to come up to
15 speed on the details of what we were discussing. But I do
16 recall the discussion, yes.

17 Q. You don't recall anything from 5 to 4, because nothing
18 was said other than 5 to 4, right? You didn't tell them
19 they changed the height. You --

20 MR. SHAW: Your Honor, if he would let him finish,
21 please.

22 THE COURT: Well, he's going to have to let
23 Mr. Carpinello finish his question. It works both ways.
24 I'm going to instruct both the witness and counsel to make
25 sure the other one has finished before you either respond or

1 ask the next question. And I think I've made myself clear
2 on this. I don't intend to have to give this instruction
3 again.

4 Let's proceed.

5 THE WITNESS: Sorry, Your Honor.

6 MR. CARPINELLO: I apologize also.

7 Q. (By Mr. Carpinello) You didn't tell him -- you don't
8 remember anything other than 5 to 4, because you didn't tell
9 him anything. You didn't tell him, for example, that you
10 had changed the length of this. You didn't tell them that
11 you had changed the vertical height. You didn't tell them
12 that you had changed the weld. You didn't tell them any of
13 those; isn't that true, sir?

14 A. I believe that's true. I -- I know that conversation
15 was focused on the 5- to 4-inch channel.

16 Q. Okay. Now, I think we've established that you made the
17 changes without any studies at all, correct?

18 A. That's really an answer for TTI. My understanding is
19 that there was not a formal study conducted. Correct.

20 Q. Formal or informal, correct?

21 A. That's correct.

22 Q. Okay. Now, what studies did you do after you made the
23 changes?

24 A. I'm not aware of any studies.

25 Q. Okay. Now, isn't it true, sir, that in order for

1 Trinity to get approval for a modification of a product that
2 Trinity must present the proposed change to the FHWA and
3 then perform the tests required by the FHWA and then to
4 truthfully and accurately report the results of the test;
5 isn't that true, sir?

6 A. I believe that to be true, yes.

7 Q. And you did not do that in 2005, is that not true, sir?

8 A. Mistakenly, yes.

9 Q. Okay. And isn't it also true that it is the FHWA and
10 only the FHWA that makes the decision whether a test should
11 be done and what that test should be; isn't that also
12 correct, sir?

13 A. That is correct.

14 Q. In fact, the FHWA specifically requires that, doesn't
15 it?

16 A. Yes, it does.

17 Q. Okay. And you've known that or Trinity's known that
18 since 1997, when that directive was issued; isn't that
19 correct?

20 A. That's my understanding.

21 Q. Okay.

22 MR. CARPINELLO: Could I have Exhibit 20 on the
23 screen, please?

24 Q. (By Mr. Carpinello) And this is the 1997 directive from
25 the FHWA, isn't it, sir? You've seen this before?

1 A. I have seen this, yes.

2 Q. Okay.

3 MR. CARPINELLO: May I have -- go to Page 3,
4 please, bottom of Page 3?

5 Could you highlight the last paragraph, Mr. Diaz?

6 Q. (By Mr. Carpinello) There are some features that by
7 their nature are nearly certain to be safe and others that
8 are so similar to currently accepted features that there is
9 little doubt that they would perform acceptably.

10 For these features, the FHWA may, on a case-by-case
11 basis, not require qualification testing or may accept
12 abbreviated or unique qualification procedures as the basis
13 for their acceptance.

14 Do you see that, sir?

15 A. I do.

16 Q. So even when a change is made that's so minor that it is
17 obvious or nearly certain to be safe, even then, it's the
18 FHWA that decides whether a test should be done; isn't that
19 correct?

20 A. That is correct.

21 Q. Now, is it your position here, sir, that the changes
22 that were made in 2005 are nearly certain to be safe?

23 A. I believe that the changes made in 2005 are safe. Yes.

24 Q. Okay. And what studies were done to verify that, sir?

25 A. I'm not aware of a study.

1 Q. Okay. And isn't it also true, sir, that in 2005, you
2 never got permission to change -- to make any of the changes
3 that you made in 2005; isn't that correct, sir?

4 A. That's my understanding, yes.

5 Q. And the reason you didn't get permission is because you
6 didn't follow that procedure. You didn't go to the FHWA and
7 tell them about the changes. You didn't ask the FHWA what
8 test we should do. You didn't conduct the test that the
9 FHWA directed you to do. And you didn't truthfully and
10 accurately report the results of the test; isn't that also
11 true, sir?

12 A. Well, again, TTI does the testing and managed the
13 process. But, yes, that is my understanding of what
14 occurred.

15 Q. That is true, is it not, what I just stated?

16 A. Yes. We depended on TTI to provide that information at
17 that time. Yes.

18 Q. I may have been unclear in my question. I'll ask it
19 again.

20 The regulations require you to disclose the proposed
21 change to the FHWA, correct?

22 A. Yes.

23 Q. Did you do that, sir?

24 A. We did not.

25 Q. Okay. The regulations require you to conduct the test

1 that the FHWA directs you to test, after making full
2 disclosure. Did you do that, sir?

3 A. No, we did not.

4 Q. Okay. The -- the FHWA regulations then require you to
5 accurately and truthfully report the tests that were done.

6 Did you do that, sir?

7 A. No. There was a mistake in the document.

8 Q. You didn't do that, did you, sir?

9 A. Didn't do that.

10 Q. Okay. Now, the -- the document -- you said there was a
11 mistake in the document. There was not only a mistake in
12 the document. There was a mistake in the lengthy letter
13 that Don Johnson of Trinity sent to the FHWA accompanying
14 the document; isn't that correct?

15 A. That is correct.

16 Q. Okay.

17 A. Omitted the 5- to 4-inch change, yes.

18 Q. I'm sorry. I didn't hear you; you said what?

19 A. Yes. It did not include the 5- to 4-inch change.

20 Q. It included none of the changes, correct?

21 A. That's correct.

22 Q. In fact, this letter that Don Johnson of Trinity
23 sent to the FHWA mentioned only one tested change,
24 correct?

25 A. I believe that to be correct.

1 Q. And what was that change, sir?

2 A. ET-Plus being tested at a 31-inch height.

3 Q. Okay. And how many people at Trinity read the TTI July
4 2005 report when it came in?

5 A. I have not been able to determine that, as I was not
6 here.

7 Q. Okay. You didn't ask anybody? You're now president of
8 the company. You didn't ask anybody? When this whole
9 thing, blew, you were president -- I'll repeat the --
10 rephrase the --

11 THE COURT: You may withdraw your statement and
12 start over.

13 MR. CARPINELLO: I'll withdraw my poorly worded
14 question, Your Honor.

15 Q. (By Mr. Carpinello) In 2012, when this issue arose, did
16 you call all the people at T -- at Trinity together and say,
17 who looked at this report?

18 A. Yes, I did.

19 Q. And what was your answer? What was the answer you got?

20 A. It was primarily those that are engaged in the
21 communication, being Don Johnson and Brian Smith at that
22 time.

23 Q. And what was Don Johnson's position?

24 A. They recall the experience, but they don't recall the
25 mistake.

1 Q. Ambiguous question. What was his position in the
2 company in 2005, Don Johnson?

3 A. He was liaison working with TTI for Trinity.

4 Q. Okay. And other than Don Johnson and Brian Smith, who
5 else looked at the report?

6 A. I don't believe anybody did.

7 Q. Okay. And Don Johnson and Brian Smith told you that we
8 reviewed the report?

9 A. They -- they did, yes.

10 Q. Okay. We -- we didn't find -- we -- we just overlooked
11 the fact that the report's entitled 31 inches, as opposed to
12 change five to four?

13 A. Yes.

14 Q. They told you that every time it referred to standard
15 ET-Plus, that they missed that?

16 A. Yes.

17 Q. They told you that they didn't notice the fact that
18 there wasn't a drawing of the ET-Plus showing the
19 configuration anywhere in the report? They told you that,
20 too?

21 A. The configuration of the five to four-inch change,
22 that's correct.

23 Q. Well, not just that. There was no drawing of the
24 dimensions of the ET-Plus that was actually tested; isn't
25 that correct?

1 A. There is a drawing of the layout of the test that was
2 performed, but there's not a specific drawing of the
3 ET-Plus, that's correct.

4 Q. Okay. All right. Now -- so the change that was made in
5 2005 -- the changes that were made in 2005 were all
6 unapproved changes, correct?

7 A. Unapproved by -- I'm not understanding your question.

8 Q. None of the changes were approved by the FHWA in
9 accordance with the FHWA's 1997 correct -- directive; isn't
10 that correct?

11 A. That's correct.

12 Q. Now, in 2012, Mr. Harman discloses that Trinity has not
13 gotten approval of these changes, correct?

14 A. That's correct.

15 Q. And the FHWA's first reaction is to draft a letter to
16 Trinity, correct?

17 A. I'm sorry?

18 MR. CARPINELLO: Well, let's have Exhibit 688 on
19 the screen, please?

20 Q. (By Mr. Carpinello) You've seen this document before,
21 haven't you, sir?

22 A. Yes, I have.

23 Q. Okay. By -- by the way, Mr. Smith -- Mr. Smith was one
24 of the people who reviewed that report in 2005?

25 A. Yes, he was.

1 Q. He was also on the email back in November 2004 that
2 said, let's do this unannounced, wasn't he?

3 A. I believe he was, yes.

4 Q. Okay. But he told you that he just didn't -- he -- he
5 just didn't notice that the report didn't have any mention
6 of the fact of the change to five to four-inch?

7 A. He told me it was an honest mistake, yes.

8 Q. Okay. So he was ignoring the directive of his president
9 at the time that he said let's do this unannounced?

10 A. I can't answer that for Brian.

11 Q. Okay. Now, this draft letter that the FHWA had drafted
12 says: It has come to our attention from various sources
13 that w-beam guardrail terminals using the ET-Plus may not be
14 performing as intended.

15 You see that, sir?

16 A. I do.

17 Q. Okay. And this letter says, in the -- concludes with
18 the following -- it talks about the various different
19 changes, how, you know, you -- the report that you had done
20 and -- and such, and it says we asked the following of
21 Trinity: One, drawings of the extruder head used in the
22 2005 test at TTI, specifically those used in TTI Test
23 220601-1 and 2.

24 You couldn't provide the drawings, though, could you,
25 sir?

1 A. We provided a drawing that was created following the
2 test.

3 Q. And that was a fabrication drawing, correct?

4 A. That's correct.

5 Q. But you didn't provide a drawing of the prototype that
6 was actually tested; isn't that correct?

7 A. We believe that that drawing represents the prototype
8 that was tested.

9 Q. No. Sir, you did not provide a drawing of the
10 prototype, correct?

11 A. We believe we did provide a drawing of the prototype.

12 MR. CARPINELLO: Your Honor, I believe he's not
13 responding to my question. I ask that he be directed to
14 respond to my question.

15 THE COURT: You asked him if he provided a
16 prototype or that he -- you asked he did not provide a
17 prototype, and he says I believe we did. He's answered your
18 question, Mr. Carpinello.

19 Q. (By Mr. Carpinello) Did you provide a drawing of the
20 prototype, sir?

21 A. We believe we provided a drawing that represented the
22 prototype that was tested, yes.

23 Q. That was created after the test, correct?

24 A. Yes, it was created after the test.

25 Q. When the prototype was created, no one at Trinity or TTI

1 made a drawing of the thing that was actually tested,
2 correct?

3 A. Not until after the test was completed, that's correct.

4 Q. What was made after the test was a fabrication drawing,
5 was it not, sir?

6 A. That's correct.

7 Q. By somebody who was not at the test, correct, sir?

8 A. Yes, that's correct.

9 Q. By somebody who did not make the prototype; isn't that
10 correct, sir?

11 A. That's correct.

12 Q. By somebody who had no direct knowledge of what was
13 actually made and sent over to TTI; isn't that correct, sir?

14 A. Well, the draftsman specifically is not engaged in the
15 production of the product, but they were guided by the
16 person that sent the prototype, yes.

17 Q. But there was no drawing ever made of the prototype that
18 was actually tested, correct?

19 A. The fabrication drawing represents what was tested in
20 our belief.

21 Q. Okay. If available, you locate the extruder heads used
22 in the 2005 test. You couldn't do that, could you, sir?

23 A. No, we could not.

24 Q. Because it had been destroyed, correct?

25 A. Yes. It had been scrapped, yes.

1 Q. Yeah. And if you had honestly reported to the FHWA in
2 2005 that you had made the changes, presumably if the FHWA
3 then wanted to look at the prototype, it would have been
4 there, right, because that would have been 2005 instead of
5 seven years later, correct?

6 A. I'm not sure what the timing of when the scrapping
7 occurred.

8 Q. Okay. And they also suggest here that you give them --
9 that you document the internal and external dimensions.

10 Now, that couldn't have been done either, could it, sir?

11 A. To document the internal and external dimensions would
12 be based on the fabrication drawing that was devised after
13 the prototype was tested.

14 Q. I -- sir, Trinity -- neither Trinity, nor TTI could
15 document the external or internal dimensions of the
16 prototype because no one took the time to measure the
17 prototype; isn't that correct, sir?

18 A. I can't speak to that --

19 Q. Okay.

20 A. -- or what was happening at that time.

21 Q. And then, three, you conduct an in-service performance
22 evaluation of the current Trinity extruder terminals to
23 determine their performance. That you could have done,
24 correct?

25 A. Yeah. That's not something we have done ever before, so

1 to have the skills and the training to be able to do that,
2 if that was requested -- formally requested, we would find a
3 way to do that, yes.

4 Q. But you didn't, correct?

5 A. We have not, no.

6 Q. Okay. Sir, when you met with Mr. Artimovich in 2000 --
7 in 2012, you suggested to him that they could look at other
8 tests to support your position that had never been sent to
9 the FHWA, correct?

10 A. I believe that to be correct, yes.

11 Q. You said we've got these tests in 2010, they -- they --
12 they -- the car test, right?

13 A. We did provide them with videos of tests that were
14 completed in 2010, yes.

15 Q. Okay. One was at 42 miles an hour and had a plastic
16 cover on it, and the other one was -- the head on that was
17 destroyed, correct?

18 A. I believe so, yes.

19 Q. Okay. You picked those two out. You didn't pick out
20 the five tests that failed in the months after the May 27,
21 2005 test, did you?

22 A. The five tests that failed were an entirely different
23 system.

24 Q. Okay. Because it was on a flare?

25 A. We do not sell a flared system. It was an R&D

1 experiment.

2 Q. Isn't the ET-Plus on a flare all over the United
3 States? In fact, right near your headquarters in
4 Dallas?

5 A. It's not defined as a flared device, no.

6 Q. Even if it is on a flare? You were here when -- when
7 Dr. Coon showed the pictures of the ET-Plus on a flare,
8 correct?

9 A. I did see that picture.

10 Q. I'm sorry?

11 A. I said, I did see that picture.

12 Q. Okay. But you -- you decided that those tests were not
13 relevant to the issue before the FHWA which was the ET-Plus
14 performing adequately on the road? You didn't feel it
15 was -- that was a relevant fact to bring to their attention;
16 is that correct?

17 A. I'm sorry, I -- could you ask the question again,
18 please?

19 Q. Do you agree with me that one of the relevant questions
20 facing the FHWA in 2012 was do these changes make a
21 difference to the performance of the product on the road?
22 That was one of the questions facing the FHWA, correct?

23 A. Yes.

24 Q. And that's why Mr. Artimovich and his -- his superiors
25 originally drafted a letter to you saying, you should do an

1 immediate in-service study to see if this is killing people,
2 correct?

3 A. We never received that draft letter.

4 Q. Okay. I -- well, you have it in your files, correct?

5 A. Yes, we do now.

6 Q. Okay. But you never thought it was relevant to bring to
7 your meeting with the FHWA the five crash tests in which
8 this head failed, did you?

9 A. It's an entirely different system. It's not relevant.

10 Q. Okay. Now, when this issue arose, you not only met with
11 Mr. Artimovich, you took steps to make sure that members of
12 Congress were aware of the problem that Trinity was now
13 facing, correct?

14 A. I recall one meeting I had with a Congressman, yes.

15 MR. CARPINELLO: Could I have 603, please?

16 Q. (By Mr. Carpinello) This is an email dated May 24th,
17 2013, from Jack Todd to Murphie Barrett. Who is Jack Todd?

18 A. Jack Todd is our corporation's Vice President of
19 Government Affairs and Public Relations.

20 Q. And who is Murphie Barrett?

21 A. Murphie Barrett is a staffer at the time with the
22 transportation infrastructure to me.

23 Q. And that's of Congress, correct?

24 A. That is, yes.

25 Q. Okay. Jack says in the second par -- third paragraph:

1 I had an opportunity to -- to attend the Road Gang luncheon
2 yesterday and sat next to Bud Wright. Needless to say, we
3 talked about this, and I believe he understands.

4 What is the Road Gang luncheon?

5 A. I have no idea.

6 Q. Who is Bud Wright?

7 A. I'm not aware of Bud Wright.

8 Q. Okay. Maybe -- well, let's move down to the next
9 paragraph: Please let me know what comes of this from your
10 end. As instructed by Representative Griffith, Brad
11 Copenhaver --

12 MR. CARPINELLO: Could we have that highlighted,
13 Mr. Diaz? Thank you.

14 Q. (By Mr. Carpinello) -- provided me a list of everyone
15 they talked with and if you think it is needed, we will
16 reach out to them, as well. Here's the list from Brad.

17 Do you see that, sir?

18 A. Yes, sir.

19 Q. Now, do you know any of these Congressmen?

20 A. I do not, no.

21 Q. Have you made contributions to these Congressmen
22 recently?

23 A. I have never made contributions to these Congressmen.

24 Q. I'm sorry. Has Trinity made contributions to these
25 people?

1 A. I don't know.

2 Q. Has Trinity's PAC made contributions to these people?

3 A. I'm not a part of that process, so I'm not aware.

4 MR. CARPINELLO: Could I have Demo 11, please?

5 Q. (By Mr. Carpinello) Representative Duncan is
6 referenced -- his staffer, you know that Trinity made a
7 2,000 contri -- 2,000-dollar-contribution to him in the
8 2012/2014 reporting period?

9 A. I'm not aware.

10 MR. CARPINELLO: Could I have Demo 12, please?

11 Q. (By Mr. Carpinello) Representative Petri, he's on that
12 committee. You made a 2,000 -- 2,000 -- two 1,000 contri --
13 dollar contributions to him. Are you aware of that, sir?

14 A. I am not aware.

15 MR. CARPINELLO: Could I have Demo 13?

16 Q. (By Mr. Carpinello) Bill Shuster, the Chairman, you
17 gave a 10,000-dollar-contribution to him. Are you aware of
18 that, sir?

19 A. I am not.

20 Q. In fact, sir, in recent years Trinity has significantly
21 increased its political contributions to members of the
22 transportation committees that oversee the FHWA; isn't that
23 correct, sir?

24 A. I -- I don't know.

25 MR. CARPINELLO: Could I have Demo 14, please?

1 Q. (By Mr. Carpinello) This -- are you familiar with these
2 -- these government contributions, sir?

3 A. No, I'm not.

4 MR. CARPINELLO: Could I have Demo 15, please?

5 Q. (By Mr. Carpinello) Do you see the -- the contributions
6 to members of the transportation committee at -- it was
7 25 -- it was zero in 2006. It was zero in 2008. It was
8 2500 in 2010. It goes up to 7,000 in 2012, and 7500 during
9 this period. You see that? Are you aware of those, sir?

10 A. I am not.

11 MR. CARPINELLO: Could I have Demo 16, please?

12 Q. (By Mr. Carpinello) Do you see the level -- that
13 Mr. Shuster is on the committee -- Chairman of the
14 committee. You gave no contributions in 2006. You gave no
15 contributions in 2008. You gave no contributions in 2010.
16 You gave a little over 2,000 in 2012. And you've given over
17 7,000 in 2014. Are you aware of those contributions, sir?

18 A. I am not.

19 MR. CARPINELLO: Number 17, please?

20 Q. (By Mr. Carpinello) Mr. Duncan, you gave no
21 contributions in 2006. You gave no contributions in 2008.
22 You gave no contributions in 2010. And you gave him \$2,000
23 in 2012. You're not aware of that either, are you, sir?

24 A. No, I'm not.

25 MR. CARPINELLO: 18, please?

1 Q. (By Mr. Carpinello) Mr. Mica, also a ranking member.
2 Nothing in 2006. Nothing in 2008. 2500 in 2010, and 2500
3 in 2012. You're not aware of that, are you, sir?

4 A. No, I'm not.

5 MR. CARPINELLO: 19, please.

6 Q. (By Mr. Carpinello) Sir, you're not aware of any of
7 these contributions that Trinity has recently made to all of
8 these members of the House and Senate, are you, sir?

9 A. I'm not.

10 MR. CARPINELLO: May I have Demo 20, please?

11 Q. (By Mr. Carpinello) You're aware, sir, that Trinity
12 dramatically increased its lobbying spending, its paying
13 through lobbyist during this period of time?

14 A. I'm not aware.

15 Q. Tell the jury what your lobbyists do, sir?

16 A. I'm not aware.

17 Q. Okay.

18 A. I'm not involved in that process.

19 Q. You spent nothing on lobbying Congress in 2005, 2006,
20 2007, 2008, 2009. Under 50,000 in 2010. '11, '12, '13,
21 '14, you're spending goes up dramatically, does it not, sir?

22 A. It appears so, yes.

23 Q. Now, it's true, sir, is it not, that the FHWA has made
24 it very clear that if you put a product on the road and you
25 get approval, that you must -- you must disclose or certify

1 that the product that you've -- you're selling has not
2 changed in any significant degree; isn't that correct, sir?

3 A. It is correct.

4 Q. Okay.

5 MR. CARPINELLO: Could I have P-216, please?

6 Q. (By Mr. Carpinello) And this is a -- this is one of the
7 approval letters dated July 16, 2007, from the FHWA to
8 Trinity, correct, to Mr. Smith?

9 A. Yes.

10 MR. CARPINELLO: And could I have Page 2, please?

11 And let's move -- I'm sorry, let's move on to Page 3.

12 Q. (By Mr. Carpinello) Please note the following
13 standard prov -- the following standard provisions that
14 apply to the FHWA letters of acceptance.

15 MR. CARPINELLO: And if we could go down to the
16 one, two, three, four, fifth bullet point.

17 Q. (By Mr. Carpinello) You will be expected to certify to
18 potential users that the hardware furnished has essentially
19 the same chemistry, mechanical properties, and geometry as
20 that submitted for acceptance. And that will meet -- that
21 it will meet the crashworthiness requirements of the FHWA
22 and the NCHRP Report 350.

23 Correct, sir?

24 A. Yes, sir.

25 Q. And you did certify -- you did certify through all your

1 certification compliance documents that that was, in fact,
2 the case, that from 2005 to today, that it's the same
3 chemistry, mechanical properties, and geometry as that
4 submitted for acceptance; is that correct, sir?

5 A. Yes, sir.

6 MR. CARPINELLO: Could I have P-173, please?

7 Q. (By Mr. Carpinello) This is another acceptance from
8 September 2nd, 2005. This is just a few months after you
9 did -- you made the changes, correct, sir? You made the
10 changes in July of 2005, didn't you?

11 A. Yes.

12 Q. Okay. So this is just a few months after the
13 changes.

14 MR. CARPINELLO: Could I have, I believe, it's --
15 I think it's the same Page 3, Mr. Diaz. No, go back. I'm
16 sorry. Go back a page.

17 I don't think we have the right -- I don't think
18 we have the right write-up, but we'll come back.

19 Q. (By Mr. Carpinello) Now, you're aware, sir, that in
20 order to -- for Trinity to -- to sell its products to
21 contractors who would place those contracts on federally
22 reimbursed or subsidized highways that you must provide a
23 certificate, correct, sir?

24 A. Yes. We do certify that the product we provide them is
25 350-certified. Yes.

1 Q. And you were here when I showed those to Mr. Stiles,
2 correct?

3 A. Yes, sir.

4 Q. And those are the certificates that Trinity provides,
5 correct?

6 A. Yes.

7 Q. Okay. And it's also true that a number of states have
8 what are called qualified products list; is that correct?

9 A. Yes, sir.

10 Q. And in order to get on a qualified products list, you
11 have to certify that what you're selling them has been
12 approved by the FHWA, correct?

13 A. That's correct.

14 Q. And that it hasn't been changed, correct?

15 A. Yes.

16 Q. Okay.

17 A. Most states, yes.

18 MR. CARPINELLO: Can I show you Exhibit 959,
19 please?

20 Q. (By Mr. Carpinello) This is a letter that Trinity sent
21 to the state of Vermont on February 17, 2006, and it says:
22 The ET-2000 and the ET-Plus with HBA that are currently
23 being furnished to the state of Vermont Agency of
24 Transportation is identical in composition and test
25 properties as approved by the FHWA and the Vermont Agency of

1 Transportation.

2 Do you see that, sir?

3 A. I do.

4 Q. That was false, correct?

5 A. In our minds, when this letter was published, it was not
6 false.

7 Q. But it is false, correct? Not what was in your mind,
8 sir. It is false, correct? Because it wasn't identical.

9 A. No, it was not identical.

10 Q. So it is false. Is it false, sir?

11 A. Yes.

12 Q. Okay.

13 MR. CARPINELLO: 962, please.

14 Q. (By Mr. Carpinello) This is to the state of Texas. You
15 say to --

16 MR. CARPINELLO: Yeah, if we could zero in on the
17 -- the paragraph there.

18 Q. (By Mr. Carpinello) You say in the first full paragraph,
19 second half: There have been no major, quote, design
20 changes that would affect the acceptance status with the
21 FHWA. The FHWA has accepted the use of each of these
22 products for use on the national highway system as a TL-3
23 product when such use is requested by a highway agency --
24 I'm sorry. I believe this is Florida. I misspoke. It's
25 Florida -- such as the Florida Department of Transportation.

1 And that was false, correct, sir? The FHWA had not accepted
2 for use the ET-Plus as modified by Trinity; isn't that
3 correct, sir?

4 A. This states no major design changes, so I wouldn't say
5 that's absolutely false.

6 Q. Because you think these changes are not design changes?

7 A. That's correct.

8 Q. That's what you're telling the jury. All these changes
9 are not design changes. That's your position in this case,
10 isn't it?

11 A. Well, that's up to TTI to decide. It was based on their
12 recommendation.

13 Q. No, sir. This is your letter. This is your letter that
14 says there have been no major design changes that would
15 affect the acceptance status. The FHWA has accepted use of
16 each of these products, but it hadn't accepted it, because
17 you hadn't told them; isn't that true?

18 A. We had not told them about all the changes at that time.
19 That's correct.

20 Q. Okay. So it was false, wasn't it?

21 A. I don't call it false. In our minds at that time, it
22 was correct.

23 Q. I'm not asking what was in your mind, sir. I'm asking
24 if it's false now as you sit here. You tell the jury
25 whether that was true or false, please.

1 A. It's not accurate.

2 Q. It's false. Isn't it false?

3 A. It's not correct.

4 MR. CARPINELLO: Your Honor --

5 THE COURT: Asked and answered. Let's move on.

6 MR. CARPINELLO: Let's look at 963.

7 Q. (By Mr. Carpinello) This is another letter to the state
8 of Florida, and, again, we see the same representation.
9 There have been no major design changes that would affect
10 the acceptance status with the FHWA.

11 And that's not correct, right, sir, that the FHWA has
12 accepted it?

13 A. I'm sorry. Can you ask your question again?

14 Q. The -- the letter is not correct, right? The FHWA had
15 not accepted this, correct?

16 A. Yes, the letter is not correct.

17 Q. Okay. How many states before Mr. Harman told the FHWA
18 how many states did you tell about the changes that you made
19 to the ET-Plus?

20 A. We had told no states about the modifications --

21 Q. Okay.

22 A. -- in 2005, to my knowledge.

23 Q. Okay. Now, your lawyers have presented a letter from
24 the FHWA that was dated June 14 -- June 17, 2014. You're
25 familiar with that letter, correct?

1 A. Yes.

2 Q. But you're also aware, are you not, that last Friday --
3 last Friday, the FHWA announced that they wanted all
4 regional administrators to report any accidents involving
5 the ET-Plus to the FHWA, correct?

6 A. I have seen that this week. Yes.

7 Q. Okay.

8 MR. CARPINELLO: Could I have 1286, please? And
9 could I have the second page, please?

10 Q. (By Mr. Carpinello) Action and request for information.
11 The FHWA requests information from state DOTs regarding the
12 performance of the ET-Plus in the field. Please immediately
13 contact your state DOTs and advise them of these recent
14 developments and ask that they pay particular attention to
15 all crashes involving these devices and request that any
16 findings from their investigations be shared with the FHWA
17 Office of Safety.

18 As more information becomes available, it will be
19 shared with you and with all the states. Do you see that,
20 sir?

21 A. I do.

22 Q. And on the first page, the FHWA recites, under recent
23 developments, that the Missouri and Massachusetts
24 Departments of Transportation have suspended the ET-Plus
25 from their qualified products lists pending further

1 examination of the field performance of these end terminals.

2 These suspensions are local decisions and not the result
3 of instructions by the FHWA.

4 You're aware, sir, that Massachusetts and Missouri have
5 suspended and taken the ET-Plus off the qualified products
6 list, because Trinity did not disclose the changes. You're
7 aware of that, aren't you, sir?

8 A. I am aware of that, yes.

9 Q. And Nevada did the same thing; isn't that correct, sir?

10 A. That's correct.

11 Q. Okay. But even after this disclosure, Nevada, when it
12 asked you to do an in-service review in 2014, you refused,
13 didn't you?

14 A. We have not done an in-service review.

15 Q. Well, more than that, Nevada asked you to do an
16 in-service review, and you refused, correct?

17 A. That's correct.

18 Q. Okay. But you said to Nevada that you appreciate
19 Nevada's, quote, commitment to procedural integrity,
20 correct?

21 A. Yes.

22 Q. And what did you mean by that, sir?

23 A. We had not disclosed the changes as required by the
24 state of Nevada, and we appreciate that.

25 Q. Okay. And -- but now Nevada said, well, given the fact

1 that you didn't disclose the changes and given the fact that
2 there's a lot of problem -- appears to be a lot of problems
3 out there, we want you to do some kind of in-service review,
4 and you said no, correct?

5 A. They did not indicate to me that there were problems out
6 there. This is all based on an administrative error, and
7 that's the way they've described it to me. We should have
8 disclosed those changes, and we did not. So, therefore,
9 they have taken us off the qualified products list.

10 Q. Okay. So I just want to understand this, sir. Your
11 position in this case and you're telling the jury that this
12 is all about an administrative error, correct?

13 A. In Nevada, that is the case. Yes.

14 Q. Well, what about in the other 49 states?

15 A. I can't speak to that yet. I have not met with them.

16 Q. Did Trinity commit an administrative error when it
17 didn't tell all other 49 states for 7 years that it did not
18 make the changes -- that it made these changes?

19 A. Yes.

20 Q. Okay. And isn't it true, sir, that Virginia has taken
21 your product off the list?

22 A. They have not taken us off the list yet. No.

23 Q. Okay.

24 MR. CARPINELLO: Could I see 1294, please? I'm
25 sorry. 12 -- 1293.

1 Q. (By Mr. Carpinello) This was issued yesterday, wasn't
2 it, sir?

3 A. I have not read this.

4 Q. Let's read it together, if we might, sir.

5 In 2000, the Department approved the use of the Trinity
6 Industries ET-Plus terminal as material that could be used
7 for the pay item alternate breakaway cable terminal GR-9 and
8 placed it on the approved products list.

9 Do you see that, sir?

10 A. Yes.

11 Q. At the time of approval in 2000, Trinity's ET-Plus
12 terminal included 5-inch channels as part of the design
13 submitted. In 2005, Trinity changed the 5-inch channels to
14 4-inch channels and did not notify the Department of the
15 modification. Due to this modification, any Trinity ET-Plus
16 terminals with 4-inch channels are not and have never been
17 approved for use in Virginia. Effective immediately, on any
18 contract that includes installing alternate breakaway cable
19 terminal GR-9, if the contractor is planning to use
20 Trinity's ET-Plus that has 4-inch channels that material is
21 not approved for use and is not to be used.

22 That's what this says, isn't it, sir?

23 A. Yes.

24 Q. You've been taken off the Virginia list, correct?

25 A. Yes.

1 Q. And, in fact, sir -- and, in fact, sir, they have
2 modified yesterday the -- their QPL to authorize only an
3 ET-Plus with a 5-inch channel; isn't that correct, sir?

4 A. I'm seeing that, yes.

5 Q. So you are off the list in Virginia -- as of right now
6 you are off the list in Virginia, Massachusetts, Missouri,
7 and Nevada, correct?

8 A. That would be correct.

9 Q. Okay. Sir, do you know someone named Dean Sicking?

10 A. Yes, I do.

11 Q. He's one of the original inventors of the ET-Plus, is he
12 not?

13 A. Actually, he's an inventor of the ET-2000.

14 Q. I'm sorry. Original inventor of the ET-2000. And he's
15 also one of the authors of NCHRP 350 that we've heard
16 discussed throughout this case, correct?

17 A. I believe he is, yes.

18 Q. And you know that Dr. Sicking teaches at the University
19 of Alabama Birmingham; isn't that correct, sir?

20 A. Yes.

21 Q. And he used to be at Texas A&M, correct, sir?

22 A. Many years ago. That's what I understand, yes.

23 Q. And when he was Texas A&M, he worked with Dr. Buth and
24 Dr. Bligh and these other people that we've heard talked
25 about, correct?

1 A. That's my understanding.

2 Q. And you paid him a visit in February 2013 at a
3 convention in San Diego; is that correct, sir?

4 A. Actually, we had breakfast at a restaurant, yes, in San
5 Diego.

6 Q. And you asked him if he might consider being a
7 consultant to Trinity, didn't you, sir?

8 A. No.

9 Q. Didn't you suggest to him, sir, that you might want to
10 engage his services to advise Trinity as to when they should
11 report things to the FHWA?

12 A. No, I don't recall that at all.

13 Q. Did you discuss the possibility of doing projects with
14 Dr. Sicking and the University of Alabama jointly with
15 Trinity?

16 A. Yes. He actually presented that idea in that he had
17 just moved to the University of Alabama Birmingham, and I
18 was interested.

19 Q. Okay. At the time you met with him in San Diego, you
20 knew that this lawsuit had been commenced, correct, sir?

21 A. Yes.

22 Q. And you specifically mentioned the lawsuit to
23 Dr. Sicking in San Diego in 2013, correct?

24 A. I don't recall having that conversation.

25 Q. Okay. In any event, nothing came of those discussions

1 in San Diego; is that correct?

2 A. Actually, we left the meeting with the intent of signing
3 a non-disclosure agreement, and I think we worked on that
4 for -- for nearly a year.

5 Q. And nothing came of it, correct?

6 A. Yeah, it got caught up in the attorneys and the legal
7 process between Trinity and the University of Alabama
8 Birmingham.

9 Q. And then you made another phone call to Dr. Sicking in
10 March of this year, correct?

11 A. That's correct.

12 Q. And you told him that you had heard that Dr. Sicking had
13 concerns about the performance of the ET-Plus and that he
14 expressed those concerns to the FHWA and members of AASHTO,
15 correct?

16 A. Yes. I had heard industry rumors that he had, so I
17 reached out to him. Yes.

18 Q. And you asked if you could come up to Birmingham and
19 meet with him, correct?

20 A. I did, yes.

21 Q. And you told him in the meeting that you had heard that
22 he had concerns about the performance of the ET-Plus,
23 correct?

24 A. I did.

25 Q. And then you broached the issue of this lawsuit, didn't

1 you, sir?

2 A. Yes, I did.

3 Q. And you told Dr. Sicking that it was Trinity's intention
4 to smear Mr. Harman's name and ruin his representation at
5 this trial; isn't that true, sir?

6 A. Absolutely not. I would never say that.

7 Q. And then, sir, didn't you say that you told -- stated to
8 Dr. Sicking that Trinity would do the same to anyone who
9 came into this courtroom and testified on behalf of Mr.
10 Harman; isn't that true, sir?

11 A. That is not true at all.

12 Q. Okay. And then you said, after a pause, to Dr. Sicking:
13 I hate to see that happen to you. Didn't you say that, sir?

14 A. I did not say that.

15 Q. Okay. Sir, you were here when your attorneys presented
16 a document published by an entity called Terebinth. Do you
17 remember that document?

18 A. Yes, I remember that document.

19 Q. And your attorneys quoted from portions of that document
20 that talked about how SPIG and Selco were going to get a
21 windfall from this case and that Trinity's going to be put
22 out of business, or words to that effect?

23 A. Yes, I do recall that.

24 Q. But you knew, sir, before your attorneys put that on
25 this screen that neither Josh Harman nor his brother, Chris

1 Harman, had anything to do with that document. You knew
2 that, didn't you, sir?

3 A. I didn't know that they didn't have anything to do with
4 the document. I know that they didn't write it.

5 Q. You knew, sir, because your attorneys knew, because it
6 came out in discovery in this case they had nothing to do
7 with that document. Didn't you know that, sir?

8 A. I don't know that they had nothing to do with the
9 document. The information is pretty accurate and precise to
10 this case.

11 Q. The information is accurate. It wasn't written by
12 Mr. Josh Harman. It wasn't written by Chris Harman. It
13 wasn't reviewed by either of them; isn't that correct?

14 A. I don't know that.

15 Q. In fact, the person who wrote that had no authorization
16 from either of them to create that document; isn't that
17 correct?

18 A. I don't know that.

19 Q. Okay. Sir, are there any other states that you know of
20 today that have advised you that you are about to or have
21 been suspended or taken off their qualified products list as
22 of right now?

23 A. Not that I'm aware of, no.

24 MR. CARPINELLO: I have no further questions, Your
25 Honor.

1 THE COURT: All right. Ladies and gentlemen,
2 before we proceed with cross-examination, we're going to
3 take a short recess. You may leave your notebooks in your
4 chairs.

5 Don't discuss the case among yourselves. Take
6 this opportunity to stretch your legs, get a drink of water.

7 We'll be back in here shortly. This won't be a
8 long recess, and then we'll continue. But you're excused
9 for recess at this time.

10 COURT SECURITY OFFICER: All rise.

11 (Jury out.)

12 THE COURT: Court stands in recess for 10 minutes.

13 (Recess.)

14 COURT SECURITY OFFICER: All rise.

15 THE COURT: Be seated, please.

16 Would you bring in the jury, Mr. McAteer?

17 COURT SECURITY OFFICER: Yes, sir.

18 All rise for the jury.

19 (Jury in.)

20 THE COURT: Be seated, ladies and gentlemen.

21 Cross-examination of the witness by the
22 Defendants. Mr. Shaw, you may proceed.

23 MR. SHAW: Thank you, Your Honor.

24 CROSS-EXAMINATION

25 BY MR. SHAW:

1 Q. Mr. Mitchell, has -- are you aware of Trinity Highway
2 Products or Trinity Industries ever deliberately and
3 intentionally lying to the Federal Government to receive
4 federal reimbursement for the ET-Plus?

5 A. I have not.

6 Q. Are you aware of Trinity Highway Products or Trinity
7 Industries ever submitting a false claim to the Federal
8 Government to receive federal monies for the ET-Plus?

9 A. I have not.

10 Q. As we sit here today, is the ET-Plus eligible for
11 federal reimbursement?

12 A. Yes, it is.

13 Q. As we sit here today, is it your understanding that the
14 ET-Plus has continuously been accepted for federal
15 reimbursement since its inception and it was approved in
16 2005?

17 A. Yes, it has.

18 Q. All right. I want to start with your background a
19 little bit, Mr. Mitchell. How long have you been working
20 for Trinity Highway Products?

21 A. Four years, this month.

22 Q. Were you employed with Trinity Highway Products when
23 this dispute with the omitted drawing began in 2003/2005
24 time frame?

25 A. I was not.

1 Q. When did you first become aware of any of this?

2 A. About three weeks into this job.

3 Q. You started your job as President of Trinity -- Trinity
4 Highway Products in what year?

5 A. 2010 -- at the very end of 2010.

6 Q. So three weeks into the job is when you became aware of
7 this issue with the ET-Plus?

8 A. Yes, that's correct.

9 Q. So did you have any personal knowledge before that
10 particular time period about anything to do with the crash
11 testing, the submittal of drawings, tests in 2010, anything
12 at all to do with any of it?

13 A. I did not, and I didn't know what an ET-Plus was.

14 Q. Did you even know what an ET-Plus was when you started?

15 A. No, I didn't.

16 Q. Have you done everything that you believe that you
17 possibly could to go back and try to investigate and
18 evaluate your due diligence so that you could come up to
19 speed on what actually occurred years before you were even
20 the President of this company?

21 A. I have to the best of my ability, yes.

22 Q. And have you done that so that you can give truthful and
23 honest answers and provide accurate information about what
24 actually was going on back in 2003, 2005, 2007, 2010, long
25 before you were even an employee there?

1 A. Yes, I have. I've taken it very seriously.

2 Q. How did you get to be the President of Trinity Highway
3 Products?

4 A. I was promoted to Trinity Highway Products from a
5 position of President of Trinity Logistics Group. I became
6 very good at running the business. We had some great
7 successes and was promoted in November -- October-November
8 of 2010.

9 Q. How would you describe your job duties and
10 responsibilities as we sit here today?

11 A. I am responsible for the end-to-end business of Trinity
12 Highway Products from purchasing to finance to accounting to
13 U.S. sales to international sales to supply chain through to
14 quality.

15 Q. Would you say that this issue with the ET-Plus is one of
16 the things that you have to deal with continuously?

17 A. Yes.

18 Q. You said that you take it seriously. Why do you take it
19 seriously?

20 A. Because I'm surrounded with people in my organization,
21 and the partnership that we have with TTI, I'm surrounded
22 with people that are very talented and very committed with
23 their integrity to do the right thing the first time.

24 Q. How did you become familiar with the ET-Plus?

25 A. I became familiar -- I became familiar with the ET-Plus,

1 like I said, just weeks after I came into this role as a
2 result really of the actions that we're experiencing now.

3 Q. Is the ET-Plus a system?

4 A. The ET-Plus is a system.

5 Q. What type of system?

6 A. It's an energy-absorbing end terminal system.

7 Q. Is the ET-Plus the same thing as the flared ET?

8 A. It's entirely a different system.

9 Q. Has Trinity ever manufactured a flared ET?

10 A. We have not.

11 Q. Has Trinity ever designed the flared ET?

12 A. No, we have not.

13 Q. Has Trinity ever conducted testing on a flared ET?

14 A. No, we have not.

15 Q. Are there flared ETs in the marketplace by -- offered by
16 competitors?

17 A. Yes, there are.

18 Q. Is Trinity able to produce a product that has ever
19 passed any type of a crash test that -- that could be placed
20 into the marketplace to compete with those products?

21 A. Not that I'm aware of.

22 Q. Does Trinity ever tell anyone that they can install the
23 ET-Plus system in a flared offset configuration?

24 A. We do not.

25 Q. In fact, it's exactly the opposite?

1 A. It is. We -- we encourage them never to install it as a
2 flared device.

3 Q. Tell the Ladies and Gentlemen of the Jury what the
4 relationship is between TTI and Texas -- Trinity Highway
5 Products.

6 A. As I mentioned earlier, the relationship began in about
7 1992, and it's been an ongoing very strong relationship.
8 TTI has been the designer and the developer, and Trinity has
9 been the manufacturer of the products that they have
10 designed and developed.

11 Q. Does Trinity ever install ET-Pluses on the roadway?

12 A. We are not an installer. We're a manufacturer.

13 Q. Does Trinity ever maintain ET-Pluses or other types of
14 end terminal devices on the roadways in this country?

15 A. No, we do not.

16 Q. Does Trinity sell the ET-Plus to the Federal Government?

17 A. We do not.

18 Q. Does Trinity sell the ET-Plus to state DOTs?

19 A. Yes, that is a customer.

20 Q. Does Trinity sell to private contractors?

21 A. We do.

22 Q. Are you familiar with the -- with Dr. Bligh, Dr. Buth at
23 -- at Trinity -- at TTI?

24 A. I am, yes.

25 Q. How is it that you know them?

1 A. Through the work that's been done historically with --
2 with Trinity Highway Products.

3 Q. Is it your understanding that Dr. Bligh and Dr. Buth are
4 some of the inventors of the ET-Plus?

5 A. Yes, they are.

6 Q. Does Trinity have any type of design rights or patent
7 rights as it applies to the ET-Plus?

8 A. We do not.

9 Q. Who owns the design of the ET-Plus?

10 A. Texas A&M.

11 Q. Who does Trinity look to concerning the design of the
12 ET-Plus?

13 A. Exclusively to Texas A&M, TTI.

14 Q. Who does Trinity look to as to whether or not there
15 should be any changes to the ET-Plus?

16 A. We look exclusively to TTI.

17 Q. Have you ever looked at anyone else besides TTI or Texas
18 A&M concerning the design of the ET-Plus?

19 A. We have not. They are the owner of the patent.

20 Q. Is TTI, in fact, responsible for all design of the
21 ET-Plus?

22 A. Yes, they are.

23 Q. Are they responsible for all testing of the ET-Plus?

24 A. Yes, they are.

25 Q. Has Trinity ever tested an end terminal device like the

1 ET-Plus themselves where they conducted the test and were
2 charged with the test and interpreting the data?

3 A. Not that I'm aware of.

4 Q. Have they ever conducted any type of crash testing
5 themselves where they were the sole people doing it on the
6 ET-Plus?

7 A. No.

8 Q. Who performs the crash test on the end terminals?

9 A. TTI.

10 Q. Who decides whether design changes may -- may impact the
11 performance of the ET-Plus?

12 A. TTI.

13 Q. Has -- does Trinity have those types of engineers in
14 their employment to even make that determination?

15 A. Not with the ET-Plus or the -- or any end terminal.

16 Q. Who decides in this relationship between Trinity and TTI
17 whether design changes of an existing product should be
18 communicated to the FHWA?

19 A. TTI does.

20 Q. Why is that?

21 A. Because they are the designer, the developer, and the
22 owner of the patent.

23 Q. Where does Trinity manufacture the ET-Plus?

24 A. We manufacture the ET-Plus in five different facilities
25 -- operating facilities in the country, and Girard, Ohio;

1 Lima, Ohio; Orangeburg, South Carolina; Fort Worth, Texas;
2 and in Centerville, Utah.

3 Q. How does Trinity ensure consistent fabrication between
4 the plants?

5 A. The employees in the plants are using drawings on the
6 floor. They also use jig systems -- consistent jig systems,
7 and we also have a quality control program that follows that
8 through the process.

9 Q. What is a jig system?

10 A. It's devices that are used to mount plates of steel in
11 order to -- to accurately weld.

12 Q. Describe for us, please, Mr. Mitchell, the quality
13 control procedures that are in place at Trinity Highway
14 Products concerning the manufacture of the ET-Plus?

15 A. Generally, there are critical points that are checked in
16 the process as the product is being fabricated, but it's
17 integrated into the manufacturing process, that as it moves
18 through, those quality checks are audited. And then once
19 the product is complete, then there's a final audit that's
20 completed to ensure that prior to shipment that goes out,
21 it's made correctly and consistently.

22 Q. Are plant inspections performed to ensure compliance
23 with the quality control system?

24 A. Yes.

25 Q. Describe for us how that works.

1 A. Plant inspections?

2 Q. Yes.

3 A. Yeah. We have a director of quality that ensures that
4 all of those inspections are adhered to.

5 Q. Does Trinity, in fact, reject products at plants that do
6 not meet their quality control requirements?

7 A. Yes, we do.

8 Q. Who is responsible for quality control at the plants
9 where ET-Plus is manufactured?

10 A. We put that responsibility into a quality control
11 employee that reports into a director of quality control,
12 but the plant manager ultimately is responsible to adhere to
13 the procedures.

14 Q. Have you -- since you have been President of Trinity
15 Highway Products, in fact, changed the chain of command, so
16 to speak, of the quality control so that it -- it reports to
17 you?

18 A. Yeah. Ultimately quality control reports to me.
19 Originally it reported into operations, and I moved that
20 directly to me because it is important.

21 Q. Was that a decision that you felt like that was in the
22 best interest of Trinity Highway Products?

23 A. Yes.

24 Q. Did anyone at Trinity Highway Products ever tell you,
25 no, not to pay any attention to quality control?

1 A. Oh, never.

2 Q. Did anyone ever tell you that it was a bad idea to have
3 someone from quality control report to you so that you could
4 ensure that that was at the forefront concerning ET-Pluses
5 and other devices?

6 A. Absolutely not.

7 Q. How does Trinity certify that products are NCHRP Report
8 350 compliant?

9 A. That's through -- done through the testing process. And
10 in this case, with the ET-Plus, with the tests that are
11 performed at TTI, those are submitted with an approval
12 request to FHWA for approval.

13 MR. SHAW: If we could, please, turn to
14 Exhibit 49?

15 Q. (By Mr. Shaw) What is Exhibit No. 49, Mr. Mitchell?

16 A. State MTR requirements have to do with certification
17 documents, and it's an internal document or tool we use to
18 make sure we're complaining today to state requirements.

19 Q. If we were to open this to Page 1, for example, what
20 would under the --

21 MR. SHAW: Mr. Hernandez, if you would, please,
22 and then -- I'm sorry, Page 2.

23 Q. (By Mr. Shaw) And you see the first state that comes up
24 here is Alabama. Do you see that?

25 A. Yes.

1 Q. Now, what is this telling you at Trinity concerning
2 state MTR requirements?

3 A. Every state has a little bit of a different expectation
4 as to what they expect in certifications. Trinity
5 certification that we send with the shipment is a compliance
6 statement that says that the materials that we use to build
7 our products were milled in America. There's a Buy America
8 requirement, suggesting that we must comply to those rules.
9 And so the certification provides that. This also has a
10 certified analysis included which is the detailed breakout
11 of where and who the mills that produce the materials used
12 in the product was qualified.

13 Q. So what would be considered the standard Trinity
14 certifications as you see in the first bullet point under
15 Alabama? It says: Do standard Trinity certifications and
16 send with shipment. What -- what would that include, Mr.
17 Mitchell?

18 A. The standard Trinity certifications suggest that all the
19 material used in the product was milled in America and the
20 product that we're shipping was made by us in America, and
21 it also has a 350 compliance statement that's included in
22 the document.

23 Q. And is this a document that is compiled by the people at
24 Trinity so that they know what each state expects?

25 A. This document is, yes.

1 Q. So, for example, if we were to look at the next page on
2 Page 3, under Colorado, this is what they expect to receive?

3 A. Yes, they expect to see a certification on all the steel
4 products that's in our proprietary products.

5 Q. Does every state require Trinity to certify that the
6 ET-Plus is 350 complaint?

7 A. Through this document or process, the states require us
8 to -- to ensure and certify that we are buying American-made
9 material and shipping American-made product. But not every
10 state requires that information.

11 Q. Does -- not every state requires that you certify that
12 its ET-Plus is 350 compliant?

13 A. That's correct.

14 Q. Do some states only require a certified analysis?

15 A. Yes, they do.

16 Q. And what is a certified analysis?

17 A. The certified analysis is a detailed breakout of where
18 all the parts that make up the system -- it gives a history
19 of where the material was made in America prior to our
20 manufacturing, and then it's just the detail of the heat
21 stamps and their origin.

22 Q. Do you have knowledge of the fabrication changes made to
23 the ET-Plus end terminal beginning in 2005?

24 A. Yes, I do.

25 Q. Did you know about these changes when joining Trinity

1 Highway Products in 2010?

2 A. No, I didn't.

3 Q. When did you first learn about the changes with the
4 ET-Plus that are involved in this lawsuit?

5 A. I learned about the changes in a meeting that took place
6 in January of 2012 with Mr. Harman.

7 Q. Did Mr. Harman tell you personally about these changes?

8 A. He indicated in that meeting that there were changes.
9 He didn't specify what they were, but we learned a few days
10 later through a document that was forwarded to us what those
11 specifics were.

12 Q. Now, where were you when you met with Mr. Harman?

13 A. I was at a law firm in Washington, D.C.

14 Q. And why were you in Washington, D.C.?

15 A. I was there for an industry meeting called the
16 Transportation Research Board which is a congregation of all
17 the state engineers and a lot of the federal engineers that
18 come together for an annual meeting.

19 Q. Did you take Mr. Harman's allegations seriously?

20 A. Yes, we did, absolutely.

21 Q. You said that shortly thereafter, you received
22 additional information?

23 A. Yes, sir.

24 Q. And this would have been -- I'm trying to do the
25 timeline -- January of 2012?

1 A. Yes.

2 Q. How many days after meeting with Mr. Harman did you
3 receive some additional information?

4 A. It was shortly thereafter, within the same day or just a
5 few days within that meeting.

6 Q. What was the information that you received?

7 A. Nick Artimovich had forwarded a PowerPoint, about a
8 hundred-page PowerPoint, that had been created by Mr.
9 Harman. It was forwarded to Mr. Brian Smith, who works for
10 me.

11 Q. And did Mr. Brian Smith tell you that he had received
12 this PowerPoint and provide it to me?

13 A. He did, yes.

14 Q. And was this the PowerPoint that Mr. Harman had compiled
15 that I think -- a hundred pages or so long?

16 A. Yes.

17 Q. Do you remember the title of this PowerPoint that you
18 had been provided from Mr. Harman to Mr. Artimovich to
19 Mr. Smith to you?

20 A. I can't remember the exact title of it, something to do
21 with failing heads.

22 Q. When you received this PowerPoint, what did you do?

23 A. I immediately gathered my team, but also notified my
24 general counsel that this accusation -- this allegation was
25 out there. We immediately looked at it, and I asked

1 Mr. Brian Smith, who is liaison to TTI at that time, to
2 immediately get with them and see what they could determine,
3 if there was any relevancy to the allegations being made in
4 the documents.

5 Q. Was this within the first three or four weeks of you
6 being President?

7 A. It was.

8 Q. Did you take these allegations seriously?

9 A. Yes, we did.

10 Q. Did you investigate them diligently?

11 A. We did.

12 Q. Tell the Ladies and Gentlemen of the Jury what you
13 did to investigate these particular allegations that
14 were being made by Mr. Harman, once you received the
15 PowerPoint presentation?

16 A. Well, as I indicated earlier, I -- I met with Mr. Don
17 Johnson. I met with Mr. Brian Smith to discuss, which at
18 the same time, TTI was investigating it within their own
19 documentation and process, and we eventually came together
20 to discuss it to kind of understand what allegations -- what
21 the allegations meant. And from that, we determined that
22 the 5- to 4-inch communication in 2005 had been remiss.

23 Q. Did Trinity, in fact, ask TTI to review its crash test
24 systems, photos, and videos from May of 2005, in response to
25 Mr. Harman's accusations?

1 MR. CARPINELLO: Objection. Leading, Your Honor.

2 THE COURT: Sustained.

3 Q. (By Mr. Shaw) What did Trinity ask TTI to review
4 concerning its crash test reports, photos, and videos from
5 May of 2005?

6 A. Mr. Smith asked them to pull out all documentation,
7 everything relevant to the testing and the history of the
8 ET-Plus to determine what -- what all of this meant.

9 Q. What did Trinity determine concerning the text and
10 photos that were omitted from 2005?

11 A. Dr. Bligh was able to confirm that a 4-inch guide
12 channel was used in the test that was performed in 2005.

13 Q. Are you familiar with the crash test report that was
14 sent in 2005?

15 A. Yes.

16 Q. In that crash test report, what, if any, type of data,
17 photographs, and videos are included with that crash test
18 report?

19 A. There's -- there's all kinds of data and information
20 that's provided beginning with the test article about what
21 is being tested, along with crash videos, pictures, still
22 images with a setup of what's being tested in the article or
23 the product that's being tested, and then language and text
24 that supports what's being tested.

25 Q. What did TTI confirm during this investigation

1 concerning the May 27, 2005 crash test?

2 A. They determined that the modification of the 5- to
3 4-inch channel had not been included in the documentation.

4 Q. Was Trinity, from your investigation, ever involved in
5 compilation and putting together the crash test report from
6 2005?

7 A. That is not a skill we have. That is a requirement by
8 FHWA to be assembled by the test lab, which in this case
9 would be TTI.

10 Q. Did TTI provide Trinity with a document showing this
11 photo analysis?

12 A. Yes, they did.

13 MR. SHAW: If we could look, please, to D-291.

14 Q. (By Mr. Shaw) Are you familiar with Defendants' Exhibit
15 No. 291?

16 A. I am.

17 Q. What is it that we are looking at?

18 A. We're looking at a -- a snapshot of a photo that was
19 taken in 2005, zoomed in as created by Dr. Roger Bligh, to
20 confirm that a 4-inch guide channel was used in that test.

21 Q. Did -- did TTI provide this to Trinity as part of the
22 investigation?

23 A. Yes, they did.

24 Q. Did Trinity contact the FHWA about the PowerPoint
25 from -- that had been provided from -- through Mr. Harman to

1 Brian Smith?

2 A. Yes. Nick Artimovich had -- he expected us to follow up
3 with him with regards to the PowerPoint, because we were all
4 taking it very seriously.

5 Q. Was there a meeting that was held with Mr. Artimovich to
6 discuss these allegations after TTI and Trinity's
7 investigation?

8 A. Yes, there were. We arranged a meeting with
9 Mr. Artimovich just a couple weeks later to sit down with
10 him and discuss our perspective on this issue.

11 Q. During this period of time, from when the PowerPoint
12 presentation was received until when you met with Mr.
13 Artimovich, how would you describe the level of diligence
14 that went into investigating these allegations?

15 A. It was all hands on deck, particularly at TTI going back
16 through files and information to determine how this had
17 occurred.

18 Q. Did you meet with Mr. Artimovich in Tampa, Florida?

19 A. Yes, we did.

20 Q. What else was involved in that meeting?

21 A. Brian Smith, my VP; Mr. Barry Stephens, who is our
22 senior vice president of engineering for Trinity; Nick
23 Artimovich; and then Dr. Roger Bligh from TTI.

24 Q. Would you describe this meeting as being intimate?

25 A. It wasn't intimate. I saw that in an email that was

1 described earlier. The meeting was really at a location
2 where we were also in our second trade show. We have two
3 major trade shows that occur in a year. The first one was
4 in D.C. The second one was in Tampa. So coincidentally, we
5 were there. We reached out to Mr. Artimovich, since we were
6 going to be there anyway, and we agreed that we would go to
7 a meeting room versus being on a trade show floor.

8 Q. What was the exact and important purpose of this
9 meeting?

10 A. It was really to discuss the PowerPoint that had been
11 provided and walk through the details of it and the
12 allegations, and to offer our perspective on the situation.

13 Q. Did Dr. Bligh -- what, if anything, did Dr. Bligh tell
14 the FHWA about the drawing and the text?

15 MR. CARPINELLO: Objection. Hearsay.

16 MR. SHAW: I'll rephrase it, Your Honor.

17 THE COURT: I'll sustain the objection. So let's
18 move on.

19 Q. (By Mr. Shaw) Was the drawing concerning the 4-inch
20 guide channel discussed?

21 A. Yes.

22 Q. Were there questions that were asked about this
23 particular issue?

24 A. Yes. From Mr. Artimovich, yes.

25 Q. How long a period -- or how long a time period was the

1 meeting conducted?

2 A. As best I can recall, 30 -- 30 to 40 minutes, maybe.

3 Q. Did you feel from your own observation that you had
4 answered the questions that were being asked by
5 Mr. Artimovich?

6 A. I think -- I think we did. I left with a good sense
7 that Mr. Artimovich was satisfied with what he had seen and
8 heard.

9 Q. Did Trinity review the SPIG PowerPoint presentation of
10 Mr. Harman's at this meeting with Mr. Artimovich?

11 A. Yes, we did.

12 Q. Did you go through or the people there go through every
13 page of the SPIG PowerPoint presentation and discuss it with
14 him at this meeting?

15 A. Yes, we did.

16 Q. From your observations in talking with Mr. Artimovich
17 that day, did it appear to you, Mr. Mitchell, that he was
18 satisfied with the responses that Trinity and TTI had
19 provided to him?

20 A. Yes.

21 Q. Do you know whether or not the FHWA conducted its own
22 analysis of the SPIG PowerPoint?

23 A. My understanding is that they did.

24 Q. What is your understanding as to what they did
25 concerning their own analysis?

1 MR. CARPINELLO: Foundation and hearsay, Your
2 Honor.

3 THE COURT: Sustained.

4 Q. (By Mr. Shaw) Did you follow up with correspondence by
5 Trinity to the FHWA concerning this meeting?

6 A. Yes. Mr. Artimovich had requested some of the
7 information we had provided in the meeting to be sent to him
8 electronically, and we followed up immediately.

9 MR. SHAW: If we could turn to Defendants' Exhibit
10 162, please.

11 Q. (By Mr. Shaw) Are you familiar with this string -- this
12 string of emails, Mr. Mitchell?

13 A. Yes.

14 MR. SHAW: If we could look at the second email or
15 the middle email on that page, please, Mr. Hernandez.

16 Q. (By Mr. Shaw) Is this the email from Brian Smith?

17 A. Yes, it is.

18 Q. And who is it addressed to?

19 A. Mr. Nick Artimovich.

20 Q. And what is he telling him in this email?

21 A. I will send you a package today or tomorrow.

22 MR. SHAW: If we'll look at the front or the first
23 email on this string.

24 Q. (By Mr. Shaw) Who is this email from?

25 A. Mr. Brian Smith.

1 Q. And what date is that email?

2 A. February 28.

3 Q. Who is that email addressed to?

4 A. Mr. Nick Artimovich.

5 Q. And would you read for us, please, what Brian Smith
6 wrote to Nick Artimovich?

7 A. Nick, attached please find our cover letter summarizing
8 the information that we are sending to you per your request.
9 A hard copy will follow with the information in the regular
10 mail. Please confirm back to me that this provides all that
11 you have requested, and as you related in Tampa, this closes
12 the matter.

13 MR. SHAW: If we could look at the next page of
14 Defendants' Exhibit No. 162, or Page 3.

15 Q. (By Mr. Shaw) We're looking at Page 3 of Defendants'
16 Exhibit No. 162, Mr. Mitchell. Are you familiar with this?

17 A. Yes, I am.

18 Q. And what is it that we are looking at?

19 A. This is a document that was provided by Mr. Smith to Mr.
20 Artimovich as a follow-up to that meeting.

21 MR. SHAW: If we will go down into the body of
22 this particular document, Mr. Hernandez.

23 Q. (By Mr. Shaw) What is it that is being provided to
24 Mr. Artimovich in response to this meeting in
25 February -- in February to answer his questions

1 concerning the ET-Plus?

2 A. It's a list of the materials that he had requested and
3 that we had reviewed.

4 Q. Did it include the crash test report of the -- of the
5 ET-Plus conducted in July -- conducted in May of 2005?

6 A. Yes.

7 Q. It says here crash test report. Is that because that
8 was the date of the report versus when the test was
9 conducted?

10 A. That's correct.

11 Q. What other things were provided that are listed here in
12 this particular letter?

13 A. The materials that were provided by TTI, so Brian had
14 consolidated that into this package.

15 Q. And would that include the photos from the test that was
16 conducted in May of 2005?

17 A. Yes, it did.

18 Q. Would it include the acceptance letters?

19 A. Yes, it did.

20 Q. Did it include the crash test reports from 2010?

21 A. Yes, it did.

22 Q. In fact, was the ET-Plus not only crash-tested in 2005
23 but also crash-tested in 2010?

24 A. Yes, it was.

25 Q. Was it crash-tested in 2010 on two occasions?

1 A. Yes, it was.

2 THE COURT: Mr. Mitchell, I'm going to ask you not
3 to refer to Mr. Smith by just his first name, Brian. Either
4 call him Brian Smith or Mr. Smith, but don't refer to him as
5 just Brian. We try to avoid referring to people by first
6 names only because it creates confusion in the record.

7 THE WITNESS: Yes, sir. I apologize.

8 THE COURT: All right. Let's proceed, Counsel.

9 MR. SHAW: Thank you, Your Honor.

10 Let's turn our attention to Defendants' Exhibit
11 D-93.

12 Q. (By Mr. Shaw) What is Defendants' Exhibit D-93?

13 A. It's -- it's a letter I issued in -- in March of 2012.

14 Q. Did you write this letter?

15 A. Yes.

16 Q. What was the purpose of writing this letter,
17 Mr. Mitchell?

18 A. It was a letter to go out to primarily customers and DOT
19 agencies with regards to our perspective on the situation,
20 the allegations that were being made by Mr. Harman.

21 Q. Did you, in fact, send this letter out?

22 A. Yes, we did.

23 MR. SHAW: If we'll look at Defendants' Exhibit
24 No. D-47.

25 Q. (By Mr. Shaw) Did you write this letter, D-47?

1 A. Yes, I did.

2 Q. What was the purpose of writing this letter,
3 Mr. Mitchell?

4 A. We learned in January, days earlier, that this case had
5 been unsealed, and we wanted to offer additional details on
6 the situation.

7 Q. Do you stand by the language in both this letter, D-47
8 and D-93?

9 A. I do.

10 Q. Mr. Carpinello asked you some questions about these
11 letters about conducting studies concerning -- to verify the
12 statements. Do you remember that testimony?

13 A. I do.

14 Q. What is it about conducting studies or how did you
15 arrive at those particular statements that you are making in
16 this letter?

17 MR. SHAW: If we will blow it up, Mr. Hernandez,
18 third paragraph on Defendants' Exhibit 47.

19 THE TECHNICIAN: 37?

20 MR. SHAW: 47.

21 Q. (By Mr. Shaw) The -- the paragraph that begins that the
22 ET-Plus system remains accepted for use by the FHWA. Do you
23 see that?

24 A. Yes, I do.

25 Q. Is the ET-Plus eligible for federal reimbursement as we

1 sit here today?

2 A. It is, yes.

3 Q. Was it eligible for federal reimbursement at the time
4 when you wrote this letter?

5 A. Yes.

6 MR. SHAW: If we'll look at the bullet point
7 sections that have the parens 1, 2, and 3, Mr. Hernandez,
8 the third full paragraph.

9 If you'll begin with -- if you will highlight for
10 me, Mr. Hernandez, in that letter, Trinity also included the
11 reasons.

12 Q. (By Mr. Shaw) Do you see where you have written in this
13 letter: Also included the reasons that TCI -- TTI suggested
14 this improvement to enhance the already demonstrated
15 performance of the system in the field.

16 Did you write that?

17 A. Yes, I did.

18 Q. And were those -- do you stand by that?

19 A. I do.

20 Q. Do you believe that to be correct?

21 A. I do.

22 Q. It said to improve alignment of the extruder head and
23 therefore alignment of the rail extrusion during head-on
24 impacts. Do you stand by that statement?

25 A. I do.

1 Q. What was the basis of you writing that particular
2 letter?

3 A. This letter was a collaborative effort between Dr. Roger
4 Bligh and me, and this is his perspective offering to this
5 letter.

6 Q. Does Trinity rely on the expertise on the design
7 engineers at Texas A&M concerning the technical matters
8 pertaining to the ET-Plus?

9 A. We rely and depend on TTI.

10 Q. Has Trinity Highway Products always relied upon TTI for
11 their technical expertise concerning the ET-Plus?

12 A. Absolutely.

13 Q. The next bullet point here in this exhibit, No. 47, or
14 the next paren, 2, reduction of the impact impulse on the
15 occupants during a head-on collision with the system. Do
16 you stand by that?

17 A. I do.

18 Q. What is the basis of putting that into the letter?

19 A. That was a recommendation by Dr. Roger Bligh.

20 Q. Paren No. 3: It created a stronger weld of the extruder
21 head to the guide channels. Do you stand by that?

22 A. I do.

23 Q. Was that the information that you were able to gather
24 during your investigation in this matter concerning the
25 change from the 5- to the 4-inch?

1 A. Yes, it is.

2 MR. SHAW: If we could look at Defendants' Exhibit
3 37, Mr. Hernandez.

4 Q. (By Mr. Shaw) What is Defendants' Exhibit No. 37?

5 A. This is a note from Mr. Nicholas Artimovich to Daniel
6 Hinton regarding the ET-Plus terminal.

7 Q. Are there -- have you seen other notes that are similar
8 to this from Mr. Artimovich addressed to other state highway
9 departments?

10 A. Yeah. In this case, it's -- it's directed toward an
11 FHWA employee that works at the state level. Yes.

12 Q. Is -- who do you understand Mr. Hinton to be an employee
13 of?

14 A. I can't recall the state he's in, but I believe he's an
15 FHWA employee at the state level.

16 Q. And what does Mr. Artimovich say in October 11th of
17 2012?

18 A. That the Trinity ET-Plus end terminal with a 4-inch
19 guide channel is eligible for reimbursement under the
20 Federal Aid Highway Program under FHWA letter CC-94 of
21 September 2nd of 2005.

22 Q. We have seen this language on other emails from
23 Mr. Artimovich -- or have you seen this language on other
24 emails from Mr. Artimovich to state DOTs?

25 A. Yes. He sent out many of them.

1 Q. To -- in response to their inquiries concerning the
2 ET-Plus?

3 A. Yes.

4 MR. SHAW: If we could turn now to Plaintiff's
5 Exhibit 534. Expand that out for me, please.

6 Q. (By Mr. Shaw) What is Exhibit 534, Mr. Mitchell?

7 A. It's a letter to Mr. John Horsley.

8 Q. And who is Mr. John Horsley?

9 A. As it states, the executive director of AASHTO.

10 Q. And who is this letter from?

11 MR. SHAW: If you could show us the signature
12 page, Mr. Hernandez. I think it's the second next page.
13 Mr. Hernandez, do you have that?

14 Q. (By Mr. Shaw) While Mr. Hernandez is looking for that,
15 are you familiar with the American Association of State
16 Highway and Transportation Officials?

17 A. Yes, I am.

18 Q. What is the basis of your familiarity with them?

19 A. My understanding is that they clearly represent the
20 states as an organization for state requirements.

21 Q. And do you see now that Mr. Hernandez has pulled up for
22 us the signature page, and who is that from?

23 A. From Tony Furst.

24 Q. Are you familiar with Mr. Tony Furst?

25 A. Yes, I believe I am.

1 Q. What does Mr. Tony Furst do for a living?

2 A. He works for FHWA.

3 MR. SHAW: If we could go back, Mr. Hernandez, to
4 the first page of this letter. If we could go to the first
5 paragraph; if you could highlight that for me, please, of
6 the letter.

7 Q. (By Mr. Shaw) Do you see where he says: Thank you for
8 your December 14th letter regarding the performance of
9 crash-tested guarded end terminals? Do you see that?

10 A. Yes, I do.

11 Q. I am responding to your concerns about the crash-testing
12 of the ET-Plus guardrail end terminals and the broader
13 issues you raised.

14 He continues, does he not, to say: As a preliminary
15 matter, we have no reliable data indicating that the ET-Plus
16 end terminals are not performing as they were intended to
17 perform. If we receive reliable data indicating the ET-Plus
18 end terminal or any other safety device are creating a
19 safety hazard to the public, we will work with AASHTO, the
20 states, and industry to quickly address those safety
21 concerns.

22 Do you see that?

23 A. Yes, I do.

24 Q. Was that your understanding at that time of the position
25 of the FHWA?

1 A. Yes, it is.

2 Q. Do you understand that to be their position as we sit
3 here today?

4 A. Yes, it is.

5 Q. Is the ET-Plus eligible for federal reimbursement on all
6 guardrail heights?

7 A. Yes, it is. From 37 and three-quarter-inch to --
8 31-inch, yes, it is.

9 MR. SHAW: If we could look at Defendants' Exhibit
10 268.

11 Q. (By Mr. Shaw) Are you familiar with Defendants' Exhibit
12 268?

13 A. Yes.

14 Q. What is Defendants' Exhibit 268?

15 A. This is a notification from the Nevada Department of
16 Transportation indicating they are removing the ET-Plus
17 system from their qualified products list.

18 MR. SHAW: If we'll look at the last sentence of
19 that particular letter. If you'd highlight that for me,
20 please, Mr. Hernandez.

21 Q. (By Mr. Shaw) And what does it say here was the per --
22 the reason for the removal?

23 A. For administrative reasons.

24 Q. And is that what you told Mr. Carpinello when he asked
25 you about this earlier?

1 A. Yes, it is.

2 MR. SHAW: If we can look at Defendants' Exhibit
3 409.

4 Q. (By Mr. Shaw) Are you familiar with Defendants' Exhibit
5 409?

6 A. Yes, I am.

7 Q. Who is Defendant -- who is the -- the author of the
8 email that is there on the screen in front of you?

9 A. I believe that Stanley Wood -- I believe he works for
10 the Department of Transportation in the state of
11 Massachusetts.

12 Q. And what is Mr. Stanley Wood asking his SCOD members?

13 A. SCOD represents Subcommittee on Design. He's asking for
14 a quick survey in light of the publicity as to who he is
15 considering banning the installation of ET-Plus end
16 treatments.

17 MR. SHAW: And if we turn to the next page, Page 2
18 of Exhibit 409.

19 Q. (By Mr. Shaw) Are you familiar with this email and the
20 other emails in this exhibit that are the responses to
21 Mr. Wood's request for what is going on in the industry?

22 A. Yeah. There's multiple responses from state
23 representatives, indicating that they're having no issues or
24 concerns.

25 Q. If we look, for example, on Page 2 of Exhibit 409, and

1 if we see this email from Annette Riley -- from Annette
2 Riley to Stanley that reads: In light of the memo released
3 by FHWA, dated July 17th, 2014, and having no issues or
4 concerns raised in the application of the ET-Plus within our
5 state, Arizona allows the use of this item and do not have
6 plans to disallow its use in the near future. Thanks.

7 Have I read that correctly?

8 A. Yes, you have.

9 MR. SHAW: If you were to turn through this page,
10 for example, to Page 4 of -- of this particular exhibit,
11 409.

12 Q. (By Mr. Shaw) And what is it there on Page 4 at the top
13 email is a response from Maine? Do you see that?

14 A. Yes.

15 Q. And it says: Maine has continued their use in
16 appropriate situations; is that right?

17 A. That's correct.

18 MR. SHAW: If we'll look at Exhibit 409, Page 14,
19 as another example.

20 Q. (By Mr. Shaw) Mr. Mitchell, are you familiar with this
21 response from George Lukes in Utah?

22 A. Yes.

23 Q. And he says to Stan: At this time, UDOT has 360 -- has
24 360 ET-Plus systems installed on state routes in Utah. To
25 date, there has not been an issue with this system in Utah,

1 and as such, we have no plans on making any changes to our
2 approved products list.

3 Did I read that correctly?

4 A. Yes, you did.

5 Q. And that was of September 25th of 2014?

6 A. That's correct.

7 Q. Less than two or three weeks or so ago?

8 A. Yes, sir.

9 MR. SHAW: If we could look at Defendants' Exhibit
10 409, Page 16.

11 Q. (By Mr. Shaw) This is from the Alaska DOT to Stanley, is
12 it not?

13 A. That's correct.

14 Q. And it says: Based on the following, Alaska will
15 continue to install ET-Plus w-beam guardrail terminals in
16 appropriate locations.

17 Bullet point: Alaska DOT and PF has not identified a
18 demonstrative -- a demonstrated problem with ET-Plus
19 performance.

20 Is that your understanding of their position?

21 A. Yes, it is.

22 Q. FHWA's September 2nd, 2005 approval letter, FHWA No.
23 CC-94, are you familiar with that letter, Mr. Mitchell?

24 A. Yes, sir.

25 Q. Is that the letter that gives the ET-Plus the approval

1 to be on the highways in the United States?

2 A. Yes, it is.

3 Q. And is that the approval letter from 2005 that allows
4 the FHWA and authorizes them as the authoritative figure to
5 make it eligible for federal reimbursement?

6 A. Yes, it is.

7 Q. And last bullet point in this exhibit, 409/16, FHWA's
8 June 17th, 2014 memoranda clarifying the federal-aid
9 reimbursement eligibility of the ET-Plus.

10 Is that your understanding?

11 A. Yes, sir.

12 Q. You were asked about the lobbying efforts and campaign
13 contributions of Trinity. Have you ever contributed to --
14 to anybody?

15 A. No, I haven't.

16 Q. Anybody concerning ET-Plus?

17 A. No.

18 Q. Are you involved at all in any lobbying efforts for
19 Trinity Highway Products or for Trinity Industries in any
20 capacity?

21 A. I am not.

22 Q. Do you make any decisions at all about any of that?

23 A. I do not.

24 Q. Is that just something that's just not in your job
25 duties and responsibilities?

1 A. I have no exposure to it.

2 Q. You mentioned that you talked to one Congressman.

3 A. I did.

4 Q. Tell the Ladies and Gentlemen of the Jury why you talked
5 to one Congressman.

6 A. We received notification from a staffer in the
7 Transportation Infrastructure Committee that they had
8 received or had been forwarded a PowerPoint from Mr. Harman,
9 the same PowerPoint we referenced earlier.

10 So they had reached out to us to let us know that it
11 was forwarded to them by Mr. Morgan Griffith, who was a
12 Congressman in Virginia. We contacted Mr. Griffith and he
13 prompted a meeting with us to hear what the issues were to
14 get an explanation from us. So we did set up a meeting with
15 him, and flew to D.C. and met with him. But that was the
16 only congressional meeting I was a part of.

17 Q. Was that a meeting that you initiated to try to
18 influence anybody concerning the ET-Plus?

19 A. Absolutely not. It was in response to a meeting that
20 had taken place in prior days with Mr. Harman and Mr.
21 Griffith.

22 Q. In which you were responding to his previous request to
23 come and meet with you?

24 A. I'm sorry?

25 Q. You were responding to his request for you to come and

1 meet with him?

2 A. That's correct. And he had received the document from
3 Mr. Harman. As I stated, he had forwarded it, and he wanted
4 an explanation from us. So we traveled there to meet with
5 them as a reaction or a response to Mr. Harman's meeting.
6 Yes.

7 Q. And is that the only meeting that you ever had with
8 any Congressman?

9 A. Absolutely.

10 Q. Did you in any way -- any way try to influence or try to
11 induce him to fraudulently get the June 14 -- the June 17th,
12 2014 memorandum from the FHWA?

13 A. Absolutely not.

14 Q. Are you aware of anybody at Trinity who has ever engaged
15 with the FHWA in any manner that could be described as a
16 fraudulent attempt to try to get them to issue the June
17 17th, 2014 memorandum that says that this product remains
18 continuously eligible for federal reimbursement?

19 A. Absolutely not.

20 MR. SHAW: If we could look at Exhibit 265.

21 Q. (By Mr. Shaw) Are you with Defendants' Exhibit No. 265?

22 A. Yes, I am.

23 Q. And is this another email, while not in the survey, but
24 from the Utah Department of Transportation indicating their
25 involvement with the ET-Plus?

1 A. Yes, it is.

2 MR. SHAW: If we could look at the middle section,
3 please.

4 Q. (By Mr. Shaw) And what is it that is being said here to
5 Chuck, from Shawn Debenham?

6 A. Shawn is indicating to Chuck Norton, who is an employee
7 of Trinity, our sales team in Centerville, Utah: As to
8 date, UDOT has not had any problems with the performance of
9 either the ET-Plus nor the ET-2000.

10 MR. SHAW: If we could look at Defendants' 277.

11 Q. (By Mr. Shaw) What is Defendants' Exhibit No. 277?

12 A. It's a letter to Mr. Brian Smith from Mr. Nicholas
13 Artimovich.

14 Q. Was this a letter that was provided to Mr. Artimovich in
15 conjunction with the meeting in Tampa?

16 A. Can you -- can you expand out?

17 Q. Yes. We'll see at the front of the letter,

18 Mr. Mitchell, in the first paragraph: As a direct
19 response to your email dated February 2nd to Brian Smith.

20 A. Yes.

21 Q. Are you familiar with this letter --

22 A. Yes, I -- I am.

23 Q. -- having had a chance to review it?

24 What is this letter?

25 A. It's a confirmation from Mr. Nick Artimovich that the

1 ET-Plus extruder head is designed by Texas Transportation
2 Institute and manufactured as conformed to the 350 crash
3 test.

4 Q. If we'll look at the last paragraph on the first page of
5 this letter. Do you see what is stated there by Mr. Brian
6 Smith to Mr. Artimovich?

7 A. I do.

8 Q. And what is stated there?

9 A. Three major misrepresentations are made in the SPIG
10 presentation entitled Failure Assessment of Guardrail
11 Extruder Terminals related to modifications to the post
12 breaker, extruder throat/exit gap dimensions, and feeder
13 chute dimensions. These misrepresentations are unfounded
14 and are addressed in the detail in the accompanying
15 documentation.

16 MR. SHAW: If we could look at the next page of
17 this letter, Page 2 of 277, the first -- the first full
18 paragraph on that page, please.

19 A. Trinity takes very seriously its responsibility to make
20 sure all of its products conform to applicable FHWA
21 crash-testing guidelines.

22 Q. Is that a true statement?

23 A. Yes, it is.

24 Q. Do you stand by that statement?

25 A. I do.

1 Q. Let's look at the attachments that were sent, Page 3 of
2 277. Do you see that?

3 A. I do.

4 Q. Is that a copy of the photograph that we discussed
5 earlier?

6 A. Yes, it is.

7 MR. SHAW: If we'll go to Page 4 of 277.

8 Q. (By Mr. Shaw) What is that picture, Mr. Mitchell?

9 A. That is the test article snapshot prior to the test
10 being performed in May of 2005.

11 Q. Has anybody ever suggested to you that these pictures
12 should be destroyed or hidden or secreted away?

13 A. Absolutely not.

14 Q. Did you -- or did you ever find in your investigation
15 back into this matter in 2005 that anybody ever took any
16 steps to intentionally or deliberately hide any of the
17 information in the crash test?

18 A. Absolutely not.

19 MR. SHAW: If we could look at P-962.

20 Q. (By Mr. Shaw) Do you have on the screen in front of you
21 Plaintiff's Exhibit 962?

22 A. Yes.

23 Q. This is a letter recertification from Mr. Steve Brown?

24 A. Yes.

25 Q. Do you know Mr. Steve Brown?

1 A. I do.

2 Q. Does every state require a recertification like Florida
3 Department of Transportation?

4 A. No. It's quite random.

5 MR. SHAW: If you could go down to this sentence
6 that you were discussing with Mr. Carpinello that has said
7 there has been no major design changes, in the first full
8 paragraph, four or five sentences down, Mr. Hernandez.

9 Q. (By Mr. Shaw) What does that particular sentence -- read
10 that sentence for us, please, Mr. Mitchell.

11 A. There have been no major design changes that would
12 affect the acceptance status with the FHWA.

13 Q. What does the acceptance status of the FHWA mean?

14 A. It would be the approval, the 350 compliance.

15 Q. Because it remains approved at that time?

16 A. That's correct.

17 Q. You talked to Mr. Carpinello about Dr. Dean Sicking.

18 Why were you consulting or talking to Mr. -- or
19 Dr. Sicking -- let's start with why were you talking to him
20 in San Diego?

21 A. He -- he had reached out to us in efforts to begin
22 working together, and we were interested in potential
23 projects for product development.

24 Q. Did you eventually go to visit him in Alabama?

25 A. I did. It was a follow-up meeting nearly a year later.

1 Q. During that interim period of time, was there an attempt
2 to get what is known as a non-disclosure agreement?

3 A. There was.

4 Q. Was that ever able to be worked out?

5 A. It was not.

6 Q. Were you involved in any of the details of trying to
7 work it out?

8 A. I was not. That was assigned to a gentlemen that works
9 in our organization that was attempting to finalize the
10 non-disclosure agreements to start the project.

11 Q. When you went to go visit -- when you went to go visit
12 Dr. Sicking in Alabama, did you ask him if he was working
13 for Mr. Harman?

14 A. I did ask him that question. Yes.

15 Q. And did he tell you that he was working for Mr. Harman?

16 A. Yes. He said he absolutely was not working with Mr.
17 Harman.

18 Q. Did you in any way threaten or intimidate him in any way
19 concerning this particular case, Mr. Mitchell?

20 A. Absolutely not. I would not do that.

21 Q. Do you deny that?

22 A. I deny that.

23 Q. Do you deny that anybody on behalf of Trinity has done
24 anything like that?

25 A. That is not what we do. It would not happen.

1 MR. SHAW: I tender the witness, Your Honor.

2 THE COURT: Redirect?

3 MR. CARPINELLO: Yes, Your Honor.

4 REDIRECT EXAMINATION

5 BY MR. CARPINELLO:

6 Q. Mr. Mitchell, with regard to Dr. Sicking, your meeting
7 in Alabama, did you take any notes, sir?

8 A. I did not.

9 Q. Okay. And it's your distinct recollection that
10 Dr. Sicking asked for the meeting in San Diego; is that
11 correct?

12 A. I think it was mutual. It was arranged by my
13 employee -- my remembrance is that it was a request from
14 him.

15 Q. Who asked to have the meeting, sir?

16 A. I believe it was Dr. Sicking.

17 Q. Okay. And did Dr. Sicking ask for the meeting in -- in
18 Birmingham also?

19 A. No. I requested that.

20 Q. Okay. Now, your attorneys showed you D-409 and the --

21 MR. CARPINELLO: Could I have the first page of
22 that, please, on the screen?

23 Q. (By Mr. Carpinello) The first page of the document
24 says that I would like to just do a quick survey
25 regarding your use of the ET-Plus guardrail end

1 terminal. In light of recent publicity, mass DOT
2 highway division is considering banning installation of
3 the new ET-Plus end treatment until we have some more
4 time to assess this situation. Our local FHWA division
5 is in support of this approach.

6 And, in fact, Massachusetts has banned the product,
7 correct, sir?

8 A. Yes, they have.

9 Q. Okay. Now, you testified in response to questions from
10 your lawyer that when Mr. Harman disclosed these previous
11 undisclosed changes, it was all hands on deck. That was the
12 word you used, right, sir?

13 A. Yes, it is.

14 Q. So you must have immediately gone to TTI and said, we
15 have to investigate these investigations, we have to do some
16 crash tests to make sure this thing is state, right? You
17 did that, right?

18 A. Could you ask your question again?

19 Q. When you said all hands on deck and you heard about
20 Mr. Harman's allegations, you immediately went to TTI and
21 said, we have to do a crash test to make sure that this is
22 -- thing is safe. You did that, right?

23 A. No, we did not.

24 Q. You didn't do that, did you?

25 A. We did not crash test, no.

1 Q. Did you go to TTI and say we need to immediately get one
2 of your LS-DYNA computers there in your computer analysis
3 lab and analyze these allegations and see if these changes
4 make a difference? You did that?

5 A. No, we did not.

6 Q. You didn't do that? When you saw the pictures from Mr.
7 Harman -- Mr. Harman had dozens and dozens of pictures of
8 accidents, correct?

9 A. Yes, he did.

10 Q. And you said that you sat down with Mr. Artimovich and
11 you went through each of these photographs, correct?

12 A. Yes, very quickly.

13 Q. How many accident reports did you review that were
14 listed in Mr. Harman's presentation?

15 A. I'm sorry, I don't recall.

16 Q. How many of the accident reports of the accidents that
17 Mr. Harman documented in his presentation, how many accident
18 reports did you review?

19 A. We did not review any accident reports.

20 Q. Did you hire an independent expert, someone separate
21 from TTI to go out and analyze the cause of the accident?

22 A. No, we did not.

23 Q. Did you hire an independent lab, separate from TTI, to
24 do a computer analysis or to examine the changes and get an
25 opinion from an independent agency, whether these changes

1 were appropriate?

2 A. No, we did not.

3 Q. You did hire an expert, eventually. You hired Dr. Ray,
4 correct?

5 A. We hired Dr. Ray, yes.

6 Q. After you were sued, correct?

7 A. I believe so. I don't recall the timing.

8 Q. To represent you in this case, correct?

9 A. Yes.

10 Q. And the independent expert that you hired, Dr. Ray, has
11 been your expert in 20 separate personal injury cases,
12 correct?

13 A. I'm not sure what the count is, but --

14 Q. Roughly 20?

15 A. Roughly, yes.

16 Q. Okay. And to this day -- because safety is really
17 important to you, to this day, you have not asked for an
18 independent expert to analyze whether these changes are
19 killing people on the highway?

20 A. Dr. Ray is an independent expert.

21 Q. Other than Dr. Ray, who has testified for you in 20
22 separate lawsuits --

23 A. No.

24 Q. -- did you go to anybody else?

25 A. No, we have not.

1 Q. Okay. So to you, all hands on deck meant telling the
2 FHWA we made a mistake in 2004, right -- 2005? We made a
3 mistake in 2005?

4 A. In the comment of all hands on deck, I was talking about
5 the investigation of going back to the test reports and
6 documentation over -- when we received the information to
7 investigate it properly.

8 Q. Okay. So let's see what you did. You met with Mr.
9 Artimovich and said we're giving you a bunch of test
10 reports, and we consider the matter closed, correct?

11 A. Yes. We provided all the information that he requested,
12 yes.

13 Q. And not in a single document that your lawyer showed you
14 that was addressed to the FHWA did you tell them of any
15 change other than five to four-inch; isn't that correct?

16 A. I recall most of the conversation being centered on the
17 five to four-inch change, yes.

18 Q. Sir, I'm going to ask --

19 MR. CARPINELLO: I'm sorry, Your Honor.

20 Q. (By Mr. Carpinello) In any of the documents that your
21 lawyer put up on the screen, do any of those documents tell
22 the FHWA of any of the changes that this jury has heard
23 other than five to four-inch?

24 A. Not that I recall.

25 Q. Okay. So all hands on deck also meant you were going to

1 run to Congress and you were going to tell the Congressmen
2 that this -- Mr. Harman's allegations were defamatory,
3 correct?

4 A. If you're referring to Congressman Griffith, that was in
5 response to a meeting and a request on his part, not ours.

6 Q. Okay. And all hands on deck meant that you were going
7 to increase your lobbying to over three quarters of a
8 million dollars in the last two years, correct?

9 A. I don't have any responsibility or association with that
10 process.

11 Q. Who does at Trinity?

12 A. We have a TIEPAC or a PAC organization that's made up of
13 employees.

14 Q. Who at Trinity hires the lobbyists?

15 A. It's a responsibility of Trinity Industries, not of
16 Trinity Highway Products.

17 Q. Who at Trinity hire -- hires the lobbyists?

18 A. I'm not sure.

19 Q. You referenced Nevada in your testimony, and you -- and
20 your lawyer put up on the screen a letter from Nevada that
21 said it's an administrative matter, correct?

22 A. Yes, sir.

23 Q. And you -- you or some -- Mr. Gripne went out to Nevada
24 and you asked them to -- after they had taken you off the
25 list, to write that letter, correct?

1 A. I'm sorry?

2 Q. You or Mr. Gripne contacted Nevada after you were taken
3 off the list and asked them to write that letter, correct?

4 A. I don't recall asking them to write a letter. We did
5 have a meeting with them.

6 Q. And you asked them to change -- to write a letter that
7 said it was an administrative problem, correct?

8 A. I can recall having a conversation and asking them to
9 explain the reason for removing us from the QPL. That
10 letter was the result of that.

11 Q. You went out to Nevada and you asked them to write a
12 letter that said it was an administrative problem, correct?

13 A. I can't recall that explicitly.

14 Q. All right. But it's a fact, isn't it, sir, that Nevada
15 asked you in February of this year to do the in-service
16 study that you still have not done, correct?

17 A. That's correct.

18 Q. And you said, no, we're not going to do it, correct?

19 A. That's correct.

20 Q. Okay. Mr. Shaw, in his questioning, referred to the
21 2005 report as the report that omitted the drawing. You
22 remember that?

23 A. Yes.

24 Q. The report that omitted the drawing. It was more than
25 omitting a drawing, wasn't it? The problem with the report

1 was more than it omitted a drawing, wasn't it?

2 A. I don't understand your question.

3 Q. The problem with the 2005 report was more than it
4 omitted a drawing of the ET-Plus head as changed, correct?

5 A. Yes. As we've testified, TTI inadvertently omitted a
6 five to four-inch drawing and communication in that
7 document, yes.

8 Q. But it omitted a lot more than that, didn't it?

9 A. I'm not sure what you're referencing.

10 Q. Well, the title refers to the 31-inch. It doesn't even
11 refer to the modified ET-Plus, does it?

12 A. That's correct.

13 Q. And every single place where you were required to
14 describe to the FHWA what was tested, you said it was a
15 standard ET-Plus, correct?

16 A. That's correct.

17 Q. Okay. So whoever wrote this -- whoever wrote this, I
18 don't know, standard how many times, 40 times, each time it
19 was inadvertent?

20 A. Yes, it was.

21 Q. Okay. And you have a whole bunch of drawings in here,
22 correct, sir?

23 A. I don't recall the number of drawings in the document.

24 Q. And --

25 MR. CARPINELLO: Well, let's put up the -- the

1 exhibit, please. It's 156. Let's go to Bates No. 16369.

2 Q. (By Mr. Carpinello) That doesn't show the dimensions of
3 the head, does it, sir?

4 A. No. It just shows the layout of the test article.

5 MR. CARPINELLO: Let's go 16370.

6 Q. (By Mr. Carpinello) That doesn't show the dimensions.
7 It's got the head, but it doesn't show the dimensions,
8 correct?

9 A. That's correct.

10 MR. CARPINELLO: Okay. Let's go to 16371.

11 Q. (By Mr. Carpinello) That's got the head. That's
12 doesn't show the dimensions, correct?

13 A. That is correct.

14 MR. CARPINELLO: Let's go to 16372.

15 Q. (By Mr. Carpinello) That's got some dimensions. That
16 doesn't show the head, correct?

17 A. That's correct.

18 MR. CARPINELLO: Let's go 16373.

19 Q. (By Mr. Carpinello) That doesn't have the dimensions of
20 the head, correct?

21 A. That's correct.

22 MR. CARPINELLO: 16374.

23 Q. (By Mr. Carpinello) That doesn't have any dimensions,
24 correct, of the head?

25 A. That's correct.

1 MR. CARPINELLO: 16375.

2 Q. (By Mr. Carpinello) That doesn't have any dimensions of
3 the head, correct?

4 A. That's correct.

5 Q. Okay. Now, you said that it was TTI -- if I -- correct
6 me if I'm wrong. You said that TTI decides what to tell the
7 FHWA about what dimensions your product has. Is that your
8 testimony?

9 A. Sorry, I don't understand what you're asking.

10 Q. I believe you said -- you were asked by Mr. Shaw, who
11 decides what to tell the FHWA? That's what I wrote down.
12 And you said TTI. Is that your testimony?

13 A. It depends on what's being discussed with FHWA.

14 Q. A certification -- a request for approval to modify
15 a product, sir, who tells the FHWA?

16 A. Depending on what the product is, that can be
17 communicated by Trinity or it can be communicated by TTI.

18 Q. And this one was communicated by Trinity, correct?

19 A. It was, yes.

20 Q. Okay. And who certifies to the states that the product
21 has been tested and approved by the FHWA?

22 A. Trinity certifies.

23 Q. And did I understand your testimony to say that you
24 don't have to certify to all the states?

25 A. We have to certify to the states that the 350 compliance

1 exists on the product, but in the shipping documents we send
2 on the certifications -- in the certified analysis, it does
3 not state 350 compliance in that document.

4 Q. You have to certify in writing to every single state in
5 this country that that product has been disclosed and
6 approved by the FHWA in accordance with NCHRP 350 in order
7 for there to be federal reimbursement for the purchase of
8 that product; is that not correct?

9 A. Oh, that's absolutely correct.

10 Q. Thank you. Now, your lawyer showed you a bunch of
11 emails from states saying that they hadn't heard about any
12 problem or they had continued using the ET-Plus, correct?

13 A. Yes, sir.

14 Q. But things have changed, have they not, sir? The FHWA
15 last week changed their position, did they not?

16 A. I'm not sure I'm following you.

17 Q. Well, the FHWA last week said --

18 MR. CARPINELLO: May I have 1286, please? Under
19 ongoing activity, bottom of the page, Mr. Diaz, please?

20 Q. (By Mr. Carpinello) The FHWA is working with the
21 American Association of State and Highway Transportation
22 Officials and the Transportation Research Board to develop
23 and conduct a comprehensive evaluation of different
24 categories of roadside safety hardware end treatments
25 through the National Cooperative Highway Research Program.

1 And then it directs all its regional people to immediately
2 advise them to pay particular attention to all crashes
3 involving the ET-Plus, correct?

4 A. Yes, that's correct.

5 Q. Okay. Now, AASHTO, the American society that's
6 referenced in the letter, they suggested quite a while ago
7 that an in-service review be done, correct?

8 A. Yeah. I recall something to that effect, yes.

9 Q. And you didn't do it, did you?

10 A. No, we didn't.

11 Q. Okay. You said you rely and depend on TTI. That's what
12 your testimony was, correct?

13 A. For design and development, yes.

14 Q. Okay. And so when you learned about these problems, you
15 relied on TTI to immediately investigate to see if the
16 changes, in fact, were causing a problem, didn't you?

17 A. Yes. I asked them to assess it, yes.

18 Q. No. What you asked them to do was to get a picture or
19 anything you could possibly put your hands on to convince
20 the FHWA that you had tested a four-inch channel in 2005.

21 That's what you did, didn't you?

22 A. That's what we provided, yes.

23 Q. You didn't ask TTI to actually run more tests and figure
24 out whether this is causing a problem, did you?

25 A. No, I did not.

1 Q. Okay. And you didn't ask TTI to undertake any kind of
2 computer analysis, correct?

3 A. That's correct.

4 Q. So...

5 MR. CARPINELLO: Could I have 886, Page 5, please?

6 Q. (By Mr. Carpinello) When you saw things like this
7 occurring on the road, sir, you didn't ask TTI to do any
8 further analysis; isn't that correct?

9 A. That's correct.

10 MR. CARPINELLO: 1248, Page 7, please? Just -- is
11 this --

12 Q. (By Mr. Carpinello) When you saw accidents like this,
13 you didn't ask TTI to do any further analysis, did you, sir?

14 A. Not that I recall.

15 MR. CARPINELLO: 1249, please?

16 Q. (By Mr. Carpinello) When you saw accidents like this,
17 you didn't ask TTI to do any further analysis, did you, sir?

18 A. I have not.

19 MR. CARPINELLO: I have no further questions.

20 THE COURT: Further cross, Mr. Shaw?

21 MR. SHAW: If we could pull up Plaintiff's Exhibit
22 2 -- or 1286, please?

23 RECROSS-EXAMINATION

24 BY MR. SHAW:

25 Q. (By Mr. Shaw) Mr. Mitchell, this is the memorandum that

1 you were just visiting with Mr. Carpinello about dated
2 October 10th, 2014; is that right?

3 A. Yes.

4 Q. Take a look at the first paragraph under the word
5 background: In general, FHWA's eligibility letters confirm
6 that roadside safety hardware was crash tested to the
7 relevant criteria, that those crash test results were
8 presented to FHWA, and that FHWA confirmed that the device
9 met the relevant crash test criteria.

10 Did I read that correctly?

11 A. Yes, sir.

12 Q. And that was of just last Friday?

13 A. Yes, it is.

14 Q. And that was the position of the FHWA as of last Friday?

15 A. That's correct.

16 Q. And we talk about relevant crash test criteria. Are we
17 talking about the relevant crash test criteria that are set
18 forth in NCHRP Report 350?

19 A. That's correct.

20 Q. To determine whether or not a device is crashworthy?

21 A. That's correct.

22 MR. SHAW: Thank you. That's all I have.

23 THE COURT: Additional direct?

24 MR. CARPINELLO: No further questions, Your Honor.

25 THE COURT: All right. You may step down, Mr.

1 Mitchell. No, he's not excused. He's the corporate
2 representative.

3 MR. SHAW: Can he join us here?

4 THE COURT: Yes, he may join you at the counsel
5 table, certainly.

6 Ladies and gentlemen, before we call the next --
7 or the Plaintiff calls their next witness, we're going to
8 recess for lunch. I'm going to ask you to leave your juror
9 notebooks on the table in the jury room as you leave for
10 lunch. Don't discuss the case among yourselves or with
11 anyone else. That's a very important instruction. That's
12 why I continue to give it to you over and over again.
13 Please be mindful of it, as I know you are.

14 I'm going to ask that you be back in the jury room
15 as close to 12:30 as you can so that we can move forward.
16 You should be ahead of the local lunch crowd and hopefully
17 at the front of the line in any of the local restaurants.

18 So with those instructions, you're excused for
19 lunch at this time.

20 COURT SECURITY OFFICER: All rise.

21 (Jury out.)

22 THE COURT: Court stands in recess for lunch.

23 (Lunch recess.)

24 *****

25

CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/_Shelly Holmes_____
SHELLY HOLMES, CSR, TCRR
Official Court Reporter
State of Texas No.: 7804
Expiration Date 12/31/14

10/16/14
Date

/s/_Susan Simmons_____
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Deputy Court Reporter
State of Texas No.: 267
Expiration Date 12/31/14

10/16/14
Date

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

UNITED STATES OF AMERICA * Civil Docket No.
EX REL JOSHUA HARMAN *
VS. * 2:12-CV-89
* Marshall, Texas
*
* October 16, 2014
*
TRINITY INDUSTRIES, INC. & *
TRINITY HIGHWAY *
PRODUCTS, LLC * 12:30 P.M.

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE RODNEY GILSTRAP
UNITED STATES DISTRICT JUDGE

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13 *****

14 P R O C E E D I N G S

15
16 (Jury out.)

17 COURT SECURITY OFFICER: All rise.

18 THE COURT: Be seated, please.

19 Is the Plaintiff prepared to call their next
20 witness?

21 MR. CARPINELLO: We are, Your Honor.

22 THE COURT: All right. You may go to the
23 podium --

24 MR. CARPINELLO: Thank you, Your Honor.

25 THE COURT: -- Mr. Carpinello.

1 Mr. McAteer, please bring in the jury.

2 COURT SECURITY OFFICER: Yes, sir.

3 All rise for the jury.

4 (Jury in.)

5 THE COURT: Welcome back from lunch, Ladies and
6 Gentlemen of the Jury. Please have a seat.

7 Plaintiff, call your next witness.

8 MR. CARPINELLO: Thank you, Your Honor.

9 Dr. Dean Sicking.

10 THE COURT: Dr. Sicking, if you'll come forward
11 and be sworn, please. No, sir, you'll need to come around
12 to the courtroom deputy.

13 (Witness sworn.)

14 THE COURT: Now if you'll come around and have a
15 seat here at the witness stand.

16 All right. Counsel, you may proceed.

17 MR. CARPINELLO: Thank you, Your Honor.

18 DEAN SICKING, Ph.D., PLAINTIFF'S WITNESS, SWORN

19 DIRECT EXAMINATION

20 BY MR. CARPINELLO:

21 Q. Good afternoon, Dr. Sicking.

22 A. Hello.

23 Q. Dr. Sicking, can you just briefly tell the jury about
24 your educational background, sir?

25 A. I -- I attended Texas A&M University, and I went there

1 in 1976. Got a bachelor's degree in mechanical engineering
2 1980. Graduated summa cum laude from Texas A&M, and then I
3 started a master's degree. At the same time, I started
4 working for Texas Transportation Institute in 1980. And I
5 got a master's degree in civil engineering, structural
6 engineering in 1987, and then in 1992, I got a Ph.D. in --
7 in civil engineering with emphasis in engineering mechanics.

8 Q. Sir, is it fair to say your experienced in the field of
9 guardrail end terminals?

10 A. Absolutely.

11 Q. Is it true, sir, that you're one of the inventors of the
12 ET-2000?

13 A. Yes.

14 Q. And also, isn't it true that you were one of the authors
15 of NCHRP 350 that we've heard so much about it in this case?

16 A. I was the second author of that document.

17 MR. CARPINELLO: Can I have Exhibit 748, please?
18 Could I have the inside page?

19 Q. (By Mr. Carpinello) And that's you listed --

20 A. Yes.

21 Q. -- on Report 350?

22 A. I was the second author, just like it shows.

23 Q. And, sir, can you tell me about some of the projects
24 that you've worked on in the field of safety?

25 A. I've been very successful and blessed to be successful

1 in this area. I developed the first energy-absorbing
2 guardrail terminal, which was the ET-2000. I led that
3 effort.

4 I led the effort to develop the first crash cushion
5 without -- without sacrificial energy absorbers. And I -- I
6 developed -- led the development of the Midwest Guardrail
7 System, which is taken -- taken the country by storm now. I
8 think most states are implementing some version thereof.

9 I developed actually a total of seven full -- seven
10 guardrail terminals that have -- have had significant
11 application in and around -- around the U.S., and most of
12 those have had applications around the globe.

13 And I've been -- I've also developed the SAFER
14 barrier -- let the effort to develop the SAFER barrier for
15 NASCAR. That's now installed on every track that NASCAR
16 runs in, in their top three series on.

17 And I -- I've developed just a whole host of what I'll
18 call niche products like guardrail over curbs and guardrail
19 over long-span culverts and things like that. And I ran the
20 Midwest Roadside Safety facility at University of Nebraska
21 for 28 years. I built that up from nothing into arguably
22 one of the top roadside safety programs on the planet, and
23 we've been very successful.

24 Q. Sir, with regard to guardrail terminals, isn't it true,
25 sir, that you've invented more guardrail terminals than the

1 rest of the industry combined?

2 A. I think that's a fair statement.

3 Q. And with regard to the NASCAR SAFER barrier that was
4 developed by you after Dale Earnhardt's death?

5 A. Correct. We actually started working on it in 1988, and
6 I led the effort, and -- and we actually brought -- brought
7 it to the track in March of 2002, which was like 12 -- 13
8 months after Dale Earnhardt died.

9 Q. Now, you mentioned the Midwest Guardrail System. That's
10 the 31-inch-high guardrail system that the jury has heard so
11 much about in this case?

12 A. Correct. That was -- that was -- I led that effort as
13 well.

14 Q. And have you done anything for the -- with regard to the
15 National Hockey League?

16 A. I developed the first energy-absorbing hockey barrier --
17 hockey boards, which you'll start seeing on -- on rings
18 around the country pretty soon. We believe it's going to be
19 able to cut concussions by more than 50 percent and should
20 just about eliminate the paralyzing accidents that occur
21 when young people slide head-first into the boards and --
22 and get paralyzed. And I think we just might eliminate all
23 those.

24 Q. And are you in discussions with the NFL and the NCAA
25 with regard to football helmets?

1 A. Well, I'm developing performance standards for football
2 helmets. The current performance standards were developed
3 in 1969. They're grossly out of date. I'm leading the
4 effort to develop new football helmet standards. The NFL
5 has narrowed their selection process down to four people,
6 and they say they're going to hire two of them, and I'm on
7 that list of four. So I'm still very hopeful.

8 Q. And, sir, you were awarded the National Medal of Science
9 and Technology by the President of United States?

10 A. Yes. I received that from George Bush in 2007, and that
11 was -- that was for the development of roadside safety and
12 race -- racetrack safety features, roadside and racetrack
13 safety features.

14 Q. Now, you mentioned, sir, that you previously worked at
15 TTI, correct?

16 A. 12 years. I was at TTI for 12 years.

17 Q. You worked with Dr. Buth and Dr. Bligh?

18 A. I worked with Dr. Buth, and I hired Roger Bligh.

19 Q. And you were an associate research engineer at Texas
20 A&M?

21 A. Yes. That was -- that was my title when I left. Of
22 course, that wasn't my title when I started, but worked my
23 way through the system.

24 Q. And you left Texas A&M and went to the University of
25 Nebraska?

1 A. In 1992, when I graduated with my Ph.D.

2 Q. Now, you were sued by Trinity, correct?

3 A. Yes. Yes, I was.

4 Q. And in your previous deposition, the lawyers suggested
5 that your testimony would be biased because you were sued by
6 TTI -- I'm sorry -- by Trinity?

7 A. Yeah. That's what they said, yes.

8 Q. Okay. What -- do you currently have a relationship with
9 Texas A&M?

10 A. Yeah. I -- my wife and I both got three degrees from
11 there. All of my -- I sent all my children there. My son
12 is graduating from Texas A&M in December with a mechanical
13 engineering degree, and he's on the borderline for summa cum
14 laude. And we are very proud of him.

15 Q. And the fact that you left Texas A&M and was sued by
16 Trinity do you think that would influence your ability to
17 give full and impartial and accurate testimony here today?

18 A. Not even a little bit.

19 Q. Now, you -- you know that Dr. Bligh and Dr. Buth are
20 currently still at TTI, correct?

21 A. Yes. I believe Dr. Buth retired.

22 Q. I'm sorry?

23 A. It's my understanding that Dr. Buth has retired.

24 Q. Thank you.

25 And you've had discussions with them over the years

1 about the performance of the ET-Plus, correct, sir?

2 A. Mostly Roger Bligh.

3 Q. Okay. And is it true, sir, that you have expressed your
4 concern to Dr. Bligh about the performance of the ET-Plus?
5 Is that correct, sir?

6 A. A number of times.

7 Q. Okay. Now, is it true, sir, that you were retained by
8 Mr. Harman's lawyers to consult with them with regard to
9 this case?

10 A. Yes, that's true.

11 Q. And did there come a time, sir, when you were contacted
12 by someone from Trinity Highway Products, sir, in the -- the
13 late winter/early spring of 2013?

14 A. I believe actually it was in the fall of 2012 when we
15 first got in contact. That was Greg Neece.

16 Q. And did he contact you, or did you contact him?

17 A. No, he called me.

18 Q. And what did he ask you in the phone call?

19 A. He said their president, Greg Mitchell, and he came
20 to -- to Birmingham the second Tuesday of every month, and
21 in one of those trips, they'd like to meet with me.

22 Q. And did it come about that -- that you were able to meet
23 with them in Alabama at that time?

24 A. No. It was -- we scheduled a -- a meeting for December,
25 and he called me, I think, in early November and we

1 scheduled a meeting in December. And I had to cancel that
2 because I had a trip come up that I had to -- couldn't --
3 couldn't be in Birmingham that day. And then -- then we
4 rescheduled for -- for a TRB meeting, which is a Washington
5 meeting, in January. And for some reason, I believe Greg
6 Mitchell couldn't make that meeting. And then it got
7 postponed to February in San Diego at the ATSA conference.

8 Q. Okay. And what was -- what was discussed at that
9 meeting, sir?

10 A. It was a somewhat strange meeting. We -- we met for
11 seemed like an hour, hour and a half, and first -- bulk of
12 it, we didn't say -- there wasn't really much brought up,
13 but near the end of the meeting, Trinity basically proposed
14 that I -- I -- that they could use my help in determining
15 when they needed to run crash tests based on product
16 revisions to product designs.

17 And my response was that, well, what we do when we have
18 revisions of products is we call up the -- the Federal
19 Highway Administration and say, hey, do you think we need to
20 revise -- run any tests to verify the performance based on
21 this change. And then we do what they tell us.

22 And that was the approach we took, and I thought that
23 made a lot of sense. And I didn't think they needed a
24 consultant. I think they needed to adopt that policy.

25 Q. Was there any discussion about any kind of joint

1 research or development relationship between Trinity and the
2 University of Alabama in that meeting?

3 A. There was some discussion about the -- the possibility
4 of developing some products together. It was all very
5 vague. Of course, we had no non-disclosure agreement, so I
6 wasn't about to bring up any of my ideas, and they -- they
7 didn't either. So it was very vague and not very concrete.

8 Q. Who brought up the idea of a joint development project
9 between Trinity and the University of Alabama?

10 A. I think that was Greg Neece, but I'm not sure.

11 Q. Of Trinity?

12 A. Of Trinity.

13 Q. You didn't raise it; is that correct, sir?

14 A. I did not bring it up.

15 Q. And did anything come about as a result of these
16 conversations about the joint -- a joint project?

17 A. Well, they -- they basically before -- before anything
18 could happen, we had to get a non-disclosure agreement
19 going, and Greg sent one to me and I forwarded it to my
20 people, my -- the attorneys for the university. And they
21 wound up basically making some revisions, sending it back to
22 Trinity.

23 And at some point, Trinity stopped responding, and so
24 our lawyers called me and told me we're just going to drop
25 this, and they eventually did.

1 Q. Now, did there come a time when you heard from either
2 Mr. Mitchell or Mr. Neece again?

3 A. Yes. I think it was mid to late February of 2014, this
4 year, Greg Mitchell called me up.

5 Q. And what'd he say, sir?

6 A. He said: I hear you've been looking into ET-Plus
7 crashes and cutting some heads apart.

8 Q. Just -- just generally, sir. Don't --

9 A. I'm sorry.

10 Q. That's okay.

11 MR. MANN: Your Honor, may we approach the bench?

12 THE COURT: Approach the bench.

13 (Bench conference.)

14 MR. MANN: Your Honor, this is exactly what
15 they said they weren't going to do.

16 THE COURT: I'm sorry?

17 MR. MANN: This is exactly what they said they
18 weren't going to do. Cutting heads apart, opening the door
19 to this informal study that -- and that's exactly what you
20 told them not to go into. And that's their job to get their
21 witness ready, not to start talking about things. The
22 Court's already ruled, even in chambers this morning, that
23 we were not going into any of those matters. And --

24 THE COURT: I'll instruct the jury to disregard
25 the answer about heads being cut.

1 MR. MANN: Well, Your Honor, I think all that does
2 is draw -- honestly draw more attention to it, so...

3 THE COURT: Are you asking me not to instruct the
4 jury?

5 MR. MANN: I don't think we want --

6 MR. SHAW: We don't want an instruction.

7 THE COURT: I'll follow the Defendants' request.

8 MR. MANN: But I -- right, Your Honor, but I'd ask
9 they be instructed just not to go any further into it, as
10 you've already made it very clear on that matter.

11 THE COURT: I think -- I think Mr. Carpinello
12 understands that.

13 MR. CARPINELLO: I do. I told the witness don't
14 even mention concerns and not to give any details.

15 MR. MANN: That's all we need then.

16 THE COURT: All right.

17 MR. MANN: Okay.

18 (Bench conference concluded.)

19 THE COURT: Let's continue.

20 Q. (By Mr. Carpinello) So you -- you had a conversation
21 with Mr. Mitchell, correct?

22 A. Correct.

23 Q. And did he ask to come to the University of Alabama and
24 meet with you?

25 A. He did.

1 Q. And did he do that?

2 A. Yes.

3 Q. Approximately when did he come to the University of
4 Alabama?

5 A. I believe it was early March of this year.

6 Q. Okay. And did you meet with him at the University of
7 Alabama?

8 A. I did.

9 Q. During this conversation, did Mr. Mitchell, again,
10 discuss with you the possibility of doing some kind of joint
11 project between Trinity and University of Alabama?

12 A. I believe there was some discussion --

13 Q. Okay.

14 A. -- on that.

15 Q. Did there come a time, sir, when Mr. Mitchell raised
16 with you the fact that he had heard that you had concerns
17 about the performance of the ET-Plus?

18 A. Yes, he did.

19 Q. Did -- during the conversation, did Mr. Mitchell raise
20 the issue of this trial coming up?

21 A. He did.

22 Q. Did Mr. Mitchell ask you whether you were going to be
23 testifying at the trial?

24 A. Yes, he asked me if I was going to testify.

25 Q. During this conversation, did Mr. Mitchell suggest to

1 you that it was Trinity's intention that they would smear
2 and ruin the representation of Mr. Harman at this trial?

3 A. Yes.

4 Q. Did he use those words, sir?

5 A. I believe he did.

6 Q. And -- and what else did he say, sir?

7 A. He went on to say that we plan to treat all the
8 witnesses for -- for Mr. Harman the same way. And -- and I
9 looked at him and I was a little surprised by that and then
10 he said, I hate to see that happen to you.

11 Q. Did you take that as a threat, sir?

12 A. I did.

13 Q. Did you report this conversation to your Dean of the
14 school?

15 A. Right. The Dean is my immediate supervisor. I felt
16 like it was appropriate to -- and necessary to report it to
17 him, and I reported it to him that same day.

18 MR. CARPINELLO: No further questions, Your Honor.

19 THE COURT: Cross-examination.

20 MR. MANN: Thank you, Your Honor. May it please
21 the Court.

22 CROSS-EXAMINATION

23 BY MR. MANN:

24 Q. Dr. Sicking, you remember back in July that both
25 yourself and Mr. Carpinello and me sat at this very table

1 right here and took your deposition? Do you remember that?

2 A. I remember that.

3 Q. And I assume you've had a chance to review what you said
4 on that day?

5 A. I reviewed it a month or so ago.

6 Q. Okay. So you've had a chance to review what you
7 actually said that day under oath, correct?

8 A. Correct.

9 Q. All right. I want to go through a little of that
10 because I -- I feel like that you and I will agree on some
11 things. And that is first of all, this meeting that took
12 place in San Diego back in early 2013, isn't it true that no
13 discussion at all of this particular litigation came up?

14 A. Discussion of litigation came up, and -- and I don't
15 know what it was because obviously it was brought up by
16 Trinity. They said, are you going to testify against us?

17 Q. All right. And they asked you, and you told them no?

18 A. Exactly.

19 Q. All right. You told them that you would not see -- in
20 your words, not see me across the table from you in that
21 case; isn't that correct?

22 MR. CARPINELLO: May we approach, Your Honor?

23 THE COURT: Approach the bench.

24 (Bench conference.)

25 MR. CARPINELLO: I don't think he should be -- I

1 don't think it's proper for him to go into and try to
2 impeach Dr. Sicking about whether he was going to come here
3 or not given the circumstances of why he's here, none of
4 which is -- we were allowed to go into in front of the jury.

5 So I don't think this line of questioning about
6 didn't you tell them you weren't going to appear and now
7 he's here is improper because we can't explain -- I can't
8 explain on redirect why he's here now.

9 THE COURT: If he opens the door, you can.

10 MR. CARPINELLO: Okay.

11 MR. MANN: It's the facts of the situation, Your
12 Honor. I mean --

13 THE COURT: Well, there are a lot of facts.

14 MR. MANN: Yeah.

15 THE COURT: But some of the facts we're not going
16 into.

17 MR. MANN: Right. I understand that.

18 THE COURT: And those that go into them open the
19 door to the other side going into them.

20 MR. CARPINELLO: May I get a ruling that he's
21 opened the door because I don't want --

22 MR. MANN: Well, I don't know what I would have
23 opened the door to, Your Honor, because the fact is it's
24 part of -- the question of whether he was going to be here
25 or not goes to the issue of whether he was intimidated or

1 not. I think it's very important for the jury to be able to
2 hear when that the conversations took place between Mitchell
3 and -- and Dr. Sicking, he was being told that Dr. Sicking
4 was not even going to be involved in this case because that
5 goes right to that issue. That's the only reason I'm
6 bringing it up. I'm not bringing it up for any other
7 reason.

8 THE COURT: Well, if you brought up the fact that
9 he said he wasn't going to be involved in this case, then I
10 think Mr. Carpinello has a right to address why he's
11 involved in this case, but only enough to cure that, okay?

12 MR. MANN: Well, and it's according to what
13 they're going to try to say is -- to cure it. I mean,
14 because -- he's here because the ruling by the Court that
15 the issue on intimidation was the issue that we weren't
16 going to go into.

17 THE COURT: Well, I think he's entitled -- I think
18 he's entitled to show that -- after the visit to Birmingham,
19 he was threatened.

20 MR. MANN: Right. I think we've gone into that.

21 THE COURT: That that changed what he intended to
22 do back in February and that he -- and that he's now
23 participating in the case, notwithstanding what he may have
24 said in February.

25 MR. MANN: Yeah. And that's -- I don't think

1 that's a --

2 THE COURT: That's what you're intending to do.

3 MR. CARPINELLO: That's exactly what I'm going to
4 do.

5 MR. MANN: Yeah, I -- I don't think that's an
6 issue.

7 THE COURT: Gentlemen, we can't do this with a
8 trip to the bench every two questions, so let's try to move
9 forward.

10 MR. MANN: Okay.

11 (Bench conference concluded.)

12 THE COURT: All right. Let's continue.

13 MR. MANN: Thank you, Your Honor.

14 Q. (By Mr. Mann) Now, Dr. Sicking, in that conversation,
15 as you said, it was decided that you would try to help
16 Trinity with certain projects; is that correct?

17 A. I wouldn't say that at all.

18 Q. Well, let's look at -- you said that you tried to enter
19 into a non-disclosure agreement, at least for the
20 university; is that right?

21 A. Correct.

22 Q. All right.

23 MR. MANN: And let's pull up D-395.

24 Q. (By Mr. Mann) Do you recognize this, Dr. Sicking,
25 D-395, the cover letter?

1 A. I see that, yes.

2 Q. Okay. This was back right after you had had the meeting
3 with them in San Diego; is that correct?

4 A. Correct.

5 Q. In February of 2013?

6 A. Correct.

7 Q. And it was followed up with this letter from Greg Neece
8 with warm regards from Greg, and you know that to be Greg
9 Mitchell, correct?

10 A. Yeah.

11 Q. All right. And where they were asking for you, along
12 with the University of Alabama, to look at a non-disclosure
13 agreement, correct?

14 A. Yes, absolutely.

15 Q. All right. And let's just go further in this cover
16 letter. It says: Perhaps your folks could review within
17 the next couple of weeks, opening up the possibility of us
18 visiting on specific details/concept/et cetera in early
19 April.

20 Is that right?

21 A. That's correct.

22 Q. At either our facility in Pell City or your office in
23 Alabama; is that right?

24 A. Right.

25 Q. And where we can be sure, Pell is near Birmingham; is

1 that right?

2 A. About 30 miles or so.

3 Q. Okay. And then Mr. Mitchell tells you: Please advise
4 of anything else you may need and confirm receipt of this
5 email as your time permits. Warm regards, Greg.

6 Is that right?

7 A. That's what it says.

8 Q. All right. Now, would you say that this is a follow-up
9 of a cordial meeting in San Diego?

10 A. This was follow-up of a meeting where we -- we basically
11 said we would look into exploring opportunities. We did not
12 agree to do anything with them.

13 Q. Okay. What I'm asking you is the meeting in San Diego
14 was a cordial meeting, wasn't it?

15 A. Yeah, it was cordial.

16 Q. Okay.

17 A. I don't have a problem with that.

18 Q. Okay. Because you probably didn't just talk about
19 business. You probably talked about football and the
20 current events and things like that?

21 A. Most of the time.

22 Q. Okay.

23 MR. MANN: And then on the next page, Page 0002,
24 Mr. Hernandez, let's go up to where purpose, Paragraph No.
25 1.

1 Q. (By Mr. Mann) It says: This agreement is entered into
2 to assure the protection and preservation of con --
3 confidential and/or proprietary nature of information to be
4 mutually disclosed or made available by the parties in
5 connection with discussions related to certain of Trinity's
6 products to include design, development, manufacturing, and
7 assembly of current, as well as future products.

8 Right?

9 A. That's what their proposed agreement said.

10 Q. All right. That's the contemplated transaction, as it
11 said; is that correct?

12 A. That's what it says.

13 Q. Okay. And you agreed to look at that, along with the
14 University of Alabama's lawyers, to see if a non-disclosure
15 agreement could be entered into?

16 A. I agreed to send this to my lawyers, which I did.

17 Q. Well, I'm assuming you were agreeable to it, weren't
18 you?

19 A. Well, of course, we could sign this, but --

20 Q. Sure.

21 A. -- doesn't mean we were going to do anything. There was
22 no real agreement to do anything. We didn't talk about any
23 particular projects.

24 Q. All right.

25 A. It was just a general concept that we might discuss some

1 things.

2 Q. All right. And the reason you didn't talk about any
3 projects was because you didn't have a non-disclosure
4 agreement, did you?

5 A. Correct. I mean, it was not possible to -- to agree to
6 do anything until -- until we talked about projects.

7 Q. All right. Let's talk just a little bit about
8 non-disclosure agreements and why you would want that.

9 Isn't it true at the University of Alabama, just like
10 any other university you've worked at, there is research and
11 development going on?

12 A. Correct.

13 Q. And when you have research and development going on at a
14 university, isn't it typical procedure that you don't
15 disclose that to anybody because that's why it's called
16 research and development, it's done in confidence, correct?

17 A. Correct.

18 Q. All right. You do that in confidence because you don't
19 want anybody else to get your ideas; isn't that correct?

20 A. Without a doubt.

21 Q. Okay. So it would not be unusual, if you're doing
22 research and development, that that's kept within the
23 university where that experimentation is going on; is that
24 right?

25 A. Yes.

1 Q. That's exactly how you do it, correct?

2 A. Yes.

3 Q. And you wouldn't be critical of anybody else that did it
4 that way, would you?

5 A. I'd be surprised if you didn't have it.

6 Q. Okay. You would be surprised in research and
7 development if you were telling anybody about the project,
8 wouldn't you? Outside of the university, wouldn't that be
9 true?

10 A. Depends on how much protection you have, but, yes,
11 that's true.

12 Q. All right. That would have been true at Midwestern
13 facilities where you worked in Nebraska, correct?

14 A. Midwest Roadside Safety facility.

15 Q. That'd be true there, wouldn't it?

16 A. Yes.

17 Q. It would be true at TTI or Texas A&M, wouldn't it?

18 A. I -- I believe so.

19 Q. Now, after that, Dr. Sicking, there was a follow-up on
20 D-396?

21 MR. MANN: If I could have that, Mr. Hernandez?

22 Q. (By Mr. Mann) This is Eloise Gooden. Is that the
23 university's lawyer or who is that?

24 A. She is the grants and contracts specialists that would
25 be -- that would be basically the -- the sponsored programs

1 officer on my -- my projects.

2 Q. Okay.

3 A. So she's -- she's -- she's not the lawyer, but she sends
4 it to the lawyers.

5 Q. All right. Would you say she's kind of the one in
6 charge of making sure paperwork gets back and forth from the
7 lawyers?

8 A. That's a fair statement.

9 Q. All right. And she is contacting Greg Neece, who you --
10 you met with out in San Diego with Mr. Mitchell; is that
11 right?

12 A. Correct.

13 Q. All right. And I won't read the whole document, but are
14 you familiar with this document?

15 A. I think I was copied on it.

16 Q. I -- I think you were up here -- at least in the subject
17 line. I've got to believe you probably got it, but it
18 doesn't show that.

19 THE COURT: Mr. Mann, is that a question?

20 MR. MANN: It is a question, Your Honor.

21 THE COURT: Let's phrase it as a question.

22 MR. MANN: Yes, sir.

23 Q. (By Mr. Mann) Did you get it?

24 A. I believe I did.

25 Q. All right. And the -- the fact is, if we go to the next

1 page, do you agree that what was being sent back was the
2 response from the University of Alabama on what the
3 confidentiality agreement should have in it?

4 A. Right. That was -- that's the way it works.

5 Q. All right.

6 A. But it's -- they get a CDA into the university, then
7 they mark it up, send it back with every suggested revision.

8 Q. There's give and take, back and forth; is that right?

9 A. Normally.

10 Q. All right. And then let's go to D-400. You see a -- an
11 email here. And have you ever seen this email? And I'll
12 give you a chance to look at it.

13 A. Yeah, I think it's the scheduling of meetings for
14 December 2013.

15 Q. All right. Is this the meeting that -- that didn't take
16 place that got delayed?

17 A. The dates are wrong.

18 Q. Okay. You think this should be December -- February of
19 2014?

20 A. So I think this was the one that was 2012. No, it's
21 from 2012, that -- yeah, this was -- this was the second
22 meeting because this -- this is dated 2013. This is not the
23 San Diego meeting.

24 Q. Okay. And if that's your memory, what I wanted to ask
25 you is, at the bottom, it talks about notes from the 2012

1 meeting; is that correct?

2 A. It's the notes from 2012 -- December 07, 2012. We never
3 had a meeting then.

4 Q. Okay.

5 A. That was a phone call.

6 Q. It looks like a phone call. And do agree that on that
7 phone call, it says Dean -- that would be you, wouldn't it
8 be, Dr. Sicking -- Dean?

9 A. Yes.

10 Q. Dean mentioned the UAB Development and Innovation Fund,
11 reportedly a half-million-dollar -- half million grant for
12 research projects for products that will be made in
13 Alabama -- must have an industry sponsor. Will provide
14 information during the meeting.

15 A. Right.

16 Q. That's because you told them that you knew about the UAB
17 Development and Innovation Fund where there was going to be
18 a half-million-dollar grant and you needed somebody to help
19 sponsor it that was in business, correct?

20 A. Yeah. Again, this is not totally accurate. This is a
21 very -- not -- I'm not saying it's -- I'm not criticizing
22 the note, but what I told him was that this was making its
23 way through the Alabama legislature and if it got granted,
24 we -- we possibly could do something --

25 Q. All right.

1 A. -- but it never actually got through the legislature.

2 Q. That's something you brought up to them that they didn't
3 know about, did they?

4 A. Yes, that's right.

5 Q. All right. So this would be -- I'm sorry, were you
6 through?

7 A. As it turns out, it was a red herring. It never made it
8 to the legislature.

9 Q. Okay. But the fact is back at this time, you had
10 proposed to them, I have some business that I may want to do
11 with you if we can get this grant; wouldn't that be true?

12 A. What I was saying was that, you know, if we can come to
13 an agreement on development of a product, we might be able
14 to get the Alabama government to pay for part of the
15 development.

16 Q. All right. So, again, let me ask you. It wouldn't be
17 unusual for a university to be getting state funds to
18 develop things at a university, correct?

19 A. That's not unusual.

20 Q. All right. That happens at the University of Alabama,
21 correct?

22 A. Yes.

23 Q. Happened at the University of Nebraska, didn't it?
24 Similar type thing?

25 A. I can't remember that ever happening.

1 Q. Happens at Texas A&M University, wouldn't you think?

2 A. Certainly does.

3 Q. All right. And it says: Dean mentioned he has a copy
4 of ideas for new products that we might be interested in.
5 We will need to get the NDA in place prior to discussing
6 details.

7 That NDA would be a non-disclosure agreement, right?

8 A. Right.

9 Q. All right. And then the address is here where that
10 non-disclosure agreement can be mailed to see if that can be
11 worked out, correct?

12 A. Correct.

13 Q. All right. So we move on -- Defendants' Exhibit 401,
14 have you seen that, sir?

15 A. August 13 -- yeah, this is four months later after
16 Eloise's reply to -- to Greg Neece.

17 Q. Right. And that four months later, the discussions were
18 still taking place in the non-disclosure agreement, but it
19 never occurred; isn't that right?

20 A. It never occurred. I don't know whether any discussions
21 were going on prior to this email.

22 Q. The last discussion was in August of 2013, wasn't it?

23 A. The last communication that we had.

24 Q. Last communication. Does that meet with your memory?

25 A. Yeah, I think that's probably right.

1 Q. All right. So the fact is you and Trinity were having
2 ongoing discussions about business that they had proposed
3 and you had proposed; isn't that right?

4 A. The possibility of exploring. We never had any business
5 dealings.

6 Q. Okay. Okay. And I'm not saying you did. I'm just
7 saying there were discussions going back and forth that --
8 where that discussion was taking place where you were both
9 proposing to work together?

10 A. There was some discussions to that effect.

11 Q. Now, when this was going on with Mr. Mitchell, did
12 Mr. Mitchell tell you when he called you the very first
13 time that I know there's been some bad blood between you
14 and Trinity and Texas A&M; I'm the new president here;
15 and I want to try to make things work? Didn't he tell
16 you that?

17 A. When he called me?

18 Q. Yes, sir.

19 A. The first call I got from Greg Mitchell was the one
20 that --

21 MR. MANN: Excuse me, Your Honor. I think he's
22 being non-responsive. I'm just asking is that the
23 conversation that took place. I object to the
24 non-responsiveness.

25 THE COURT: Well, you asked him about the phone

1 call. He's trying to give you his recollection of the phone
2 call.

3 MR. MANN: Your Honor, if that's -- I thought I
4 asked him if the conversation took place as I told him.

5 THE COURT: Reask your question, Counsel.

6 Q. (By Mr. Mann) When -- when Mr. Mitchell called you and
7 said I'd like to meet with you, didn't he tell you he was
8 the new president at Texas -- Trinity Highway Products?

9 A. No.

10 Q. Did you know him before then?

11 A. Yes.

12 Q. All right. You knew that he was a new president for
13 Texas -- Trinity Highway Products, didn't you?

14 A. I met him in -- in February of 2013.

15 Q. Okay. But you knew he was pretty new on the job in
16 Trinity Highway Products, didn't you?

17 A. Right.

18 Q. All right. And you knew that you had had some issues
19 between you and Trinity and Texas A&M on some patents you
20 had in the past, didn't you?

21 A. That's correct.

22 Q. All right. In fact, to the point where you told me when
23 we were seated here at this table and you told -- told us in
24 other hearings that Trinity has a reason to be worried about
25 what I'm going to say, because I think they should have to

1 have a reason to be worried. Haven't you said that, sir?

2 A. You know, basically I did say that, but let's put this
3 in context.

4 Q. Well, let --

5 A. I -- I am the --

6 MR. MANN: Your Honor, I object to the
7 non-responsive --

8 THE COURT: Yeah. You've answered the question,
9 Dr. Sicking. Mr. Carpinello can go into it further on
10 redirect, if he chooses to.

11 THE WITNESS: Okay. Thank you.

12 THE COURT: Let's proceed, Mr. Mann.

13 Q. (By Mr. Mann) What you were talking about, when you told
14 me that, was that you had a product that you and Texas
15 A&M -- you had that competed with Texas A&M, didn't you?
16 With a -- with a patent that Texas A&M had, didn't you?

17 A. That was what was the basis for the -- one of the
18 lawsuits -- one of the five lawsuits was based on that.

19 Q. All right. And that was over some patents that they
20 claim that you had come up with while you were at Texas A&M;
21 isn't that right?

22 A. The claim was that I had conceived these products at
23 Texas A&M, didn't tell anybody about it for four years,
24 after I left A&M, and developed another product which was
25 inferior to the ones that -- that came out later. And

1 then -- then finally four years after I left, they -- they
2 claimed I -- I pulled this off the shelf and -- and
3 developed it, which was absolutely ludicrous.

4 Q. Well, the fact is, in that case, you ended up paying for
5 that violation, \$730,000, didn't you?

6 A. That's totally wrong.

7 Q. Have you said that before that that's what happened?

8 A. No, I never said that before.

9 Q. Okay. Well, are you saying that that did not happen?

10 A. I'm saying that did not happen.

11 MR. MANN: Mr. Hernandez, would you turn to Page
12 142, Line 7 through 15.

13 Q. (By Mr. Mann) Let's look at Line 7 through 15, Doctor.
14 I read through your deposition, but I think you had to pay
15 Trinity, what, 2 million?

16 And your answer was: No, we did not pay Trinity
17 2 million.

18 QUESTION: Well, what did you pay them?

19 ANSWER: We paid them what our attorney estimated would
20 be the attorney's fees to take the case through trial.

21 And I said: How much was that?

22 You said: \$730,000.

23 Let's go a little bit further.

24 And so you did have to pay -- also did have to pay some
25 legal fees on behalf as a part of that case.

1 ANSWER: We had to pay our own legal fees.

2 And the question was: I've read in the depositions where you
3 have estimated the figure to be about 4 million.

4 Is that correct?

5 A. Yes.

6 Q. Is that correct?

7 A. Yes.

8 Q. All right.

9 A. But not -- not really.

10 Q. All right. The fact is --

11 A. That's deceiving.

12 Q. Well, the fact is, the judge in that case imposed a
13 730,000-dollar settlement in the case, didn't he?

14 A. In the --

15 Q. Or she?

16 A. In the case filed here in Marshall that we discussed
17 just a few minutes ago, that's not true.

18 Q. Well, did you testify to that right here under oath in
19 this deposition, sir?

20 A. I testified to the fact that we paid these fees for the
21 patent violation case that was filed in Beaumont. This --
22 this was imposed by the Beaumont judge, and he basically
23 ordered that the -- that the Marshall -- Marshall claims,
24 which was filed here in Marshall that you talked about
25 earlier, the ridiculous claim that I developed this product,

1 conceptualized this product before leaving A&M, and then
2 waited four years to develop it, and in the meantime,
3 developed an inferior product in between then, and then
4 pulled it off the shelf four years later.

5 That was thrown in by the judge in Beaumont. This is a
6 stupid case we're going to throw this out, but we're going
7 to make you pay your attorney's fees, basically the cost of
8 buying your verdict is what our attorney told us in the
9 Beaumont case, which was -- which was a different case
10 altogether.

11 Q. Well, this stupid, screwy case, as you say it was, was
12 where you paid to Texas A&M \$730,000, correct?

13 A. No.

14 Q. So that answer was not correct?

15 A. The -- the 730,000 -- remember, I said there were five
16 patent -- there were five claims, five cases, two filed here
17 in Marshall, three -- no, three filed here in Marshall. I
18 got two filed here in Marshall and three in Beaumont. The
19 three cases in Beaumont, which where we paid the \$730,000
20 dollars, basically the cost of the verdict fee, was they
21 claimed that the best terminal -- a terminal that cut the
22 guardrail into shreds before it -- and never flattened it,
23 just cut it into pieces, Trinity and A&M claimed that
24 violated the ET-2000 patent because it flattened the
25 guardrail by -- because -- and -- and so it cut the

1 guardrail into pieces, they said that was the equivalent to
2 flattening it, and so they're -- they're suing us based on
3 patent infringement of that product.

4 And there was another product, the -- the SKT, which is
5 the sequential kinking terminal, again, it has no -- no
6 place in the -- in the impact head where -- where it's
7 narrower than 4 inches wide. And they were claiming that
8 that violated the ET-2000 patent as well.

9 And the third -- third case was the FLEAT case.

10 Q. Excuse me, Dr. Sicking. Hold on just one moment.

11 MR. CARPINELLO: Your Honor, let him finish the
12 question. He asked --

13 MR. MANN: Well, my question --

14 THE COURT: Just a minute. Let me hear from you,
15 Mr. Mann.

16 MR. MANN: I think my question was, Your Honor,
17 wasn't that an imposed settlement by the Court.

18 MR. CARPINELLO: And he's explaining the answer.
19 He's explaining -- I think it's a little complicated, but --

20 MR. MANN: Your Honor, it's just a yes or no
21 answer. If he doesn't want to agree, I think he can say no
22 there. He didn't say yes.

23 MR. CARPINELLO: He did say no, and then he asked
24 a follow-up question.

25 THE COURT: Well, you let him run a long time

1 before you raised that.

2 MR. MANN: Well, Your Honor, I was trying to be
3 nice to the witness.

4 THE COURT: Let's do this, gentlemen. Rephrase
5 your question or move on, Mr. Mann.

6 MR. MANN: I'm going to move on, Your Honor.

7 Q. (By Mr. Mann) Let me just ask you, Doctor, if you turn
8 to the Brandt deposition, Page 87, 15 through 23.

9 THE COURT: Dr. Sicking, while this is coming up,
10 I am going to instruct you to limit your answers to the
11 questions asked as best as you can. And to the extent that
12 counsel for the other side thinks they need to be gone into
13 further, they have the right to do that on redirect. But
14 you need to limit your answers to the questions asked.

15 THE WITNESS: Yes, Your Honor.

16 THE COURT: That doesn't mean that everything is a
17 yes or no answer, but limit your answer to the questions
18 asked.

19 THE WITNESS: I'll do my best.

20 THE COURT: Thank you.

21 All right. Mr. Mann, let's proceed.

22 MR. MANN: Your Honor, I think we're having
23 difficulty with the -- so I'm going to put it on the ELMO.
24 That will save us a little bit of time, Your Honor.

25 Q. (By Mr. Mann) Doctor, do you remember the Brandt

1 deposition where you gave testimony?

2 A. I do.

3 Q. Do you remember being an expert in that case? Were you
4 an expert?

5 A. Yes.

6 Q. All right. That was other litigation involving a state,
7 wasn't it?

8 A. Correct.

9 Q. And you were acting as an expert for who in that case?

10 A. MDOT.

11 Q. For Missouri --

12 A. MDOT, Missouri DOT.

13 Q. -- DOT. And on Page 87, Line 15, if you can follow
14 along with me, you were asked by that lawyer in that case:
15 And why did you think that they asked you that question?
16 Why do you think anyone at Trinity would be curious about
17 what you have to say?

18 There's an objection, and then you said: Since they
19 sued me, it cost me 4 million to defend myself. I think
20 they have a reason to be worried.

21 Is that what you said?

22 A. That's what I said.

23 Q. All right. So at the time Mr. Mitchell called you in
24 late 2013 to meet in 2014, that deposition had been taken
25 several years ago, hadn't it?

1 A. Okay. Your premise to the -- to the -- preface to this
2 question was wrong. So ask it again, please.

3 Q. At the time that the call was made to you about meeting
4 in 2014, this deposition had already been taken where you
5 say --

6 A. Many years before.

7 Q. -- about Trinity needing to be worried, correct?

8 A. That statement.

9 Q. Is that right?

10 A. Correct.

11 Q. All right. So you told Mr. Mitchell, come on, and I
12 will meet you in Alabama, right?

13 A. Correct.

14 Q. And when he called you, he asked you, do you have any
15 type of agreement with Mr. Harman or his lawyers, didn't he?

16 A. No, he didn't.

17 Q. The fact is he -- did he ask you whether you were going
18 to be involved in this particular case?

19 A. He did not say that.

20 Q. All right. So when he showed up in Alabama to meet with
21 you, what, the meeting lasted an hour and a half?

22 A. Something like that, maybe a little longer.

23 Q. And most of the time when you were talking to -- to Mr.
24 Mitchell, you talked football, didn't you?

25 A. A variety of topics, football was one of them.

1 Q. All right. Nothing to do with any case, nothing to do
2 with any work, just talk you would have man-to-man, correct?

3 A. More than half of it, yes.

4 Q. All right. And then he asked you, do you have any type
5 of an agreement with Mr. Harman or his lawyers, didn't he?

6 A. He did not say that.

7 Q. Well, have you previously told me that, Doctor?

8 A. I don't believe I did.

9 Q. Well, let me go ask you, on Page 14, Line 16: And
10 during the whole -- and this is a question to you: And
11 during the whole time that you talked with him, when he
12 started talking about the Harman case, you never disclosed
13 to him that you had a consultation agreement with Boise
14 Schiller, did you?

15 A. That's true.

16 Q. Now, Doctor, would you consider yourself to be what I
17 would call litigation savvy?

18 A. I wouldn't say that.

19 Q. I mean, you've testified in a number of cases before,
20 haven't you?

21 A. That would be true.

22 Q. All right. You understand when you're an expert in the
23 case that lawyers will be asking you hard questions a lot of
24 times, correct?

25 A. Of course.

1 Q. You understand when you're in litigation, just like in
2 this case, that hard questions are asked by both sides, you
3 understand that?

4 A. Of course.

5 Q. You understand by having been in cases that if you're an
6 expert or have a consultation agreement with one side, that
7 would be pretty important for the other side to know,
8 wouldn't it?

9 MR. CARPINELLO: Objection, Your Honor. Totally
10 improper question. He's --

11 THE COURT: State your objection.

12 MR. CARPINELLO: He's trying to insinuate an
13 obligation that doesn't exist, and it's a legal conclusion,
14 and it's also wrong. And he's -- this person is not
15 qualified to testify what he has an obligation as an expert
16 witness in another case. That's an issue of law he's not
17 qualified to testify about.

18 THE COURT: I'll sustain the objection as calling
19 for a legal conclusion.

20 Q. (By Mr. Mann) Well, Dr. Sicking, I'm not asking about an
21 obligation. I'm asking about you know it would be important
22 for the other side to know --

23 MR. CARPINELLO: Objection. Same question.

24 MR. MANN: Your Honor --

25 MR. CARPINELLO: He -- he's not an expert in

1 litigation or in ethics. And for Mr. Mann to say it would
2 be important for the other side to know is -- is a question
3 that's inappropriate. It's an opinion question. He's not
4 here as an expert. He's certainly not an expert on the
5 ethics of expert opinions.

6 THE COURT: Mr. Mann, you may respond.

7 MR. MANN: Your Honor, the importance of it is, is
8 when he's talking to Mr. Mitchell, it would be important for
9 Mr. Mitchell to know whether he actually has some type of
10 relationship with the other side of a case in order to know
11 whether to continue the conversation. That's why it's
12 important.

13 I'm not asking for a legal conclusion. But
14 Dr. Sicking, being a professional in the area, knows that
15 the other side should know that he has a connection with the
16 other side. I'm not -- that's all that question is for. It
17 would alert Mr. Mitchell.

18 THE COURT: Gentlemen, are these questions not
19 about an agreement that never got signed?

20 MR. CARPINELLO: No, they are not.

21 THE COURT: There's not a signed consulting
22 agreement or --

23 MR. CARPINELLO: Oh, I'm sorry.

24 MR. MANN: Yes, there is.

25 MR. CARPINELLO: Yes.

1 MR. MANN: Yes, there is, Your Honor.

2 MR. CARPINELLO: Yes, there is.

3 THE COURT: All right.

4 MR. CARPINELLO: But -- but my point is, Your
5 Honor, Mr. Mann is trying to insinuate that Mr. Sicking --
6 Dr. Sicking had an obligation to tell him about his
7 consulting relationship, which -- which is an assumption
8 that Dr. Sicking knew Mr. Mitchell was coming to Alabama to
9 talk about this case instead of what he said he was going to
10 come to talk about.

11 THE COURT: All right. I'm going to allow the
12 question, and I'm going to allow Mr. Carpinello to go back
13 into it and explore it further on redirect, if he deems it
14 appropriate. Let's move on.

15 MR. MANN: Thank you, Your Honor.

16 Q. (By Mr. Mann) Dr. Sicking, all I want to know is, you
17 know that if you're talking to Mr. Mitchell and you have a
18 relationship with the other side of a case that he's talking
19 to you about, do you feel like it would be important for
20 you, just as an expert, to let him know?

21 A. That's not something that I would -- I would do, unless
22 I got the permission of my -- my client to tell him about
23 it.

24 Q. Okay. So --

25 A. Because I know there's certain -- I'm not a legal

1 expert, but I know there's certain rules about disclosing
2 attorney work product and stuff like that, and I don't
3 understand all that, so --

4 Q. I'm not asking you about any of that, Doctor. All I
5 want to know is, if you know you're working for the other
6 side of a case, and somebody -- if I came to talk to you,
7 for instance, let's say hypothetically, you've got an
8 agreement with one side of the case, I'm on the other side,
9 okay? You understand that?

10 A. Yes.

11 Q. Hypothetically, if I came to talk to you, you know
12 that's not appropriate. I'm not -- I should not talk to
13 you, because you're on the other side of the case without
14 the lawyer being there. You understand that?

15 A. If you say that -- if you say so. I don't know that.

16 Q. Okay. Well, bottom line is, you didn't tell
17 Mr. Mitchell you had a consultation agreement with Boise
18 Schiller, the law firm, did you?

19 A. That's true.

20 Q. You didn't tell Mr. Mitchell when he was coming to talk
21 to you that you had a consultation agreement where you were
22 helping Mr. Harman with his side of the case, did you?

23 A. I did not tell him that.

24 THE COURT: Okay. Now, let's move on.

25 Q. (By Mr. Mann) And so when you started talking and when

1 he started talking about this particular case, you didn't
2 say anything else about it, did you?

3 THE COURT: Mr. Mann, that's been covered. Let's
4 move on.

5 Q. (By Mr. Mann) Now, when -- when you -- when Mr. Mitchell
6 talked to you and you said you felt threatened, he never
7 threatened you physically, did he?

8 A. No, he never threatened me physically.

9 Q. He never affected you professionally, did he?

10 A. That remains to be seen.

11 Q. You don't know of anything that he has done to affect
12 you professionally, has he?

13 A. Well, it's difficult to say how much the -- this
14 tremendously broad disclosure agreement or the production
15 request for documents, how much that affected the -- the --
16 my administration. We'll have to see.

17 MR. MANN: Let's turn to Page 35, Line 11.

18 Q. (By Mr. Mann) In July when I got a chance to talk
19 to you, Dr. Sicking, I said: So, Dr. Sicking, has there
20 been anything that Trinity or Texas A&M have done to
21 affect your professional standing in the community?

22 ANSWER: Not to my knowledge.

23 QUESTION: Has there been any threat carried out
24 against you that you know about?

25 ANSWER: Not to my knowledge.

1 Is that correct?

2 A. That's correct. This is before the incident I just
3 referred to.

4 Q. And the fact is, Dr. Sicking, after Mr. Mitchell left
5 your office that day, you didn't -- you never called any of
6 the lawyers you had a consultation agreement with to tell
7 him he had been there, did you?

8 A. No, I don't think I did.

9 Q. All right. And when I asked you -- let's turn to Page
10 32, Line 21. I asked you: And you really weren't worried
11 about professionally being -- about being professionally
12 threatened, were you?

13 ANSWER: Because I wasn't going to testify.

14 Is that right?

15 A. Right. I basically -- until -- I wasn't terribly
16 worried about this because I wasn't going to testify, but I
17 was shocked by the fact that he threatened me.

18 Q. Well, he never threatened you, did he?

19 A. I believe he did.

20 Q. He never said anything to you about threatening you, did
21 he?

22 A. He said: I hate to see that happen to you.

23 Q. And so you took it seriously right then?

24 A. I did.

25 Q. All right. Well, let's look at Page 32, Line 24. I

1 said -- asked you: Now, why -- so the conversation about
2 that visit, the lawyer representing Mr. Harman knew about it
3 in at least April of 2014, correct?

4 And your answer -- I said: Is that correct?

5 And you said: He knew about some of the stuff. In
6 fact, things I thought that they were -- would be more --
7 most interested in.

8 And I asked you, and you did not think it would -- they
9 would be interested in whether there'd been a threat. And
10 you said: I didn't think it would be relevant.

11 A. Well, I didn't realize that there -- that it was against
12 the law. I mean, that was -- again, it surprised me. I'm
13 not a legal expert.

14 Q. So when you talked to the lawyers about Mr. Mitchell
15 coming to your office, for weeks on end, you never told any
16 of the lawyers that you had a consultation agreement with,
17 did you?

18 A. That he came there?

19 Q. That he even came there or that you felt like you had
20 been threatened?

21 A. Well, yeah, I told them that he came there.

22 Q. Okay. But you didn't tell them that you thought you'd
23 been threatened?

24 A. I didn't know it was against the law.

25 Q. Doctor, haven't you told me that if somebody -- if you

1 felt -- felt like you had been threatened professionally,
2 you would have laughed at it?

3 A. I think they told me they were going to get me fired,
4 I'd never work in the industry, and -- and I have tenure
5 and, you know, tenure protects people like me from -- from
6 that type of attack.

7 Q. Doctor --

8 A. So I can't get -- they can't get me fired.

9 Q. Doctor, on Page 32, Line 18, I asked you here at this
10 very table in front of us: You didn't feel like you'd been
11 physically threatened, did you?

12 MR. MANN: Let's wait until it comes up.

13 A. I think I repeated that just a few minutes ago.

14 Q. (By Mr. Mann) And you said no, correct?

15 A. Yes.

16 Q. All right.

17 THE COURT: I guess we don't need it to come up
18 now.

19 MR. MANN: Yeah. He just answered it.

20 THE COURT: Let's move on.

21 Q. (By Mr. Mann) And I asked you on Page 14, Line 3: He
22 never told you that he would smear you where you would never
23 work in the industry again? He didn't do that -- he didn't,
24 did he?

25 And you said: I would have laughed at him.

1 Correct?

2 A. Because I have tenure.

3 Q. You -- you have tenure.

4 A. Means that he can't keep me from working in this
5 industry because I have tenure.

6 Q. All right. Now, Doctor, isn't it true that you're the
7 largest competitor to Trinity with end terminals?

8 A. I can't say for sure, but I think that might be true.

9 Q. All right. And isn't it true that if Trinity can no
10 longer sell products to compete with your SKT, that you
11 stand to make millions of dollars; isn't that true?

12 A. I wouldn't say that. My expectation is that they would
13 put a product back on the street within four or five months.
14 And so there'd be some short-term gain. But, for example,
15 the ET-2000 is still valid and approved in most states.
16 They can be producing that tomorrow.

17 Q. Doctor, do you know how much money you've been paid for
18 the ET-Plus over the years?

19 A. I do not.

20 Q. Do you remember telling me in that deposition you've
21 been paid millions for the ET-Plus?

22 A. Well, I took that to mean the ET-2000 and the ET-Plus
23 combined. And I believe that would be into the million
24 range.

25 Q. Okay. Well, when I asked you on Page 16, do you know

1 how -- on Page 16, Line 25: Do you know how much money
2 you've been paid over the years for the ET-Plus?

3 And your answer on the next page on Line 2: It'd be
4 millions.

5 A. Well, I think that I misspoke there --

6 Q. Okay.

7 A. -- in terms of I thought the question was for both
8 terminals, and that would be a fair statement for both the
9 ET-2000, as well as the ET-Plus --

10 Q. All right.

11 A. -- combined.

12 Q. All right. And the fact is you stand to make even more
13 if something were to happen to the ET-Plus, correct?

14 A. I disagree with that.

15 Q. Now, let me ask you, you weren't an inventor of the
16 ET-Plus, were you?

17 A. I was not.

18 Q. All right. The reason that you continue to get
19 royalties for the ET-Plus is because it used the same
20 technology as the ET-2000?

21 A. Exactly.

22 Q. All right. Otherwise you wouldn't have received
23 royalties for the ET-Plus?

24 A. That's true.

25 Q. All right. Now, in the end, Doctor, when you say that

1 you told Mr. Mitchell that you had concerns, you never told
2 him and you did not say that you thought the ET-Plus was
3 dangerous, did you?

4 MR. CARPINELLO: Your Honor --

5 THE COURT: Approach the bench.

6 (Bench conference.)

7 THE COURT: Yes, Mr. Carpinello?

8 MR. CARPINELLO: We went over this. We were going
9 to say that he had concerns. If he says that he -- that he
10 took it that Mr. Mitchell was dangerous, I'm -- I think we
11 should go into the whole conversation, that is completely a
12 breach of -- of what was put on the record for him to say he
13 didn't say it was dangerous.

14 THE COURT: Lower your voices, gentlemen.

15 MR. CARPINELLO: It doesn't matter whether he did
16 it or not. You get into the specifics, I get into the
17 specifics.

18 MR. MANN: I'm not getting into the specifics,
19 Your Honor. All I'm asking is he -- he didn't --

20 MR. CARPINELLO: Your Honor --

21 THE COURT: No, no.

22 MR. MANN: -- because they get to infer that he's
23 --

24 THE COURT: This is beyond what was permitted.

25 It's not relevant. And I've excluded it and I'm telling you

1 not to go there.

2 MR. MANN: Okay. All right.

3 THE COURT: Are you clear?

4 MR. MANN: I'm clear, Your Honor. I didn't mean
5 to breach anything. I'm just asking that he didn't say
6 that.

7 MR. WARD: He's now said what you didn't say.
8 He's gone into the -- let me just please finish. He's
9 asking what you didn't say. Well, okay. But in the same
10 conversation, we ought to get to say he's kicked the door
11 wide open, Your Honor. We ought to be able to say what did
12 you say.

13 THE COURT: Well, I'm stopping him from going
14 forward. If you think the door is open, you approach during
15 redirect.

16 MR. WARD: I was trying to save from -- your
17 instruction --

18 THE COURT: Let's finish this cross-examination.

19 MR. CARPINELLO: Would you ask the jury to strike
20 the -- to disregard the question?

21 THE COURT: Well, Mr. Mann?

22 MR. MANN: Yes. Yes, Your Honor.

23 THE COURT: Mr. Carpinello has asked something
24 just as you walked off, so I want you to hear what he asked.

25 MR. CARPINELLO: I asked you to instruct the jury

1 to disregard the question.

2 MR. MANN: That's fine.

3 THE COURT: I'll do that.

4 MR. MANN: That's fine.

5 (Bench conference concluded.)

6 THE COURT: Ladies and Gentlemen of the Jury, I'm
7 going to instruct you to disregard the last question that
8 was asked. Completely disregard it, and then we'll now go
9 forward with the next question.

10 Proceed, Counsel.

11 MR. MANN: Thank you, Your Honor.

12 Q. (By Mr. Mann) Dr. Sicking, after the meeting with Mr.
13 Mitchell, after you had a chance to talk to your lawyer and
14 didn't tell them -- you said you didn't feel like it was
15 relevant about what you thought was a threat. You remember
16 those questions?

17 A. Yes.

18 Q. The fact is you kept your consultation agreement with --
19 in this case until July -- until the day before I took your
20 deposition here; is that correct?

21 A. Yes.

22 Q. Okay. And then after I took your deposition, did you
23 take up another consultation agreement with them?

24 A. Well, let me -- let me make sure we're clear here.

25 Q. Okay.

1 A. I -- the consultation agreement, I signed the contract.
2 It -- it didn't include testifying, and -- and I testified
3 as a fact witness. And so I was unsure whether that --
4 that -- that contract had terminated. And after reviewing
5 the contract, it appears that it didn't terminate.

6 Q. That it did --

7 A. Never -- never terminated.

8 Q. Never terminated? Okay.

9 A. So...

10 Q. So while I took your deposition here with Mr. Carpinello
11 in the courtroom, you actually were under a consultation
12 agreement at that point, too?

13 A. Right. The contract, I thought would -- you know, not
14 being a lawyer --

15 Q. I understand.

16 A. -- I thought that -- you know, the contract to not
17 testify, said I specifically wouldn't testify when I wound
18 up testifying, I thought that would void the contract, but
19 apparently it didn't.

20 Q. Okay. I appreciate it, Dr. Sicking. Thank you.

21 MR. MANN: I pass the witness.

22 THE COURT: Redirect.

23 MR. CARPINELLO: Thank you, Your Honor.

24 REDIRECT EXAMINATION

25 BY MR. CARPINELLO:

1 Q. (By Mr. Carpinello) It's a fact, is it not, Dr. Sicking,
2 that you were getting royalties on the ET-Plus even while
3 you were raising concerns about the ET-Plus, correct?

4 A. Yes.

5 Q. So the fact that you were getting royalties did not
6 prevent you from raising those concerns with appropriate
7 people, correct?

8 A. It never did.

9 Q. Okay. Mr. Mann asked you about what you thought was
10 appropriate to tell Mr. Mitchell about this case, right?

11 A. Correct.

12 Q. Did Mr. Mitchell tell you before he came that he was
13 going to talk about this case?

14 A. No.

15 Q. Did you believe when he got here that you were going to
16 talk about this case?

17 A. I was unsure what he was going to talk about.

18 Q. And when was it at the conversation -- at what point in
19 time in the conversation was it that he threatened you?

20 A. At the very end.

21 Q. Now, Mr. Mann asked you about the Brandt case. Do you
22 recall that case, sir?

23 A. Yes, I do.

24 Q. That was, what, a personal injury case?

25 A. Yes, it was.

1 Q. Trinity was a Defendant?

2 A. Yes, it was.

3 Q. State of Missouri was a Defendant?

4 A. Yes.

5 Q. And you were an expert for the state of Missouri,
6 correct?

7 A. Correct.

8 Q. And this case wasn't the first time that somebody from
9 Trinity called you up before you testified; is that correct?

10 A. I think that's right.

11 MR. CARPINELLO: Could I have Page 86, please, of
12 the Brandt deposition?

13 Q. (By Mr. Carpinello) Question on Line 6. This is -- this
14 is your deposition, sir: Okay. Have you conferred with
15 anyone who is employed by or an agent of Trinity Industries
16 in regard to the facts of this accident, the Brandt
17 accident?

18 ANSWER: With regard to the facts of the accident, no.
19 Well, with regard to anything about this accident?

20 Well, Don Johnson sort of asked me what I expected to
21 say in this deposition.

22 And what did you tell Don?

23 I said I don't know. We'll see what they ask.

24 So that was another occasion where someone from Trinity
25 called you up before you came to testify under oath,

1 correct?

2 A. Yes.

3 Q. Okay. Now, sir, with regard to the many, many questions
4 that Mr. Mann asked you about this payment in these five
5 trade -- patent actions, that was a settlement, was it not,
6 sir?

7 A. It was -- it was a settlement. That's correct. We were
8 found not to violate -- not to literally violate their
9 patent, and they weren't eligible for doctrine by
10 equivalence. So we basically had a settlement imposed upon
11 us when we should have won the case.

12 Q. Okay. Now, Mr. Mann asked you about practices at
13 universities where they do research and development. Do you
14 remember that?

15 A. Yes.

16 Q. And he asked you whether it was appropriate to keep
17 secret ongoing projects. You remember that?

18 A. Yes.

19 Q. Sir, but if you had developed a product and your product
20 was on the road all over the United States and in 40
21 countries and you did a series of tests in which that
22 product failed, would you feel an obligation to advise
23 someone of the -- of that fact?

24 A. I would.

25 Q. Thank you.

1 MR. CARPINELLO: No further questions.

2 THE COURT: Additional cross?

3 MR. MANN: Real short, Your Honor.

4 RECROSS-EXAMINATION

5 BY MR. MANN:

6 Q. Dr. Sicking, when you were talking about Mr. Johnson
7 talked to you in that other case from Trinity --

8 A. Correct.

9 Q. -- Trinity and the Missouri Highway and Transportation
10 Commission were on the same side of the case, weren't they?

11 A. They were in separate cases. The way that -- the way
12 that -- that court -- the litigation process in Missouri
13 works.

14 MR. CARPINELLO: I'm going to object. Calls for
15 legal conclusion. We don't know whether there was a
16 counter-claim or cross-claim. To say that they're on the
17 same side of the case, I think is beyond his expertise.

18 MR. MANN: Your Honor, I -- if I can show the
19 style of case, Your Honor, I think that answers the
20 question.

21 THE COURT: Show me the style of the case.

22 Q. (By Mr. Mann) You represented who in the case?

23 MR. CARPINELLO: Your Honor, I renew my objection.
24 It's a caption -- it's -- I don't know if it's a final
25 caption, and we don't know whether Trinity has filed a

1 cross-claim against the state of Missouri. We have no
2 knowledge of the claims among the Defendants. So to ask Mr.
3 Sicking whether he knows whether they're on the same side or
4 adverse is totally beyond his confidence, and we have no
5 evidence what the nature of the litigation was, other than a
6 caption on a deposition.

7 THE COURT: All right. I consider this to be
8 seeking a legal conclusion. I'm going to sustain the
9 objection. Besides, there's -- there's very questionable
10 relevance to this line of questioning.

11 Let's move on.

12 Q. (By Mr. Mann) Dr. Sicking, if the ET-Plus were removed
13 from use, you would receive more royalties for the ET-2000,
14 wouldn't you?

15 A. No.

16 Q. Now, let's go back to when you were talking about tenure
17 real quick. The fact is, you left Texas A&M, didn't you,
18 because Texas A&M would not give you tenure; isn't that
19 right?

20 A. No.

21 Q. Okay. Let's go back to your deposition, Page 139
22 through 140.

23 The -- the question is, and -- and just so we'll know
24 what tenure is, what is tenure, Doctor?

25 A. Tenure is basically a privilege given to faculty after

1 they've proven their merit as -- as an assistant professor.
2 You get seven years to prove that you -- you -- you deserve
3 to be a professor for the rest of your life at that
4 institution.

5 Q. All right. And you applied for that twice at Texas A&M,
6 didn't you?

7 A. I -- you can't apply for tenure until you're already on
8 the faculty.

9 Q. All right.

10 A. And I never got on the faculty.

11 Q. All right.

12 A. So, no, that's not right.

13 Q. Well, the question in the case was, Page 139, Line 22:
14 This was covered somewhat in your deposition that was taken
15 down in Marshall, but you wanted to continue to be a
16 professor there at A&M, but they didn't place you on the
17 tenured track; isn't that correct?

18 ANSWER: I applied for the position, and they did
19 not -- they did not hire me.

20 QUESTION: Did that happen twice?

21 And you said: Yes.

22 Is that correct?

23 A. Right. I never got the job to get on the faculty, so I
24 couldn't be denied tenure because I never got the position
25 to start with.

1 Q. And the fact is, you left because you say that if you're
2 not a tenured professor, you're treated like a second-class
3 citizen; isn't that what you said?

4 A. That's generally true.

5 Q. All right. So that's why you left Texas A&M, because
6 you felt like you were being treated as a second-class
7 citizen; isn't that right?

8 A. You know, basically as a graduate student or full-time
9 researcher, yeah, I felt that way.

10 Q. All right. In fact, you said -- you told us that in
11 your deposition, didn't you?

12 A. And I told you that just now.

13 Q. Thank you, sir.

14 THE COURT: Further direct?

15 MR. CARPINELLO: No more questions, Your Honor.

16 THE COURT: All right. You may step down,
17 Dr. Sicking.

18 THE WITNESS: Thank you. Thank you very much.

19 MR. CARPINELLO: May we -- may he be excused, Your
20 Honor?

21 THE COURT: Is there objection?

22 MR. MANN: There's no objection, Your Honor.

23 THE COURT: Dr. Sicking, you're excused. You're
24 free to stay; you're also free to leave.

25 THE WITNESS: Thank you very much.

1 THE COURT: Thank you.

2 MR. CARPINELLO: Thank you, Dr. Sicking.

3 THE COURT: All right. Plaintiff, call your next
4 witness.

5 MR. CARPINELLO: Your Honor, Plaintiff rests.

6 THE COURT: All right. Plaintiff having rested --

7 MR. CARPINELLO: I'm sorry. Subject to -- sorry,
8 Your Honor. Subject to formal admission of exhibits in
9 rebuttal, we rest.

10 THE COURT: All right. Plaintiff having rested
11 their case-in-chief, we'll proceed to hear the Defendants'
12 case-in-chief, but before the Defendants call their first
13 witness, we'll take a short recess, ladies and gentlemen.

14 You may leave your notebooks in your chairs.
15 Don't discuss the case among yourselves. And we'll be back
16 in here shortly to begin the Defendants' case-in-chief.
17 You're excused for recess at this time.

18 COURT SECURITY OFFICER: All rise.

19 (Jury out.)

20 THE COURT: We stand in recess.

21 (Recess.)

22 (Jury out.)

23 COURT SECURITY OFFICER: All rise.

24 THE COURT: Be seated, please.

25 Let's bring in the jury, Mr. McAteer.

1 COURT SECURITY OFFICER: Yes, sir.

2 MR. MANN: Your Honor, we are doing 50 -- Rule 50
3 motions after --

4 THE COURT: Yes, as I indicated during pre-trial.

5 COURT SECURITY OFFICER: All rise for the jury.

6 (Jury in.)

7 THE COURT: Be seated, please, ladies and
8 gentlemen.

9 All right. The Defendants may call their first
10 witness.

11 MR. MANN: Your Honor, we call Brent Hopkins.

12 THE COURT: All right. If you'll come forward,
13 sir, our courtroom deputy will administer the oath to you.

14 (Witness sworn.)

15 THE COURT: If you'll come around, sir, and have a
16 seat here at the witness stand.

17 All right. Mr. Mann, you may proceed.

18 MR. MANN: Thank you, Your Honor.

19 BRENT HOPKINS, DEFENDANTS' WITNESS, SWORN

20 DIRECT EXAMINATION

21 BY MR. MANN:

22 Q. State your name for the ladies and gentlemen, please.

23 A. My name is Brent Hopkins.

24 Q. And, Mr. Hopkins, where are you from?

25 A. I'm from Columbia, South Carolina.

1 Q. And, Mr. Hopkins, if I could ask you a little bit about
2 your personal background, if that's okay?

3 A. That'd be fine.

4 Q. What -- are you married?

5 A. Yes, sir, I am married.

6 Q. And children?

7 A. Got two children, 15 and 10.

8 Q. All right. And where do you work?

9 A. I work for Trinity Highway, Orangeburg, South Carolina
10 plant.

11 Q. All right. Mr. Hopkins, how long have you worked for
12 Trinity?

13 A. I worked for Trinity since 1998.

14 Q. Okay. I want to go back just a little bit in your
15 background. Tell me what your first -- what I would call
16 real job out of high school would be.

17 A. Okay. When I graduated high school, I -- I went into
18 the guardrail installation field for a company based out of
19 Pennsylvania. I worked for them for roughly 15 years.
20 Started out as a laborer and moved my way up through the
21 ranks with that company as a machine operator, eventually
22 became a foreman, eventually became a superintendent.

23 Q. Okay. And what was the name of the company?

24 A. Company was called LS Lee, Incorporated.

25 Q. All right. And then what happened to LS Lee? What did

1 you do after LS Lee?

2 A. The parent company for LS Lee was called Buffalo
3 Specialty Products. They decided opening -- to open a
4 manufacturing plant in Birmingham, Alabama, and I went to
5 that plant to run that plant.

6 Q. Okay. And -- and tell me what you actually did on a day
7 in/day out basis in that plant.

8 A. I was responsible for everything there at the plant. It
9 was a very small plant. I was responsible for everything,
10 including receiving material, shipping, production, quality,
11 safety. I was -- I was the plant manager at that plant at
12 that time.

13 Q. And what kind of products did they make or what did they
14 do?

15 A. We manufactured guardrail posts.

16 Q. Okay. Are you familiar with installation or maintenance
17 of guardrails and systems that go with guardrails?

18 A. Yes, sir. Like I said, for 15 years, I worked for LS
19 Lee, and I did installation of guardrail. I did maintenance
20 of guardrail. I also did installation of overhead sign
21 structures on the highways.

22 Q. All right. And when we're talking about installation of
23 guardrail, would you have worked with any products that --
24 not necessarily these in front of me, but similar type
25 products?

1 A. Yes, sir, I would.

2 Q. Okay. Now, after you -- after that job, where did you
3 go?

4 A. From that job, I transferred with Trinity Industries to
5 a plant in Orangeburg, South Carolina, where I'm currently
6 employed. When I transferred there, I became plant
7 superintendent under another plant manager who had a lot
8 more years of experience and he taught me some of the --
9 administrative part of the job until he retired and I took
10 over as plant manager at the plant that I'm currently
11 employed at.

12 Q. And -- and in what year did you actually go there to
13 Orangeburg?

14 A. The end of 2001, I went to Orangeburg.

15 Q. All right. And in Orangeburg, did they -- or did -- did
16 that plant make ET products?

17 A. Yes. We began in 2002 building the ET products.

18 Q. All right. And what was the product that you were
19 making there?

20 A. It was an ET-Plus.

21 Q. All right. And what -- what size ET-Plus? Does that
22 make sense to you?

23 A. No, sir.

24 Q. Size of the rail?

25 A. Of the guardrail?

1 Q. Yeah. No, what I'm saying was -- well, was it an
2 ET-Plus with five-inch or four-inch guide channels?

3 A. The ET we were manufacturing in 2002 was a five-inch
4 guide channel.

5 Q. All right. So would it be fair to say that you're
6 familiar with and knew about construction of five-inch
7 ET-Pluses?

8 A. Yes, we did manufacture the five-inch ET-Plus. As a
9 matter of fact, I set up the line that manufactured it.

10 Q. All right. Would -- you may have to stand up --

11 MR. MANN: If that's okay, Your Honor?

12 Q. (By Mr. Mann) -- just to look -- I'm just going to ask
13 you one question. Is -- is that -- would that be like --

14 THE COURT: You can go ahead and stand up, Mr.
15 Hopkins.

16 Q. (By Mr. Mann) Would that be like this product right --
17 that I have my hand on?

18 A. Yes, sir, that is a five-inch guide channel ET-Plus.

19 Q. All right. Thank you, sir.

20 THE COURT: If you'd have a seat.

21 Q. (By Mr. Mann) Now, tell me, at some point did your
22 plant start making four-inch guide channels for your
23 ET-Plus?

24 A. Yes, sir, we did, and we continue to do it today.

25 Q. All right. And on a -- on a day in/day out basis, about

1 how many are you actually manufacturing on a day in/day out
2 basis in the plant?

3 A. We average approximately 40 complete ET-Plus units,
4 including the entire unit, per day.

5 Q. All right. Now, what about you, do you wear a coat and
6 tie to work, or do you wear jeans? How do you go to work?

7 A. No, sir, I'm blue collar. I run my plant from the shop
8 floor. I dress in jeans and work uniform generally.

9 Q. Wear hard toe -- hard toe boots?

10 A. Hard toe boots and a hard hat, yes, sir.

11 Q. Okay. And are you in charge of and work on the
12 administrative end, too, like filling out paperwork?

13 A. Yes, sir, I do. I'm the plant manager at the plant.
14 I'm responsible for all the day-to-day duties at the plant.
15 Everything that goes on in that plant, I'm responsible for.

16 Q. Are -- are you responsible for inspection of the -- the
17 products?

18 A. I'm responsible to make sure it gets done, yes, sir.

19 Q. All right. Are you responsible for how many products
20 are turned out on a daily basis?

21 A. Yes, sir, I am. I'm responsible for production.

22 Q. Are you responsible for the personnel that you have
23 working on the lines?

24 A. Yes, sir, I am.

25 Q. Okay. What other things do you do on a day in/day

1 out basis?

2 A. I generally spend the first part of my day reviewing
3 production reports, shipping reports, customer requirements.
4 I meet with my plant supervisors in the morning. 9:00
5 o'clock in the morning every morning I do a shop floor walk
6 where I go to every production line on the shop floor
7 looking at quality, safety, production problems, manpower
8 problems, reviewing any problems we might have in the shop
9 with the guys in the shop floor. After that point, I stay
10 on the shop floor and I help anybody that might need some
11 help. I do trainings. I assist employees if we're
12 shorthanded somewhere. And I load trucks sometimes if we're
13 shorthanded and we have a lot of trucks that ship out that
14 day. Just depending on what we need, but I spend most of my
15 day on the shop floor.

16 Q. Okay. What about welding? Do you have any type of
17 certifications in welding?

18 A. I'm a weld inspector specialist.

19 Q. All right. And what does that mean?

20 A. That means I've had training to the AWS specifications
21 as far as inspection of welding.

22 Q. What's AWS?

23 A. American Welding Society.

24 Q. All right. And do you actually get a certificate or do
25 you carry something in your pocket to show that?

1 A. I have a certificate, yes, sir.

2 Q. Okay. And what does that allow you to do?

3 A. That -- that has trained me and allows me to inspect
4 welds. I can -- I can visually inspect. I can look at
5 someone's weld and make sure it -- it passes according to
6 the drawing and the design of that weld.

7 Q. All right. Do you -- who hires the welders in your
8 plant?

9 A. They're hired through our HR representative, but they're
10 always approved through the fabrication foreman and myself.

11 Q. All right. Do -- do the welders that work in your
12 plant, do they have to do any type of testing in front of
13 you to see if they weld up to standard?

14 A. Yes, sir. They -- they're all required to pass a -- a
15 weld test. They're all coded to A -- AWS D 1.1 which is the
16 welding code. They all must pass a test to be certified to
17 that code.

18 Q. All right. Well, what I'm -- I guess what I'm really
19 asking you is even though they may pass that test, do you
20 actually observe them to see if you think they're up to
21 standard to what you want as far as a welder?

22 A. Yes, sir, I do.

23 Q. All right. So would all the welders that work in your
24 plant be people that were -- that you've checked out to see
25 that they know how to weld?

1 A. Yes, sir, every one of them.

2 Q. All right. Now, what I want to ask you about, in front
3 of me, I have what you've identified as the five-inch.

4 Would -- would you call this the five-inch guide channel?

5 A. Yes, sir.

6 Q. The one I'd talked about earlier?

7 A. Yes, sir.

8 Q. And Mr. Hopkins, what's -- what's this over here to
9 my -- that I have my left hand on?

10 A. That's an example of our four-inch guide channel ET-Plus
11 extruder head.

12 Q. Okay. Now, what I wanted to ask you about is -- and
13 you --

14 MR. MANN: Your Honor, if he can stand up and
15 come to the end and hold this -- I've got a pointer for him
16 if that's okay.

17 THE COURT: Mr. Hopkins, let me -- the Court
18 Security Officer is going to give you this handheld mic.
19 You can use it. If you'll stand there at the corner next to
20 that statue, you can stand there and see from. And if, Mr.
21 Mann, you want to hand him a laser pointer, that's perfectly
22 fine.

23 MR. MANN: All right.

24 Q. (By Mr. Mann) Okay. Mr. Hopkins, I may need you to
25 direct me a little bit, but let me ask you. First of all,

1 this five-inch guide channel and head that we have here; is
2 that correct?

3 A. Yes, sir, that's the extruder head.

4 Q. All right. If we were driving down the road looking at
5 these, is this how we would be looking at them from this end
6 driving down the road?

7 A. Yes, sir, that -- this is the traffic side of the -- of
8 the unit.

9 Q. Okay. And you may not be able to see it. You may have
10 to take a little step, but what's all this right here on the
11 front of this?

12 A. That -- that's just reflective tape to make it more
13 evident to oncoming traffic, that that is there.

14 Q. Does your plant put those on, or when does that get
15 applied?

16 A. No, sir. The customer applies those. We don't apply
17 those. Generally different states require a different type
18 of reflector.

19 Q. Okay. And then this one that I'm touching with my left
20 hand, what is this?

21 A. That is the four-inch guide channel on the ET extruder
22 head.

23 Q. Is this like what you make, produce, put together in
24 your plant in Orangeburg?

25 A. Yes, sir, that's typically what we produce there.

1 Q. All right. And for how long have you been doing that,
2 again?

3 A. We've been producing the ET-Plus since 2002.

4 Q. Well, I meant this -- the four-inch channel?

5 A. We began this, I believe, in 2006.

6 Q. Okay. And have -- what is this I've got my hand on
7 right here?

8 A. This is a standard section of w-beam guardrail.

9 Q. All right. And tell me, is -- I put that in earlier.
10 Have I got it in correctly? Is it facing the correct way?

11 A. Yes, sir, that's typical of how -- if -- if that unit
12 was installed on the highway, of how the guardrail would be
13 inserted into that -- into that extruder head.

14 Q. Okay. And tell me what about this guardrail, is it
15 standard size?

16 A. Yes, sir. That's standard size guardrail, meets AASHTO,
17 and 180 spec -- dimensionally correct for that.

18 Q. All right. Now, what I wanted to ask you about is this
19 five-inch, what would you want me to call this right here?
20 What do you want me to call it?

21 A. That's the extruder head portion of the unit from --
22 from where your right hand is to your left hand, that's the
23 extruder head portion of the unit.

24 Q. All right. So from my right hand, where this weld is,
25 to my left hand, that's the extruder head?

1 A. Yes, sir.

2 Q. All right. And where my right hand and my left hand is
3 -- is over here, what's that?

4 A. Same thing, that's the extruder head of the unit.

5 Q. What's the difference between this extruder head and
6 this extruder head on this one?

7 A. Nothing. They're both the same.

8 Q. Okay. Now, tell me, do we also have -- tell me what
9 this is, though --

10 MR. MANN: And, Your Honor, if I can, if I can
11 push that around in front?

12 THE COURT: You may move them around.

13 Q. (By Mr. Mann) Okay. Tell me what this is that I've
14 pushed in front of you.

15 THE COURT: And, members of the jury, if you need
16 to stand up, you're welcome to.

17 A. Okay. What -- what we have there, that's a five-inch
18 example of the ET -- ET-Plus extruder head with a five-inch
19 guide channel on it. What we did is we cut it lengthwise to
20 give you an idea what a cross section of the thing looks
21 like.

22 Q. (By Mr. Mann) Okay. And --

23 A. That would have been typical 2001 to 2005 production.

24 Q. All right.

25 THE COURT: Mr. Hopkins, let's wait until he asks

1 you questions.

2 THE WITNESS: Okay.

3 THE COURT: Answer the questions he asks, but
4 don't go beyond what he asks you.

5 THE WITNESS: Yes, sir.

6 Q. (By Mr. Mann) This -- what I am touching here, would
7 this be half of what this is lying down that I've got my
8 right hand on?

9 A. Yes, sir.

10 Q. All right.

11 A. Yes, sir, that's --

12 Q. Okay. So we could put two of these -- could we put two
13 of these together and put them right over here if we
14 oriented them right?

15 A. Yes, sir. That -- that is the same unit there.

16 Q. All right. Now, this that I'm pushing up that has the B
17 tag on it, what is this?

18 A. That is -- that's the cross section of our ET-Plus with
19 a four-inch guide channel.

20 Q. All right. Now, can -- can you point me to where the
21 exit gap is on first the five-inch. Where is it?

22 A. Yes, sir. The exit gap is -- is right here.

23 Q. Right there?

24 A. Yes, sir.

25 Q. All right. And where is the exit gap on this four-inch?

1 A. Right here.

2 Q. Right here?

3 A. Yes, sir.

4 Q. All right. And if we were to turn these two, can you
5 use this five-inch side of this extruder head and this
6 four-inch side of this extruder head to make this one right
7 here that I have -- this four-inch -- full four-inch one?

8 A. Yes, sir. The extruder head is -- is the same.

9 Q. Okay. Whether it's on this five-inch one over here or
10 this four-inch one over here, these are both the same?

11 A. Yes, sir. They all came from the same weld fixture.

12 Q. All right. And what about -- how do you make these?

13 A. We manufacture those. The extruder head part is
14 non-individual pieces that come together into a fixture
15 where they're tightly clamped into place, tack welded
16 together, removed from the fixture, and loaded into a
17 robotic cell where the robot does the welding on those
18 parts.

19 Q. All right. So -- so part of the welding is done by a
20 person; is that correct?

21 A. Yes, sir.

22 Q. And then once that's tacked into place, the rest of the
23 welding is done by robot?

24 A. Yes, sir, they're robotically welded.

25 Q. How long does it take to -- to put together and

1 manufacture a head -- an extruder head?

2 A. From start to finish without galvanize, without putting
3 the silver coating on it that you see on, it -- it's 19
4 minutes per part.

5 Q. And that's doing experienced workers?

6 A. Yes, sir. My guys that run that line have been there
7 for four years.

8 Q. With robotic welding?

9 A. With robotic welding, yes, sir.

10 Q. Is -- in your experience, is robotic welding faster than
11 human welding?

12 A. Yes, sir, it's much faster.

13 Q. Okay. And why is that?

14 A. The robot moves incredibly quick. The robot never
15 stops. The robot goes from weld to weld and welds
16 incredibly quick and consistently every time.

17 Q. All right. Let me ask you also while I'm -- this
18 guardrail and this 4-inch head, can you put the same
19 guardrail in the 5-inch head? Would it be the same as far
20 as -- would you put the same guardrail in?

21 A. Yes, sir. The same piece of guardrail has always been
22 used on that unit.

23 Q. Okay. All right. And these holes that are in the end
24 of this guardrail, what are those?

25 A. Those -- those are the holes where you splice two pieces

1 of guardrail together, whether it be a 25-foot or a
2 12-and-a-half-foot piece of guardrail. They overlap and the
3 two pieces of guardrail are attached together at that point.

4 Q. What do you mean by 12-and-a-half and 25-foot?

5 A. There are two main lengths of guardrail that we produce,
6 a 12-and-a-half-foot section and a 25-foot section.

7 Q. Okay. And then would you use -- that's where these
8 bolts go through to hold another panel of guardrail
9 together?

10 A. Yes, sir. It's bolted together at that point.

11 Q. All right. And the bolts that you've been using since
12 2002, are they the same bolts that you've been using since
13 2002, size-wise?

14 A. Yes, sir, they're the same size. I believe them to be
15 inch-and-a-quarter-by-5-inch bolt.

16 Q. And the type of metal that you've been using in these
17 heads, has it been the same?

18 A. Yes. If you're referring to the grade of steel.

19 Q. Yes, sir.

20 A. Always been the same, yes, sir.

21 Q. All right. And the galvanizing, has it been same or has
22 it improved?

23 A. Galvanizing is the same.

24 Q. All right. And the way that you build these, except for
25 the robots, is it the same from this 5-inch to 4-inch?

1 A. Yes, sir. Yes, sir. Like I said, the extruder head,
2 nothing has changed there as far as the way we manufacture
3 it. Obviously, the legs are a little different because
4 we've got a 5-inch and a 4-inch variance.

5 Q. And the -- the gap that you were talking about down here
6 that you're pointing to, what's that size been since 2002?

7 A. That size is 1-inch.

8 Q. Okay. Now, what -- what -- are there tolerances in your
9 plant on how you build them, like they're all 1-inch or
10 what's -- what would you say as far as what I'd call a
11 tolerance?

12 A. No. We -- we manufacture the 1-inch plus an 8th of an
13 inch on that minus 0. It would be virtually less than
14 1-inch the way we fixture those together.

15 Q. Why don't you take your seat.

16 THE COURT: Hand the microphone back to the
17 security officer, please, and then return to your seat.
18 All right, Mr. Mann.

19 MR. MANN: Thank you, Your Honor.

20 Q. (By Mr. Mann) Yesterday, there was a gentleman here by
21 the name of Dr. Coon who said he was in Fort Worth, and he
22 could assemble in the parking lot with his counsel's help --
23 with my counsel helping holding things in place, one of
24 these heads in 15 minutes. Is that possible?

25 A. I find that hard to believe. I've been building them

1 for 12 years now, and my best cycle time right now is right
2 at 19 minutes. There's 261 inches of welding in that unit.

3 Q. Okay. Well, what if you're not welding it? What if
4 you're just out there holding things together, how would you
5 do that?

6 A. I don't -- not sure how you would do it. If you're
7 trying to hold them together, you might be able to put
8 something together that looks similar, but I don't believe
9 it would be accurate.

10 Q. Okay. And what do you mean it wouldn't be accurate?

11 A. I don't believe you could build an accurate part just by
12 holding pieces together. You need the proper tools that we
13 use and the training that we provide to build a proper
14 ET-Plus.

15 Q. And the -- the -- and like -- if we're talking about a
16 jig, what is a jig?

17 A. A jig is -- a jig is -- I call it a fixture or a jig.
18 It's a unit with clamps on it that locates these parts for
19 welding. It accurately locates them and clamps them down so
20 you can actually weld the part together and pull out a
21 consistent part every time you tack it together.

22 Q. Okay. Now, Mr. Hopkins, have you gone around to -- if
23 I'm wrong, correct me -- New York, Marshall, and somewhere
24 else to measure heads that Mr. Harman has provided?

25 A. Yes, sir, I have.

1 Q. Where -- where was the third place?

2 A. I've been to Virginia, New York, and Texas.

3 Q. All right. Here in Marshall; is that correct?

4 A. Yes, sir.

5 Q. And when you've measured the heads that we're talking
6 about, whether they're 5-inch or 4-inch, have you actually
7 come and measured the heads that Mr. Harman's --

8 A. Yes.

9 Q. -- shown us in this case?

10 A. Yes, sir. I have measured the ones that he's provided
11 for us to measure. Yes.

12 Q. Okay. And when you've measured the heads in this case,
13 whether it be the 5-inch or the 4-inch, tell us, on the
14 length of the guide chute on the 5-inch and 4-inch, what has
15 that been on the heads that you've measured?

16 A. That has been 37 inches.

17 Q. All of them?

18 A. I believe so, yes, sir.

19 Q. Do you need to look at notes? Look -- do you have
20 notes?

21 (Pause in proceeding.)

22 A. Yeah. Other than the ones that were missing the legs
23 that have the legs cut off or damaged, I believe they were
24 all within the 37-inch.

25 Q. (By Mr. Mann) So the ones you could measure, they were

1 37 inches.

2 A. Yes, sir.

3 Q. Is that correct?

4 A. Yes, sir.

5 Q. Is that how you manufactured them?

6 A. Yes, sir.

7 Q. And of all the heads that you've measured Mr. Harman's
8 provided that you have looked at, what's been the -- the
9 measurement from here to here, from top to bottom on the
10 5-inch and top to bottom on the 4-inch?

11 Does that make sense to you?

12 A. No. You mean on the end where your hand is where it
13 attaches to the extruder head?

14 Q. The bottom of this rail to the top of this rail where
15 the --

16 THE COURT: Go ahead and go back to where you
17 were, Mr. Hopkins, so you can see, and I'll let you use the
18 handheld microphone.

19 Q. (By Mr. Mann) And bring your notes, Mr. Hopkins. That
20 way we don't have to go back and forth.

21 Did you make those measurements?

22 A. Yes, sir, I did.

23 Q. What were those measurements from there -- here to here
24 and here to here (indicating) inside where this guardrail
25 is?

- 1 A. The -- the 5-inch example, 15-3/8.
- 2 Q. All right.
- 3 A. At the extruder head.
- 4 Q. Okay.
- 5 A. 14-1/2 at the -- at the entrance head.
- 6 Q. All right. Is that the way you make them, or is it like
- 7 this one over here on the 4-inch? What's the size on these?
- 8 A. The 4-inch is the same, 14-1/2 on the entrance end, and
- 9 15 inches on the -- on the end that attaches to the extruder
- 10 head.
- 11 Q. Okay. So 15 inches over here (indicating)?
- 12 A. Yes, sir.
- 13 Q. And what here (indicating)?
- 14 A. 14-1/2 inches.
- 15 Q. And is that how you make them in your plant?
- 16 A. Yes, sir, it is.
- 17 Q. All right.
- 18 A. I don't believe those dimensions have ever changed since
- 19 we've started using the 4-inch channel.
- 20 Q. Okay. And then in the head, did you measure the -- what
- 21 we've been calling the exit gap, this right here
- 22 (indicating), did you measure those?
- 23 A. Yes, sir, I did.
- 24 Q. What were the measurements on those?
- 25 A. Of the 5-inch examples in Mr. Harman's collection that

1 he allowed me to measure, out of 16 5-inch examples, 11 were
2 1-inch, and 5 were approximately 1.5 inches.

3 Q. Okay. How did they get to be 1.5 inches?

4 A. I'm not sure. I don't know. A lot of them may have
5 been hit. A lot of them were damaged. I don't know the
6 history of a lot of them. A lot of them were 14 years old.
7 They were -- they had been installed, repaired, taken down.
8 I just didn't know the history of them.

9 Q. All right. But 11 of them, of the 5-inch, were 1 inch
10 from here to here (indicating), correct?

11 A. Yes, sir, they were.

12 Q. And then what about this? What do you call this right
13 here (indicating) that I have my hands on?

14 A. I call that the entry to the extruder head.

15 Q. Okay. Have you measured these, these entrances to the
16 extruder head?

17 A. Yes, I have measured those.

18 Q. How much is that in width?

19 A. $4-7/8$ on the outside dimension; $4-3/8$ on the inside.

20 Q. $4-3/8$ on the inside. Is that how you manufactured them?

21 A. Yes, that's how we manufactured them.

22 Q. And when you measured Mr. Harman's, what was his inside
23 measurements for the 5-inch? Do you have those?

24 A. I do. They averaged $4-3/8$ inch. They ranged from
25 $4-1/4$, $4-3/16$, $4-3/8$, within tolerance to the $4-3/8$.

1 Q. All right. And -- and when you measured 4-inch
2 entrances, what did they measure, Mr. Harman's?

3 A. The ones in his collection?

4 Q. Yes, sir.

5 A. Same measurements.

6 Q. All right. So were they consistent with what you
7 measured in your plant?

8 A. Yes, sir, they were.

9 Q. All right. Okay. You can have your seat, Mr. Hopkins.

10 Mr. Hopkins, from 2002 until today, is your plant
11 making the head, the extruder head, the same on this 4-inch
12 guide channel of what you did with a 5-inch channel from
13 2002 to 2005? Are they the same?

14 A. Yes, sir. The extruder head portion of that unit is --
15 is identical.

16 Q. What has changed on these -- on this product since 2006,
17 when you say you were making the 4-inch guide channels?
18 What has actually changed, the measurements?

19 A. The only measurements that have changed are on the guide
20 channel. The guide channels have gone from a 5-inch guide
21 channel to a 4-inch guide channel.

22 Q. All right. And as far as the weld, has there been any
23 change in that?

24 A. The weld where the channel attaches to the extruder head
25 has changed. Yes, sir.

1 Q. What -- what do you call that, that I've got my
2 finger -- that I'm pointing to?

3 A. That is a quarter-inch fillet weld.

4 Q. And you call this -- what was this over here with the
5 5-inch channel?

6 A. That's a -- that's a butt weld.

7 Q. All right. Do you have an opinion, based on your years
8 and experience of welding of which one is the easier one to
9 weld?

10 A. Yes, sir. The fillet weld on the 4-inch channel is an
11 easier weld to consistently perform.

12 Q. Do you have an opinion based on your years of being a
13 certified -- I may say this wrong -- certified welder
14 examiner -- what did you call it, ACS. What was the
15 acronym?

16 A. I'm a weld inspection specialist.

17 Q. Weld inspection specialist. In your years of being a
18 weld inspection specialist, which one of these welds, in
19 your opinion, is the strongest weld?

20 A. I believe the fillet weld to be a better joint with the
21 4-inch channel.

22 Q. Why is that?

23 A. You've got twice the material thickness there where the
24 material actually overlaps so we've got a double thickness
25 of material there. You've got room to get a big, fat

1 quarter-inch weld in there to hold them together. And
2 you've also got a little bit of triangulation there at that
3 joint.

4 Q. And what do you mean by triangulation?

5 A. Where the two pieces of steel come together, you've got
6 the weld on the top, and then the two pieces of steel kind
7 of taper down to form a point, which is a small triangle
8 there, which I know a triangle is a stronger shape.

9 Q. Okay. All right. Now, these -- these changes that you
10 were talking about, the weld and what about this insertion
11 of the 4-inch channel here, how far in is that?

12 A. The spec on that, I believe, is three-quarters of an
13 inch, sir.

14 Q. Okay. That changed and the weld and the length. Have
15 there been any changes material to going from 5- to 4-inch
16 that have occurred in putting this 4-inch channel in that
17 are not related to changing from 5 to 4 inches?

18 Does that question make sense to you?

19 A. I don't understand your question.

20 Q. Well, what I'm asking is, have you made any changes in
21 the way you make -- make this product that would not be
22 related to changing from 5 to 4 inches?

23 A. Other than a galvanizing change that we made to the
24 product, and I believe a patent stamp that we now put in it.
25 No, sir.

1 Q. What do you mean a patent stamp?

2 A. There is a -- if you look at one of the revisions of our
3 drawing, it calls for the patent -- a patent number for that
4 part.

5 Q. Okay. Well, we've heard that there have been either 6
6 or 13 revisions to the shop -- shop drawings, weldment
7 drawings.

8 A. Yes, sir, the weldment drawing. We call them --
9 weldment detail we call them.

10 Q. Have there been any weldment changes to this product
11 that would not be related to changing the 4-inch besides the
12 patent sticker you're talking about or the stamp and the
13 galvanization?

14 A. No, sir. I believe most of the changes were all -- came
15 at the same period of time when we changed from the 5-inch
16 to the 4-inch channel.

17 Q. Okay. Can you think of any change that has been made to
18 this product unrelated to changing from 5 to 4 inches that
19 would be in your weldment drawings?

20 A. No, sir, other than -- other than what I mentioned, the
21 patent number and the -- and the galvanizing change.

22 Q. So would the -- the changes in your weldment drawings
23 would all be a result of changing from 5 to 4, right?

24 A. Yes, sir, the majority of them would be.

25 Q. Well, you're saying majority. What other ones wouldn't

1 be?

2 A. Other than the two that I just mentioned to you, sir.

3 Q. Okay. All right. Now, Mr. Hopkins, have you also
4 had -- let me go back just one moment. I'm sorry.

5 This -- these two that have been cut in half, can you give
6 us the history of these? Where did they come -- have they
7 been changed in any way?

8 A. No, sir, other than when I cut them in half. I look --
9 I located those at a contractor's yard that had a stockpile
10 of undamaged ET heads in their yard, a large pile of them
11 ranging from 2000 to current day ETs.

12 Q. All right. In other words, did -- were these made for
13 this case?

14 A. No, sir.

15 Q. Do you have some idea of how old these are?

16 A. The 5-inch example would have been manufactured and
17 shipped from 2001 to 2005 on your right side, the jury's
18 left side.

19 The 4-inch channel would have been manufactured from
20 2006 until 2000 -- until current date, until 2014.

21 Q. Okay. Well, do you have some idea about looking at it?
22 Is it a year old or seven years old, can you tell?

23 A. They're old -- they've been around for a while. They're
24 fairly old, by looking at the galvanizing on them.

25 Q. Okay. Otherwise, you can't date them?

1 A. No, I can't date them.

2 Q. They didn't come from your plant then?

3 A. No.

4 Q. Do you even know if they were made in Orangeburg, or
5 were they made in Fort Worth? Do you know where they were
6 made?

7 A. They could have been made at any of five plants.

8 Q. Okay. Sir, are you familiar with the installation of
9 Trinity's terminals and their setup for their system on the
10 sides of our roadways in the United States? Are you
11 familiar with the installation?

12 A. I am familiar, yes, sir.

13 Q. All right. First of all, as far as installing these
14 products, if we're -- if we were looking at them driving
15 down the road and they're installed properly on the side of
16 the road, how -- how much of a curve would one of these have
17 on the road?

18 Does that make sense to you? Would it run next to the
19 road, or would it be curved away from the road?

20 A. Our -- our ET-Plus, sir, is designed as a tangent
21 system, which would remain parallel to the roadway.

22 Q. When you say tangent, is that what that means is
23 parallel?

24 A. That's what that means. It's straight.

25 Q. And if it's not that way, is it installed wrong?

1 A. Possibly. I believe you're allowed 1 foot in 25 foot of
2 offset on -- on a 50-foot ET, so it would be 2 foot for a
3 50-foot end terminal unit.

4 Q. And to put it in terms that maybe would be more like
5 what we would think about, like a roof, what's the angle of
6 a roof? Do you know generally?

7 A. I don't know what a roof is. I don't work with wood.

8 Q. Well, this -- these -- if they're 25 to 1 would be a
9 pretty darn flat roof, wouldn't it?

10 A. Yeah. Every 25 foot that means, you can move back
11 1 foot.

12 Q. Okay. So what that means is down the road, if you got a
13 50-foot span, it should be no further than 2 feet at the end
14 from the road?

15 A. Yes, sir.

16 Q. All right. And that's the instructions that you're
17 familiar with for Trinity?

18 A. Yes, sir, it is.

19 Q. All right. Now, is your plant ISO-certified?

20 A. Yes, sir, we are.

21 Q. What is ISO certification? What does that mean?

22 A. ISO, if you're not familiar with it, is a quality
23 certification. It governs everything we do in our shop. It
24 basically dictates to me how I run my business. It covers
25 everything and mandates formal documentation and trainings

1 on everything we do from the receiving of raw materials
2 right to the shipments of outbound goods.

3 It mandates written documents with work procedures,
4 operator trainings, calibrations of equipment. It just goes
5 on and on, to dictate how we run the quality system in our
6 plant.

7 Q. Do you have quality -- quality control in addition to
8 that or auditing that goes on in your plant on your products
9 coming out?

10 A. Yes, sir. In order to maintain the ISO certification,
11 we're required to have two audits a year, one internal audit
12 and one external audit by a trained ISO auditor.

13 Q. What is that all -- what is that all supposed to do for
14 your plant, both ISO and the audits and the -- all of that?
15 What is it supposed to do for you?

16 A. It -- it -- it makes my plant a better plant.

17 Q. Okay. In what way?

18 A. It maintains not only the quality in our plant, but it
19 maintains directions in my plant. It assures me that I've
20 got my operators trained properly. It assures me that my
21 equipment is calibrated properly. Since I started ISO, I
22 would not have it any other way. I would have ISO in every
23 plant I went to.

24 Q. All right. Now, what I want to ask is, have you also --
25 in the last year or two, have you stopped to look at

1 guardrails on the sides of roads and measure them?

2 A. Yes, sir. I probably do that a little bit more often
3 than what I should. My wife doesn't care for it.

4 Q. Okay. Any particular reason why you're doing that?

5 A. I don't -- I don't obviously stop and look at new
6 installations often, but I do -- I do like to stop and
7 see -- especially on the ET-Plus -- look at impacted ones.

8 Q. Okay. And have you -- have you ever -- in measuring
9 those on the side of the road, just by stopping randomly,
10 have you ever found any to be out of certification for what
11 should be coming out of your plant?

12 In other words, have they all met the criteria that
13 they should have as far as size, width, length, welding, how
14 they're put together?

15 A. Yes, sir. I've seen no problems.

16 Q. Okay. And have you -- have you found problems in any
17 ET-Pluses that you have measured at any point in time,
18 whether they be Mr. Harman's or out on the road or in your
19 plant?

20 A. Problems meaning?

21 Q. Sizes.

22 A. Sizes? The ones I mentioned in Mr. Harman's
23 collections, I have never been able to find one out of
24 tolerance on the road. The only 5-inch examples that I
25 measured that were out of tolerances were in Mr. Harman's

1 collection, the ones that I mentioned earlier.

2 Out of all the 4-inch examples that I've measured, I've
3 never measured one to have a tolerance -- the ones that I
4 have measured to not meet our tolerance were made by
5 Mr. Harman's company.

6 Q. Okay. Now, the -- and did you measure some that were
7 made by Mr. Harman's company?

8 A. Yes, sir, I did.

9 MR. BAXTER: Objection, Your Honor.

10 THE COURT: Sustained.

11 Q. (By Mr. Mann) What about the 5 inches that you measured,
12 do you have some idea or thought about how it is that those
13 are out of -- out of sync; they're not the right size; the
14 measurements aren't correct?

15 A. No, sir. Like I mentioned before, I don't know what's
16 happened to those parts. I don't know how many impacts
17 they've had, how old they are, where they were made. I've
18 just got no history to try to evaluate why they were
19 different than the ones that I produced.

20 Q. All right. And from your perspective from a
21 manufacturer that makes these, do you see any reason why
22 this 5-inch guide channel is any sturdier than this 4-inch
23 guide channel?

24 A. No, sir.

25 MR. BAXTER: Objection. Objection, Your Honor.

1 Far outside his expertise.

2 THE COURT: Sustained.

3 MR. MANN: Okay.

4 THE COURT: This is a fact witness correct,
5 Counsel?

6 MR. MANN: He is.

7 THE COURT: He's not designated as an expert?

8 MR. MANN: He's not designated as an expert,
9 correct, Your Honor.

10 THE COURT: Okay. Proceed.

11 Q. (By Mr. Mann) Now, let me ask you also, when the -- when
12 your workers are working in the plant, how do they know the
13 sizes to weld the lengths to cut and how to put this product
14 together?

15 A. They're trained. They go through a thorough training
16 program. Before they build any parts in our plant, they go
17 through safety training; they go through quality training;
18 they go through work construction training for the
19 particular job they're going to be doing.

20 They're -- also, every morning each operator is
21 provided with a drawing of what they're going to be building
22 that day, plus all the quality reports and quality documents
23 that they're going to be filling out that day.

24 Q. All right. Now, have you reviewed the weldment drawings
25 that your workers used to put these products together?

1 A. Yes, sir, I reviewed them.

2 Q. And are they correct?

3 A. Yes, sir.

4 Q. And have you ever had a situation in your plant or any
5 plant that you've run where there's been an issue of quality
6 control in getting the product out in the way that your
7 drawings show they should be built?

8 A. Can you clarify what you're asking me, please?

9 Q. Yeah. Have you ever had any problem that you can think
10 of, of getting the product out of your plant built the way
11 it's supposed to be built?

12 A. No, sir.

13 Q. Okay. Do you ever have a situation where you do quality
14 control and you reject some of these heads where you don't
15 let them out of your plant?

16 A. Yes, sir.

17 Q. How does that happen?

18 A. Majority of it would be a weld issue, for instance,
19 porosity in the weld. Some of the welds are very difficult
20 to get to on these heads, and if we do have porosity, some
21 of it would be -- it's very difficult to get into to grind
22 that out, to reweld it, so occasionally we'll spoil one and
23 have to destroy it.

24 Q. Okay. Instead of having to rework it?

25 A. Yes, sir.

1 Q. Okay. And how often does that happen?

2 A. Not often. Maybe 1 out of -- 1 out of 500.

3 Q. Okay. And, Mr. Hopkins, finally, as between this 5-inch
4 head and this 4-inch head and this one that's split in half,
5 if -- if we were to get the other half of this head and put
6 it -- if we would just weld it back the way you cut it,
7 would it fit perfectly fine?

8 A. Yes, sir, I believe it would.

9 Q. If we were to take this 4-inch one and hook it onto this
10 5-inch one and weld them together, except for these -- this
11 part up, would it fit perfectly fine?

12 A. Yes, sir, it would.

13 Q. Okay. Thank you, sir.

14 MR. MANN: That's all I have. I pass the witness.

15 THE COURT: Cross-examination. Before you
16 proceed, Counsel, approach the bench.

17 (Bench conference.)

18 THE COURT: Given that these -- given that these
19 are demonstratives only, is the Plaintiff intending to use
20 them in cross-examination?

21 MR. BAXTER: Yes, sir.

22 THE COURT: All right. Then after this witness,
23 they're to be removed from the courtroom.

24 MR. MANN: I think the next witness is using them,
25 too, Your Honor.

1 THE COURT: Well, they're not exhibits. You're
2 not going to leave them in here the whole trial.

3 MR. MANN: I understand while -- we're trying --

4 THE COURT: Do you have any other witnesses you
5 intend to use these demonstratives?

6 MR. MANN: Dr. Buth.

7 THE COURT: Do you have anyone after that?

8 MR. MANN: I don't think so.

9 MR. BAXTER: Will it be okay if I do like Mr. Mann
10 did and kind of roam around the front?

11 THE COURT: Yes, yes.

12 (Bench conference concluded.)

13 THE COURT: All right. Let's proceed.

14 MR. BAXTER: Thank you, Your Honor.

15 CROSS-EXAMINATION

16 BY MR. BAXTER:

17 Q. Mr. Hopkins, I don't think we've met. My name is Sam
18 Baxter and welcome to Marshall.

19 A. Thank you, Mr. Baxter.

20 Q. We're glad to have you here, sir. Anybody from South
21 Carolina, that's practically a sister state to Texas, isn't
22 it?

23 A. We kind of talk the same, don't we?

24 Q. Yes, sir. I don't understand some of these other folks,
25 but you and I can talk.

1 Now, let me ask you this, Mr. Hopkins: You came to the
2 plant in 2002; is that right?

3 A. I did, yes, sir. That plant -- that plant began
4 operation in 2002.

5 Q. You don't have any earthly idea what they were putting
6 out, say, from the mid-'90s up to 2002, what the dimensions
7 of those -- either the 2000s or the ET-Pluses are, do you?

8 A. I didn't build those parts until 2002.

9

10 Q. So if there was an exit gap, say, on the ET-Plus in
11 2000 or 2001 that was an inch and a half, you'd have no
12 earthly idea, would you?

13 A. The only way I would know would be if I go back to the
14 revisions on the drawings.

15 Q. Okay. And you haven't done that?

16 A. No, sir.

17 Q. Okay. But you did get to measure a bunch of -- of heads
18 that had five-inch channels, didn't you?

19 A. I have measured some, yes, sir.

20 Q. All right. And I've just got a couple of them here, and
21 you've got a bunch of notes up there. Let me ask you about
22 some, see if we can ID them. For example, T 3, do you have
23 that one? That had an -- that was a five-inch channel, was
24 it not?

25 A. Yes, sir, I have TX 3 listed as a five-inch channel.

1 Q. And that -- the dimension of the exit gap was 1.89 minus
2 .27, so that's about 1.6 inches, right?

3 A. Yes, sir.

4 Q. So that one, you don't know when it was made, but that
5 one's got an exit gap that's much bigger than an inch -- in
6 fact, it's bigger than an inch and a half, isn't it?

7 A. Yes, sir, it is.

8 Q. All right. How about T 4? You measured that one, and
9 that one was 1.9 minus .27, so that's about 1.7 inches,
10 isn't it?

11 A. Yes, sir, at T 4, 1.7 inches.

12 Q. And that's a whole bunch bigger, isn't it?

13 A. Yes, sir, it is.

14 Q. All right. The next one would be T 5, right?

15 A. Yes, sir.

16 Q. And that dimension was 1 -- 1 and 5/8 inches, isn't it?

17 A. Yes, sir.

18 Q. I'm not good on the -- on the fraction part, but that's
19 bigger than an inch and a half, isn't it?

20 A. Yes, it is.

21 Q. And I think you noted on that one, not impacted, didn't
22 you? Look at your notes and see.

23 A. Yes, sir.

24 Q. Okay. And it had an ET-2000 sticker on it. Do you know
25 why that was, because it wasn't an ET-2000, was it?

1 A. No, sir, I don't know why.

2 Q. Well, have you heard the tale that when they started
3 making the ET-Pluses, they had to put some old stickers on
4 there because they hadn't thought far enough in advance to
5 make some new stickers to put on there?

6 A. No, sir.

7 Q. You haven't heard that tale? All right.

8 Look at the next one which, would be T 6. That one's
9 got an exit gap of 1.9 minus .28, so that's about 1.7, isn't
10 it?

11 A. Yes, sir, 1.66.

12 Q. And you, in fact, can tell if they've been impacted,
13 can't you, Mr. Hopkins?

14 A. Normally you can, yes, sir.

15 Q. All right. And you didn't make any notation on any of
16 your notes that any of these five-inch channel heads had
17 been impacted, did you?

18 A. Not to my knowledge, no, sir.

19 Q. Okay. And when -- when one of these bolts goes through
20 an inch gap, you can pretty much tell that, can't you?

21 A. Yes, sir.

22 Q. All right. There's no way to orient this bolt, is it,
23 where it will actually go through an inch gap and not tear
24 the metal up?

25 A. I'm not sure of that, no.

1 Q. Well, if you got an inch gap and this thing's an inch
2 and a half, I don't know about where square bolts and round
3 holes, but it looks like to me it won't fit. And if it gets
4 through there, because it was driven through by force,
5 that's going to do something to that metal, isn't it?

6 A. It would probably leave a mark, yes, sir.

7 Q. It'd probably leave a bunch of marks, wouldn't it?

8 A. Yeah. I -- I don't know.

9 Q. You didn't see -- see any of that on these heads that
10 you measured, did you?

11 A. I did not observe that, no.

12 Q. All right. Let me talk to you just a moment about the
13 welding on these things.

14 MR. BAXTER: Can I move around here, Your Honor?
15 I'm going to try to keep my voice up.

16 THE COURT: You have the same leave as Mr. Mann
17 had.

18 Q. (By Mr. Baxter) Now, you said that A and B were
19 identical, but, of course, they're not because you've got a
20 channel sticking down in the extruder head on this B one,
21 don't you?

22 A. Yes, sir, the four-inch channel.

23 Q. And you've got a lip on it that's not covered up by a
24 weld, don't you? Inside there, isn't there a lip down
25 there?

1 A. Yes, sir.

2 Q. Okay. That's not filed off or covered up or filled in
3 or anything, is it?

4 A. No, sir.

5 Q. And so the distance inside that extruder head is going
6 to be different from the one with a butt weld that's not
7 sticking in there. And the one that's sticking in there, as
8 a matter of fact, it will be sticking in on both sides,
9 won't it?

10 A. Yes, sir.

11 Q. So you've got -- whatever you stick -- the thickness of
12 the steel is, you've got to take away that space for the
13 guardrail to go through, don't you?

14 A. Yes, sir, 0.18 inches.

15 Q. Makes a much tighter fit, doesn't it?

16 A. No, sir.

17 Q. All right. Well, tell me about the butt -- did I
18 understand you to say that this -- this fillet weld, that's
19 also called a lap weld?

20 A. No, we call it a fillet weld, sir.

21 Q. I know you've heard real welders call it a lap weld,
22 haven't you?

23 A. I have not.

24 Q. So the real difference is -- and that's one of the welds
25 you've got to do by hand, isn't it?

1 A. We do -- we do that weld by hand, yes, sir.

2 Q. Now, to do the butt weld, you've got to have a really
3 experienced welder because that's much -- a much harder weld
4 to do, isn't it?

5 A. In my opinion, yes, sir, it is a hard weld to do.

6 Q. And so it's a lot cheaper on you guys if you've got this
7 fillet weld because almost any welder can do that, can't
8 they?

9 A. No, sir. All my welders can do both.

10 Q. But it takes a much more experienced welder. And if you
11 mess up on this one, you got to take it off, you got to
12 grind it, you got to do the whole thing, but this fillet
13 weld is almost foolproof, isn't it?

14 A. Not necessarily, no, sir.

15 Q. All right. You -- you would have a lot more cost with a
16 butt weld than you do with a fillet weld, right?

17 A. No, I don't believe that, sir.

18 Q. All right. Now, you use the butt weld for like 15
19 years, didn't you, or Trinity did, you didn't?

20 A. No, I believe we did about three years.

21 Q. Well, I know at the plant you did that, but long before
22 that when they were making the ET-2000, that was a butt
23 weld, too, didn't it?

24 A. I -- I don't know on the ET-2000, no, sir.

25 Q. If the evidence in this case is that it was just like

1 this and the designers designed it this way, you have any
2 reason to disagree with that?

3 A. No, sir, I don't.

4 Q. Did you install some of those ET-2000s when you were
5 installing?

6 A. Yes, sir, I did.

7 Q. All right. They were big old things?

8 A. They were slightly bigger than those, yes, sir.

9 Q. All right. Now, you told me it was stronger, but when
10 you test them, you don't test them driving them down, do
11 you? You test them by trying to bend them sideways, don't
12 you?

13 A. I don't test the --

14 Q. You test the welds?

15 A. Oh, yes, sir.

16 Q. Yes, sir. And when you have a welding test, that's how
17 you test whether a product is any good or not, isn't it,
18 sideways?

19 A. Yes, sir, we do --

20 Q. Not up and down?

21 A. Yes, sir.

22 Q. I tell you what, I -- I had to borrow these because wood
23 working is not something I can do, but if I were to take
24 these two pieces of wood and if I were to glue them
25 end-to-end like this and I were to hit it from this end, you

1 see that? Do you think it's stronger to be glued end-to-end
2 or if I took it sideways like this like a fillet weld and
3 then hit it, which one of those is stronger?

4 A. I don't know, sir.

5 Q. Sir?

6 A. I don't -- I don't understand your -- your --

7 Q. Let me try it again. I'm going to take these two and
8 either weld them or glue them or whatever it is, I'm going
9 to do a butt weld right there. And I'm going to hit it from
10 the top, okay?

11 A. Okay.

12 Q. I want to know if that's stronger or weaker than if I've
13 got it tacked on the side here like this and I hit it from
14 the top.

15 A. I do not know. I don't know which one's stronger, sir.

16 Q. Really?

17 A. Really.

18 THE COURT: All right. Gentlemen, let's speak up.
19 You're both beginning to whisper.

20 Q. (By Mr. Baxter) So if I've got it -- if I've got this
21 metal to metal or wood to wood butted up like that --

22 A. Uh-huh.

23 Q. -- and I get it from the top --

24 A. Uh-huh.

25 Q. -- you're really telling me you can't tell whether

1 that's stronger or weaker than if just got it tacked from
2 the side here and hit it from the top?

3 A. I -- I don't know, sir, no.

4 Q. Okay. You know anything about welding pipelines?

5 A. No, sir, I don't.

6 Q. You know that on a pipeline -- on a high pressure
7 pipeline, they always do a butt weld?

8 MR. MANN: Your Honor, I'm going to object
9 because Mr. Baxter's testifying now and that's
10 inappropriate. So --

11 THE COURT: What's your objection, Counsel?

12 MR. MANN: My objection is it's outside the
13 evidence in the case, and it's also speculation on
14 Mr. Baxter's part. He's now testifying instead of just
15 asking the questions, because it's outside the realm of what
16 this expert or this man uses as far as welding.

17 THE COURT: It's -- I'll overrule your objection
18 that Counsel's testifying. It's clearly a question,
19 although he has said he doesn't know anything about
20 pipelines, so in that respect, I'll say let's move on.

21 MR. BAXTER: All right.

22 Q. (By Mr. Baxter) Let me -- let me ask you this, Mr.
23 Hopkins. If -- if I'm driving down the road in my car and I
24 got some of my six kids with me or you're driving along with
25 your children, and lo and behold something happens and you

1 hit this -- this head right here, you see that?

2 A. Yes, sir.

3 Q. Got me?

4 A. Yes.

5 MR. BAXTER: Can I move around, Your Honor?

6 THE COURT: You may.

7 Q. (By Mr. Baxter) If I'm sitting in the car like this and
8 I'm driving, can you think of anything worse coming through
9 my windshield than the end of your guardrail?

10 A. No. I wouldn't like that, no, sir.

11 Q. That'd be pretty bad, wouldn't it?

12 A. Yes.

13 Q. Have you seen some of these accident photos, Mr.

14 Hopkins, of -- where that's happened with the product that
15 you make?

16 A. Yes, sir, I have seen some.

17 Q. Well, would you expect a company like Trinity, once they
18 realize there's a problem about that happening, that they
19 would then conduct an investigation? You would expect your
20 company to do that, wouldn't you?

21 A. Yes, sir.

22 Q. Okay. Now, the easiest way, of course, would be just to
23 take it out and crash test it, wouldn't you?

24 A. I don't know.

25 Q. Well, I mean, that's what they do to see if they're

1 safe. You know about that, don't you?

2 A. I'm not involved in the crash testing.

3 Q. I know you're not. But -- but you -- you hear about
4 that, and you know about that, don't you?

5 A. Yes.

6 Q. And you know that that's how they test them, to see if
7 they're safe for the public or not, right?

8 A. Yes, sir.

9 Q. Well, if you've seen those photos with those guardrails
10 coming through the cars and they're with a product you make,
11 wouldn't you expect your company to investigate it?

12 A. Yeah, I don't -- I don't know the procedure for that,
13 sir.

14 Q. No, sir. Just as a human being out there driving on the
15 roads, wouldn't you expect a company to investigate it, sir?

16 A. Yes.

17 Q. Okay. And one of the things they could do is that if
18 they've got a company that can do a crash test is you go
19 stick it in a crash test and see how it does. Wouldn't you
20 expect that?

21 A. Sir, I'm not familiar with the policies and procedures
22 on how they operate that. I'm -- I'm not involved in the
23 corporate end of it, sir.

24 Q. Forget the policies. Just as -- just as a citizen,
25 wouldn't you expect a company to do that?

1 A. Yes, sir. Trinity is -- is very ethical and I trust in
2 the integrity of this company. I've been with this company
3 for a long time.

4 Q. Right.

5 A. And I trust what they do.

6 Q. Right. Well, do you trust them when they refuse to
7 crash test it and not investigate what's happening with the
8 heads that you're making in your plant?

9 A. I'm not sure that they have refused that. I don't know.

10 Q. Well, if the president of the company today testified
11 they had done no crash tests, they had done no computer
12 simulations, they had done no investigation at all, would
13 that be a surprise to you?

14 A. No. No, sir.

15 Q. You think that's -- is that the way Trinity would react,
16 we're just not going to look into it?

17 A. No, I don't -- I don't think they would not look into,
18 no, sir.

19 Q. Well, I'm telling you, if his testimony is they've never
20 crash tested it once they got the complaints and they
21 haven't done any computer simulations and they've done no
22 investigation of the wrecks, doesn't that shock you -- your
23 conscience just a little bit?

24 A. No, sir.

25 Q. You think that's the thing to do, just ignore it?

1 A. Sir, I don't think it's been ignored.

2 Q. What do you think they've done?

3 A. We -- we -- we have done examinations. I've gone out on
4 the road --

5 Q. What do you think Trinity's done to investigate these
6 horrific accidents where people are losing their lives and
7 their limbs because of the products you make?

8 A. I don't know what they've done, sir.

9 Q. Okay. But you would think they would do something,
10 wouldn't you?

11 A. Yes, sir.

12 Q. Did you find out in this case that when you started
13 making these products in 2000 -- what you'd say '6? When
14 did y'all start shipments?

15 A. 2002.

16 Q. No, sir. On the four-inch guide rail, when did you
17 start shipping it?

18 A. I believe that to be the first of 2006, yes, sir.

19 Q. All right. Was it January, was it February, was it
20 what?

21 A. I -- I don't know the exact date when we started
22 shipping the four-inch channel, sir.

23 Q. All right. Well, since -- since that time, are you
24 telling me that they've done an investigation as to why this
25 thing is killing people?

1 A. Restate that. I don't understand what you said.

2 Q. I thought you told me that you thought they'd done an
3 investigation. I'm trying to figure out what it is you
4 think they've done.

5 A. No. We investigated. We went out and took measurements
6 on thousands of -- of ETs.

7 Q. Sir, I'm talking about just the accidents. What do you
8 think they've done to investigate that?

9 A. I don't know what they've done, sir.

10 Q. Okay. Now, you're not an engineer, are you, Mr.
11 Hopkins?

12 A. No, I'm not.

13 Q. And you don't know the changes that they've made to this
14 head, whether or not it affected performance or not, do you?

15 A. I don't believe it did, no, sir.

16 Q. No, sir. I didn't ask you that. Do you know from an
17 engineering standpoint whether it has or not?

18 A. No, I'm not an engineer.

19 Q. I realize everybody at Trinity says it didn't affect it,
20 but you don't have any engineering or scientific or testing
21 knowledge to know that's true, do you?

22 A. I don't know, sir.

23 Q. Did you know that when they submitted a report of a
24 crash test, the first prototype that was made, they forgot
25 to tell the Federal Government they had made changes to the

1 head? Did you know that?

2 A. No, sir.

3 Q. Did you know they were required to do so, but they
4 didn't?

5 A. No, sir.

6 Q. Isn't that a little shocking to you?

7 A. Yes, it -- it is.

8 Q. Thank you, Mr. Hopkins. That's all I have, sir. I
9 appreciate it.

10 THE COURT: Redirect?

11 MR. MANN: Yes, sir.

12 REDIRECT EXAMINATION

13 BY MR. MANN:

14 Q. Mr. Hopkins --

15 MR. MANN: Can I get him to stand up, Your Honor?

16 THE COURT: Yes.

17 Q. (By Mr. Mann) Bring your pointer, too, Mr. Hopkins.

18 First of all, would this -- the way this is inserted, this
19 four-inch, is it up against the sides of these -- this
20 entrance right here?

21 A. Yes, sir.

22 Q. I mean, when you push down on this, it's against metal
23 right here where this throat is, isn't it?

24 A. Yes, sir, it's -- it's flush against it.

25 Q. Is that why you called it triangular earlier?

1 A. Yes, sir. You've got a little triangulation there.

2 Q. All right. Is that why you said that's the strongest
3 configuration you know?

4 A. Yes, sir. An angle joint or a triangular joint is -- is
5 strong.

6 Q. And if you hit, from your knowledge, if you hit this
7 here from the side versus this one from the side, which one
8 in your experience would break easier, this butt weld or
9 this fillet weld hitting from the side?

10 MR. BAXTER: Objection, unless he can lay a
11 foundation, Your Honor.

12 MR. MANN: Your Honor, it's the same line that
13 Mr. Baxter went off and asked him, Your Honor.

14 THE COURT: And he said he didn't know. So, I
15 mean, he -- you're going to have to lay a foundation,
16 Counsel.

17 MR. MANN: Well, the found --

18 Q. (By Mr. Mann) Mr. Hopkins, as far as your knowledge
19 concerning -- in welding, have you had experience on
20 whether the butt weld or the fillet weld works in a sheering
21 situation? You know what I mean, where something's coming
22 from the side?

23 A. Yes, sir. My experience --

24 Q. I'm not -- tell me what your experience is.

25 A. I've welded -- I've put -- I've built parts for 30 years

1 now.

2 Q. Okay.

3 A. I've seen weld tests performed.

4 Q. All right. And we're not talking about pushing from
5 this end. I'm talking about pushing from the sides. In
6 your experience in welding pieces together that you know are
7 going to have side impacts, something pushing from the
8 sides, do you have experience with that on which weld works
9 the best on pushing from the side, also?

10 A. Yes, sir.

11 Q. And tell me what that experience is.

12 A. My experience with welding and -- and weld testing and
13 seeing welds tested before and welds -- a reverse bend test.

14 Q. And what's a reverse bend test?

15 A. That's how we test our welders. They make a weld and
16 bend it backwards.

17 Q. All right.

18 A. To make sure the steel breaks and not the weld.

19 Q. Okay. So when you do a reverse bend, would that be like
20 hitting from the side?

21 A. Similar.

22 Q. All right. And in your experience in a reverse bend,
23 does this -- butt weld works the best or the fillet weld
24 works the best?

25 A. I believe it to be the fillet weld, sir.

1 Q. All right. And is that based on experience in your own
2 plant?

3 A. That is.

4 Q. All right. Lastly -- you can have a seat, Mr. Hopkins.
5 Mr. Baxter asked you about investigations, and I think you
6 were trying to say you had been out to investigate, correct?

7 A. Yes, sir, I have done some.

8 Q. All right. And in your investigations going out and
9 looking at the roads and looking at these guardrails that
10 have been impacted, what observations have you made?

11 A. The only reason I've made any time -- the case I believe
12 we're talking about is --

13 Q. Well, we're not talking about any particular case. Just
14 tell me about your observations.

15 A. I have measured guardrail in -- that has been extruded
16 in these extruder heads, and I've measured the width of the
17 guardrail where the leg channels are inserted into the
18 extruder head. The widest measurement I've ever gotten on
19 that piece of guardrail of an impacted unit is 14 and one
20 quarter inches and -- and that was one that was in
21 Mr. Harman's collection that was labeled TX 1. The inside
22 dimension of those guide channels as installed -- the
23 four-inch guide channels is 14 and 5/8 of one inch. I have
24 never measured a piece of guardrail wider than 14 and one
25 quarter inches at that point on an impacted extruder --

1 including the ones in Mr. Harman's collection.

2 Q. And what -- what would that mean? What -- what are
3 you talking about? Why is that important?

4 A. Well, they're saying that the guardrail is binding up
5 because the channels are narrower now. In my experience and
6 the ones that I've measured --

7 MR. BAXTER: He's kind of wandered off to the
8 expert.

9 MR. MANN: I'm -- I'm just asking factual
10 observations.

11 THE WITNESS: These are my observations.

12 THE COURT: I'll overrule the objection. You can
13 -- you can answer the question.

14 A. Please restate the question for me.

15 Q. (By Mr. Mann) Well, why -- why is that important, the
16 factual observation that you have that you've not found any
17 guardrails wider or flattened out than 14 and a quarter
18 inches -- is that what you said?

19 A. 14 and a quarter is the widest one I've ever seen, and
20 there's only been one that I've seen that wide. They --
21 they average 14 inches at that point.

22 Q. Okay. And I'm saying why is that observation important
23 as far as the width of these channels?

24 A. Because it is narrower than the inside dimension of
25 those channels, and there's no chance that it'll bind up

1 there.

2 Q. Okay. Tell me what your observations have been on the
3 roadway as far as bolts going through a four-inch guide
4 channel -- your observations?

5 A. As far as the bolts going through the guide channel --
6 through the extruder head?

7 Q. Yes, sir.

8 A. The extruder head? I've seen bolts driven right through
9 the extruder heads. Actually I've seen two splices where
10 the bolts -- where two sections of rail, 16 bolts have --
11 have been driven through that -- through that slot.

12 Q. Okay. And have you also gone out and observed -- how
13 many would you say, as far as the heads you have measured to
14 see whether they meet the specifications that -- of what you
15 turn out in your plant?

16 A. Thousands.

17 Q. Okay. And of all those you've measured -- have most of
18 those been four inches?

19 A. Yes, sir.

20 Q. Four-inch guide channels?

21 A. Yes, sir.

22 Q. And of all those you've measured, have you ever measured
23 any of them that were out of -- less than one inch? No. 1,
24 have you measured any that had an exit gap less than one
25 inch?

1 A. Absolutely not.

2 Q. Have you ever measured any that were out of
3 specification more than an inch and an 8th?

4 A. On the four-inch guide channels, I have measured some
5 that were out of the inch and a half specification, but they
6 were not built by Trinity.

7 Q. Okay. So as far as Trinity heads, I'm asking about?

8 A. No.

9 Q. Have you measured any?

10 A. No, sir.

11 Q. Even in Mr. Harman's collection?

12 A. Even in Mr. Harman's collection, all the four-inch guide
13 channel ETs that I measured were well within the spec.

14 Q. Okay. Thank you.

15 MR. MANN: I pass the witness, Your Honor.

16 THE COURT: Additional cross?

17 MR. BAXTER: Yes, Your Honor.

18 RECROSS-EXAMINATION

19 BY MR. BAXTER:

20 Q. Did I understand you, Mr. Hopkins, to say you've been
21 out to some wreck scenes to investigate the wrecks?

22 A. Not the wrecks, no, sir. I've stopped and looked at a
23 damaged end terminal if I see it, on occasion.

24 Q. On occasion?

25 A. When I get the opportunity.

1 Q. One or two?

2 A. No, hundreds.

3 Q. Hundreds?

4 A. Yes, sir.

5 Q. These things are involved in hundreds of wrecks?

6 A. They are.

7 Q. Okay. Now, when he was asking you about hitting it from
8 the side, if you hit it from the side, that head's not going
9 to work, is it? That's not what it's indented to do, is it?

10 A. I don't know, no, sir.

11 Q. Oh, you do, Mr. Hopkins. You mean to tell me you don't
12 know you're supposed to hit it from the front?

13 A. Oh, I do know you're supposed to hit it from the front.
14 You asked -- you asked me another question. You asked me
15 two questions.

16 Q. If you hit it from the side --

17 THE COURT: Gentlemen, one at a time. And, Mr.
18 Baxter --

19 MR. BAXTER: Yes, Your Honor. I'm sorry.

20 THE COURT: -- no sidebar comments.

21 MR. BAXTER: Yes, sir.

22 Q. (By Mr. Baxter) If you hit it from the side, it's not
23 going to extrude that guardrail, is it?

24 A. I don't know, sir.

25 Q. Don't you know you've got to hit it from the front to

1 make it work?

2 A. There's a certain angle that it's tested at. I'm not
3 familiar with what that is, sir.

4 Q. If you hit it right here at this weld, right there,
5 that's where your car hits it, it's not going to work, is
6 it?

7 A. I don't know, sir.

8 Q. You really don't know if it's going to have to hit it
9 from the front to drive it down that track? If you hit it
10 from the side, it's not going to extrude the guardrail. You
11 don't know that?

12 A. No, sir. I'm -- I'm not involved in the performance end
13 of this thing.

14 Q. Okay. Now, you don't know, do you, sir, whether or not
15 the butt weld or the fillet weld is stronger than a -- in a
16 crash when a car actually hits it from the front?

17 A. I believe the fillet weld would be stronger, sir.

18 Q. All right. You remember testifying about that before?

19 Let me read to you what you got asked and what you said.

20 A. Okay.

21 Q. And have you no idea whether the butt weld and the
22 placement of the steel in the butt weld is more crash
23 resistant than the fillet weld and the way the steel was
24 placed on the fillet weld, correct?

25 And you said: No, sir.

1 Do you remember that?

2 A. No, sir.

3 Q. Okay. If I read that to you correctly, would you say
4 now that you want to back up on what you swore to before and
5 now you do know which one's stronger in a crash?

6 A. I -- I believe the fillet weld is stronger, sir. I
7 believe that's a stronger joint, and I believe that's what I
8 testified before.

9 Q. No, sir. You said you had no earthly idea in a
10 real-world crash which one was stronger.

11 A. That may have been my statement in a real-world crash,
12 sir.

13 Q. Okay. Well, then that's -- that's really the only point
14 I'm interested in is when my family hits your product here,
15 in that situation do you know which one is stronger?

16 A. No, sir.

17 Q. Okay.

18 MR. BAXTER: That's all I have, Your Honor. Thank
19 you very much.

20 THE COURT: Additional direct, Mr. Mann?

21 MR. MANN: No, Your Honor.

22 THE COURT: You may step down, Mr. Hopkins.

23 MR. MANN: He can be excused.

24 MR. BAXTER: No problem.

25 THE COURT: Is there objection?

1 MR. BAXTER: No.

2 THE COURT: You may be excused, Mr. Hopkins.

3 MR. MANN: Your Honor, if we could collect the
4 laser pointer where we don't think there's a --

5 THE COURT: Give it to the Court Security Officer,
6 Mr. Hopkins.

7 THE WITNESS: Thank you.

8 THE COURT: I'll let him keep it in case another
9 witness needs it.

10 MR. MANN: That's fine.

11 THE COURT: Call your next witness, Defendants.

12 MR. BROWN: Defendants call Dr. Eugene Buth, Your
13 Honor.

14 THE COURT: All right.

15 MR. BROWN: This witness has not been sworn,
16 Judge.

17 THE COURT: About 20 people left the courtroom. I
18 assume somebody is going to bring him in.

19 MR. BROWN: Yes, sir, there he is.

20 THE COURT: Dr. Buth, come forward, please. Our
21 courtroom deputy will administer the oath to you if you'll
22 come forward.

23 THE WITNESS: Okay.

24 THE COURT: You dodge all that steel.

25 (Witness sworn.)

1 THE COURT: Now, if you'll come around here, sir,
2 and have a seat on the witness stand.

3 All right. Mr. Brown, you may proceed.

4 MR. BROWN: Thank you, Judge.

5 CARL EUGENE BUTH, Ph.D., DEFENDANTS' WITNESS, SWORN

6 DIRECT EXAMINATION

7 BY MR. BROWN:

8 Q. Dr. Buth, would you please introduce yourself to the
9 Ladies and Gentlemen of the Jury?

10 A. Yes, sir. I'm Carl Eugene Buth.

11 Q. And, Dr. Buth, are you current -- currently employed,
12 sir?

13 A. No, sir.

14 Q. Are you retired?

15 A. Yes, sir, I'm retired from Texas A&M Transportation
16 Institute as of May 2013.

17 Q. Dr. Buth, how long did you work at Texas Transportation
18 Institute?

19 A. For 50 years.

20 Q. At some point in your career did it change to the name
21 Texas A&M Transportation Institute?

22 A. Yes, it did.

23 Q. And, Dr. Buth, before we get into actually your work at
24 TTI, can you give us a little bit of an idea of your
25 educational background?

1 A. Yes, I can. I attended Tarleton State College for two
2 years, went to A&M after that. Received a Master of Science
3 degree in civil engineering in 1963 from A&M College of
4 Texas. Received a Master of Engineering degree August 1964,
5 and a Ph.D. degree in engineering in 1972.

6 Q. Dr. Buth, have you ever worked professionally anywhere
7 besides the Texas A&M Transportation Institute?

8 A. I spent my entire career there, sir.

9 Q. What different roles or jobs have you held at TTI during
10 your 50 years?

11 A. My titles have been research assistant, research
12 associate, assistant research engineer, associate research
13 engineer, research engineer, senior research engineer,
14 senior research fellow. And along the line, my job
15 responsibilities were program manager, division head, and on
16 two different occasions finally, system agency director.

17 Q. Dr. Buth, have you ever been an instructor in the
18 classroom at Texas A&M University?

19 A. Oh, yes, sir.

20 Q. And what courses did you teach, sir?

21 A. Strength and materials, steel and concrete design, and
22 structural analysis classes.

23 Q. How long did you teach, Dr. Buth?

24 A. For about 20 years.

25 Q. Was that in the School of Engineering?

1 A. Yes, sir, in civil engineering.

2 Q. As a research scientist at TTI, how would you describe
3 the work that you did as a research scientist?

4 A. Most of it was directed at roadside safety, highway
5 safety, related areas to roadside safety.

6 Q. As part of your various job responsibilities, did you
7 have an opportunity to actually invent some things there,
8 sir?

9 A. Yes, sir, I did.

10 Q. How many patents do you hold?

11 A. I don't have an accurate count. Somewhere on the order
12 of eight or ten.

13 Q. In the development of the highway safety products
14 that you've testified to, was all of that work dedicated
15 to patented products, or did you work on other products?

16 A. Not all dedicated to patented product.

17 Q. Was the majority of your work on patented or
18 non-patented products?

19 A. I would say non-patented.

20 Q. All right, sir. If you would, sir, please explain to
21 the Ladies and Gentlemen of the Jury the process that goes
22 into research and development that a research engineer would
23 engage in at TTI. What do you do?

24 A. Well, there's some variations on what you would do, but
25 if we're developing something to solve a problem, addressing

1 a problem, trying to develop a new solution, we would start,
2 first off, with that issue being identified, some ideas
3 about how to address it, probably prepare a proposal to the
4 appropriate sponsor to work on that, and a proposal would
5 outline some scope of work, some objective.

6 The way we initially at least intend to go about
7 solving the problem, outline the work plan, and, of course,
8 we'd have a budget, like I said, a scope.

9 Q. All right, sir.

10 A. Submit that to a sponsor.

11 Q. Sir, would part of that process be engaged in trial and
12 error? Would you do experimentation from time to time?

13 A. Yes. Some of those would definitely be called in
14 experimentation. I would call it cut-and-try procedure.

15 Q. All right, sir. Is that in the nature of the research
16 and development work that's done at TTI?

17 A. Some of that work is in that nature. Yes, sir.

18 Q. And as part of the process of actually going through
19 what you just described to the Ladies and Gentlemen of the
20 Jury, are there different types of testing that occurs,
21 including crash-testing?

22 A. For roadside safety devices and related things, yes,
23 sir.

24 Q. All right. And in your career at TTI, have you worked
25 in other areas besides roadside safety?

1 A. Some in pavement friction, hydroplaning, perimeter
2 protection, homeland security kinds of things.

3 Q. How many crash tests, full-scale crash tests do you
4 estimate that you've participated in over your career,
5 Doctor?

6 A. Something over 2,000.

7 Q. Have you personally participated in also thousands of
8 tests on various components that are utilized out at TTI in
9 its work?

10 A. Yes, sir.

11 Q. Once the product is actually developed and approved,
12 does your work as a research engineer at TTI end?

13 A. No, sir.

14 Q. And what do you-all try to do at TTI, even when you have
15 a product that's been approved out there, sir?

16 A. We are always continually looking for ways to improve
17 things, problems to solve, ways to make things safer,
18 whether we have a product there or not.

19 Q. Dr. Buth, when was TTI created?

20 A. In 1950.

21 Q. You went to work there some decade later after its
22 creation; is that right?

23 A. Yes, sir, that's correct.

24 Q. Would you agree with me that it's the largest university
25 tran -- transportation research agency in the United States?

1 A. Yes, sir.

2 Q. Do you know why TTI was created?

3 A. It was created in response to a cooperative research
4 agreement between TXDOT and Texas A&M that was developed by
5 the Texas legislature.

6 Q. Have the focused of TTI expanded to address literally
7 all modes of transportation including highway, air, water,
8 and pipeline?

9 A. Yes, it has.

10 Q. Is TTI affiliated with the State of Texas in any way?

11 A. TTI is -- is a state agency.

12 Q. Is it part of Texas A&M University as well?

13 A. Yes, sir. It reports to the Texas legislature through
14 the Texas A&M University System.

15 Q. During your 50-year career out at TTI, did you also have
16 an opportunity to serve on various industry committees?

17 A. Worked with several of those, like Transportation
18 Research Board, Roadside Safety Group, and others.

19 Q. Have you had an opportunity to also work with federal
20 and state highway officials?

21 A. Yes, sir.

22 Q. During the course of your career, have you been asked to
23 speak and write articles on highway state topics as well?

24 A. I have some, yes, sir.

25 Q. All right, sir. Let's talk about TTI's role as a

1 crash-testing laboratory.

2 Would you please explain to the Ladies and Gentlemen of
3 the Jury what TTI's role is in terms of doing research
4 projects? How many have you done on an annual basis?

5 A. It'd be a few hundred.

6 Q. And do you have any idea how many sponsors that TTI
7 would work with on a year-in-and-year-out basis?

8 A. A few hundred also.

9 Q. Who would you describe as TTI's biggest client, if you
10 would, Dr. Buth?

11 A. That kind of changes with time, but over a period, it's
12 been Federal Government agencies, including the Federal
13 Highway, Department of State, Homeland Security, many state
14 DOT agencies.

15 Q. Dr. Buth, are you familiar with the 1997 FHWA memo?

16 A. Yes. I think I know the one you're asking about.

17 Q. The one that lists agencies that have experience in
18 crash-testing?

19 A. Yes, sir, I've seen that.

20 MR. BROWN: May I see Defendants' Exhibit 10, Mr.
21 Hernandez, Page 12 specifically?

22 Q. (By Mr. Brown) Dr. Buth, at the top of this page, it
23 lists various agencies as part of this document. Would that
24 be correct?

25 A. Yes, it does.

1 Q. And would you agree with me that Texas Transportation
2 Institute, as it was then known, Texas A&M University is
3 listed as one of those that have significant experience in
4 crash-testing?

5 A. Yes, it's listed there.

6 Q. And you actually are the contact point; is that right,
7 Dr. Buth?

8 A. I was at that time, yes, sir.

9 Q. Thank you, sir.

10 MR. BROWN: Thank you, Mr. Hernandez.

11 Q. (By Mr. Brown) Is TTI as a crash-testing facility
12 accredited or certified in any way, Dr. Buth?

13 A. TTI has an accredited crash-testing laboratory.

14 Q. Who is it accredited by?

15 A. It's accredited by American Association of Laboratory
16 Accreditors (sic). It's accredited to the International
17 Standards Organization 17025.

18 Q. Dr. Buth, during the time that TTI has existed doing
19 crash-testing, do you have idea how many crash tests have
20 actually been performed by TTI?

21 A. I have an idea. It's close to 3,000.

22 Q. During your time at TTI, did you have an opportunity to
23 also do work for the Federal Government?

24 A. Yes, sir.

25 Q. And what --

1 A. I did.

2 Q. I'm sorry. Did you actually do work for the Federal
3 Highway Administration?

4 A. Yes, sir.

5 Q. Do you also do testing and work for private sponsors?

6 A. Yes, sir, we do.

7 Q. Is Trinity Highway Products one of those clients?

8 A. Yes, sir.

9 Q. Is it the only client of TTI?

10 A. No, sir.

11 Q. Is it a large client, small client? How would you rate
12 it?

13 A. In -- in comparison to all the sponsors, it's a small
14 client, a significant one from private industry.

15 Q. Let's talk a little bit about crash-testing generally,
16 if we could, Dr. Buth. I want to talk a little bit about
17 how the process of crash-testing actually occurs.

18 You've described for the jury how one is set up or
19 obviously how the process develops. Once you decide to do a
20 crash test, how would you actually begin to set that crash
21 test up, sir?

22 A. We would prepare some documentation about the
23 description of the test, what is it to be tested, how is it
24 to be tested, what instrument -- what vehicle, what
25 instrumentation used in a vehicle, the test plan for what to

1 do.

2 We would then obtain the test article somewhere in that
3 time period; install it in our proving grounds, prepare the
4 test vehicle with all the instrumentation, playing the
5 photography, the still photography and the video photography
6 that's to be done during the test.

7 Once all that's in place, we would perform the crash
8 test at a scheduled time. During that test, instrumentation
9 on the vehicle and other instrumentation perhaps on a test
10 article, videos and photos would be made to document what
11 happened during the actual collision.

12 We'd make measurements before and after the collision
13 to document what happened. Take all that data, put it in
14 a -- in a file, and prepare a test report.

15 Q. Dr. Buth, one of the terms that you've used and the jury
16 has heard used several times is this item called a test
17 article. In its most basic terms, is a test article that
18 thing which gets hit during a crash test?

19 A. Yes, sir.

20 Q. All right. You've also talked about how the particular
21 vehicle may be installed with instrumentation. Did I hear
22 you correctly?

23 A. That's correct, yes, sir.

24 Q. What sort of instrumentation is actually put onto a
25 vehicle during a crash test?

1 A. Typically, most commonly, it would be accelerometers,
2 measuring acceleration of the vehicle in the three
3 directions, longitudinal, lateral, and vertical.

4 It would be other instrumentations that measure the
5 roll -- the roll, pitch, and yaw displacement of the vehicle
6 to define its trajectory, other things such as contact
7 switches and those sorts of things, too.

8 Q. What are those things actually measuring, Dr. Buth,
9 inside the vehicle during the crash?

10 A. They're measuring the response of the vehicle or the
11 effects of the collision on the vehicle.

12 Q. Are they also measuring what actually happens inside
13 the occupant compartment to a potential driver or
14 passenger in that compartment?

15 A. Well, they're measuring what happens to the vehicle to
16 allow us to evaluate what would happen to the occupant.

17 Q. Are you familiar with NCHRP Report 350?

18 A. Yes, sir.

19 Q. The jury's certainly heard a lot about that document,
20 sir. Would you consider it to be an authoritative source
21 when you-all do crash-testing according to federal
22 standards?

23 A. During that time period, yes, sir.

24 Q. Does 350 have its own set of criteria as to what is to
25 be measured during the actual crash test?

1 A. Yes. It has a number of criteria in there as to what is
2 to be measured, how it's to be measured, and what values
3 must be resulted in order to be a passed test, an acceptable
4 test.

5 Q. The jury has already seen a table called 5.1 from the
6 350 report. Is that the table by which you evaluate and you
7 measure the data that's collected from each crash test, Dr.
8 Buth?

9 A. I don't remember that table by number, but there's such
10 a table in there.

11 Q. All right, sir. Thank you.

12 Once you've had an opportunity to actually collect all
13 the data from the crash test, how at TTI is that data
14 interpreted, sir?

15 A. The data is processed in accordance with the procedures
16 outlined in 350. The resulting numbers are compared to
17 those evaluation criteria in 350 to decide whether they're
18 below or above, whether they pass or fail.

19 Q. Once that raw data is collected in terms of numbers or
20 interpreted in terms of numbers, is there any opportunity
21 for an engineer at TTI or any person at TTI to somehow
22 change those numbers, Dr. Buth?

23 A. Not legitimately, no.

24 Q. All right, sir.

25 A. There are numbers that are measured, and they result

1 from the calculations. They are the numbers.

2 Q. They're whatever occurs according to the
3 instrumentation. Is that a fair statement?

4 A. Yes, sir.

5 Q. And are they compared to that chart?

6 A. Yes, sir.

7 Q. And does that determine a pass or fail?

8 A. Yes, sir.

9 Q. Would you agree with me that it's an objective standard,
10 plain and simple?

11 A. Yes, I would.

12 Q. All right. And once you have an opportunity to collect
13 all your data -- and I believe you've told the jury about
14 photography and videotape and other things -- is that data
15 actually compiled into some sort of a report, if it's going
16 to be submitted to the Federal Highway Administration for
17 consideration?

18 A. Yes, it would be.

19 Q. Is that typically known as a crash test report?

20 A. Yes, sir.

21 Q. Are those crash test reports prepared at TTI?

22 A. Yes, sir.

23 Q. Is there a standard within 350 that outlines what should
24 be covered inside that report?

25 A. Yes. It contains the items that need to be included in

1 the report.

2 Q. All right. And does TTI follow that standard, sir?

3 A. Yes, sir.

4 Q. If you could describe for me generally and for the jury,
5 what are the general things that are included within a crash
6 test report, Dr. Buth?

7 A. It would include some introduction to the report,
8 include a statement of the purpose of the report, a
9 description of what was tested, a description of how it was
10 tested, the results that were obtained from the test, the
11 evaluation of those results to determine the pass or fail,
12 photo documentation and measurements from the before and
13 after the test.

14 Q. Would there be a narrative section also included in the
15 report, Dr. Buth?

16 A. Yes, sir. Some of those would be narrative sections.

17 Q. How quickly after a particular crash test is run is that
18 crash test report assembled, sir?

19 A. It would -- it would occur over one or two months.

20 Q. Dr. Buth, during your time at TTI, a product was
21 developed called the ET-2000. Are you familiar with that
22 product?

23 A. Yes, I am.

24 Q. Were you, in fact, one of the inventors of the ET-2000?

25 A. Yes, I am.

1 Q. Can you tell the jury what your role was in developing
2 the ET-2000? What contribution did you make to that
3 particular product?

4 A. Bringing ideas to the table for discussion to
5 incorporate in the design of the head, the design of the
6 anchorage system, and perhaps other parts.

7 Q. Is there a particular part of that system where you feel
8 like you had a significant amount of input?

9 A. Yes.

10 Q. And would you tell the jury what that is, sir?

11 A. It would be the -- the main section in the head, the
12 squeezing plates that flatten the w-beam, and it would be
13 the anchor box that anchors the cable to the w-beam up in
14 advance of the head.

15 Q. All right, sir.

16 MR. BROWN: Your Honor, may I leave the podium
17 briefly?

18 THE COURT: You may.

19 Q. (By Mr. Brown) Dr. Buth, I want to show you what has
20 been placed here in the courtroom. Are you familiar with
21 what I have here before me?

22 MR. BROWN: May he stand, Your Honor?

23 THE COURT: Yes.

24 MR. BROWN: Thank you, sir.

25 THE COURT: If you'll come around here, Dr. Buth,

1 to this corner. Use this handheld microphone.

2 Mr. Brown, let me know when you're finished so he
3 can return to his seat.

4 MR. BROWN: Thank you, Judge.

5 Q. (By Mr. Brown) Would you agree with me that this is an
6 ET-Plus head that has been cut in two, sort of?

7 A. It looks like it is, but it has a faceplate that's
8 ET-2000.

9 Q. Right. This is actually, I'm going to represent for
10 you, an ET-Plus that's been cut in half. I want you to look
11 specifically down in this area (indicating).

12 You've told the Ladies and Gentlemen of the Jury that
13 there are squeezing plates.

14 A. Yes, sir.

15 Q. Are those squeezing plates, and do you have the --

16 MR. BROWN: May he borrow the pointer, Your Honor?

17 THE COURT: Yes.

18 MR. BROWN: Would you --

19 Q. (By Mr. Brown) Dr. Buth, can you point to this
20 particular demonstrative what would be the squeezing plates
21 that you had significant contribution on?

22 A. It would be these two plates here that start out at this
23 width and extend downward and end up at this width
24 (indicating).

25 Q. All right, sir. If you will hand that back to the

1 officer.

2 MR. BROWN: And may he return to his seat, Judge?

3 THE COURT: Yes, please.

4 Q. (By Mr. Brown) Dr. Buth, when you contributed that to
5 the development of the actual ET-2000, can you tell the
6 Ladies and Gentlemen of the Jury what you-all were trying to
7 do when you actually developed those squeezing plates?

8 A. We were trying to come up with a mechanism that would
9 dissipate energy and that would prevent the guardrail from
10 piercing the vehicle, deflect it out to the side.

11 Q. Let's talk a little bit about that. Was that a problem
12 on the highways prior to the development of the ET-2000?

13 A. It was for some terminals. For the old standup
14 terminal, they call it, it was just a blunt end of a
15 guardrail standing there ready to pierce the vehicle.

16 Q. And was that the danger to the motorists of the United
17 States who might encounter one of those blunt end guardrails
18 setting on the highways?

19 A. Oh, in that case, they would be, yes.

20 Q. Are you familiar with an opportunity that was attempted
21 called a turn-down?

22 A. Yes, sir.

23 Q. And what was a turn-down, Dr. Buth?

24 A. That was a different kind of an end treatment for a
25 guardrail. It consisted of one section of guardrail that

1 started out as standard height like the rest of the
2 guardrail, then was twisted, and the end was at ground
3 level, anchored to a post underground. So it removed the
4 blunt end of the guardrail.

5 Q. What was the problem with that installation, Dr. Buth?

6 A. In some collisions, it could cause vehicles to be
7 launched, to roll over, particularly smaller vehicles.

8 Q. Did someone develop or -- or come up with a need to
9 develop some sort of treatment to the end of guardrails?

10 A. Yes.

11 Q. Who started that initiative, Dr. Buth?

12 A. People at the Transportation Institute and Texas Highway
13 Department at that time, which is now TXDOT, started
14 discussions about whether or not we could develop another
15 terminal that would be better than a turn-down.

16 Q. And did TTI address that concern, Dr. Buth?

17 A. Yes, sir.

18 Q. The ET-2000 product has been called at different times a
19 revolutionary product for the nation's highways. Would you
20 agree with that?

21 A. Yes.

22 Q. And that was developed by the engineers at Texas A&M; is
23 that right?

24 A. Yes, sir.

25 Q. During the course of the -- the ET-2000's life,

1 Dr. Buth, those particular plates that you have identified
2 for the jury, did those plates ever change in the ET-2000,
3 sir?

4 A. Yes, they did.

5 Q. All right. And tell us when that happened.

6 A. Early on in the life of the ET-2000.

7 Q. And what was the decision there, sir?

8 A. There were two -- two styles of plates available. One
9 was straight plates, and one was the curved plates like in
10 this example here.

11 Q. And did you folks at A&M actually develop the curved
12 plates as well?

13 A. Yes, sir. People at TTI did.

14 Q. In 1999, Texas A&M developed a new product called the
15 ET-Plus. Are you familiar with that?

16 A. Yes, I am.

17 MR. BROWN: And, Your Honor, if I may leave the
18 podium again?

19 THE COURT: You may.

20 Q. (By Mr. Brown) Dr. Buth, do you recognize the setup here
21 in this courtroom that are mounted here on these two carts,
22 the device which is known as the ET-Plus?

23 A. Yes, sir.

24 Q. Dr. Buth, are you one of the folks that helped invent
25 the ET-Plus as well?

1 A. Yes, sir.

2 Q. I want to talk to you just a little bit, if I could,
3 about various components of this ET-Plus. On the model
4 that you see right here to the right of me, right here
5 in front of the podium, to the left of the jury, that
6 has guide channels welded on it.

7 Would you agree to that?

8 A. Yes, sir.

9 Q. And can you tell the jury, if you would, sir, how those
10 guide channels came to be placed on an ET extruder terminal?

11 A. How they're physically placed on there?

12 Q. If you would just sit down and we'll just talk about it.

13 A. Okay. Those -- those guide channels are normally the
14 same width as the opening in those squeezer plates, so
15 they're just butted together and welded.

16 Q. Were those guide channels actually installed on the
17 first ET-2000?

18 A. Yes, but there may have been experiments where
19 different -- different heads were made and tested.

20 Q. On the original ET-2000, was there a 5-inch guide
21 channel, Dr. Buth?

22 A. Yes, sir.

23 Q. All right. When the ET-Plus was developed, did you
24 begin with a 5-inch guide channel that was on the original
25 ET-2000?

1 A. Yes, we did.

2 Q. When you-all developed the ET-Plus in 1999, why did you
3 decide to develop a new product beyond the ET-2000? Why
4 this product?

5 A. Well, we paid attention, observed the way the 2000 had
6 behaved. It didn't have any problem, but we thought we saw
7 some ways that we could make improvements to it.

8 Q. And what were some of the ways to make improvements to
9 it?

10 A. Well, one was we observed that the deflector chute,
11 which used to be a channel like -- that extended to about 90
12 degrees, had an inside wall and an outside wall, and that
13 that inside wall really wasn't needed. It wasn't doing
14 anything to redirect the w-beam.

15 Q. All right.

16 A. So we could omit that, and -- and we did.

17 Q. Did you do anything with the orientation of the head
18 itself? Did you change the dimensions of the head, the
19 faceplate?

20 A. We changed the faceplate, made it not as wide as it used
21 to be and made it taller.

22 Q. And what was the reason for doing that, Dr. Buth?

23 A. We made it not as wide so that it wouldn't stick out
24 toward traffic near as far. It's only a few inches but that
25 should help. We made it taller so we could be more

1 confident that it would accommodate vehicles of different
2 heights, lower little cars and taller vehicles.

3 Q. Was one of the reasons, Dr. Buth, for increasing the
4 height of this particular faceplate also to engage pickup
5 trucks and SUVs?

6 A. Well, yes. Those were taller bumper heights, yes.

7 MR. BROWN: Mr. Hernandez, may I see Defendants'
8 Exhibit No. 172?

9 Q. (By Mr. Brown) Dr. Buth, this is, in fact, the face
10 cover or cover sheet of the --

11 A. Yes, it is.

12 Q. And this has the December 1999 date in the right-hand
13 corner. Do you see that?

14 A. Yes, I do see that.

15 Q. Would this be, in fact, the crash test report that was
16 originally done on the first ET-Plus that was originally
17 submitted to the Federal Highway Administration?

18 A. Yes, that would be it.

19 Q. All right. How did TTI come to decide what crash test
20 to perform on the ET-Plus, when it was originally developed?

21 A. Well, we -- researchers among ourselves would talk about
22 that, consider the differences in the design, how it might
23 influence the behavior in the crash test, and, therefore,
24 select the test that we at least should run first to confirm
25 that it was still functioning acceptably.

1 Q. The jury in this case has seen evidence that the crash
2 test that was performed in 1999 was the 3-31 crash test.

3 Are you familiar with that?

4 A. Yes, sir.

5 Q. And that involves a pickup truck, doesn't it, Dr. Buth?

6 A. Yes, sir.

7 Q. The jury has already seen a video of that which I will
8 not replay at this time, and that test has been described at
9 times as the critical test.

10 Do you believe the 3-31 test is the critical test for
11 all crash tests?

12 A. No, not for all.

13 Q. Tell the jury how 3-31 was selected as the critical test
14 to be performed in 1999, Dr. Buth.

15 A. We had made changes to the parts that would influence
16 the extrusion process, possibly. We thought it wouldn't
17 have a big effect. And that in itself was the main reason
18 to use the pickup truck which would get the most extrusion
19 distance during the collision.

20 Q. So if I understand what you've said, you wanted to see
21 how that head would react when hit with a heavy vehicle and
22 extruded over a long period of time; is that correct?

23 A. Yes, sir.

24 Q. And was there some question in the mind of the
25 researchers to see how this housing would actually react to

1 that heavy-strength impact?

2 A. Well, we want -- we thought there would not be a
3 detrimental effect, that it would all be acceptable, but we
4 kind of needed to prove it to ourselves with a full-scale
5 crash test.

6 Q. And did you prove it to yourself?

7 A. Yes, sir.

8 Q. And did the Federal Highway Administration agree with
9 you that that was the test to run at that time?

10 A. Yes.

11 Q. Did you engage with the Federal Highway Administration
12 as to whether or not other tests needed to be run?

13 A. Yes. We typically do that.

14 Q. And what was their answer back to you, sir?

15 A. They accepted this one.

16 Q. All right. And I think we've already seen the cover of
17 the crash test report. Was there an acceptance that was
18 actually obtained on that particular device?

19 A. Yes. The Federal Highway accepted it.

20 Q. All right. Now, Dr. Buth, let's talk a little bit more
21 about the ET-Plus and how it may have evolved.

22 Now, in 1999, you-all developed this particular product
23 here. It's been represented that this was a new product,
24 different than the ET-2000.

25 A. Yes, sir.

1 Q. Will you agree with that?

2 A. Yes, yes. We had changed things in the
3 squeezer/extruder mechanism a little bit, so it's different.

4 Q. And you also changed the housing that contains those
5 squeezing plates?

6 A. Yes, we did.

7 MR. BROWN: Your Honor, may I step out again?

8 THE COURT: You may.

9 Q. (By Mr. Brown) Dr. Buth, in this particular device,
10 there has been testimony already that these guide channels
11 act as a mechanism to keep this head in alignment during a
12 head-on impact; is that correct?

13 A. That's correct.

14 Q. Do they also have another function when this device is
15 hit at an angle? Do they assist in the gating effect of
16 this particular terminal?

17 A. Yes. They're involved in that, yes.

18 Q. And -- and we've talked a little bit with other
19 witnesses in this case about the function of the ET-Plus,
20 and we've heard that generally it has three functions. It
21 takes a head-on impact?

22 A. Yes.

23 Q. It can take also an angled or gating impact?

24 A. Yes.

25 Q. And it also takes a redirection impact. Would you

1 generally agree with that?

2 A. Yes. Different impact points, yes.

3 Q. When this particular head is hit through the
4 redirection --

5 MR. BAXTER: I wonder if there's any chance I can
6 object to him leading on every question, Your Honor.

7 THE COURT: I'll sustain the objection.

8 Mr. Brown, you're going to have to ask non-leading
9 questions.

10 MR. BROWN: Thank you, Judge.

11 THE COURT: You, in effect, have been testifying,
12 so let's let the witness testify. You ask the questions;
13 they give the answers.

14 Q. (By Mr. Brown) Dr. Buth, when there's a redirection test
15 that occurs, what is the function of the head?

16 A. Simply supports the end of the w-beam at that post.

17 Q. Thank you.

18 We have seen correspondence in this case that in 2003 a
19 decision was reached to change the dimensions of the guide
20 channels. Were you involved in that?

21 A. Yes. In those discussions about that at that time, yes,
22 sir.

23 Q. All right.

24 MR. BROWN: May I see Defendants' Exhibit 38, Mr.
25 Hernandez?

1 Q. (By Mr. Brown) Dr. Buth, if we look down to the bottom
2 of this particular email, are you, in fact, copied on this?

3 A. Yes, sir, I am.

4 MR. BROWN: And would you go to the next page,
5 please, Mr. Hernandez?

6 Q. (By Mr. Brown) On item No. 6 in this email from
7 Dr. Hayes Ross, it says: We are thinking that impact
8 performance of the head may be improved by reducing the
9 available clearance between the downstream end of the guide
10 chute and the w-beam in both the lateral and vertical
11 directions.

12 Did I read that correctly?

13 A. Yes.

14 Q. When Dr. Ross says we were thinking, were you part of
15 that we, Dr. Buth?

16 A. I assume I would be included.

17 Q. Is that typically what would be done at Riverside?

18 A. Yes.

19 Q. When you-all at Riverside at TTI's testing facility
20 would discuss an idea on how to improve a product, would you
21 typically be involved in that?

22 A. Yes.

23 Q. All right.

24 MR. BROWN: Thank you, Mr. Hernandez.

25 Q. (By Mr. Brown) Once that suggestion was made, Dr. Buth,

1 would you expect that Trinity would respond to that?

2 A. Yes, at some time.

3 Q. And would it typically -- when you have a product
4 licensed to someone like Trinity who is manufacturing
5 the product, would you expect them to answer if it's
6 feasible to manufacture it as you have suggested?

7 A. Yes. I think they'd have some response, some opinion
8 about what they thought about it and what it would mean to
9 them to change it.

10 MR. BROWN: May I see Defendants' Exhibit 169, Mr.
11 Hernandez?

12 Q. (By Mr. Brown) This is, in fact, an email from Steve
13 Brown to you, Gene Buth, and Dr. Ross. Would you agree with
14 that?

15 A. Yes, sir.

16 Q. This particular email asks about or responds to: Was
17 thinking about your idea of tightening the fit of the guide
18 channel on the ET-Plus.

19 Did I read that correctly, sir?

20 A. Yes.

21 Q. This is a question that Steve Brown asked of the
22 engineers at TTI; is that correct?

23 A. Yes, of -- of -- of me and Dr. Ross.

24 MR. BROWN: Thank you, Mr. Hernandez.

25 Q. (By Mr. Brown) Dr. Buth, why, in fact, did you-all at

1 TTI ask Trinity to consider making this change in the width
2 and the lateral and vertical directions of these guide
3 channels?

4 A. Why did we ask to make that change?

5 Q. Yes, sir.

6 A. We thought it would improve -- by reducing the amount of
7 space between the guide channels and the w-beam, that we
8 would have a little bit of improvement in the way the guide
9 channels kept the heads straighter.

10 MR. BROWN: May I leave the podium for a moment?

11 THE COURT: You may.

12 Q. (By Mr. Brown) Dr. Buth, is this the space (indicating)
13 that you're talking about?

14 A. At the end of the guide channels where there's two
15 vertical pieces connecting them together.

16 Q. And also the space from here to here (indicating)?

17 A. Vertically, yes.

18 Q. And is this, in fact, the reduction that you were
19 talking about?

20 A. Yes, sir.

21 Q. All right. Now, Dr. Buth, if this 5-inch guide channel
22 that was on this ET-Plus head was working, why would you
23 need to reduce it?

24 A. There was no real need. It just looked like it would be
25 an improvement.

1 Q. And do you take the issue of improvement of products
2 pretty seriously out at TTI?

3 A. Yeah. That's a key part of what we're doing.

4 Q. In your earlier testimony, you told the jury one of the
5 things that you did as a research engineer was to continue
6 to look at products and find ways to improve those products.

7 A. Yes, sir.

8 Q. Did you consider that part of your job as a research
9 engineer, sir?

10 A. Yes.

11 Q. Dr. Buth, as you begin to show the Ladies and Gentlemen
12 of the Jury the components here, is there a portion which
13 the bent and flattened rail will go outside this head?

14 A. Yes, sir, down at the exit gap.

15 Q. Are you familiar with splices in the rail?

16 A. Yes, sir. Bolted splices?

17 Q. Bolted splices.

18 A. Yes, sir.

19 Q. How are those bolted splices actually held together,
20 sir?

21 A. There's a pattern of eight bolt holes and eight bolts
22 that go in those holes. The w-beam is lapped over. Those
23 bolts extend through both pieces.

24 Q. During your experience at TTI, have you seen a series of
25 crash tests starting with the ET-2000 all the way through

1 the ET-Plus where those bolts have passed through that exit
2 gap?

3 A. I've seen that happen several times. Yes, sir.

4 Q. Have you always seen it successfully pass through?

5 A. If the extrusion was -- went far enough to encounter the
6 -- the -- the splice, yes, sir.

7 Q. And what you're saying, as long as the head was pushed
8 far enough down the rail; is that right?

9 A. Yes.

10 Q. Is it true that sometimes the head will gate before it
11 gets to that point?

12 A. Yes.

13 Q. All right. Let's talk a little bit, if we could, sir,
14 about the issue of what happens when you decrease the size.

15 There is an insertion of this particular guide channel
16 into the extruder throat.

17 Would you agree with that?

18 A. Yes, there is, for the 4-inch one.

19 Q. And I believe the evidence in this case will show that
20 it's about three-quarters of an inch. Would that be a fair
21 statement?

22 A. Yeah, sounds right.

23 Q. In addition to this reduction here, there's a height
24 reduction here as well; is that right?

25 A. Yes, it is.

1 Q. All right.

2 MR. BAXTER: Excuse me. I object to the leading
3 again. I'm sorry, Your Honor. Every one is leading.

4 THE COURT: Mr. Brown, you're continuing to lead
5 the witness. I'm going to instruct you not to.

6 MR. BROWN: Thank you, Judge.

7 THE COURT: And I don't -- I don't want you to say
8 thank you, Judge, and then keep doing it. I want you to
9 change your conduct.

10 MR. BROWN: Yes, sir.

11 THE COURT: All right. Let's proceed.

12 MR. BROWN: Defendants' Exhibit 16, Mr. Hernandez,
13 please.

14 Q. (By Mr. Brown) Do you recognize this email, Dr. Buth?

15 A. Yes.

16 MR. BROWN: Mr. Hernandez, if you could go to the
17 bottom of it and please expand that for us.

18 Q. (By Mr. Brown) Are you one of the recipients of this
19 email?

20 A. Yes, I am.

21 Q. Who is this email from, sir?

22 A. Brian Smith.

23 Q. The email says: Gentlemen, as per yesterday's
24 conversation, Trinity would like to hear your thoughts on
25 changing the 5-inch channel on the ET-Plus extruder head to

1 a 4-inch channel did I read that correctly?

2 A. Yes.

3 Q. It also says: As can be seen from the sample that
4 Trinity shipped to TTI, this seems to provide a better fit
5 while also slightly reducing the weight of the head.

6 Did I read that correctly?

7 A. Yes.

8 Q. And the last sentence, it says: If TTI decides to
9 accept these modifications, could the sample extruder head
10 be used in the ET 31 test that is scheduled for May 25 or
11 26? Thanks, B.S.

12 Did I read that correctly?

13 A. Yes, you did.

14 Q. And do you recognize B.S. to be whom, sir?

15 A. Brian Smith.

16 MR. BROWN: If you'll go to the top of the page,
17 Mr. Hernandez.

18 Q. (By Mr. Brown) In the middle of the page, there is a
19 response from Dean Alberson; is that right?

20 A. Yes.

21 Q. Or actually it's from Dean Alberson; is that correct?

22 A. From, yes. Yes.

23 Q. In the -- the content of that email, it says: Hello,
24 Brian, we haven't heard from Hayes on this issue, but we are
25 in agreement at Riverside the head should work fine, and we

1 will install it on the test on May 25/26, unless we hear
2 contrary to that plan. Regards, Dean.

3 Did I read that correctly?

4 A. Yes, you did.

5 Q. And then at the top of that email, Dr. Buth, did
6 Dr. Ross respond?

7 A. Yes.

8 Q. And how did he respond?

9 A. I'm in agreement.

10 Q. Did the engineers that were involved in the research and
11 development at A&M agree with the change that you-all had
12 suggested to TTI that was in the prototype that was shipped
13 to you?

14 A. Yes, we are all in agreement.

15 Q. All right. Dr. Buth, was eventually that head used in a
16 crash test?

17 A. Yes, it was.

18 Q. And I believe that crash test occurred when, sir?

19 A. In May, but I think it was after the 15th. It was later
20 in the month.

21 Q. The evidence, I believe, will show May 27, 2005, and do
22 you have any reason that you would dispute that, sir?

23 A. No, sir.

24 Q. All right. If we could, please, Dr. Buth, when the test
25 was run on May 27, 2005, why did you not use a pickup truck

1 in that test?

2 A. That test also included a guardrail mounting height that
3 was higher than 31 inches, and the main question there was
4 with the small car, would it, in that end-on kind of test,
5 underride the terminal and -- and not pass the test. So
6 that was the first question we were trying to answer.

7 Q. Did you have an opportunity to actually look at that
8 crash test, Dr. Buth?

9 A. Yes.

10 Q. Did you have an opportunity to examine the results of
11 that crash test?

12 A. Yes.

13 Q. In your opinion, Dr. Buth, did that particular crash
14 test meet the 3-30 criteria?

15 A. Criteria.

16 Q. Yes, sir. Dr. Buth, when TTI decided to run the 3-30
17 crash test, did you consult with the Federal Highway
18 Administration when you did that?

19 A. Yes, we did.

20 Q. All right, sir. Once the result of that crash test
21 occurred, did you feel there was any need to run additional
22 tests on it?

23 A. No.

24 Q. Did you see the extrusion that was done by that test,
25 sir?

1 A. Yes.

2 Q. Did you feel there was any question, sir, as to whether
3 or not a pickup truck could still extrude that rail?

4 A. No question in my mind. No, sir.

5 Q. And why is that, Dr. Buth?

6 A. Well, we had tests on that same kind of squeezer throat
7 and extruder thing with -- with a pickup. There was no
8 change to that. There was -- there was no need to run that
9 test.

10 Q. Dr. Buth, did the structural housing -- and I mean the
11 outside of these two particular ET-Pluses -- changes between
12 the original one done in 1999 and the one that was done in
13 2005?

14 A. No, no changes in that part.

15 Q. So no need to test that steel integrity; is that right?

16 A. That's right.

17 MR. BROWN: May I see Defendants' Exhibit 136, Mr.
18 Hernandez?

19 Q. (By Mr. Brown) While he's looking for that, Dr. Buth,
20 let me ask you this question: Did TTI prepare a crash test
21 report after this particular event?

22 A. Yes.

23 Q. And would that be the practice of TTI to do that?

24 A. Yes.

25 Q. Were you involved in the preparation of that

1 particular crash test?

2 A. Yes.

3 Q. When this crash test was assembled, Dr. Buth, did you
4 have an opportunity to look through that particular crash
5 test report?

6 A. Yes, I had an opportunity to review it.

7 Q. All right, sir. And as we see here on Defendants' No.
8 6, is this, in fact, a copy of the crash test report that
9 was prepared by TTI?

10 A. Yes.

11 Q. And is that your name at the top of the document, Dr.
12 Buth?

13 A. Yes, it is.

14 Q. Dr. Buth, did you all at some point pass this crash test
15 report to Trinity?

16 A. Yes, we did.

17 Q. All right.

18 MR. BROWN: May I see Defendants' Exhibit No. 165,
19 please? Actually, Defendants' Exhibit 11 is what I'm
20 looking for. Thank you.

21 Q. (By Mr. Brown) And is Defendants' Exhibit 11 the actual
22 result of that crash test being submitted for consideration
23 or actually being submitted to FHWA for consideration?

24 A. Would you say that again?

25 Q. Yes, sir. Once the crash test itself -- the crash test

1 report was prepared, did you all send it for Trinity for
2 them to do something with it?

3 A. Yes.

4 Q. And what did you intend for them to do, Dr. Buth?

5 A. We expected they would submit it to -- that information
6 to the Federal Highway Administration requesting Federal
7 Highway's acceptance of it.

8 Q. And this Defendants' exhibit that we see before us, is
9 that, in fact, the evidence that Trinity actually passed
10 that particular crash test information on to Federal Highway
11 for consideration?

12 A. Yes, sir, it is.

13 Q. Did you all intend at TTI for them to have the crash
14 test report and the information that accompanied it in a
15 form suitable to be given to the Federal Highway for --
16 administration for consideration?

17 A. Yes.

18 MR. BROWN: Thank you, Mr. Hernandez.

19 Q. (By Mr. Brown) At some point, Dr. Buth, did you learn
20 that there was not something included in that crash test
21 report that you intended to have included in that?

22 A. Yes.

23 Q. And what was that, sir?

24 A. It was a drawing that would show the details of the
25 four-inch channel. There was a drawing in there that didn't

1 show the details of the four-inch channel.

2 Q. Was it the intent of Texas A&M to have included that
3 drawing?

4 A. Oh, yes.

5 MR. BROWN: May I see Defendants' Exhibit 40,
6 please?

7 THE COURT: While you do that, Counsel, approach
8 the bench.

9 (Bench conference.)

10 THE COURT: You're not following my instruction,
11 Mr. Brown. You're continuing to lead this witness
12 regularly.

13 MR. BROWN: I apologize, Your Honor.

14 THE COURT: Do you know how to lead -- how to not
15 lead the witness?

16 MR. BROWN: Once upon a time I did, and I'll go
17 back to it. I apologize.

18 THE COURT: Well, it's the Plaintiff's right to
19 make the objection. The objection is valid. I've
20 instructed you to stop doing it. You say, yes, Judge, and
21 then you go right back to doing it again. I'm -- I'm not
22 going to let you ignore my objection and my ruling and my
23 directive to you with impunity. If it continues this badly,
24 I'll have to do something. But I want you to know before I
25 do it that otherwise -- otherwise, I don't want -- I don't

1 want you to be surprised. But this is not going to continue
2 the rest of the afternoon with this witness.

3 MR. BROWN: I'll make it brief, Judge. Thank you.

4 THE COURT: Ask as many questions as you want.
5 Just don't ask leading questions.

6 MR. BROWN: Certainly.

7 THE COURT: Let's continue.

8 MR. BROWN: Thank you.

9 (Bench conference concluded.)

10 THE COURT: All right. Let's continue.

11 Q. (By Mr. Brown) Before you, Dr. Buth, is Defendants'
12 Exhibit 40. What is this, sir?

13 A. It's a very brief note from Dean Alberson to me with the
14 subject of four-inch channel ET head.PDF, and had that
15 drawing attached.

16 MR. BROWN: May I see Defendants' Exhibit 41,
17 please?

18 Q. (By Mr. Brown) Dr. Buth, can you tell the jury what
19 this is?

20 A. It's some emails between -- at least between Dean
21 Alberson and me that -- and I guess involved -- this -- this
22 one email was from me to Dean asking him how about get the
23 drawing in a PDF format.

24 MR. BROWN: Can we look at the bottom of the page,
25 Mr. Hernandez?

1 Q. (By Mr. Brown) And while he does that, what is it at
2 the bottom of the page? Is that an email?

3 A. Yes, from Brian Smith to several of us.

4 Q. I'm sorry?

5 A. It's from Brian Smith to several of us at TTI. Please
6 see the attached and advise your thoughts. It's -- the
7 subject is the ET extruder head with a four-inch channel.

8 Q. What, if anything, was attached?

9 A. I believe what was attached was a drawing that was in
10 autoCAD format or some other graphics format.

11 MR. BROWN: Thank you, Mr. Hernandez.

12 Q. (By Mr. Brown) From time to time, does TTI ask its
13 internal staff to do drawings, sir?

14 A. Yes. We have draftsmen on staff that -- that prepare
15 various drawings, yes.

16 MR. BROWN: May I see Defendants' Exhibit 14?

17 Q. (By Mr. Brown) At the top of the page, can you tell the
18 jury what we see?

19 A. Email from Dean Alberson to several people, Gary Gerke,
20 Wanda Menges, and Chris Michalec. It copied several other
21 people. It asks: Chris, please work on a drawing to
22 reflect the new ET head on the upcoming terminal test.

23 Q. And are you included on this distribution list?

24 A. Yes.

25 Q. Thank you.

1 MR. BROWN: Thank you, Mr. Hernandez.

2 Q. (By Mr. Brown) Dr. Buth, can you tell the jury why it
3 is that TTI did not transmit the crash test report itself
4 directly to Federal Highway Administration?

5 A. There would be no big reason for us not to. Sometimes
6 TTI would submit those things to Federal Highway. Sometimes
7 some sponsor would submit them, or sometimes we -- TTI would
8 work together with the sponsor to submit the report.

9 Q. Dr. Buth, was the drawing that we have seen in these
10 particular emails contained within the crash test report?

11 A. No, sir, it was not. We made a mistake. We apologized
12 for it. It was omitted unintentionally.

13 Q. Dr. Buth, did the folks at Texas A&M intend to
14 purposefully exclude that drawing?

15 A. No, sir.

16 Q. Was it your intent in any way to somehow deceive Trinity
17 or the Federal Highway Administration?

18 A. Not in any way.

19 Q. In your opinion, Dr. Buth, did the omission of this
20 drawing in any way change the results of this particular
21 crash test that was submitted to Federal Highway
22 Administration?

23 A. No, it couldn't change the result.

24 Q. Dr. Buth, are you aware of any other crash test that was
25 done of the ET-Plus with four-inch guide channels after that

1 2005 event?

2 A. Yes, I am. I think we did more on a couple of tests
3 later.

4 Q. Do you know, as you sit here today if, in fact, the
5 crash test done on May 27th, 2005, was actually approved by
6 the Federal Highway Administration?

7 A. Yes, they issued an acceptance letter for that design.

8 MR. BROWN: May I see Defendants' 78, please?

9 Q. (By Mr. Brown) Do you recognize this document, sir?

10 A. Yes.

11 Q. Can you tell the jury what it is?

12 A. It's -- it's to Steve -- Steve Brown, President, Trinity
13 Highway Safety Products, and it refers to a letter that was
14 sent to Mr. Richard Powers. Don Johnson requested Federal
15 Highway Administration acceptance of modified version of the
16 ET-Plus guardrail terminal named in the ET-Plus 31.

17 Q. Dr. Buth, do you know if this is what is generally
18 called an acceptance letter by the Federal Highway
19 Administration?

20 A. That's what it is, yes, sir.

21 Q. Thank you.

22 MR. BROWN: Thank you, Mr. Hernandez.

23 Q. (By Mr. Brown) After this test was done, do you know
24 when the other crash tests of the ET-Plus were performed,
25 sir?

1 A. Three or four years later, yeah.

2 Q. And can you tell the jury actually what occurred in
3 those tests?

4 A. Both of them resulted in acceptable components.

5 Q. Now, we've heard some evidence that perhaps the one done
6 in February of 2010 was not a 350 compliant test. Do you
7 know anything about that, sir?

8 A. Yes, I do.

9 Q. All right.

10 A. Yes.

11 Q. Can you tell us what your opinion was of the particular
12 event that occurred and was it a successful attempt at crash
13 testing?

14 A. Yes, it was successful. We checked out what we had
15 intended to check out, what we were asked to do. As I
16 recall, that test involved some different posts in -- in the
17 terminal section, and it was tested at a higher speed to be
18 sure we extruded rail all along that length of post to
19 maximize the effect those posts could have on the results of
20 the -- of the test.

21 Q. Did you personally observe the results of that crash
22 test?

23 A. Yes, I did.

24 Q. Have you seen the video that was performed in that crash
25 test?

1 A. Yes, I have.

2 Q. Do you believe that that particular crash test event
3 showed successful extrusion of the guardrail during the
4 impact?

5 A. Oh, yeah, several feet of it.

6 Q. And that was done when, again, sir?

7 A. About 2010, I believe, it was.

8 Q. All right. In your experience of making -- well,
9 let me ask you this. Does TTI sometimes make its own
10 direct submissions to FHWA of approval of a product?

11 A. Yes, we do.

12 Q. From your own experience, Dr. Buth, do you have an
13 opinion as to what the FHWA will look at to determine
14 whether the crash test is a pass or a fail?

15 A. Yes. They will look at the results obtained from the
16 test and a comparison of those with the criteria in the
17 controlling test document. And they would further review to
18 confirm that it was tested in the appropriate way with the
19 appropriate vehicle and the appropriate values of the
20 parameters.

21 MR. BROWN: May I have Defendants' Exhibit 318,
22 please?

23 Q. (By Mr. Brown) Dr. Buth, do you recognize this
24 particular photograph?

25 A. Yes. It's one of those tests, Test No. 2.

1 Q. Would that -- do you know when this particular crash
2 test was performed?

3 A. I need to look in the report to see.

4 Q. All right, sir. Do you have any reason to dispute that
5 this was not the crash done -- test done on May 27, 2005?

6 A. No, I -- I do not dispute that. It -- it looks like it
7 probably is that test.

8 MR. BROWN: Thank you, Mr. Hernandez.

9 Q. (By Mr. Brown) Dr. Buth, are you familiar with a
10 Chapter 3 in NCHRP Report 350 concerning engineering
11 judgment?

12 A. Yes.

13 MR. BROWN: May I see Defendants' Exhibit 3, if I
14 could, please, Page 25?

15 Q. (By Mr. Brown) Dr. Buth, will you please look on the
16 right-hand side of that particular two columns? Do you see
17 the section highlighted?

18 A. Yes, I do.

19 Q. The first sentence reads: It is not uncommon for a
20 designer/tester to make design changes to a feature during
21 the course of conducting the recommended test series or
22 after successful completion of the test series. Changes are
23 often made to improve performance or to reduce costs of the
24 design or both. It goes on to say: Questions then
25 invariably arise as to the need to repeat any or all of the

1 recommended tests. Good engineering judgment must be used
2 in such instances.

3 Did I read that correctly?

4 A. Yes, that's correct.

5 Q. Dr. Buth, did you use the good engineering judgment that
6 is set forth in Report 350 when you all made these
7 particular suggestions to Trinity to reduce it from five
8 inches to four inches?

9 A. Yes, I say we did.

10 Q. Thank you. Dr. Buth, I know you retired from TTI, as
11 you've told us, but at the same time of your requirement, do
12 you have an opinion or do you know whether the ET-Plus was
13 eligible for reimbursement at the time that you retired?

14 A. Yes, it was eligible.

15 Q. Do you know today -- as you sit here today, if it's
16 still eligible for reimbursement?

17 A. It's my understanding it is, yes.

18 Q. Now, Dr. Buth, as part of the work that you did at Texas
19 A&M University, you receive royalties; is that right, sir?

20 A. Yes, I do.

21 Q. And how are royalties particularly paid to you, sir, at
22 Texas A&M?

23 A. Royalties are paid to Texas A&M system by the licensee,
24 and -- with this device, it would be Trinity. A&M system
25 uses some of that money and shares some of it with Texas

1 Transportation Institute. And Texas Transportation
2 Institute, in turn, shares some of that with the inventors.

3 Q. Dr. Buth, the evidence in the case will show that you
4 have made somewhere in excess of \$3 million over the 15
5 years that you have received royalties for the ET-Plus.

6 Does that sound right to you, sir?

7 A. That sounds okay. Sounds right.

8 Q. Are you ashamed of the money that you've made down at
9 Texas A&M for the work of this invention?

10 A. No, no.

11 Q. Dr. Buth, when you graduated with your Ph.D. at Texas
12 A&M, did you have an opportunity to go to work elsewhere?

13 A. Oh, yes.

14 Q. Could you have gone to work for a private company or
15 consulting firm?

16 A. Could have. Could have applied and got some jobs with
17 others, yes.

18 Q. You chose to remain at Texas A&M and work; is that
19 right?

20 A. That's true. I stayed there right after the degree.

21 Q. Dr. Buth, please tell the Ladies and Gentlemen of the
22 Jury, did Texas A&M in any way lie to the Federal Highway
23 Administration about what was crash tested in May of 2005?

24 A. No, they did not lie about it.

25 Q. Did you lie or intentionally try to deceive Trinity?

1 A. No, I did not.

2 Q. Do you believe it to be reasonable for Trinity to rely
3 on the people at TTI to be experts in the area of crash
4 testing and crash test reports?

5 A. Yes. We trust that they do rely on us.

6 Q. And let me ask you this, sir. The ET-Plus extruder head
7 with five inches and four-inch guide channels that are
8 depicted here in these demonstratives, are the internal
9 workings of this particular unit from the welds of the guide
10 channels down essentially the same one to the other?

11 A. For both the one with the five-inch and the four-inch,
12 they're the same.

13 Q. All right, sir.

14 MR. BROWN: I pass the witness, Your Honor.

15 THE COURT: Cross-examination.

16 I tell you what, before we get into
17 cross-examination, let's take a short recess.

18 Ladies and Gentlemen of the Jury, you may leave
19 your notebooks in your chairs. Don't discuss anything about
20 the case, and we'll be back in here shortly to continue.

21 You're excused for recess at this time.

22 COURT SECURITY OFFICER: All rise.

23 (Jury out.)

24 THE COURT: The Court stands in recess.

25 (Recess.)

1 (Jury out.)

2 COURT SECURITY OFFICER: All rise.

3 THE COURT: Be seated, please.

4 Let's bring in the jury, Mr. McAteer.

5 COURT SECURITY OFFICER: All rise for the jury.

6 (Jury in.)

7 THE COURT: Please be seated, ladies and
8 gentlemen.

9 We'll proceed with cross-examination of the
10 witness by the Plaintiff.

11 Mr. Baxter, you may proceed.

12 MR. BAXTER: Thank you, Your Honor.

13 CROSS-EXAMINATION

14 BY MR. BAXTER:

15 Q. Dr. Buth, my name is Sam Baxter, sir. On behalf of the
16 old contingent in the courtroom who wishes we could retire
17 like you, welcome to Marshall.

18 A. Thank you, sir.

19 Q. I was wondering, Dr. Buth, if you have seen the email
20 chain that -- that started at Trinity about the process that
21 started TTI to work on modifying the ET-Plus. Have you seen
22 the originations at least at TTI -- I mean, at TI -- Trinity
23 about how this all got started?

24 A. I have seen some emails to that effect. I recall that
25 early one -- first one came from Dr. Ross at TTI.

1 Q. Okay. Well, the one that came from Dr. Ross at TTI went
2 nowhere, did it? Y'all didn't do anything, did you? And
3 that was in 2003?

4 A. I -- I believe that's correct.

5 Q. So from 2003 until 2005, TTI did nothing to implement
6 that change, did you?

7 A. I would not say -- I could not say for sure that nothing
8 was done. We probably discussed it some, but there was no
9 testing and things like that.

10 Q. Well, I guess that was my point. In 2003, if you
11 thought it was a good idea, you could have started running
12 computer simulation tests to see if it were a good idea,
13 couldn't you?

14 A. We could have.

15 Q. But you didn't?

16 A. No, sir.

17 Q. You didn't -- you okay?

18 A. Excuse me.

19 Q. That's all right. You didn't run any tests at all, did
20 you?

21 A. Not that I know of, no, sir.

22 Q. Okay. You didn't even get a graduate student to -- to
23 work on it, did you? Nothing happened?

24 A. Same is correct, yes, sir.

25 Q. Except you talked on it?

1 A. Yes.

2 Q. Now, as I understood your testimony today, what you said
3 was we weren't having a problem out in the field, but we
4 decided to change it anyway; is that right?

5 A. Well, we decided that we wanted to talk about it. We
6 thought there could be some ways to improve it, and that's
7 -- that's where we were coming from.

8 Q. All right. But am I right that there was no problems
9 out in the field?

10 A. Well --

11 Q. No complaints?

12 A. Not me, no, sir.

13 Q. Well, not to TTI or Trinity, as far as you know, is it?

14 A. I -- I can't say what came to Trinity. But as far as I
15 know, there were no complaints to them.

16 Q. Well, Trinity didn't call you up and say, hey, we're
17 just getting a ton of complaints, you guys have got to do
18 something? That didn't happen, did it?

19 A. That didn't happen.

20 Q. Okay. And so the old motto if it ain't broke, don't fix
21 it didn't apply, though, did it?

22 A. Well, the motto we were following is more like is there
23 any way we can improve anything that we have around here.

24 Q. Okay. And so one of the things that T -- that Trinity
25 wanted you to do was take out steel out of the current

1 ET-Plus and make it lighter, right?

2 A. The things that we did would cause that to happen, yes.

3 Q. Now, is it your testimony, Dr. Buth, that if you took
4 steel out, that it made it stronger?

5 A. No, didn't -- didn't say that, no, sir.

6 Q. Does it make it stronger if you take all that steel out?

7 A. Well, we need to talk about some details about where
8 we're taking it out or what we're doing or something. It
9 may have an affect on the strength, it may not.

10 Q. But that's something you could test, isn't it?

11 A. As to whether it's stronger or not stronger?

12 Q. Yes, sir.

13 A. We could run a full scale crash test and see if it's
14 adequate.

15 Q. Well, you could also run a whole bunch of simulation
16 tests, couldn't you?

17 A. Simulations of that thing are possible.

18 Q. Be a lot -- lot cheaper, wouldn't it?

19 A. Sometimes they are, sometimes they're not.

20 Q. Okay. But you chose not to do that, did you?

21 A. That's right. There was no urgency to this thing.

22 Q. No urgency?

23 A. That's right.

24 Q. Okay. Was there any urgency once you got started in --
25 in 2005 to finish it up, or did you have lots of time to do

1 all the tests you wanted?

2 A. I suppose time was still available, yes.

3 Q. Okay. Now, we know that from the emails that probably
4 you've seen --

5 MR. BAXTER: If I can see 133, Mr. Diaz?

6 Q. (By Mr. Baxter) -- that Trinity --

7 MR. BAXTER: Second page if we can.

8 Q. (By Mr. Baxter) Trinity started out by saying I'd like
9 to start pushing the ET to the four-inch channel, right?

10 And then it says: How much weight could we save and
11 what would be the cost savings?

12 So as far as Trinity was concerned, it wasn't an
13 improvement situation. It was a cost saving measure, wasn't
14 it?

15 A. Well, in this email it is. Of course, those -- those
16 guys need to always look at the -- the cost to produce
17 something. And this was another idea that Mr. Brown came up
18 with. He said, hey, let's look at doing this. Maybe
19 there's some cost savings, too.

20 Q. But that wasn't TTI's job was to have cost savings, was
21 it? Your job was safety?

22 A. Our job is safety, but we want to do it at the least
23 expense we can.

24 Q. Okay. So you wanted to help Trinity make more money,
25 and safety was somewhere there in the balance?

1 A. I'm -- I'm not understanding how you're characterizing
2 this.

3 Q. Well, you -- you were on board with them saving --
4 saving money. If you could help them save money, you're on
5 board?

6 A. Well, not blanket -- not in a blanket way, no.

7 Q. Okay. All right. Well, in this way?

8 MR. BAXTER: Let me see the next one, Mr. Diaz, if
9 you can go up?

10 Q. (By Mr. Baxter) And it says: They could use eight
11 pounds less, and they could save, gosh, 2 -- \$2 a head,
12 didn't they? Isn't that what they said?

13 A. That's what it says there.

14 Q. And over five years, they can save \$250,000, right?

15 A. I don't see that on mine.

16 Q. Well, okay. We'll -- we'll get to it.

17 A. Yeah.

18 Q. It's right up here at the top?

19 A. I -- I now see that, sir.

20 MR. BAXTER: Go down just a moment -- well, let's
21 go right here.

22 Q. (By Mr. Baxter) This is from Mr. Brown to Mr. Boyd and
23 Mr. Smith. Do you know who Mr. Brown is?

24 A. Yes, I know him.

25 Q. Was he an executive at Trinity?

1 A. I'd say yes.

2 Q. And one of the things he says in November of 2004 is if
3 TTI agrees, I'm feeling we could make this change with no
4 announcement. We did pretty good with the TRACC changes.
5 Is that what he said?

6 A. Yes, that's what's highlighted there.

7 Q. Okay. And lo and behold, that's what happened, isn't
8 it?

9 A. I -- I don't know what kind of announcements Trinity may
10 or may not have made with this new thing.

11 Q. Well, they didn't announce it to the FHWA, did they?

12 A. That's true.

13 Q. And as far as you know, they never told a single
14 customer it was new and improved, did they?

15 A. I don't know what happened there between them and their
16 customers.

17 Q. Well, if the testimony in this case is they never once
18 advertised they had a better ET-Plus after you made the
19 changes, would that be a little surprising to you that they
20 didn't try to take advantage of their new product in the
21 marketplace?

22 A. That -- that's not my area of work. I work on
23 developing something that would function acceptably, and the
24 marketing technician and so forth, it's up to them.

25 Q. I -- I know, Dr. Buth. But just as a general rule,

1 people that make improvements go out and tell their
2 customers it's new and improved, don't they?

3 A. I see many labels like that on other things, new and
4 improved formula, yes, sir.

5 Q. That's right. And companies do that, don't they?

6 A. Yes, sir, I see they do.

7 Q. But Trinity, as far as you know, never told a DOT, a
8 customer, an installer, or the Federal Government it was new
9 and improved, did they?

10 A. I have no information to --

11 Q. Okay.

12 A. -- to decide that.

13 Q. Well, if they didn't, does that sound like they made
14 the change with no announcement?

15 A. Well, that's one way you could word it.

16 Q. Yes, sir. Okay. Now, one of the things that happens is
17 that you're -- you're an expert or at least you -- you
18 follow this NCHRP 350 Report in the way that you conduct
19 tests and the way you do business, don't you?

20 A. Well, we did at that time.

21 Q. Okay. And you were totally familiar with that, were you
22 not?

23 A. Well, reasonably well.

24 Q. Okay. Now, you -- you decided, I suppose, sometime in
25 2004 or 2005 that maybe you were going to make changes to

1 the ET-Plus, right?

2 A. Yes, sir.

3 Q. Okay. Did you ever do any design drawings and send to
4 Trinity of your proposed changes?

5 A. I don't know of any design drawings that we did.

6 Q. Did you have any conversation with Trinity about how it
7 ought to be changed before they sent you the prototype?

8 A. Yeah, there were conversations going on for quite some
9 time about changing from this five-inch channel to the
10 four-inch channel.

11 Q. I'm not asking you that, sir. I'm asking, did you tell
12 them how to do it?

13 A. We talked with them about how to do it.

14 Q. Okay. Did you tell them to take the channels and stick
15 them down into the extruder head?

16 A. I don't know that we gave them that deal. We said take
17 the five-inch off and put a four-inch on there.

18 Q. Okay. Did you tell them --

19 A. How could you do that?

20 Q. Did you tell them how to put the four-inch on there?

21 A. No, sir, not in that detail.

22 Q. Well, did anybody at TTI sit around the room and draw up
23 a design of what the changed channels might look like on the
24 extruder head?

25 A. I don't know that that happened.

1 Q. Okay. Do you know of any communication that went from
2 TTI to Trinity about how to do it?

3 A. I know there were conversations that took place about
4 that, and we were asking how they would weld it up, you
5 know. We said put the four-inch channel there, how -- is
6 that a problem in fabricating? Can you fabricate okay or --
7 and they -- they said what headaches would that cause you?

8 Q. And they said we can do it?

9 A. Well, they did one.

10 Q. Oh, yes. Yes, sir. Well, the testimony in this case is
11 that there was a gentleman up in Girard, Ohio, that got him
12 a welder and they made that prototype and they figured out
13 that design themselves. Do you have anything to contradict
14 that, sir?

15 A. Did they say -- figure out the design or they figured
16 out the shop fabrication process?

17 Q. No, sir. They -- they figured out the way to do it was
18 to take the channels and stick them a quarter of an inch
19 down in the extruder head and -- and fillet weld it.

20 A. Okay.

21 Q. Does that sound about right to you?

22 A. That could have happened. I don't deny it.

23 Q. Okay. Well, certainly it wasn't a design of TTI that
24 you sent them that caused them to do that, was it?

25 A. What I consider to be design is the decision to put a

1 four-inch channel instead of a five-inch channel. The other
2 things we're talking about are details of fabrication.

3 Q. Okay. You didn't send them any details of fabrication
4 about how to do it, did you?

5 A. No, sir.

6 Q. And nobody at TTI had sat around and thought about the
7 details of fabrication, had they?

8 A. I don't know what my colleagues had thought about, but I
9 -- I don't recall conversations about that, no, sir.

10 Q. But not with Gene Buth?

11 A. Right.

12 Q. Okay. Now, when you got the prototype in -- that was in
13 May of 2005, wasn't it? Was that the first time, sir, you
14 saw the channels stuck down in the throat?

15 A. That's the first I remember.

16 Q. Okay. No one had ever discussed that with you, did
17 they, beforehand?

18 A. I -- I don't remember detailed discussions about that.

19 Q. All right, sir. Now, you -- you ran the test because
20 you were already going to test the height of the guardrail
21 raising from 27 to 31, weren't you?

22 A. Yes, sir.

23 Q. And you had already done a test early in May in which
24 you hit the side of the guardrail, but in that test, you
25 didn't use the changed ET-Plus, did you?

1 A. I'm not sure which test you're talking about.

2 Q. When you hit the pickup truck and ran it into the side?

3 A. Yeah, okay.

4 Q. You use -- you didn't use the changed head, did you?

5 A. I believe that's right.

6 Q. Okay. You used a standard ET-Plus head?

7 A. Yes, sir.

8 Q. Okay. But then when you ran the little car into it and
9 the little car was used, as I understand it, because you
10 wanted to see if it would submarine under the guardrail?

11 A. Yes, sir, and that's correct.

12 Q. Prior to that test, did someone at TTI get on the phone
13 with the FHWA to explain what tests you planned to use and
14 get their approval to do that little car test?

15 A. There was some communication with them about that. I
16 don't know if it was on the phone or what it was.

17 Q. Okay. Would it be fair to say, sir, that when you had
18 the conversation, that nobody told the FHWA, by the way,
19 we're going to use a new head that's got a bunch of changes
20 to it and we're going to test that, too?

21 A. That decision to use that head with a four-inch channel,
22 I don't call it a new head with a bunch of changes, but that
23 decision had not been made at the time we were planning that
24 test. It was made later on.

25 Q. So is it fair to say the FHWA knew nothing about it?

1 When they -- when they said, yeah, use that little car, they
2 didn't know anything about a new head, did they?

3 A. As far as I know, they did not.

4 Q. Okay. And you ran the test. And let me ask you about
5 the test.

6 MR. BAXTER: Mr. Diaz, can -- can we put the --
7 the test up just a second, sir?

8 Q. (By Mr. Baxter) I want to see if this looks like what
9 you did. You took the little car and you put the new
10 prototype head on the end; is that what you did?

11 A. I don't call it a prototype head.

12 Q. Well, okay.

13 A. The new head with the four-inch channel.

14 Q. The new head with the four-inch channel.

15 A. The old head with the four-inch channel.

16 Q. Okay. Whatever you want to call it. You took whatever
17 they sent you in a box and stuck it on the end and ran a car
18 into it?

19 A. Briefly describes it.

20 Q. Yes, sir.

21 MR. BAXTER: Do you have that test, Mr. Diaz?

22 THE TECHNICIAN: It won't run, Mr. Baxter.

23 Q. (By Mr. Baxter) All right. Well, let me just ask it to
24 you this way. You -- you passed -- you passed everything,
25 didn't you? I mean, everything passed?

1 A. The data came out on the passing side of the limit.

2 Q. Did any of it fail?

3 A. No, sir.

4 Q. Okay.

5 MR. BAXTER: Let me see, Mr. Diaz, if you can get
6 me the report up, which is PX 156, and go to Bates Page
7 16401.

8 Q. (By Mr. Baxter) There's the -- there's the report. You
9 recognize that, Dr. Buth?

10 A. Yes, sir, I do.

11 Q. Okay. This is from your report, and it says: Vehicle
12 trajectory. After collision, it is preferable that the
13 vehicle's trajectory not include -- intrude into the
14 adjacent traffic lanes. Result: The small car intruded
15 into the traffic lanes 8.5 meters. Fail. Is that what
16 happened?

17 A. Yeah, that failed the preferred one as stated in that
18 report there. That's not a requirement. It was stated that
19 way. The dimensions were given, and that was given to
20 Federal Highway.

21 Q. Okay. Now, when you say 8.5 meters, about how far is
22 that in -- in distance I can understand?

23 A. 30 feet.

24 Q. Okay. And so what happened was that the small car --

25 MR. BAXTER: Can you run it now, Mr. Diaz?

1 Q. (By Mr. Baxter) There it is.

2 (Videoclip played.)

3 Q. (By Mr. Baxter) Now, if that had been in real life,
4 right out here on Interstate 20 and that car hit your head
5 just like that, with the busy truck schedule, it's now
6 fixing to meet an 18-wheeler, isn't it?

7 A. It's possible.

8 Q. Did that give you any concern?

9 A. No, sir.

10 Q. So when -- the one test you ran in crash testing this
11 head, when the car hit it and went out into the lane of
12 traffic, not just a little bit, but 30 foot --

13 A. Yes, sir.

14 Q. -- TTI said, oh, that's okay.

15 A. Well, we prefer it not do that. And the requirement is
16 it's preferable that it not do that. We observed what it
17 did, sent that to Federal Highway, they accepted it.

18 Q. Well, let me ask you this. Wouldn't the prudent thing
19 to do, if you're really worried about safety, is said let's
20 do it again and let's see if it will do it again?

21 A. Well, if we had an idea how to solve that issue, I guess
22 we could have done that.

23 Q. Okay. So what happened was you didn't have any idea how
24 to solve that problem with the new changed head or whatever
25 you want to call it?

1 A. Not at that time, I don't.

2 Q. Okay. Well, do you now have an idea about how to solve
3 it?

4 A. I'm retired now, sir.

5 Q. Okay. When -- when you left, was there somebody working
6 on that problem?

7 A. Not that I know of.

8 Q. Okay. But can you and I agree, Dr. Buth, that it failed
9 that portion of the test, and not only did it fail it, but
10 if it happened in real life, it's potentially catastrophic?

11 A. It could be, yes, sir.

12 Q. Well, 18 -- I mean, I looked at the time rates and it
13 took it less than a second to get out there after we got --
14 after it left the head. Do you disagree with that?

15 A. I don't know. Seconds seem kind of short, but it may
16 be.

17 Q. Okay. So if he got out there and even two seconds,
18 if somebody's coming down the interstate at 75 miles an
19 hour and that car ricochets right in front of them,
20 they're going to smack it, aren't they?

21 A. They could hit it, I admit to that.

22 Q. Okay. And that portion failed, did it not?

23 A. That's what it says. Yes, sir.

24 Q. All right, sir. The -- the -- the report itself,
25 however -- you made the report, which is, I think, my

1 Exhibit No. 156, and I want to get up the first page, if I
2 can, Dr. Buth, and I want you to assume for me just a moment
3 that you had assigned one of your Ph.D. graduate students to
4 write this report.

5 A. Okay.

6 Q. Are you with me?

7 A. Yes, sir.

8 Q. Okay. So the very first thing we see is that this is a
9 test on the ET-Plus for the 35 -- 31-inch-high w-beam
10 guardrail.

11 A. Yes.

12 Q. And I want you now to give that graduate student a grade
13 about whether or not he reported correctly what the real
14 purpose of the test was.

15 A. I don't see a statement of the purpose here.

16 Q. Well, okay. You've got a title. You're trying to tell
17 the people at the Federal Highway Administration, whoever
18 reads this, what this report is about, right?

19 A. We're trying to put as many key words in that title as
20 we can to identify what was tested, not necessarily all of
21 the reasons for testing, et cetera.

22 Q. Well, one of the things that was tested was this new
23 head, right?

24 A. The head with the 4-inch channel?

25 Q. Yes, sir.

1 A. Yes, sir, that's true.

2 Q. Does that appear in the title anywhere?

3 A. No, sir.

4 Q. Well, on a scale of A to F, what does he get for that
5 when he leaves it out and he doesn't give notice about what
6 really got tested, or she as the case may be?

7 A. Okay. That -- that person would be criticized some for
8 that just as I criticized myself and our own people for
9 doing that. We made a mistake. We've apologized for it.
10 It was unintentional.

11 Q. Yes, sir.

12 A. And that drawing should have been in there. It would
13 have been in there.

14 Q. Okay. I'm not talking about the drawing. I just want
15 to talk about this now. That's an F for that?

16 A. I don't grade that severely. I couldn't get anybody to
17 pass. Like I said, I would mark them down some for that.

18 Q. Well, how much did you mark them down for leaving out
19 the fact that you tested a brand new head and you didn't
20 tell anybody? What grade did you give?

21 A. The main reason for this test was a 31-inch, so we got
22 that in there.

23 Q. Okay. And so this -- this -- this prototype head was
24 just a throw-in?

25 A. No. It -- it was piggybacked on that test with the

1 4-inch channel, because we had an opportunity to test this
2 thing with a 4-inch channel, and we've been wanting to do
3 that for months, you know, so we had an opportunity and we
4 included it.

5 Q. Okay. And you'll admit to me, I take it, that you
6 should have reported it, right?

7 A. Yes. Oh, yes.

8 Q. And that you didn't tell them at least in the title, so
9 if it's not an F, what is that? A C-minus? Don't know?

10 A. I don't know what that is.

11 Q. All right.

12 MR. BAXTER: Well, let's -- let's go then, if we
13 can, to -- to Page -- if you'll flip over two pages,
14 Mr. Diaz.

15 Q. (By Mr. Baxter) Now, one of the things that you're now
16 telling the Federal Highway Administration, because you know
17 this is where this is going to go, right?

18 A. We expect it to go there. Yes, sir.

19 Q. Right. Is that you use the ET-Plus system, and do they
20 know what that is?

21 A. Yes, they know what that is.

22 Q. And that is a head that was approved in 1999 and put on
23 the market in 2000, right?

24 A. It would include the head and other components.

25 Q. Okay, sir. But that's not exactly right, is it? It's

1 not an ET-Plus. It's a changed ET-Plus, isn't it?

2 A. Well, it's changed to the extent the channel -- guide
3 channels were changed. The height was changed.

4 Q. Yes, sir. The fact you stick it in the throat is
5 changed?

6 A. Sir?

7 Q. And the fact that you're sticking it down in the throat
8 is changed, right?

9 A. I'm not sure about that.

10 Q. Well, you mean you don't know if the --

11 A. Oh, sticking the guide channel down in there?

12 Q. Yes, sir.

13 A. Yes. That's -- that's different than with the 5-inch.
14 Yes, sir.

15 Q. The weld is changed?

16 A. Yes, sir.

17 Q. And -- and frankly, at that time, you didn't know if
18 there was any other changes internally or not, did you?

19 A. Didn't understand there to be any, was confident there
20 was no other internal changes.

21 Q. Well, nobody told you that, did they? You didn't ask
22 anybody, did you?

23 A. Well, I believe Trinity sent us an ET-Plus head with
24 4-inch channels on it.

25 Q. Well, you don't know -- they just fabricated it, didn't

1 they? It didn't come off the line. They fabricated it,
2 didn't they?

3 A. I don't know where they got it from.

4 Q. They certainly didn't send you a drawing, did they?

5 A. Not at that time.

6 Q. Okay. Before the test, you had no drawing, did you?

7 A. I think that's correct.

8 Q. And you know that one of the things the -- the 350
9 requires is both before the test and after the test you have
10 to compare the drawing to the article to make sure you've
11 got the right thing, don't you?

12 A. It may be indicated in there. I'm not sure which
13 section you're talking about. We were satisfied and
14 confident we had what we wanted, that that head was made the
15 way we expected it to be made. There was no reason for
16 somebody to go modify it, other than put the 4-inch channel
17 in there.

18 MR. BAXTER: Mr. Diaz, can we -- can we get up the
19 350 report, sir, which I think is Plaintiff's Exhibit 748?
20 And if you would go to Page 736.

21 Now, if -- and I think you and I have got a
22 different page number, Mr. Diaz. So if you can -- if you
23 can get me -- there we go; right there.

24 Q. (By Mr. Baxter) Let me read the part that's highlighted,
25 if I can, please, Dr. Buth?

1 A. Okay.

2 Q. To ensure that all critical elements are considered, a
3 careful after-test examination of the test article is
4 essential.

5 Do you see that?

6 A. Yes, I see that.

7 Q. Did you do that?

8 A. Well, I think we did at least some of that.

9 Q. Okay. The test article should be constructed and
10 erected in a manner representative of in-service
11 installations and should conform to specifications and
12 drawings of the manufacturer or designer.

13 And in order for you to figure that out, you've got to
14 have a set of drawings before you do the test, don't you?

15 A. Well, that's one way to interpret it. I am confident it
16 was built like an ET-Plus, and we have drawings for ET-Plus.
17 So I think it was built correctly.

18 Q. Can you interpret it any other way than you are to have
19 a drawing and you're to compare the drawing to the test
20 article?

21 A. I did not personally do that. Drawings existed; test
22 articles existed. I was confident it was right.

23 Q. But no drawing existed of this test article, did it?

24 A. Not with a 4-inch channel, or at least not in my
25 possession.

1 Q. You didn't get the first drawing until June, did you?

2 A. That sounds about right.

3 Q. All right, sir.

4 MR. BAXTER: So if we can turn to Page 3 back, Mr.
5 Diaz, to the report. If you'll go to Page 3.

6 Q. (By Mr. Baxter) And I'm going to read to, Dr. Buth, what
7 you said. A standard ET-Plus guardrail terminal was
8 modified for attachment to a 787 millimeter 31-inch
9 guardrail system features to modify the design as follows.
10 And there are eight of them, and none of them mention any
11 change to the head, do they? How you're going to install
12 the head on the post?

13 A. I don't see that page here. I have something else here.

14 Q. Coming right up.

15 A. Okay.

16 MR. BAXTER: I have confidence Mr. Diaz can get it
17 for us.

18 I'm about to lose confidence in him. I'll put it
19 on the ELMO, if I need to, Mr. Diaz.

20 There we go. He got it.

21 Q. (By Mr. Baxter) See where it says a standard ET-Plus
22 guardrail terminal?

23 A. Yes.

24 Q. Now, unfortunately, that's not true, is it?

25 A. No, it was modified. It -- the rest of the sentence

1 says standard was modified.

2 Q. But it was modified in the following ways. Look down
3 those eight ways and see if one of them has to do with
4 either the guide channels or any internal change inside the
5 head.

6 A. I'd have to look at that, but I'm confident it doesn't
7 have that.

8 Q. All right. And so what you've got is a standard ET-Plus
9 that's modified only in the way that it's mounted on the
10 post and no other way, right?

11 A. I think there were other ways that it was modified.
12 There are eight here, as you said, longer post bolts because
13 of increase blocked out. The hinge breakaway post was
14 modified.

15 Q. Dr. Buth, not to disrupt you, sir, but if you could
16 point out to me where in any of these changes it talks about
17 the channel or internal workings of the head, I'd appreciate
18 that.

19 A. I don't see that in there.

20 Q. Okay. So what we're left with is that you and TTI told
21 the Federal Government it was a standard ET-Plus, didn't
22 you?

23 A. With those modifications.

24 Q. With modifications about how it's mounted, but not any
25 modifications to how it's built?

1 A. Not any modifications about the head.

2 Q. Yes, sir.

3 A. Yes, that's true. They're not listed in there.

4 Q. So if we're going to grade our graduate student about
5 telling the truth, that's not true either, is it? It was
6 false?

7 A. One item was omitted. Eight were included, and I
8 guess that's one out of nine.

9 Q. No, sir. You left out any mention at all that you were
10 testing a new head and that you had changed the design of
11 the head, didn't you?

12 A. I'd go for that.

13 Q. Is that the one item --

14 A. That was not intentional. I'd go for that.

15 Q. Excuse me. Is that the one item that you're talking to
16 me about, just this little bitty item?

17 A. The change of the channels, the -- the size of the
18 channels.

19 Q. And how the channels are placed and whether or not there
20 are other internal changes to the head, right?

21 A. If there were others, yes. That's not there.

22 Q. Well, all right. And so my question to you, sir, is
23 that's not true that you used the standard ET-Plus, did you?

24 A. Okay.

25 Q. It's false, isn't it, Dr. Buth?

1 A. I wouldn't go that far. One item was omitted. The
2 change of the channels was omitted, and there are certain
3 things you have to do like weld it differently, and it ends
4 up with some slightly different dimension without changing
5 some other things in an assembly like that.

6 Q. Dr. Buth, you wouldn't say it was untrue to tell the
7 Federal Highway Administration you used a standard ET-Plus
8 when you didn't?

9 A. We didn't tell them we used a standard. We told them a
10 standard that was modified.

11 Q. Well, you said a standard that was modified in the
12 following ways, and we went over the ways, and none of them
13 have to do with the actual changes that you made to the
14 head. This is all mounting stuff, isn't it?

15 A. Okay.

16 Q. And posts.

17 A. Okay.

18 Q. So it wasn't a standard ET-Plus that you used, was it?

19 A. Whatever we want to call it. It was a standard ET head
20 with some channels changed from 5 to 4, and that's the best
21 way I can describe it.

22 Q. Okay. Do you know that you told the Federal Highway
23 Administration 40 times in this report it was a standard
24 ET-Plus head?

25 A. We may have. I didn't count how many times that phrase

1 was in there.

2 Q. But at least they were led to believe you used a
3 standard ET-Plus head that was approved in 1999.

4 A. You can conclude that from that page.

5 Q. You couldn't conclude anything else, could you?

6 A. I guess not.

7 Q. Okay. And it turns out that it's just not true, is it?

8 A. Okay.

9 Q. Okay. Did you send it off to the Federal Highway
10 Administration to get approved?

11 A. I believe we -- we sent this one to Trinity.

12 Q. Okay. And I -- I think you told your lawyer it was no
13 big deal, but the truth is, most of the time, TTI sent these
14 request changes to the Federal Highway Administration,
15 didn't they?

16 A. I haven't counted up the times that we have done this or
17 somebody else has done this. If you asked for Federal
18 Highway acceptance of a device to put on the road, it would
19 typically be the manufacturer's job to do that. The people
20 that are manufacturing and selling are the ones that want to
21 put it on the road, so they're the ones that need the
22 acceptance.

23 Q. Okay.

24 A. TTI as a designer does not need their acceptance,
25 because we're not manufacturing and selling and putting them

1 on the road. But we always do what we can to help make the
2 sponsor happy.

3 Q. Okay.

4 A. So sometimes we do the entire letter. Sometimes we help
5 them do the letter. And it happens in different ways.

6 Q. And I understand that you wanted Trinity Industries
7 happy, didn't you?

8 A. Any sponsor.

9 Q. Yes, sir.

10 A. Yes, sir.

11 Q. All right. Now, you send the report to Trinity, and I
12 assume they got to read it, right?

13 A. I assume they did. I don't know what they did. I'm not
14 there.

15 Q. Okay. But assuming some executive at Trinity read it --

16 A. I don't know what happened there, sir.

17 Q. I know. I'm just going to -- assume for me just a
18 moment -- and we've had some testimony that at least two
19 executives read the report.

20 A. Okay.

21 Q. When they read it, they also had an opportunity to
22 correct your error, didn't they?

23 A. I would say so, if they read the report.

24 Q. Did they call you up and say, gosh, Dr. Buth, we -- we
25 read it and you forgot to put all that prototype information

1 in there; why don't you redo the report?

2 A. They didn't call me about that. No, sir.

3 Q. Okay. Now, there is a protocol about how to write the
4 report, is there not? And you can find that in the 350
5 standards, can't you?

6 A. I believe that includes a list of things that should be
7 included in the report.

8 Q. And one of the things that's included is the test
9 article design and construction, isn't it?

10 A. Yes.

11 Q. And when it came to that -- did you write the report?

12 A. I did not construct the report. A draft -- a complete
13 draft was constructed by the evaluation and reporting
14 section.

15 Q. All right. Did you read it?

16 A. Yes, I did.

17 Q. And when you got to the part about the test article, it
18 didn't just jump off the page that you forgot to mention the
19 test article you actually crash-tested?

20 A. It didn't jump off the page at me.

21 Q. How many other people read this report down at TTI?

22 It's got at least four authors, doesn't it?

23 A. Yes. You would assume those four people read it.

24 Q. Well, you'd also assume they'd know that they had tested
25 a different head, and you forgot to mention it. Did

1 everybody --

2 A. Didn't remember that we tested a different head. This
3 report was put together and reviewed like two months after
4 the test was done, and we were doing eight or ten more tests
5 during that time, a lot of things happening. A drawing was
6 in there, a description was in there.

7 Myself, I didn't realize that we had omitted that
8 4-inch channel. I -- I didn't remember that we omitted it.
9 And we've apologized for that. We should not have left it
10 out. It was a mistake. It should have been in there.

11 Q. I understand that, Dr. Buth. And I know you apologized
12 to somebody. But my question to you, sir, is wouldn't it
13 jump off the page to at least one person at TTI?

14 A. I don't know. It didn't for me.

15 Q. Well, I understand. Dr. Bligh was one of the authors
16 and he read it, right?

17 A. I assume he read it.

18 Q. And Dr. Alberson, he read it?

19 A. I assume he read it.

20 Q. And Mr. Bullard, he was a research engineer. You'd
21 assume he read it, right?

22 A. I did not observe what they did when they had it in
23 their hands to review it, but you normally assume that
24 they're reviewing, and their author, they would read it.

25 Q. Okay. And can we assume that because there had been a

1 two-month gap, although this was actually in July and you
2 did it at the end of May, so it's only a one-month gap, that
3 time had moved on and you just all forgot what you did?

4 A. That seems like what happened, that we forgot that the
5 channel was changed. We didn't forget what we did. We
6 didn't forget the test or the outcome of the test.

7 Q. But, Dr. Buth, you'd already told me that you people
8 were sitting around for months, if not years, wanting them
9 to change the channel, and now you got a chance to test it,
10 and now you got a chance to get it approved, and you all
11 forgot?

12 A. Well, during those months or years, we had a very
13 occasional, very short conversation about it. And we needed
14 to work on the channel or something or you hear anything
15 about the 4-inch channel. It was not a situation where we
16 worked on it continuously for three or four years.

17 Q. Well, did you not work on it, you didn't run any tests
18 at all, did you?

19 A. Well, not in the early stages of the discussion about
20 should we do it.

21 Q. Okay. Well, how many times, sir, before the test did
22 you run any simulation on the 4-inch channels to see if it
23 might work in a simulated computer?

24 A. I don't know that any simulations were done. The
25 decision to even use it wasn't made to until like a couple

1 weeks before that test.

2 Q. Well, since that time, until the -- that day -- until
3 the time you left, how many simulations did you run to see
4 if it was working okay?

5 A. I don't know of any that were run. We had the test. It
6 proved it worked.

7 Q. All right. Now, you could have used the 3-31 test,
8 right?

9 A. Yes.

10 Q. And even though you weren't worried about the pickup
11 going over -- underneath the increased height of the head,
12 you could have run another test to see if, in fact, a bigger
13 impact from a bigger vehicle was going to affect the
14 performance of the head, couldn't you?

15 A. Could have done that test, if we had chosen to.

16 Q. And you didn't?

17 A. We didn't do it. We didn't -- we didn't need to do it.
18 We didn't have any need to do it. We saw how that rail
19 extruded in the car test. Worked just fine. We knew from
20 other testing, from that squeezing extruder chamber that the
21 pickup truck worked fine. It'd extrude over a long
22 distance. There was no need to run the pickup truck test.

23 THE COURT: Dr. Buth, he asked you did you do it.
24 He didn't ask you why you didn't do it.

25 THE WITNESS: Okay.

1 THE COURT: Limit your answers to the questions
2 that are asked.

3 THE WITNESS: Okay.

4 THE COURT: Your lawyer can get up and ask
5 additional questions, after Mr. Baxter is through. But you
6 need to limit your answers to the questions.

7 THE WITNESS: Yes, sir.

8 THE COURT: Okay.

9 Q. (By Mr. Baxter) Dr. Buth, after this, you ran some more
10 heads, though, didn't you? You ran into them with a small
11 car in a flared configuration, did you not?

12 A. We did some tests of a flared configuration of an
13 extruder terminal, yes.

14 Q. And originally there were going to be two tests, and you
15 were going to pay for half of it, right? That is, TTI was
16 going to pay for half of it. Do you remember that?

17 A. Probably right. I don't recall it at this moment.

18 Q. And then after those two tests failed, you decided to
19 run it three more times, didn't you?

20 A. Could be, yes, sir.

21 Q. Okay. And when you hit that new changed head with the
22 small car, it was at a 0-degree angle, wasn't it? It was
23 head-on?

24 A. Zero degree, yes, for a flared terminal.

25 Q. Just like the one that you had run in May of 2005?

1 A. No, sir. I wouldn't say it was just like that. It was
2 on a flared terminal.

3 Q. I understand that. Did you hit it head-on at 0 degrees
4 in May of 2005?

5 A. Zero degrees with the road, yes, sir.

6 Q. And the other five tests that you ran, did you hit
7 it at 0 degrees, hit it dead-on?

8 A. Zero degrees with the road, yes, sir.

9 Q. Okay. Tell me how many times it passed?

10 A. None.

11 Q. Actually, you got horrific results, didn't you? Cars
12 flipped over, right?

13 A. Had cars roll over, yes.

14 Q. You had guardrail gouging the side of the car and
15 entering the car, didn't you?

16 A. Yes, sir.

17 Q. Having seen those tests, Dr. Buth, did someone say, you
18 know, maybe we ought to notify the FHWA that this head
19 failed five times so they could at least tell us what to do?

20 A. No. That would not be the conclusion drawn from those
21 tests.

22 Q. Okay. My understanding, sir, is, is that if you are
23 running a test so the head that is parallel to the road,
24 that there's a 15-degree angle that it's got to pass on.

25 You can hit it head-on, or you can hit it up to 15 degrees,

1 and it's still got to pass, doesn't it?

2 A. 15 degrees, yes, sir.

3 Q. Okay. And the test you ran on the flared test were
4 within that 15-degree cone, weren't they?

5 A. Relative to the guardrail?

6 Q. Relative to the road.

7 A. It was 0 degrees relative to the road.

8 Q. It was 0 to the guardrail, right?

9 A. No, sir, 0 to the road.

10 Q. Okay. 15 degrees to the head of the guardrail?

11 A. No, sir.

12 Q. It wasn't within that 15 degrees?

13 A. It would be more like a 6-degree angle or something like
14 that.

15 Q. A 6?

16 A. I think that's -- if you have a 4-foot flare and
17 50 feet, I think that's 6 degrees.

18 Q. 6? Okay.

19 A. I think that's what it is.

20 Q. That's good. In any case, you determined not to tell
21 the FHWA about that, didn't you?

22 A. We did not report that to FHWA. We were not looking for
23 acceptance.

24 Q. Did you, sir, say to yourself, you know, I know it was
25 on a flare, but nobody was going to survive those wrecks, if

1 they'd been in that car; maybe we ought to do some computer
2 simulations to make sure everything was okay?

3 A. No. We didn't do that. Not only was it on a flare, it
4 was a different system with different components.

5 Q. Well, the head was the same, right?

6 A. The head would have been the same.

7 Q. And everything else is a couple of posts downstream,
8 right?

9 A. Well, they're right at the head. The two posts are
10 right at the head.

11 Q. Okay.

12 A. One is under it and one is just advanced of it.

13 Q. And that didn't cause the system to fail when you ran
14 the small car into it, did it?

15 A. I wouldn't say that. I wouldn't say that didn't cause
16 it.

17 Q. The head locked up, didn't it? It locked up all five
18 times, didn't it?

19 A. I wouldn't characterize it that way.

20 Q. Well, you've seen those tests and you've seen the
21 horrific results.

22 A. Some extrusion and some gating-type behavior because of
23 the flare.

24 Q. In any case, just to be on the safe side, could you had
25 said let's run some more tests?

1 A. Well, we'd already spent a lot of money testing. I
2 obviously didn't think they would let me run more.

3 Q. Okay. How about just for TTI's peace of mind that they
4 had done it right? Couldn't you run some simulation tests,
5 Dr. Buth?

6 A. Simulations would have been possible. What we really
7 needed was a change in design that would have fixed the
8 problem, and that's what we were missing.

9 Q. That's what you were missing, right?

10 A. Yes, sir.

11 Q. Now, Dr. Buth --

12 MR. BAXTER: Can I approach these, Your Honor?

13 THE COURT: You may.

14 Q. (By Mr. Baxter) I believe you testified earlier that
15 these heads were exactly alike, the one you got on the
16 inside. Isn't that what you testified?

17 A. Yes, sir. I think I said that, within tolerances.

18 MR. BAXTER: Could he get up, Your Honor, and get
19 a view?

20 THE COURT: Yes.

21 Dr. Buth, if you'll come around to the corner here
22 and use this handheld microphone.

23 THE WITNESS: Yes, sir.

24 THE COURT: Right there by that statute, if you'll
25 just stand there.

1 Q. (By Mr. Baxter) Now, Dr. Buth, this plate right here,
2 that's where the exit gap is?

3 A. I'm sorry. I was looking this way and didn't see it.

4 Q. I'm sorry, sir. Are you ready?

5 A. Yes, I'm ready.

6 Q. He'll get it for you.

7 This plate right here, this curved plate is the exit
8 gap, right?

9 A. Well, it's the outside wall of the deflector shoot. The
10 exit gap is up there where that curve begins.

11 Q. Right up here (indicating)?

12 A. That's the entrance, sir.

13 THE COURT: You're going to have to speak up,
14 Mr. Baxter.

15 Q. (By Mr. Baxter) If I was going to measure from the
16 bottom of the plate to that curved portion on both of these,
17 they're vastly different, aren't they?

18 A. I didn't look at those dimensions. There may be some
19 difference there, but, sir, that's not the exit gap.

20 Q. It's at least half an inch, isn't it? I know that's not
21 the gap. I'm talking about the curve. That's not the same,
22 is it?

23 A. If it measures differently, it's not exactly the same.

24 Q. So about a half-inch difference --

25 A. If that's what you measured.

1 Q. -- is that right?

2 So apparently, these heads aren't made exactly alike,
3 and there's been a change from the old 5-inch to the 4-inch;
4 is that right?

5 A. Yes.

6 Q. Do you know if that makes any difference at all?

7 A. Those dimensions that you measured for the half inch?

8 Q. Yes, sir.

9 A. That's quite irrelevant to me.

10 Q. Well, did you test it to see?

11 A. Oh, I -- it's irrelevant. All that thing does is guide
12 the chute. The guardrail out the side provides some
13 separation with the faceplate.

14 Q. You don't think that's going to cause the -- the w-beam
15 to flatten out in different areas because of the change of
16 angle of that plate?

17 A. The platen -- no, sir. The flattening w-beam occurs up
18 there within those converging plates, and it's basically
19 completed by the time you get down to the bottom where that
20 one convergent plate ends.

21 Q. You don't think that's going to cause the head to
22 buckle?

23 A. Is that exit gap going to cause the head to buckle?

24 Q. This change in the angle of the deflector plate?

25 A. No, no.

1 Q. Okay.

2 A. That little bit of difference is not going to amount to
3 anything.

4 Q. Okay. Thank you, Doctor.

5 THE COURT: You can take your seat back, Dr. Buth.

6 Q. (By Mr. Baxter) Now, Dr. Buth, did you at some time
7 become aware that there were these horrific accidents out on
8 the road with the guardrail going through cars, after you
9 changed the ET-Plus?

10 A. I -- I have seen one or two photos with guardrail that
11 went through the vehicle. I don't recall exactly which head
12 or where it was after that or not.

13 Q. Well, did you try -- I mean, that must have been very
14 alarming to you. It was your product, wasn't it?

15 A. Well, it appeared to be an ET head and -- and a
16 guardrail through a vehicle, but that's all I know. I don't
17 know why the guardrail went through the vehicle.

18 Q. Well, did TTI conduct any investigation to find out why?

19 A. Not that I know of, it didn't. It's not our prerogative
20 to go to some state and investigate their accidents.

21 Q. Oh, okay. So if those accidents were happening and TTI
22 knew they were happening all over the country and there were
23 hundreds of them, your position was not my job?

24 A. Well, I don't know that there were hundreds of them
25 where the rail went through the car. I wouldn't

1 characterize it that way. We'd have been happy to go and
2 investigate any accidents that occurred in the field, any
3 collisions that occurred in the field, if we'd have had the
4 liberty to do so or if anyone would ask us to do so.

5 Q. But you didn't?

6 A. We didn't.

7 Q. Okay. And it wasn't until 2012 that you came clean with
8 the Federal Highway Administration there had been changes to
9 the ET-Plus, wasn't it?

10 A. We took all that detail -- our people at TTI, not me,
11 took all that detail to Federal Highway at that time. Yes,
12 sir.

13 Q. And that was only after this man went to the Federal
14 Highway Administration and said these things are killing
15 people; you've got to conduct the investigation, isn't it?

16 A. Which man?

17 Q. Mr. Harman right over here. Do you know Mr. Harman?

18 A. Yes, sir, I now see him.

19 Q. Okay. After he went and complained, that's when you
20 came clean with the FHWA?

21 A. I wouldn't describe it that way, but that's when we
22 had -- our people at TTI understood that some of that
23 information was mistakenly not submitted to Federal Highway,
24 and so they went and did it to try to correct the mistake.

25 Q. After you saw the wrecks, Dr. Buth, did someone say,

1 hey, let's do a crash test and put all this to rest; that
2 our head's not safe? Did somebody do that?

3 A. What I've seen is photos after collisions. When you say
4 if I saw the wrecks, I didn't see the collision happen. I
5 saw photos that --

6 THE COURT: Gentlemen. Gentlemen, one at a time.
7 Dr. Buth, you can't talk over Mr. Baxter and he can't talk
8 over you. So one of you talks at a time. I'm not going to
9 have both of you talking over each other.

10 THE WITNESS: Yes, sir.

11 THE COURT: You make sure he's finished his
12 question before you answer.

13 And you make sure he's finished his answer before
14 you ask the next question.

15 Let's proceed with the next question.

16 MR. BAXTER: Thank you.

17 Can you give me a slide up, Mr. Diaz, of one of
18 the wrecks?

19 Q. (By Mr. Baxter) This one right here we've looked at
20 several times, Dr. Buth. If TTI had information that this
21 car hit an ET-Plus head, a changed one, and the guardrail
22 came through there like that, wouldn't that concern TTI?

23 A. Well, yes, I'm concerned that the guardrail came through
24 that vehicle like that. That doesn't look good.

25 Q. No, sir.

1 A. I don't know why it happened. All I see is it's in the
2 vehicle.

3 Q. Wouldn't you want to find out? Wouldn't you want to
4 find out if your head design was involved in that failure?

5 A. I'd be curious to know that, yes.

6 Q. Well, wouldn't it almost be a moral imperative to find
7 out?

8 A. I wouldn't say so, no, sir.

9 Q. Okay. In any case, you didn't do simulations and
10 you didn't do crash tests. In fact, you did nothing?

11 A. Okay.

12 Q. Is that right?

13 A. Yes, sir.

14 MR. BAXTER: I believe that's all I have, Your
15 Honor. Thank you very much.

16 THE COURT: All right. Redirect, Mr. Brown?

17 MR. BROWN: Yes, sir.

18 MR. BAXTER: I'm going to leave these here,
19 Mr. Brown, unless it's in your way and I'll come back and
20 get them.

21 Thank you, Your Honor.

22 MR. BROWN: May I proceed, Your Honor?

23 THE COURT: Yes, you may.

24 REDIRECT EXAMINATION

25 BY MR. BROWN:

1 Q. Dr. Buth, did you have an opportunity to look at the
2 crash test results of the crash test performed on the
3 ET-Plus head with four-inch guide channels on May 27, 2005?

4 A. Yes.

5 Q. Did you have any reason to believe that those four-inch
6 guide channels would not extrude rail properly through that
7 head?

8 A. No, sir.

9 Q. Did the United States Federal Highway Administration
10 accept the product as crash tested?

11 A. Yes.

12 Q. And they continue to do that today, don't they, sir?

13 A. Yes, they do.

14 Q. Dr. Buth, you were asked several questions by Mr. Baxter
15 about whether or not you thought your head design was
16 defective. As you sit here today, given your experience and
17 training, do you believe that head design that's being
18 placed on the highways is defective?

19 A. No, sir, I do not.

20 Q. Dr. Buth, do you and your family drive on the highway?

21 A. Oh, yes.

22 Q. Do you have any belief that this particular device poses
23 a hazard to you and your family?

24 A. No, I think it's a safety feature that reduces a hazard.

25 Q. Dr. Buth, would you risk your reputation and your 50

1 years of experience by placing something on the highway that
2 you thought was defective or dangerous?

3 A. Oh, no.

4 MR. BROWN: May I see Plaintiff's Exhibit 165,
5 please?

6 Q. (By Mr. Brown) Dr. Buth, can you identify this
7 particular letter for us, sir?

8 A. Yes, I can.

9 Q. Tell the jury what it is, please.

10 A. It's the letter from me to Brian Smith at Trinity
11 Industries transmitting the research -- the test report for
12 the ET-Plus test on 31-inch-high guardrail and CD -- a
13 digital version of the report and some videos of the
14 collision.

15 Q. Did you intend for Trinity to rely upon this particular
16 letter that you sent to them?

17 A. Oh, yes, I hoped they would. I thought it was adequate.

18 Q. Did you believe that Trinity could rely on your
19 representation that this particular documents that you
20 transmitted was sufficient to obtain Federal Highway
21 approval?

22 A. I think they could. They should be able to, yes.

23 Q. Does Trinity rely upon Texas A&M for its expertise in
24 preparing these crash test reports, suitable to be sent to
25 the Federal Highway Administration?

1 A. Yes, sir, I believe they do.

2 Q. Did they have a reason to believe that if they sent the
3 drawing that the jury has previously seen, that it would be
4 included in that crash test report, Dr. Buth?

5 A. I assume they would trust that we followed up and did it
6 right.

7 MR. BROWN: May I see Defendants' Exhibit 15, Mr.
8 Hernandez? And could we please go to the second page?

9 Q. (By Mr. Brown) Do you see the portion of it where it
10 has from Brian Smith to various addressees, sir?

11 A. Yes, I do.

12 Q. All right. And I believe we've seen this particular
13 portion before. You received this; is that correct?

14 A. Yes.

15 MR. BROWN: Could we go to the first page, please,
16 Mr. Hernandez?

17 Q. (By Mr. Brown) Would you see -- would you please look
18 at the top portion of that email where you see it from Dean
19 Alberson to various individuals at TTI?

20 A. Yes.

21 Q. Were you one of the recipients?

22 A. Yes, I am.

23 Q. If you looked at the email below, sir, can you see who
24 that's from?

25 A. From Don Johnson.

1 Q. Do you know who Don Johnson is?

2 A. Yes, I do.

3 Q. And who is he sending this email to?

4 A. To Dean Alberson, copying Steve Brown and Brian Smith.

5 Q. The text of this email says: Talked to Brown today. He
6 will arrange to send you a drawing of the -- or drawing of
7 the ET-Plus with four-inch chute.

8 Did I read that correctly?

9 A. Yes, you did.

10 Q. And was that, in fact, transmitted to you, Dr. Buth?

11 A. Yes, we received a fabrication drawing for that.

12 Q. You were asked questions by Mr. Baxter, Dr. Buth,
13 regarding whether or not Trinity should have made an
14 announcement regarding this particular product to the
15 Federal Highway Administration. Do you think that Trinity
16 in your opinion should have had a right to rely on TTI to
17 include the drawing that was sent to them, sir?

18 A. Oh, yes.

19 Q. One of the things that you were asked by Mr. Baxter was
20 to look at the part of the crash test report that dealt with
21 vehicle trajectory?

22 MR. BROWN: Mr. Hernandez, may I see Defendants'
23 Exhibit 3, and please go to Page 65?

24 Q. (By Mr. Brown) Dr. Buth, would you read for us at the
25 top of that page what that says at the Table 5.1 under

1 evaluation factors?

2 A. Evaluation criteria?

3 Q. Right. Look at Item K. What --

4 A. Item K. After collision, it is preferable that the
5 vehicle's trajectory not intrude into adjacent traffic
6 lanes, and that applies to all tests.

7 Q. You saw with Mr. Baxter the fact that you all at TTI
8 recorded that in this preferable category that there was a
9 fail; is that right?

10 A. Yes, we did.

11 Q. Did you transmit that fail to the Federal Highway
12 Administration?

13 A. Yes, it was included in that documentation.

14 Q. Did you attempt to hide the fact that you believed it
15 failed from the Federal Highway Administration?

16 A. No, sir.

17 Q. Did you give that information to the Federal Highway
18 Administration to consider when they considered your crash
19 testing report?

20 A. Yes, we did.

21 Q. Dr. Buth, you were asked questions about the flared ET
22 crash test. Do you recall that?

23 A. Yes, I do.

24 Q. How do you characterize those tests that were done down
25 at TTI, sir?

1 A. It was a research and development program, experimental
2 program to develop flared energy-absorbing system.

3 Q. What kind of system is the ET-Plus that's currently sold
4 on the roadways?

5 A. It's classified as a tangent system.

6 Q. Does that mean along the roadways, sir?

7 A. It would be installed parallel to the roadway.

8 Q. Has TTI ever recommended to Trinity that it should try
9 to commercialize a flared ET?

10 A. No. We didn't have one acceptable.

11 Q. Has the ET-Plus system ever been represented to the
12 Federal Highway Administration as a flared system, sir?

13 A. Not that I know of. None of us did.

14 Q. What did you all do with the crash testing that was done
15 down at TTI regarding the flared ET test? Did you continue
16 to do them, sir?

17 A. We did a number of tests, I think about five, gathered
18 all of the data and information from those. They failed.
19 We got that -- data test information results in their file
20 folders for those tests.

21 Q. Based upon your experience, Dr. Buth, when you go to
22 Federal Highway with the results of crash testing, what are
23 you asking the Federal Highway to do?

24 A. Accept it for use on the National Highway System.

25 Q. Had you ever intended for the flared ETs to be accepted

1 for use on the National Highway System?

2 A. Not with those kind of test results.

3 Q. Is that as true today as it was back then, sir?

4 A. Yeah. We wouldn't ask to put that on the road.

5 MR. BROWN: May I see Plaintiff's Exhibit 185,
6 please, Mr. Hernandez?

7 Q. (By Mr. Brown) Dr. Buth, at the beginning of this
8 particular email string -- it's from Lance Bullard to Nick
9 Artimovich at the top. Do you see that?

10 A. Yes, I do.

11 Q. Are you copied upon that email, sir?

12 A. Yes.

13 Q. Is this an -- or can you characterize what this is for
14 us, Dr. Buth?

15 A. Email, like we said, to Artimovich from Lance Bullard,
16 Nick Artimovich, Federal Highway.

17 Q. All right.

18 MR. BROWN: Can you scroll down, Mr. Hernandez,
19 and can you go to the next page, please? And finally to the
20 third page, sir?

21 Q. (By Mr. Brown) Dr. Buth --

22 A. Yes.

23 Q. -- was TTI informing Federal Highway Administration that
24 they were considering a flared ET-Plus -- or a flared ET
25 system for configuration?

1 A. Oh, yes. They were aware we were working on it, yes.

2 Q. All right. And this flared ET system configuration that
3 you were doing, were you trying in any way to hide that from
4 the Federal Highway Administration?

5 A. Not at all.

6 Q. In the first email, there was reference to a 3-31 test.
7 Is that the big pickup truck test, sir?

8 A. Yes.

9 Q. What is the reason that you did not run the 3-31 test on
10 the flared ET, sir?

11 A. There was no need to. It hadn't passed a car yet, so
12 we'd need to run another test. It's not going to be
13 acceptable.

14 Q. All right, sir.

15 MR. BROWN: Thank you, Mr. Hernandez. Mr.
16 Hernandez, could I see Demonstrative No. 25, please?

17 Q. (By Mr. Brown) Dr. Buth, can you tell the Ladies and
18 Gentlemen of the Jury where a commercialized ET-Plus system
19 is, sir?

20 A. Upper left-hand corner, first one on top row.

21 Q. Is that the orientation that an ET-Plus system that
22 is installed on the national highway system today, sir?

23 A. Yes. That's one of the orientations. However, the head
24 may be moved over a foot or two.

25 Q. Is that as permitted by the Federal Highway

1 Administration?

2 A. Yes, yes, yes.

3 Q. All right. And the further tests that are indicated
4 ending in Nos. 1, 2, 3, 4, and 5, do you see those, sir?

5 A. Yes.

6 Q. They are labeled screenshots from those tests; is that
7 correct?

8 A. Yes, they are, all of them.

9 Q. What are those, Dr. Buth?

10 A. Those are steel frame taken -- taken from something --
11 for the test that shows -- along the length of the
12 guardrail, it shows the flare -- flare-back of the end of
13 the guardrail from the roadway.

14 Q. Has Texas A&M's Transportation Institute at any time
15 ever told Trinity that you may, in fact, flare the ET-Plus
16 system that's on the roadways in any manner like the things
17 that are depicted in 1, 2, 3, 4, and 5?

18 A. No, not ever.

19 Q. Has that effort that was done at TTI ever been
20 commercialized, sir?

21 A. No, sir.

22 MR. BROWN: Thank you, Mr. Hernandez.

23 Q. (By Mr. Brown) Dr. Buth, we talked about the
24 crash-testing that was done in 2010.

25 MR. BROWN: May I see Exhibit No. -- Defendants'

1 Exhibit No. 4, please?

2 Q. (By Mr. Brown) Can you identify this, please, Dr. Buth?

3 A. Yes. Cover Page Test 2-30 of TL-2 ET-Plus with HBA and
4 SYTP.

5 MR. BROWN: And may I have Defendants' Exhibit --
6 that's fine, Mr. Hernandez. Please take that down.

7 Q. (By Mr. Brown) Dr. Buth, did Texas A&M University's
8 Transportation Institute in any way try to intentionally
9 deceive the Federal Government?

10 A. No, sir, we did not.

11 Q. By the omission of the drawing that's previously been
12 talked to you about in this courtroom, were you in any way
13 trying to intentionally deceive the Federal Government from
14 what you-all had crash-tested?

15 A. No, sir, I was not, not at all.

16 Q. In addition to your crash test report, did you supply
17 them with other things?

18 A. Yes, some --

19 Q. What were they?

20 A. Photos -- still photos, before and after tests, video
21 showing the collision during the test.

22 Q. Did that actual video show the impact of that crash
23 test, sir?

24 A. Yes.

25 Q. As you sit here today, do you believe that Trinity

1 Industries in any way tried to intentionally defraud or in
2 any way intentionally deceive the Federal Highway
3 Administration by passing on the crash test report to the
4 Federal Government?

5 MR. BAXTER: Objection, Your Honor. He can't draw
6 that conclusion.

7 THE COURT: Well, it's clearly a leading question,
8 and he doesn't have the ability to speculate. The objection
9 is sustained for multiple reasons.

10 MR. BROWN: All right. Pass the witness, Your
11 Honor.

12 THE COURT: Additional cross, Mr. Baxter?

13 MR. BAXTER: Yes, Your Honor.

14 RECROSS-EXAMINATION

15 BY MR. BAXTER:

16 Q. Dr. Buth, you do know that when they started the flare
17 test, that both TTI and Trinity didn't want to do the pickup
18 truck on that flared head, didn't they? They -- they tried
19 to get out of that, didn't they?

20 A. They may have. The car would be more critical.

21 Q. You just didn't want to run the pickup truck into that
22 head, did you?

23 A. No, I wouldn't say that's true.

24 Q. But the FHWA said you had to, didn't you? You tried to
25 get out of it. And then when it got down to it, the FHWA

1 said, no, no, we don't think that 3-31 is a gimme; you've
2 got to go do it?

3 A. That's in some emails. Yes, it is.

4 Q. And you didn't ever do it, did you?

5 A. Well, no, sir, we didn't, but there was no need to do
6 it. If it passed or failed, the system still wasn't
7 acceptable because the car failed.

8 Q. All right, sir. The -- neither Trinity nor TTI -- after
9 the first two tests, they could have said, well, the third
10 test, let's use a pickup truck, couldn't they?

11 A. Could have done that.

12 Q. And didn't do it?

13 A. No, sir.

14 Q. Even though you have been told to test it by the FHWA
15 with a pickup truck, you didn't do it?

16 A. Yes, we didn't do it, but there was no need to do it.

17 Q. All right.

18 A. If the car had passed, we would have done it.

19 Q. All right, sir.

20 MR. BAXTER: Now, let me see Exhibit No. 1257,
21 please, Mr. Diaz, if I can.

22 Q. (By Mr. Baxter) And I want to represent to you this is
23 a --

24 MR. BAXTER: If I can go to the next page.

25 Q. (By Mr. Baxter) This is a question and answer session

1 sponsored by Trinity with a consultant named Mr. Gripne
2 answering the questions. Look down there at the highlighted
3 part, the bolded part.

4 It says: Based on this test, it is acceptable to
5 install a tangent NCHRP 350 terminal -- and that's the
6 ET-Plus; is that right?

7 A. Yes, sir.

8 Q. -- at the end of a flared line of guardrail that is
9 flared for length of need calculations on the same flare
10 rate of the line guardrail that is 15 to 1 or flatter for
11 Test Level 3 design conditions.

12 Do you see that?

13 A. Yes, I see that.

14 Q. And so apparently, Trinity is telling contractors and
15 telling the world, stick this thing on a flared
16 configuration that's 15 to 1, right?

17 A. No, sir. It's saying if the guardrail length of need is
18 already not tangent with the road, you can put a terminal on
19 the end of it.

20 Q. Which would make it flared?

21 A. Not flared from the alignment of the guardrail.

22 Q. Well, it's flared from the road, isn't it?

23 A. I don't know how to answer that.

24 Q. Okay. Now, Dr. Buth, see if I can figure this out.

25 Before 2005, you've got a product out there that has no

1 problems, and it has none of these spearing accidents that
2 you know about; is that right?

3 A. I'm sorry. Could you say that again, please, sir?

4 Q. Yes, sir. Right before -- in 2004, you've got a product
5 on the highway that is working fine, right?

6 A. Yes.

7 Q. And is not having any of these spearing accidents that
8 you know about, no complaints?

9 A. I don't recall documentation of any of those, right, and
10 I did not receive any complaints.

11 Q. Now, in 2014, you've got hundreds of these accidents,
12 and the only thing that's different is you changed the head
13 in 2005, isn't it?

14 A. Sir, I cannot accept hundreds of these accidents.

15 Q. Well, if the testimony is there are hundreds of them,
16 sir, assume for me just a moment, there are. The only thing
17 that's different is you changed the head in 2005 and started
18 putting it on the roadway in 2006, didn't you?

19 A. I didn't start putting it on the roadway. Trinity
20 started marketing it at some time. I still can't buy the
21 premise from the question.

22 Q. Okay. Is it -- is it because you don't know how many
23 accidents there are?

24 A. I don't have an accurate count of accidents, but we
25 talked about no accidents where guardrails speared, and the

1 next sentence we talked about hundreds of accidents where
2 the guardrail speared. And I -- I'm thinking I haven't seen
3 that.

4 Q. Okay. Well, if that's the testimony in this case, could
5 you accept it for just a moment, sir?

6 A. I have difficulty, but I'll talk about it.

7 Q. Okay. Assuming that to be true, the thing that's
8 different is you changed it in 2005; isn't that right, sir?

9 A. Yes.

10 MR. BAXTER: Thank you, Dr. Buth.

11 THE COURT: Additional direct, Mr. Brown?

12 MR. BROWN: Yes, sir.

13 REDIRECT EXAMINATION

14 BY MR. BROWN:

15 Q. Dr. Buth, in your time down at Texas A&M Transportation
16 Institute, have you ever had -- or do you have knowledge of
17 anyone whose life has been saved by hitting an ET-Plus?

18 A. Yes, at least one or two people.

19 Q. And how do you know that, sir?

20 A. They came and told us.

21 Q. And you've had them personally tell you that; is that
22 correct?

23 A. Yes.

24 Q. All right.

25 MR. BROWN: Could I see Plaintiff's Exhibit 185,

1 again, please? If we could expand the first top of the
2 email there, please, Mr. Hernandez.

3 Q. (By Mr. Brown) Mr. Baxter said you-all down at TTI
4 didn't want to run the 3-31 pickup truck test. Did you hear
5 him ask you that?

6 A. Yes, I did.

7 Q. What does that second sentence say? TTI will proceed
8 with running the 3-30 and 3-31 at the 31-inch -- 31-inch
9 height?

10 A. Yes.

11 Q. Did you read that, sir?

12 A. Yes.

13 Q. Did I read that correctly?

14 A. Yes.

15 Q. Is that a statement by TTI saying we don't want to run
16 that test?

17 A. No. It says we will run it.

18 Q. Tell the Ladies and Gentlemen of the Jury why you didn't
19 run the test.

20 A. Because we were first running the test with the car, and
21 we couldn't get it to pass. So the question of whether or
22 not the pickup passed is irrelevant. It doesn't matter.
23 The car failed, so the device is not acceptable. No need to
24 go run the other test.

25 Q. Is what you're saying if the small car won't pass,

1 there's no need to try it with the pickup truck?

2 A. Right.

3 Q. Because you're not going to commercialize it either way;
4 is that right?

5 A. Right.

6 Q. Were you going to ask the Federal Highway Administration
7 to just accept it for a big pickup truck, if it passed the
8 test?

9 A. No, no. We'd have to get it to pass the car test.

10 MR. BROWN: Pass the witness, Your Honor.

11 THE COURT: Additional cross-examination?

12 MR. BAXTER: No, Your Honor. That's all I have.

13 Thank you.

14 THE COURT: All right. Dr. Buth, you may step
15 down.

16 THE WITNESS: Thank you.

17 MR. BROWN: May he be excused, Your Honor?

18 THE COURT: Is there objection from the Plaintiff?

19 MR. BAXTER: No, Your Honor.

20 THE COURT: You may be excused, Dr. Buth.

21 THE WITNESS: Thank you.

22 THE COURT: All right. Ladies and gentlemen,
23 we're going to use this opportunity to stop for the day.

24 I'm going to ask you as you leave the courthouse to leave
25 your notebooks on the table in the jury room. I'm going to

1 instruct you, as you would expect, not to discuss the case
2 with each other or with anyone -- or among yourselves.
3 I'd like to have you back in the morning on our same
4 schedule. Be in the court -- in the jury room assembled and
5 be ready to go at 8:30.

6 With those instructions, travel safely, and I'll
7 see you in the morning. You're excused at this time.

8 COURT SECURITY OFFICER: All rise.

9 (Jury out.)

10 THE COURT: Be seated, please.

11 Counsel, after we recess for the day, these
12 demonstratives need to be cleared from the courtroom and the
13 easel needs to be replaced where it was.

14 Defendants, who are your remaining witnesses that
15 you intend to call?

16 MR. MANN: Your Honor, Chris Harman and then Dr.
17 Ray and then Mr. Matthews.

18 THE COURT: All right. Well, between the two of
19 you, I think there's about a tad over three hours left. So
20 you'll need to be mindful of your time. You can get an
21 exact update on your time from my law clerks after we recess
22 for the day.

23 MR. MANN: Yes, sir.

24 THE COURT: Is there anything the Plaintiff's
25 aware of the Court should take up before we recess?

1 MR. BAXTER: Not -- not take up, Your Honor. I
2 was -- I was -- if we finish around noon tomorrow, which
3 sounds like we may, would the Court anticipate having a
4 charge conference that afternoon or some other time?

5 THE COURT: No. My -- my hope is that we can
6 finish the evidence by the time we break for lunch.

7 MR. BAXTER: Yes, sir.

8 THE COURT: Have lunch, come back. I'll hear Rule
9 50 motions from both sides. Then I'll schedule a time for
10 an informal charge conference tomorrow afternoon.

11 MR. BAXTER: Okay.

12 THE COURT: It would be my hope that based on
13 that, I can furnish both sides over the weekend with what I
14 believe the final charge and verdict form should be and I'll
15 have a formal charge conference first thing Monday to
16 receive objections. After that, we'll proceed with final
17 instructions and closing arguments.

18 MR. BAXTER: Thank you, Your Honor.

19 THE COURT: That's my plan.
20 All right. Anything that the Defendants are aware of before
21 we recess?

22 MR. SHAW: None, Your Honor.

23 THE COURT: All right. We stand in recess until
24 tomorrow morning.

25 COURT SECURITY OFFICER: All rise.

(Court adjourned.)

CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/ Shelly Holmes
SHELLY HOLMES, CSR, TCRR
Official Court Reporter
State of Texas No.: 7804
Expiration Date 12/31/14

10/15/14
Date

/s/ Susan Simmons
SUSAN SIMMONS, CSR
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State of Texas No.: 267
Expiration Date 12/31/14

10/15/14
Date

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

UNITED STATES OF AMERICA * Civil Docket No.
EX REL JOSHUA HARMAN *
VS. * 2:12-CV-89
* Marshall, Texas
*
* October 17, 2014
TRINITY INDUSTRIES, INC. & *
TRINITY HIGHWAY *
PRODUCTS, LLC * 8:22 A.M.

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE RODNEY GILSTRAP
UNITED STATES DISTRICT JUDGE

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14 P R O C E E D I N G S

15
16 (In-chambers hearing.)

17 THE COURT: Y'all have a seat.

18 All right. I understand that the parties have
19 some issues that have developed overnight. Let's take those
20 up and see what they are.

21 MR. MANN: I just want some clarification, Your
22 Honor, to make sure I don't violate any order.

23 On Chris Harman, there is a patent that they've
24 applied for. I know the patent is out itself. You've ruled
25 that that exhibit is out. It's part of --

1 THE COURT: I've not only ruled that the patent
2 itself is out as an exhibit, I've ruled that other than
3 there was patent litigation that was resolved to both
4 parties' satisfaction, there's to be no more discussion
5 about patents.

6 MR. MANN: Okay. And -- and that's why -- but I
7 wasn't trying to do that, Your Honor. They applied for a
8 patent after that. It's -- it's out there. It exists. I'm
9 -- I'm obviously not interested in putting the patent in.
10 You've ruled that actual patent application out. But it's
11 part of their attempt to recapitalize and the investment
12 business into a patent.

13 THE COURT: Come in. Come join us.

14 (Ms. Truelove enters chambers.)

15 MS. TRUELOVE: I guess you need me.

16 THE COURT: All right. Let's continue.

17 MR. MANN: Anyway, an investment into that patent.
18 I -- I just want to know whether I can or cannot go into the
19 fact they have a patent.

20 THE COURT: Well, I want to get -- I want to be
21 completely clear about how Chris Harman is going to be
22 examined, and that's why I wanted Counsel who are going to
23 do the direct and the cross present.

24 Quite honestly, Counsel, I was very disappointed
25 yesterday with the examination and cross of Dean Sicking.

1 People came in here and told me, we understand where the
2 lines are, we worked it all out, we need one little question
3 answered, and we're all good to go. And then we went out
4 there and the wheels came off. And I really feel like there
5 was a serious failure to communicate with the Court, if not
6 intentionally, at least negligently.

7 And I want to get a very clear understanding of
8 exactly what is and isn't going to happen with Chris Harman
9 today. Because if those lines get crossed today with him
10 like they got crossed yesterday with Dean Sicking, then I
11 expect to do more than just get upset about it.

12 MR. MANN: That's why I'm asking.

13 THE COURT: All right. Let's -- let's start at
14 the top. Certainly the efforts in the bankruptcy proceeding
15 that indicate an intent to recapitalize either SPIG or Selco
16 with recovery from Trinity is fair game. It shouldn't go
17 beyond what's filed in the bankruptcy proceeding, but that's
18 fair game.

19 The fact that SPIG and/or Selco -- Selco did
20 produce a four-inch head is fair game. What they did with
21 it, how they marketed it, anything beyond the fact that they
22 produced it is out.

23 MR. MANN: Okay.

24 THE COURT: With regard to the issues of
25 spoliation, what the Court's previously found in its

1 previous orders is fair game. But the spoliation issue is
2 limited to what the Court's expressly found in its prior
3 orders.

4 MR. MANN: So --

5 THE COURT: We're not going to go beyond what's
6 already spelled out in my findings.

7 MR. MANN: Well, I had -- well, I had left that
8 completely --

9 THE COURT: Let me finish -- let me finish.

10 MR. MANN: Oh, I'm sorry.

11 THE COURT: Let me finish and then you can ask a
12 question.

13 We're not going to get into patent litigation
14 beyond the fact that there was a patent dispute that was
15 resolved to both parties' satisfaction. And to my
16 knowledge, those are the permitted areas of inquiry with
17 regard to Chris Harman.

18 I quite honestly, Counsel, feel like given the
19 amount of time left, you don't have a lot of time to waste
20 in chasing rabbits anyway.

21 MR. MANN: That -- that's exactly right, Your
22 Honor. That's why -- well, let me just --

23 THE COURT: If there are questions, I'll hear
24 them.

25 MR. MANN: My question, Your Honor, is if -- if --

1 if they go into -- I mean, I plan on -- if patents are
2 out -- out in the case except for just mentioning the fact
3 that there was patent litigation settled to the satisfaction
4 of the parties, I'm just going to leave it alone. But if
5 they go into it and I --

6 THE COURT: Let me say this, and you raise a good
7 point. If either side is convinced that the examination by
8 the other side opens the door to something, I want you to
9 approach the bench and get a ruling on it from me before you
10 attempt to touch it at all. And if I say the door's opened,
11 I'll tell you the extent to which you can go through it. If
12 I say it's not, then these guidelines remain unaffected.

13 MR. MANN: Well, I think it's just -- by the way
14 you're talking about those issues, Your Honor, I think it's
15 just easier just to stay away from it.

16 So on the other issue -- on your Court's orders on
17 spoliation, so you're saying that we can mention the fact
18 that the Court's made an order on the spoliation because I
19 -- I didn't know that that would be fair game.

20 THE COURT: The Court -- the Court has found that
21 there has been spoliation.

22 MR. MANN: Okay.

23 THE COURT: The Court has indicated it intends to
24 give the jury a -- an appropriate instruction on it.

25 MR. MANN: Okay.

1 THE COURT: You haven't seen my instruction. I
2 think you have some danger in saying it's going to be
3 something it isn't when they hear it and you haven't seen it
4 yet, but that's your call.

5 MR. MANN: Okay.

6 THE COURT: But I've -- I've not only ruled on it
7 before, I've ruled on the motion to reconsider it and said
8 again what I will do and what I won't do.

9 MR. MANN: Okay.

10 THE COURT: But to the extent you go beyond what's
11 already been established and found by the Court, you do so
12 at your peril. This -- we're not -- this is not a fishing
13 expedition. This -- this gentlemen, when we had the
14 argument on the Plaintiff's motion to quash his subpoenas to
15 appear, we had a very clear discussion about what he was
16 permitted to go into. This is not a blank slate where you
17 can just see what he says, whatever question you want to ask
18 him.

19 MR. MANN: Yeah, I -- I don't think I have time to
20 do that, Your Honor.

21 THE COURT: Well --

22 MR. MANN: So I understand.

23 THE COURT: Well, I want to -- do you have any
24 questions --

25 MR. WARD: I have a question if I could, Your

1 Honor.

2 THE COURT: Let me ask Ms. Truelove if she has any
3 questions because she's going to examine him for the
4 Plaintiff.

5 MS. TRUELOVE: Well, that's my first point as --
6 and part of the reason why I wasn't over here yet. I think
7 actually Mr. Baxter may be examining him, unless you tell me
8 that he's not because he's not sitting here right now.

9 THE COURT: Well, I had lawyers in here yesterday
10 who told me what was going to happen with Dr. Sicking and
11 they weren't the lawyers who examined him.

12 MS. TRUELOVE: And -- and I understand that.

13 THE COURT: And I want to avoid what happened
14 yesterday.

15 MS. TRUELOVE: And so my -- my question to you is,
16 Your Honor, if -- if you are okay with us communicating to
17 him exactly what the -- I mean, obviously he has a
18 responsibility to hold to what we've discussed here --

19 THE COURT: Well, let me put it this way. I'm not
20 going to tell Plaintiff who can and can't examine the
21 witness, but the fact that he's not here is not going to be
22 a defense to any violations of the rules that have been
23 spelled out in here.

24 MS. TRUELOVE: I understand completely.

25 THE COURT: So you make the decision. If you're

1 comfortable with him operating within the guidelines I'm
2 giving, knowing that if he gets outside of them, he'll be
3 treated just as if he was in the room here when we discussed
4 them.

5 MS. TRUELOVE: Absolutely. And the only other
6 question I have is just to make sure I completely understand
7 what you said here is I understand those are the -- the
8 areas or the topics and the boundaries for those areas and
9 topics, but you're not saying that we can't acquire just
10 like things that he does for a living and businesses that he
11 has.

12 THE COURT: I assume both sides will have some
13 background questions of an introductory nature, but they
14 need to be brief and they need to be purely introductory
15 type questions to familiarize him with the jury.

16 MR. CARPINELLO: I think we understand --

17 THE COURT: That doesn't need to be an excuse to
18 go into some other substantive area.

19 MR. MANN: Your Honor --

20 THE COURT: Yes, sir.

21 MR. MANN: I've -- got one qualification, and it
22 will probably help Ms. Truelove, too. Yesterday there was
23 an exhibit that's been pre-admitted that was a typed up
24 version of the bankruptcy hearing. And we have the actual
25 true transcript. I'm planning on using the true transcript

1 where there's no issue. I'm not going to be referring to
2 the pre-admitted exhibit. And that way it doesn't come in,
3 and we don't have an issue. We've worked that out between
4 us.

5 MS. TRUELOVE: In other words, we've both agree
6 there -- the original transcription, it's a tape recording,
7 the hearing. They just punched play on a tape recorder, and
8 the original transcription is difficult to follow. There's
9 all kinds of question marks and things in it. But for
10 whatever reason, it entered in the pre-admitted exhibit
11 list. If it got admitted as an exhibit, there would have to
12 be a lot of whiteout basically going on. So we've agreed --

13 THE COURT: Are both sides telling me that both
14 sides have agreed not to use that pre-admitted exhibit? Is
15 that correct?

16 MR. MANN: Yes, Your Honor. I don't think that's
17 a problem because we have -- I have an actual transcript
18 now.

19 THE COURT: Does anybody have an objection to the
20 use of the action transcript from the bankruptcy proceeding?

21 MS. TRUELOVE: Not -- not for purposes of
22 impeachment, Your Honor. I mean, that's my understanding of
23 how it would be used.

24 THE COURT: Do you intend to use it for any other
25 purpose, Mr. Mann?

1 MR. MANN: Not really, Your Honor. I mean, that's
2 the only reason I would use it. So that's why I don't think
3 it should -- probably should even be admitted anyway.

4 THE COURT: All right. Does anybody have any
5 other questions?

6 MR. WARD: Your Honor, I just had one question in
7 relation to your findings on the order of spoliation. You
8 also entered a penalty of \$140,000 in attorney's fees and
9 Mr. Mann will be able to ask --

10 MR. MANN: I'm not going to ask him.

11 MR. WARD: Okay.

12 THE COURT: That's not appropriate anyway. I'm
13 talking about the factual findings.

14 MR. WARD: Okay.

15 THE COURT: Not the -- not the penal provisions.

16 MR. MANN: Yeah, I didn't -- I never thought we
17 could go into that.

18 THE COURT: Does anybody have any other questions
19 about Mr. Chris Harman's examination?

20 MS. TRUELOVE: I just want to be really, really,
21 really, really clear because I want to make sure that I
22 explain to Mr. Baxter -- Mr. Baxter what we discussed. Mr.
23 Harman ran a gas pipeline business for six years, and we
24 were contemplating asking him some questions about that.
25 And I don't want to get off into a substantive area that --

1 THE COURT: All I can say, Ms. Truelove, is your
2 introductory questions to introduce him to the jury should
3 be solely for that purpose. If you want to talk about what
4 he did for a living in very high level general terms, that's
5 probably within that purview. If he starts talking about
6 how you operate a gas pipeline and specifics that go beyond
7 just introductory exposure of his work history, then that
8 may be a problem.

9 MS. TRUELOVE: I got you.

10 THE COURT: Anybody have any other questions?

11 MS. DYER: We have one additional issue beyond
12 that, Your Honor.

13 THE COURT: Okay. We'll move from Chris Harman to
14 whatever the next issue is.

15 MS. DYER: The next issue has to do with -- with
16 potential rebuttal of Dr. Coon. We would like to ask him or
17 be able to ask him about a pendulum test that was done on a
18 four-inch head in 2003.

19 The other side has objected because it's obviously
20 not in his reports, any of them. We didn't get it until
21 last Monday, and we didn't actually access it until last
22 Tuesday. It is appropriate rebuttal because Malcolm Ray
23 states very specifically in his report that they didn't
24 start testing this thing until -- a four-inch until 2005.
25 So we think it's both appropriate obviously for

1 cross-examination and rebuttal using Dr. Coon.

2 MR. CARPINELLO: These -- these are the -- these
3 are the documents that came in late, Judge.

4 THE COURT: These are the February emails?

5 MR. CARPINELLO: No.

6 MS. DYER: No, these are tests.

7 MR. CARPINELLO: These are the 6,000 documents --

8 THE COURT: Oh.

9 MR. CARPINELLO: -- that we had never gotten that
10 involved the pendulum and other tests that were produced
11 literally last -- literally last Monday. So obviously, we
12 couldn't do an expert report on them.

13 And as part of our sanctions motion, we asked to
14 be able to elicit testimony on them without having to do a
15 report because they came in literally on the eve of trial,
16 even though they had been ordered to be produced way back in
17 February.

18 THE COURT: Were portions of those 6,000 documents
19 that address this pendulum test, were some or all of those
20 pre-admitted in this case?

21 MS. DYER: They were, Your Honor.

22 THE COURT: Okay. What's the Defendants'
23 objection?

24 MR. MANN: Your Honor, it's not just the report
25 issue. It's a matter of if -- if they're going to use it in

1 rebuttal, that's something they anticipated in the
2 case-in-chief. And the fact is the -- the people from A&M
3 are gone now. That's an A&M production, not a Trinity
4 production.

5 The -- we still dispute that -- or at least A&M
6 does, but I'm going to speak for the fact that before your
7 order that you entered back in February and March, those
8 time periods, there was never an order to produce post
9 tests. And that's what that is, and so it's not --

10 THE COURT: I'm not going to take up the motion
11 for sanctions on its face. I want to narrow this to
12 specifically the dispute over what Dr. Coon may or may not
13 do in rebuttal.

14 I think what I'll do, Counsel, is I think I'll
15 carry this. And I assume Dr. Coon and the rebuttal case are
16 not going to happen before we at least have a recess this
17 morning. And we'll have an opportunity to talk about it. I
18 think I'll have more guidance after I hear Dr. Ray's
19 testimony. The rebuttal case, by definition, is to respond
20 to the Defendants' case-in-chief. And knowing what he's
21 testified to as your case -- as part of your case-in-chief
22 will help me address this.

23 MR. MANN: I think so.

24 THE COURT: So I'll carry it.

25 Do we have anything else that we need to take up

1 before we start this morning?

2 MR. MANN: Your Honor, we're going to have some
3 offers of proof, and these are our offers of proof that
4 we'll be giving the Court. I didn't know if the Court
5 wanted to go ahead and have these for you or your clerks to
6 look at before we get to the point where we need to do an
7 offer of proof. So we just brought it for Court's
8 convenience. If you'd rather us wait, we'll do that.

9 THE COURT: I'll take them and look at them.

10 MR. MANN: Okay.

11 MR. CARPINELLO: How about giving us a copy? You
12 didn't even tell me you were going to raise this in here.

13 MR. MANN: Well, George, I just got it walking in
14 the door.

15 MR. CARPINELLO: You knew about it before you came
16 in here.

17 MR. MANN: Well --

18 THE COURT: Make the other side a copy, and then
19 bring me a copy.

20 MR. MANN: We'll have to make a copy.

21 THE COURT: What else?

22 MR. CARPINELLO: I don't think there's anything
23 else, Judge.

24 MR. MANN: That's it.

25 THE COURT: Okay. I'll see you in the courtroom.

1 (Hearing concluded.)

2 (Jury out.)

3 COURT SECURITY OFFICER: All rise.

4 THE COURT: Be seated, please.

5 Is the Plaintiff prepared to read into the record
6 its list from the total list of preadmitted exhibits used
7 during yesterday's portion of the trial?

8 MR. CARPINELLO: We are, Your Honor.

9 THE COURT: If so, please proceed.

10 MS. MONROE: Thank you.

11 The Plaintiff's exhibits used on October 16th are
12 P-173, P-216, P-573, P-603, P-959, P-962, P-963, and P-1293.

13 THE COURT: Are there objections to that rendition
14 from the Defendants?

15 MR. MEIER: No objection, Your Honor.

16 THE COURT: All right. Do Defendants have a
17 similar list from the preadmitted list of exhibits to read
18 into the record?

19 MR. MEIER: We do.

20 THE COURT: Please proceed.

21 MR. MEIER: D-4, D-11, D-15, D-16, D-41, D-49,
22 D-78, D-93, D-169, D-172, D-265, D-268, D-277. So that was
23 D-277. D-395, D-396, D-400, D-401, D-409, Plaintiff 534.

24 And then yesterday, we need to withdraw D-30. It
25 was erroneously read at this time. And Defendants' D-230.

1 THE COURT: All right. Counsel, the Court
2 recognizes Ms. Monroe who's being doing this during the week
3 for the Plaintiffs. Please identify yourself for the
4 record.

5 MR. MEIER: Brendon Meier from Akin Gump for
6 Trinity.

7 THE COURT: Ms. Monroe, do the Plaintiffs have any
8 objection to the Defendants' rendition, including the one
9 withdrawal?

10 MS. MONROE: No, we don't.

11 THE COURT: Okay. Thank you, Counsel.

12 All right. Are we prepared for the Plaintiff
13 (sic) to call their next witness?

14 MR. MANN: Yes, sir.

15 THE COURT: Okay. Let's bring in the jury, Mr.
16 McAteer.

17 COURT SECURITY OFFICER: All rise for the jury.

18 (Jury in.)

19 THE COURT: Good morning, Ladies and Gentlemen of
20 the Jury. Please be seated.

21 MR. MANN: Your Honor, we call Chris Harman by the
22 adverse witness rule.

23 THE COURT: All right. Mr. Harman, if you'll come
24 forward, our courtroom deputy will swear you in at this
25 time.

1 (Witness sworn.)

2 THE COURT: If you'll come around over here, Mr.
3 Harman, and have a seat in the witness stand.

4 All right. Mr. Mann, you may proceed.

5 MR. MANN: Thank you, Your Honor.

6 JESSE CHRISTOPHER HARMAN, DEFENDANTS' WITNESS, SWORN

7 DIRECT EXAMINATION

8 BY MR. MANN:

9 Q. Mr. Harman, you're -- would you state your full name,
10 please, sir?

11 A. It's Jesse Christopher Harman.

12 Q. All right. And I'm going to -- I'm going to call you
13 Mr. Harman, even though your brother is here in the
14 courtroom, Joshua Harman, correct?

15 A. Yes, sir.

16 Q. You and Mr. Josh Harman have been partners in business
17 for a long time; is that right?

18 A. Yes, sir.

19 Q. And the two businesses would be, if we were naming them,
20 that you've been partners in would be one called SPIG,
21 right?

22 A. Yes, sir.

23 Q. What's SPIG stand for?

24 A. Safety Products and Guardrail.

25 Q. All right. And then the other one is called Selco?

1 A. Yes, sir.

2 Q. S-E-L-C-O?

3 A. Yes, sir.

4 Q. And what is that?

5 A. It's a seeding and land company.

6 Q. And you've either been president or vice president in
7 both of those businesses along with your brother, correct?

8 A. Yes.

9 Q. In other words, y'all probably traded out year by year,
10 or is there some sequence of events that causes that to
11 change?

12 A. Just I think once in a while, like every 10 -- 10 or 11
13 years or something.

14 Q. Okay. And then in SPIG, you're both the principals and
15 the managing partner of the businesses, too, correct?

16 A. Yes. I'm -- I'm the -- the managing partner and
17 principal.

18 Q. All right. And that's because your brother, his
19 business for the last two or three years has been this
20 actual lawsuit we're here in; is that correct?

21 A. It's the past -- I'm not sure about the timeframe, a
22 couple of years.

23 Q. Okay. And then you're back in Virginia running the
24 business, correct?

25 A. Yes, sir.

1 Q. All right. And it's my understanding that SPIG is a
2 guardrail company, correct?

3 A. Yes. We manufacture guardrails.

4 Q. And then Selco installs guardrails, right?

5 A. Yes, sir.

6 Q. All right. And it's my understanding that in the 2009
7 timeframe, your company -- or yours and your brother's
8 company, started manufacturing a 4-inch guide channel,
9 correct?

10 A. Yes, sir.

11 Q. All right. And you got the tools and you got the
12 machinery and you set up the -- the dies in order to make
13 that 4-inch guide channel; is that right?

14 A. I don't know of any dies.

15 Q. Well, did you use machinery to put them together, or
16 were they held together by hand?

17 A. It was like a fabrication shop with cutting and welding.

18 Q. Okay. But no -- no equipment like air hoists, things
19 like that, air clamps to put the things together?

20 A. No, there are no dies. It was just like a workshop.

21 Q. All right. Now, it's my understanding that at some
22 point, SPIG and Selco that they went into bankruptcy,
23 correct?

24 A. Yes, sir.

25 Q. And when you went into bankruptcy, what you started to

1 do, you and your -- both you and your brother, is look for
2 investors in the business; is that right?

3 A. Yes, sir.

4 Q. All right. And we know that, because in the bankruptcy
5 court, you actually testified, didn't you?

6 A. Yes, sir.

7 Q. It was --

8 A. A meeting.

9 Q. In a meeting. And that was in Virginia?

10 A. Yes, sir.

11 Q. All right. And it's my understanding that that would
12 be -- it may not be as big a courtroom as this. I've not
13 been there, but was it a courtroom where you had a judge and
14 somebody's taking down what's going on and clerks and
15 lawyers there?

16 A. No. There was nobody taking -- there was no reporter.
17 It was like a recording or something.

18 Q. Okay. And you were reporting under oath, weren't you?

19 A. Yes, sir.

20 Q. All right. So you knew that what you were saying was
21 being recorded, taken down where it could be looked at later
22 on?

23 A. Yes, sir, at -- at that proceeding.

24 Q. All right. And in that proceeding, you told the
25 trustee, and you knew the trustee was there to try to figure

1 out how people were going to get paid back, right?

2 A. Yes, sir. The trustee were questioning about the debts.

3 Q. Okay. And the trustee was asking you, well, what's your
4 plan on getting back into business, didn't he?

5 A. Yes. It was her.

6 Q. Her.

7 A. Yes.

8 Q. A female trustee. And when you were asked that, you
9 told them that -- that you and your brother, or your
10 brother, with you having an interest in it, had a plan to
11 pursue a lawsuit and get money out of it, right?

12 A. I said there was a case ongoing that my brother had.

13 Q. Okay. Of which you had an interest in, correct?

14 A. I had no interest in it.

15 Q. Your businesses have an interest in it, don't they?

16 A. He's -- he's my partner. Yes.

17 Q. All right. And what you told them is that you planned
18 on having investigators and winning a lawsuit and going into
19 a business where you thought you could make about a billion
20 dollars; is that right?

21 A. No, that's not what I told them.

22 Q. Well, let's -- let's look where we can be accurate at
23 Page 55, Line 17 -- let's go to Line 16.

24 This would be, Mr. Harman, the transcript of what you
25 told that trustee; is that right?

1 A. Yes, that's the recording.

2 Q. The recording. And the trustee was asking you: Well,
3 in what way are you going to continue business?

4 And you said: Well, we're having -- we've already had
5 three or four investors come and visit the property. Number
6 one, grounds, that what we need to succeed and prosper is
7 galvanizing. And then the -- there at -- during the same
8 period of building the galvanizing plant, we would test our
9 new end terminal and bring it to the market now, which is --
10 you know, it's -- it's a billion-dollar industry of the end
11 terminal.

12 Right?

13 A. Yes, sir. It is the end terminal.

14 Q. All right. And then there's over 100,000 --

15 MR. MANN: Next page.

16 Q. (By Mr. Mann) -- of these end terminals that gets
17 installed every year from either accidents or new
18 construction.

19 Right?

20 A. Yes.

21 Q. All right. So that was the plan, correct?

22 A. That was the plan in front of the trustee, yes, sir.

23 Q. And then you went on to say -- because the trustee kept
24 questioning you and said: Tell -- tell me more about this
25 story, about this case you've got.

1 And on Page 61 of that same transcript, the trustee
2 said: So back to the --

3 MR. MANN: Line 22.

4 Q. (By Mr. Mann) So back to the -- what's the timeline for
5 the debtor --

6 And you would be the debtor, correct? Your businesses
7 would be the debtor?

8 A. Yes, sir.

9 Q. -- going to be able to accomplish the things it wants to
10 do to reorganize?

11 MR. MANN: And let's go to the next page.

12 Q. (By Mr. Mann) And this is where you told the trustee
13 about the plan, isn't it?

14 A. Yes, sir, it appears so.

15 Q. Okay. You told the trustee: Hopefully, within the next
16 six months, but I -- I -- I could foresee no problem within
17 the next 12 months. No problem whatsoever. We have several
18 interested investors actually coming towards us, reporting
19 -- I mean, we're having an influx of emails and some of the
20 billion-dollar companies that's wanting to do a merger.

21 THE COURT: Let's slow down a little bit with your
22 reading, Mr. Mann.

23 MR. MANN: Yes, sir. That is kind of -- I'm
24 sorry.

25 Q. (By Mr. Mann) I mean, we're having an influx of emails

1 and some of the billion-dollar companies that's wanting to
2 do merger. So -- I mean, there's no -- there's no other
3 guardrail manufacturing plant within 400 miles.

4 Correct?

5 A. Yes, sir.

6 Q. And who are the billion-dollar companies that were
7 coming forward to want to merge with your company?

8 A. There were some companies -- other companies interested
9 in the -- in our plant.

10 Q. Well, who --

11 A. -- that was wanting to merge with us because we were
12 under bankruptcy.

13 Q. Who were the billion-dollar companies that wanted to be
14 a part of your plant?

15 A. There was a company in Canada, a group -- Samuels Group.

16 Q. Uh-huh. Who else?

17 A. There was another company, Barrier Systems,
18 Incorporated --

19 Q. All right.

20 A. -- out of California.

21 Q. All right. These would be competitors in the guardrail
22 industry, wouldn't they?

23 A. They was wanting the controlling interest of us while we
24 were in bankruptcy.

25 Q. They wanted to obtain an interest in you, because they

1 were interested in your lawsuit, too, weren't they?

2 A. I don't know what they were interested in. I know they
3 wanted to obtain part of the company.

4 Q. Well, you had -- you and your brother had marketed and
5 started to market the fact that you had this lawsuit here in
6 Marshall, Texas, hadn't you?

7 A. No, sir. We didn't market it like that.

8 Q. Through Mr. Rogers. You know who Mr. Rogers is, don't
9 you?

10 A. Yes, I'm aware of Ed Rogers.

11 Q. Yeah. Ed Rogers is a friend of yours?

12 A. Acquaintance. I know him, yes.

13 Q. All right. And he had a company that was called
14 McCarty -- or he had a company called Terebinth, didn't he?

15 A. Yes. I think it was an investment group firm that he
16 ran to try to find investors.

17 Q. Okay.

18 MR. MANN: And let's look at D-81, Mr. Harman, on
19 Page 3, No. 13.

20 And let's highlight, Mr. Hernandez.

21 Q. (By Mr. Mann) Terebinth -- this is the company of your
22 friend, Mr. Rogers, correct?

23 A. Yes.

24 Q. -- has pre-identified investors who have expressly --
25 expressed preliminary interest in a SPIG Industry

1 transaction. But in addition, Terebinth will offer Mr.
2 Harman (C. Harman, J. Harman, and Ratliff) the opportunity
3 to invest cash in Terebinth Properties and Terebinth Capital
4 on equal terms as those offered to outside investors.

5 Correct?

6 A. Yes, sir.

7 Q. And that was related to Exhibit No. 82.

8 A. Where did that -- that exhibit was not signed, the one
9 you just showed me. I did not sign that exhibit.

10 Q. All right. It was signed by Mr. Rogers, but not signed
11 by you?

12 A. Can I look at it again?

13 Q. Sure.

14 MR. MANN: Page 3, Mr. Hernandez, if you'll pull
15 that up again.

16 Q. (By Mr. Mann) Correct?

17 A. Yeah, correct. I did not sign that, because I did not
18 agree with it.

19 Q. All right. Well, the fact is, you knew because this
20 presentation was going out to other people, didn't you?

21 A. No, I did not.

22 Q. All right. And the presentation was Exhibit No. 82.

23 MR. MANN: Mr. Hernandez.

24 Q. (By Mr. Mann) On the front page, is this a Trinity
25 guardrail on the front page?

1 A. Yes, that's an end terminal, Trinity end terminal.

2 Q. It's a Trinity end terminal system that your company put
3 out on the roads, correct?

4 A. No, sir. I never put out a Trinity end terminal.

5 Q. All right. Now, if we go to the --

6 A. You're talking about building the Trinity end terminal
7 or -- or you're talking about installing the end terminal?

8 Q. Installing the end terminal.

9 A. Yes. We have in the past installed the Trinity end
10 terminal.

11 Q. Right.

12 MR. MANN: Now, if we go to Page 7 of this
13 document, no. 82, Defendants' 82, Page 7, Mr. Hernandez --
14 page before.

15 Q. (By Mr. Mann) The packet specifically up here where it
16 says False Claims Act.

17 MR. MANN: If we could highlight, Mr. Hernandez.

18 Q. (By Mr. Mann) That is what the business plan was, wasn't
19 it?

20 A. That is not my document.

21 Q. The document that your friend had placed out in the
22 public was that there was this case going to trial in
23 September, and the plan was at the bottom to replace
24 approximately one million units in the U.S. and a
25 billion-dollar revenue opportunity windfall for SPIG,

1 correct?

2 A. That was his plan. He's an attorney. I did not sign
3 that.

4 Q. Okay. Do you find it interesting that in this document
5 where there's a claim that you're going to have a billion
6 dollars, that in the bankruptcy court back on Page 55 when
7 we were talking about it earlier, talks about a
8 billion-dollar profit.

9 A. Billion-dollar industry, not profit.

10 Q. Industry?

11 A. Industry, sir.

12 Q. Well, out of a billion-dollar of revenue, if you had
13 that type of revenue, you'd expect to make a lot of money,
14 wouldn't you?

15 A. I haven't yet in seven years in business.

16 Q. All right. But the plan is, even though you haven't
17 made any money in seven years of business, is to have a
18 windfall in this case to go into business?

19 A. No, sir, not in the SPIG business. In the Selco
20 business, I've been 26 years.

21 Q. Okay. Now, Mr. Harman, isn't it true that when this
22 case arose, that your company had a subpoena that was coming
23 to it to get its documents and emails, correct?

24 A. I'm not aware of that.

25 Q. Well, you knew it, because you started destroying

1 documents -- you started destroying your emails back in
2 2013, didn't you?

3 A. I received from my web provider who told me that I could
4 not receive or take emails, and I had to clean up my trash
5 bin.

6 Q. Well, you had an email address called spigindustry.com,
7 didn't you?

8 A. Yes, sir, I do.

9 Q. And that was your primary email address since 2011?

10 A. Thereabouts, around 2011.

11 Q. And then this lawsuit got filed. You knew about that,
12 didn't you?

13 A. No, I did not know when this lawsuit got filed.

14 Q. You didn't know this lawsuit was even filed?

15 A. Not until later when it was filed.

16 Q. Okay. And then you destroyed all the emails that were
17 on this particular email address when the subpoena came,
18 didn't you?

19 A. No, sir, I did not.

20 Q. Well, hasn't this very Court found that you have
21 destroyed documents on purpose?

22 MR. BAXTER: Objection, Your Honor. Way outside
23 what he ought to be doing. I object to it.

24 THE COURT: Overruled.

25 Q. (By Mr. Mann) Hasn't this Court found specifically that

1 you, in this case -- that documents from your company that
2 have been subpoenaed have all been destroyed under these
3 emails, correct?

4 A. No, sir. No, sir. I had to clean up my trash bin.

5 Q. Well, that's what you say, correct?

6 A. That's all I knew how to do when I talked to the web
7 provider. They told me I had to clean up my in-box and
8 out-box really, because I never could receive or take
9 emails.

10 Q. You cleaned it really good, because there's nothing
11 left; isn't that right?

12 A. No. Nothing's been touched since I've been informed.

13 THE COURT: Let's move on, Counsel.

14 MR. MANN: Can I ask one more question and I'm
15 through, Your Honor, on that? I'm totally through.

16 THE COURT: Go ahead.

17 Q. (By Mr. Mann) The fact is, you know the Court entered
18 that order that you had specifically, intentionally
19 destroyed documents, right?

20 A. No, sir. I'm not aware of that.

21 Q. Thank you, sir.

22 MR. MANN: I'll pass the witness.

23 THE WITNESS: Yes, sir.

24 THE COURT: Cross-examination.

25 CROSS-EXAMINATION

1 BY MR. BAXTER:

2 Q. Let's start with your emails, Mr. Harman.

3 A. Yes, sir.

4 Q. Did you have anything in your email that had anything to
5 do with this case?

6 A. No, sir, I did not.

7 Q. What was in there?

8 A. Mostly just internal business and -- and spam and junk,
9 and my trash bin had become full.

10 Q. All right. When your trash bin got full, what happened
11 to your email?

12 A. It would no longer operate.

13 Q. You couldn't get or receive email?

14 A. Yes, sir.

15 Q. So what did you do?

16 A. I had to call my web provider.

17 Q. And what did they tell you to do?

18 A. They told me that my trash bin was full where I hadn't
19 cleaned it out, and they told me to -- I had to actually go
20 in -- they told me how to empty my trash bin to delete
21 those, because I'm not IT savvy.

22 Q. Were you trying to hide any documents from these Trinity
23 folks?

24 A. No, sir, I'm not -- I'm not part of this case.

25 Q. Did you have any documents about this case?

1 A. No, sir, I did not.

2 Q. Did you have any documents that somehow you wanted to
3 hide from anybody?

4 A. No, sir.

5 Q. Was it simply that your email wouldn't work and they
6 told you to clean it out, so you did?

7 A. Yes, sir, I did.

8 Q. All right. Now, the company -- your company, I'm
9 assuming through Mr. Harman, has produced all their
10 documents, haven't they?

11 A. Yes, sir, they have.

12 Q. And if he had any emails from you, he'd have them in his
13 in-box, wouldn't he?

14 A. Yes, he did.

15 Q. Did you communicate with your brother by email?

16 A. No, sir, I'm not an email person.

17 Q. Was there anything you were trying to hide at all?

18 A. No, sir.

19 Q. Was it communications with friends or what was it?

20 A. It was basically friends and internal business with the
21 business like clients, and it was like just spam and
22 advertisements. And I didn't realize that even though they
23 told me to delete the trash bin that the emails would be
24 gone. I always heard that no emails can ever be destroyed.
25 So I had to clean that out to receive on the in-box and send

1 emails. That's all I knew.

2 Q. Were you trying to hide one single email from these
3 folks?

4 A. No, sir. I have nothing to hide from Trinity.

5 THE COURT: All right. Let's move on, Mr. Baxter.

6 Q. (By Mr. Baxter) Did Ed Rogers -- now, Mr. Mann called
7 him your friend; is that right?

8 A. He's an acquaintance friend.

9 Q. How did he get in touch with you about any of this when
10 you were in bankruptcy?

11 A. He came out of the blue to visit me and said that he
12 raised money for companies.

13 Q. And what -- did you hire him up?

14 A. No, I did not hire him.

15 Q. Did you ever pay him any money?

16 A. No, sir, I never paid him no money.

17 Q. Did you -- did he ever send that exhibit that they --
18 they showed you? Did he ever send that out?

19 A. Not to my authorization. I found out later he did send
20 it to one company.

21 Q. Did you see it before he sent it?

22 A. Did I see it before he sent it?

23 Q. Yes.

24 A. No, sir. No.

25 Q. Did you write it?

1 A. No, sir, I did not write it.

2 Q. Did you authorize a single thing in there?

3 A. No, sir, I did not.

4 Q. Where did he get most of that information?

5 A. I guess he -- he indicated he got it on Fox News and ABC
6 stories where he's an attorney.

7 Q. Did he get it from you?

8 A. No, sir, he did not get it from me.

9 Q. After you found out he'd sent it to somebody
10 unauthorized, what did you do?

11 A. I just discharged him. I did not fool with him anymore.

12 Q. Did you tell him don't send this to anybody because we
13 don't approve of it?

14 A. Yes, I did.

15 Q. And as far as you know, did he?

16 A. To my knowledge, he did not; just that one company
17 before I even got to look at it.

18 Q. Have you had any business with him since?

19 A. No, sir.

20 Q. Okay. One more thing. Are you out of bankruptcy?

21 A. Yes, sir. I am -- I am out of bankruptcy now.

22 Q. And -- and what are you doing?

23 A. We're working. We're back to installing. I had nine
24 crews that installed guardrails across the states, and I've
25 got one small crew. We're back -- back -- got blisters on

1 my fingers.

2 Q. Are you out installing?

3 A. Yes, sir, I am.

4 Q. Have you got any other business?

5 A. We have one small hydroseeding crew that does the
6 hydroseeding.

7 Q. Sprays that --

8 A. Sprays grass.

9 Q. -- grass. Anything else?

10 A. We -- once -- we're trying to manufacture a little bit.
11 When I say a little bit, like maybe two or three loads a
12 year of guardrail.

13 Q. Okay. Is that it?

14 A. That's it, yes, sir.

15 Q. You out working every day?

16 A. Excuse me?

17 Q. You out working every day?

18 A. Yes, sir, I am. I'm always working and they've missed
19 me this week.

20 Q. Thank you, Mr. Harman. I appreciate it, sir.

21 THE COURT: Redirect, Mr. Mann?

22 MR. MANN: I have nothing further, Your Honor.

23 THE COURT: All right. You may step down, Mr.
24 Harman.

25 MR. BAXTER: May he be excused, Your Honor?

1 THE COURT: Is there objection?

2 MR. MANN: There's no objection.

3 MR. BAXTER: Thank you, Your Honor.

4 THE COURT: Mr. Harman, you're excused. You're
5 free to stay. You're also free to leave. It's up to you.

6 THE WITNESS: Yes, Your Honor.

7 THE COURT: Thank you.

8 MR. BAXTER: Could I -- could I be excused just
9 one moment with him, Your Honor?

10 THE COURT: If you need a word with him as he
11 leaves, that's fine.

12 MR. BAXTER: Yes. Thank you, Your Honor.

13 MR. CARPINELLO: Your Honor, we can proceed --

14 THE COURT: Plaintiff, who's your next witness --
15 excuse me, Defendant, who's your next witness?

16 MR. BROWN: Thank you, Your Honor. Defendant
17 calls Dr. Malcolm Ray.

18 THE COURT: All right. Dr. Ray, if you'll come
19 forward and be sworn.

20 (Witness sworn.)

21 THE COURT: If you'll come around and have a seat
22 here, Dr. Ray, on the witness stand.

23 All right. Mr. Brown, you may proceed.

24 MR. BROWN: Thank you, Your Honor.

25 DR. MALCOLM RAY, DEFENDANTS' WITNESS, SWORN

BY MR. BROWN:

A. Hello. My name is Dr. Malcolm Howard Ray.

Q. (By Mr. Brown) Dr. Ray, could you give us a brief description of your educational background?

MR. BROWN: Mr. Hernandez, could I have
Demonstrative No. 34, please?

A. Yes, I have a number that are shown on the slide. I guess the most recent is the Stonex Award, which is a -- sort of a lifetime achievement award in roadside safety given out by the Transportation Research Board, and a variety of best paper awards from the Transportation

1 Research Board and so forth.

2 MR. BROWN: May I have Slide No. 35, please?

3 THE COURT: Dr. Ray, try to speak into the
4 microphone.

5 THE WITNESS: Oh, thank you, Your Honor. I'm
6 sorry.

7 Q. (By Mr. Brown) Dr. Ray, do you hold licenses and/or
8 certifications, sir?

9 A. Yes. I've -- I'm currently licensed in Maine, North
10 Carolina, and Mississippi, I believe, and I have been
11 registered in Tennessee, Illinois, and Iowa, among a few
12 others, I think.

13 MR. BROWN: Thank you, Mr. Hernandez.

14 Q. (By Mr. Brown) Doctor, would you please tell the jury
15 your work experience, sir?

16 A. I started my professional career at Southwest Research
17 Institute which is a -- basically a crash testing lab and I
18 worked in their crash testing section for four years or so.
19 Then I -- I went -- when I went to Vanderbilt to work on my
20 Ph.D., I was also appointed there as a research instructor,
21 so I was doing research work primarily for the Federal
22 Highway Administration back then. Then when I left
23 Vanderbilt, I went to work as an on-sight support contractor
24 for the Federal Highway Administration, and I was kind of
25 bringing the -- the LS-DYNA simulation program kind of into

1 the roadside safety area. So I worked there for three or
2 four years, and then I got a -- a tenure track faculty
3 position at the University of Iowa.

4 THE COURT: Dr. Ray, could you slow down just a
5 little bit?

6 THE WITNESS: I'm sorry, sir.

7 THE COURT: You're fine. Just slow down a little
8 bit.

9 A. And so after -- after the University of Iowa, I moved on
10 to Worcester Polytechnic Institute in Worcester, Mass, and I
11 was a full professor in both civil engineering and
12 mechanical engineering. In fact, I was the -- the Ralph
13 White Distinguished Professor of Civil Engineering, and I
14 was there for about 11 years. And then in 2010, myself and
15 several of my Ph.D. students formed their own company that's
16 called RoadSafe LLC, and that's where I work right now.

17 Q. (By Mr. Brown) Dr. Ray, what, if any, experience do you
18 have in highway safety research?

19 A. Really, my whole 30-year career has been involved in
20 roadside safety research. I've been involved on the crash
21 testing end of it, been involved in product development and
22 design, been involved in crash analysis and accident data
23 analysis, developing policies and procedures, working for
24 the Federal Highway Administration, so really kind of all
25 aspects of roadside safety design.

1 Q. Dr. Ray, in your experience, do you have experience with
2 the Federal Highway Administration's approval process?

3 A. Yes, I do.

4 Q. Could you briefly describe it for the jury?

5 A. Well, I've been on both sides of it. I've, you know,
6 been the designer, developer, on roadside safety products
7 and have issued requests for eligibility to Federal Highway
8 and -- and I've received four such eligibility letters back.
9 So I've worked on it from -- from the outside, if you will,
10 from the submitter side. And also a few years ago, Federal
11 Highway approached my company to see if -- when people
12 submit computer simulations, LS-DYNA principally, we review
13 those for Federal Highway and basically make a
14 recommendation as to what they should do in the approval
15 process. So I've worked as a consultant reviewing those
16 approvals of other people in the past few years.

17 Q. Have you personally submitted approvals to the FHWA
18 yourself for consideration?

19 A. Yes, I have, four times.

20 Q. Dr. Ray, what types of cases have you served as an
21 expert on?

22 A. In litigation cases, they've -- they've all been various
23 aspects of roadside safety litigation cases.

24 Q. How much of that work in litigation has been for the
25 Plaintiff and how much for the Defendant, sir?

1 A. I think it -- it's about 70/30, 70 for Defendants and
2 about 30 percent for the Plaintiffs.

3 Q. Does your company do other work besides litigation
4 support?

5 A. Yeah. Really, the majority of our work is not
6 litigation. Our -- our primary work is doing NCHRP research
7 contracts. That accounts for about 80 percent of my
8 company's, you know, income.

9 Q. Who is your company's biggest litigation client?

10 A. Our biggest litigation client is Arizona DOT.

11 Q. And who is your company's biggest non-litigation client?

12 A. Again, it would be NCHRP. We do a lot of NCHRP research
13 and -- and projects.

14 Q. Dr. Ray, have you been paid for the work that you've
15 done in this case?

16 A. Yes, I have.

17 Q. Do you have an idea of how much you've been paid to
18 date?

19 A. Kind of prior to this week, it's about 150,000 in labor
20 costs and some more for direct costs, like travel and so
21 forth.

22 Q. Dr. Ray, can you tell the jury what you were asked to do
23 in this case?

24 A. Basically, I was asked to look at differences between
25 the -- the various ET-Plus designs, look at the FHWA

1 approval process with respect to those products, the crash
2 testing that went into those products, and -- and -- and
3 basically how Report 350 was applied to the -- the
4 evaluation of those products.

5 Q. And, Dr. Ray, have you done that work?

6 A. Yes, sir.

7 Q. Dr. Ray, as you sit here today, have you reached an
8 opinion with a reasonable degree of engineering certainty
9 about the ET-Plus system and the ET-Plus extruder head with
10 the five-inch guide channel and the ET-Plus extruder head
11 with a four-inch guide channel?

12 A. Yes, I have.

13 Q. And tell the jury what this opinion is, sir.

14 A. My basic opinion is that they're substantially the same
15 device. They -- they work in the same way, and they're
16 substantially the same.

17 Q. And, Dr. Ray, what did you base this opinion upon?

18 A. Primarily looking back at the -- at the crash test
19 information and the crash test results, you know, the way we
20 evaluate them for Report 350.

21 MR. BROWN: Mr. Hernandez, may I have Slide 46,
22 please?

23 Q. (By Mr. Brown) Dr. Ray, did you prepare this particular
24 slide?

25 A. Yes, I did.

1 Q. And can you tell the jury what this slide shows, please,
2 sir?

3 A. Well, what I did was -- we can look at how much energy a
4 crash test dissipates. And here I have three particular
5 tests, and the tests I chose were tests that -- where the
6 vehicle strikes the -- the terminal head-on, so all the
7 energy is going into the extruding guardrail. You know, we
8 don't want it at an angle because then some of it is
9 extruded in the guardrail and some of it is spinning out
10 afterwards. So this is all energy going into the guardrail.
11 The 1999 test would be the five-inch guide channel version
12 of the ET-Plus, and that was a pickup truck test. And then
13 the 2005 test, that's -- that's the May 27th, 2005 test with
14 a small car. And then there was the -- I think there was
15 testimony in the past few days on the 2010 small car test.

16 And basically we can just go right into the test report
17 and find out what the impact speed is. I see one of the
18 lower lines there records the impact speed that was actually
19 recorded in the test and shown in the test report.

20 THE COURT: Dr. Ray, please try to slow down.
21 It's important that the jury hear everything you say and
22 that the court reporter get it all down. And you're just a
23 little fast. If you could slow down, I'd appreciate it.

24 THE WITNESS: Sorry, sir.

25 THE COURT: Okay. Let's continue.

1 THE WITNESS: My Yankee tendency, I guess, to talk
2 fast.

3 A. So the speed just comes right from the test report.
4 Likewise, the mass of the vehicle, that -- that comes right
5 from the test report. That's a -- a measured quantity. And
6 then, again, from the test report, we also get reported how
7 much guardrail was extruded. So -- so you see I tabulated
8 those things.

9 And we can calculate energy or kinetic energy. It is
10 simply one-half the mass times the velocity squared. That's
11 how much energy a vehicle has just before it touches the
12 guardrail.

13 So if we calculate that number and then divide it by
14 the amount of guardrail we extruded, we can find out how
15 much energy we're using up per foot of extrusion. And
16 that's the calculation I did on the bottom.

17 So you'll see on the bottom row, back in 1999. With
18 the pickup truck test, we extruded 15,000 foot pounds per
19 foot. In the 2005 small car test, we extruded just under
20 15,000 foot pounds per foot.

21 In the 2000 test, we just had over 15,000 foot pounds
22 per foot. So for all these tests, the extruder head is
23 always extruding 15,000 foot pounds per foot, more or less.

24 And that's true even though, you know, we're using a
25 large pickup truck, 3410-pound pickup truck and a small car,

1 the two right columns. And we're using different impact
2 speeds, almost 70 miles per hour on the far left and 63 in
3 the other two columns.

4 So that leads me to believe that whatever those minor
5 changes were between those heads, the dissipating energy at
6 the -- the same -- the same lane and at the same rate.

7 Q. (By Mr. Brown) And, Dr. Ray, where did the numbers
8 come from that are on this chart that you prepared?

9 A. They came right out of the test reports.

10 Q. Thank you.

11 MR. BROWN: Mr. Hernandez, may I see Slide No. 45,
12 please?

13 Q. (By Mr. Brown) Dr. Ray, was Slide No. 45 prepared at
14 your direction?

15 A. Actually I prepared it myself, yes.

16 Q. Before we begin, can you tell the jury what occupant
17 risk means?

18 A. Yes. Report 350 has a lot of specific evaluation
19 criterias, and the occupant risk criteria is one of them. I
20 would say probably one of the most important ones. And
21 there's really two primary parts of that that we see in the
22 bottom two rows.

23 The OIV is the occupant impact velocity, and what that
24 estimates is how fast the occupant would hit the dashboard,
25 if you will, of the car in a -- in a crash.

1 The second number, the ORA, is the occupant ride down
2 acceleration, and that measures once you've hit the
3 dashboard, what kinds of accelerations are you currently
4 feeling. So -- so both of them are measuring what's
5 happening to the occupant.

6 Q. Dr. Ray, where did these numbers come from?

7 A. Again, these all came straight out of the -- out of the
8 test reports for those -- those tests.

9 Q. Based upon your review of these numbers, do you have an
10 opinion as to what they show?

11 A. Yes. As -- as you can see, you know, the -- the test go
12 way back to 1987, which was the ET-2000 prototype that
13 Quershy put together. Then in 1989, this is another
14 ET-2000. The 2005 test that we've already talked, which was
15 a four-inch guide channel ET-Plus. And then the 2010 test,
16 which is a four-inch guide channel ET-Plus.

17 And if we look at these numbers, they're the occupant
18 impact velocity, so the velocity to hit the dash, if you
19 will. It has always been around nine meters per second.
20 And likewise, the ride down acceleration has always been,
21 you know, on the order of 14 or 15g's.

22 Q. Dr. Ray, do you have an opinion as to the safety of an
23 occupant who would be in a vehicle from the ET-2000, as
24 related to the ET-Plus with four-inch guide channels?

25 A. Well, yes. And I guess I should have mentioned, the

1 numbers that you see here are all well below the -- the --
2 you know, the maximum values that you can have. And as you
3 can see, they've never changed. They're the same for the
4 ET-2000 back in the '80s, as they are now with the four-inch
5 guide channel version.

6 So my conclusion is the way energy is being dissipated
7 and the way those occupant forces -- or the way those forces
8 are transmitted to the occupant haven't changed. They're
9 substantially the same from 1987 all the way up to the 2010
10 crash test.

11 Q. Dr. Ray, based on your engineering experience and
12 training, do you have an opinion as to the importance the
13 Federal Highway Administration places on occupant risk data?

14 A. Yeah, it's -- I think I mentioned earlier, the occupant
15 risk values are one of the -- one of the big ones that --
16 that any engineer is going to consider when he looks at the
17 Report 350 criteria. Some of the Report 350 criteria are --
18 are subject, but most of them and more of them are
19 objectively. It's just a number. You calculate it, and it
20 is what it is. And in order for it to be, you know,
21 acceptable according to Report 350, you've got to get the
22 right -- you've got to get the right number.

23 Q. Dr. Ray, were you in the courtroom when Dr. Coon, Dr.
24 Bligh, and Dr. Buth testified regarding the experimental
25 flared ET crash testing that was done down at Texas A&M?

1 A. Yes, sir, I was.

2 Q. Have you had an opportunity to personally review that
3 flared experimental testing?

4 A. Yes, I have.

5 Q. Before I go into that, have you in your experience and
6 training personally conducted research and development
7 experiments yourself?

8 A. Yes.

9 Q. Do you submit experimental research and development to
10 the Federal Highway Administration?

11 A. No. If -- if an experiment or a finite element
12 simulation isn't going to result in a product that you want
13 to put on the road, there is no reason to submit it to the
14 Federal Highway Administration.

15 Q. Dr. Ray, is the ET-Plus system that is currently sold by
16 Trinity a tangent or a flared system?

17 A. It's a tangent system.

18 Q. Can you tell the jury very basically and briefly what
19 the differences are between a flared and a tangent system?

20 A. Basically guardrail terminals are divided into several
21 classes, if you will. One are them are tangent terminals,
22 so those are designed to be more or less parallel to the
23 road, so just right parallel with the road. The flared
24 systems are designed -- you know, the guardrail itself is
25 parallel to the road. And then the guardrail terminal

1 flares away from the road -- angles away. So by the time
2 you get out to the beginning of the guardrail terminal, a
3 flared system, they're usually on the order of four feet
4 from the tangent section of the guardrail.

5 Q. Dr. Ray, is there an industry publication that describes
6 tangent and flared terminals?

7 A. Yes, sir. There's a document called the Roadside Design
8 Guide and its various editions. It's been around for -- for
9 decades. The latest edition is in 2012. It goes through
10 telling you exactly what kind of device you can use in which
11 situation and which devices are most appropriate in
12 different situations.

13 MR. BROWN: Mr. Hernandez, may I see Slide No. 64,
14 please?

15 Q. (By Mr. Brown) Dr. Ray, did you prepare Slide No. 64?

16 A. Yes, sir. It's really just an excerpt from the Roadside
17 Design Guide.

18 Q. Tell the jury, please, what this particular slide shows.

19 A. The Roadside Design Guide has a section about all the
20 different kinds of guardrail terminals. This is the one for
21 the ET-Plus. And in this one, you know, if I direct you
22 down more toward the bottom, it says that you can install an
23 ET-Plus, so this kind of tangent terminal, with a flare up
24 to 25 to 1 which would be 2 feet on a typical 50-foot long
25 ET. And -- and then it also cites that 2 feet a little -- a

1 little over in the same -- in the same sentence. So you can
2 have up to a 2-foot offset on an ET-Plus, and it's still a
3 tangent terminal.

4 Q. Dr. Ray, do you know who the Roadside Design Guide is
5 used as a research or a resource tool for?

6 A. Oh, yes. All the -- all the states general -- well, all
7 the states typically have their own roadside design guides
8 that are based on the National Roadside Design Guide. So
9 this is a document when -- when a designer is designing a
10 particular highway project or a particular road or street
11 improvement, that's the document they look at to see, you
12 know, what terminal or what kind of guardrail should I use,
13 what kind of terminal, how should I lay it out on the field,
14 and -- and put it all together. So it's kind of -- the
15 Bible for the -- you know, for the people that just do
16 design right out in the real world in the field.

17 Q. Thank you.

18 MR. BROWN: Thank you, Mr. Hernandez.

19 May I see Slide 65, please?

20 Q. (By Mr. Brown) Dr. Ray, what is Slide 65, and where was
21 it taken from?

22 A. Again, it's just a table from the 2011 Roadside Design
23 Guide. And it's just a table that shows you the different
24 categories that I was mentioning earlier, different kinds of
25 terminals. And you see two of them. The flared terminal is

1 the second one listed, and the tangent terminal is the third
2 one listed. And you'll notice the -- the ET-Plus doesn't
3 appear in the flared terminal list, but it does appear in
4 the tangent terminal list. So the Roadside Design Guide
5 only considers the ET-Plus a tangent terminal.

6 Q. Thank you. Dr. Ray, do you have an opinion as to
7 whether flared terminals and tangent terminals are the same
8 or different products?

9 A. Oh, they're -- they're completely different products.

10 Q. Are they, in fact, different systems, as well?

11 A. Yes, they're different systems.

12 MR. BROWN: May I see Slide No. 23, please?

13 Q. (By Mr. Brown) Dr. Ray, did you prepare Slide No. 23?

14 A. Yes, I did.

15 Q. And can you tell the jury what you have depicted
16 here?

17 A. What I did was I looked at the commercial ET-Plus, you
18 know, the one you can buy today, if you call Trinity up on
19 the phone. And I compared it to a -- what was tested in
20 those five flared ET tests. And so this is just a picture
21 of the first post. So you notice on the top left is the
22 commercialized ET-Plus, so that's the one you can buy. And
23 the other five are the first post that was used in those
24 five flared tests, and you can see it's -- it's quite a
25 different -- quite different post arrangements and different

1 post design with those posts.

2 MR. BROWN: May I see Slide 25, Mr. Hernandez?

3 Q. (By Mr. Brown) Dr. Ray, the jury has already seen this,
4 but was this prepared by you and at your direction?

5 A. Yes, it was.

6 Q. Can you please tell the jury what it depicts?

7 A. This -- this shows you what -- what a tangent and a
8 flared terminal, how they're laid out. The upper left is --
9 is the tangent ET-Plus system that you can buy and install
10 on the road. And you can see the terminal is -- is straight
11 and tangent with the guardrails. It's all just one straight
12 line.

13 The other five were different flared arrangements of
14 the experimental flared terminal. You can see they all had
15 a bend at about Post 7 where they're angled back away from
16 the -- from the road and that's a 4-foot offset they have.
17 Four of them are straight, and then the third one is
18 actually even a curve, so it's not even -- even straight.

19 Q. Thank you.

20 MR. BROWN: Mr. Hernandez, may I see Slide 26?

21 Q. (By Mr. Brown) Did you prepare Slide 26, as well?

22 A. Yes, sir.

23 Q. And what does it show?

24 A. This is a cable anchor bracket. This is a bracket that
25 fits between Post 1 and 2, and it's an important part of

1 the -- the system. On the upper left, you see the -- the
2 commercialized version, the one you can buy today.
3 And the other five show you what was tested in those
4 experimental flared ET tests. And the point here is that
5 they're just different. It's a different anchor bracket.
6 And I guess I would also point out that the -- that the
7 bottom left one not only is it a different bracket, it's
8 also in a different place. In that test, they put it
9 between Posts 2 and 3, rather than 1 and 2, so it's
10 different than the commercialized version.

11 MR. BROWN: Thank you, Mr. Hernandez.

12 Q. (By Mr. Brown) Dr. Ray, were these experimental tests
13 that were done at Texas A&M evaluating individual
14 components?

15 A. No, sir. Actually quite the contrary. When we do a
16 crash test, we're really looking at how do all the
17 components work together to accomplish the -- you know, the
18 effect of the crash tests. Components don't work in
19 isolation. They work together. In these five tests,
20 clearly they're looking for a solution that works because
21 they keep changing the type arrangement and so forth of the
22 components.

23 Q. Dr. Ray, do these experimental tests that you have
24 reviewed tell you about the particular performance of the
25 ET-Plus head that was used on that particular system and

1 whether or not it failed individually?

2 A. Certainly not. You can't look at it individually. You
3 know, and just as a quick example, the -- the first post is
4 the thing that gets everything started. So if the first
5 post is -- is different, how can you attribute any
6 particular performance to just the head? So you have to
7 look at the whole system together, and not just one
8 component in -- in isolation.

9 So those tests don't give you any indication about
10 what's going on with -- with just the head.

11 Q. Dr. Ray, do you have an opinion as to what failed in
12 those experiments?

13 A. Well, the whole system failed in those experiments.
14 That -- that arrangement of -- well, actually I should say
15 that -- those five arrangements of components and the way
16 they were laid out, attached, and used together didn't work.

17 Q. Is the experimental flared ET that was tested down at
18 TTI the same as the ET-Plus system that is sold today?

19 A. Certainly not.

20 Q. What, if anything, does that experimental flared testing
21 that you reviewed tell us about the performance individually
22 of those components, if anything?

23 A. It really doesn't tell you anything about the individual
24 performance of the components. Again, you have to look at
25 how they all work together, not how -- you just can't look

1 at them individually. And that's why you do them as a crash
2 test. If you could look at the performance of components
3 individually and predict a test, you'd just do component
4 tests. But we do a crash test with all the components
5 because they all work together towards whatever the result
6 of the test is.

7 Q. Dr. Ray, as you sit here today, do you have an opinion
8 as to whether Texas A&M's Transportation Institute or
9 Trinity should have submitted the flared ET experiments to
10 the Federal Highway Administration?

11 A. Oh, certainly not. It obviously didn't work. Obviously
12 A&M wasn't pleased with the -- with the results, so
13 apparently they dropped the development. So there wasn't
14 any intention to move it forward to being used on the road,
15 so there's no -- no point in sending it on to Federal
16 Highway.

17 Q. Dr. Ray, tell the jury, if you would, what particular
18 standard, if any, is used by the Federal Highway
19 Administration in evaluating whether or not a system is
20 acceptable for use on the National Highway System?

21 A. Oh, it's Report 350. You know, their -- their 1997
22 memo, you know, specifically calls out Report 350, and
23 they're looking at does a particular device -- particular
24 system, does that satisfy the evaluation criteria of Report
25 350.

1 Q. Dr. Ray, do you -- have you had an opinion (sic) to
2 review the crash test of the ET-Plus with four-inch guide
3 channels performed by TTI?

4 A. Which one, the one in 2005 or 2010?

5 Q. Both?

6 A. Well, I have reviewed both, yes.

7 Q. Have you reached an opinion with a reasonable degree of
8 engineering certainty regarding the results of all those
9 crash tests?

10 A. Yes. They were -- they were all acceptable crash tests.
11 They met the Report 350 evaluation criteria.

12 Q. Dr. Ray, the May 27, 2005 test that was performed, do
13 you have an opinion whether or not that test showed 350
14 compliance?

15 A. Oh, it most certainly did. You know, the test report
16 lists all the evaluation criteria and everything passed.
17 You know, the slide we were looking at just a moment ago
18 about the occupant risk, you know, that's one of the key
19 ones in there, and, again, it passed.

20 Q. Are you aware, Dr. Ray, whether the Federal Highway
21 Administration reviewed and accepted this particular product
22 for use on the National Highway System?

23 A. Yes, I'm aware they -- they issued an acceptance letter
24 or what we call an eligibility letter in, I believe,
25 September of 2005.

1 MR. BROWN: Mr. Hernandez, may I see Defendants'
2 78, please?

3 Q. (By Mr. Brown) Dr. Ray, is this, in fact, the letter
4 that you reviewed in reaching that conclusion?

5 A. Yes, sir.

6 Q. Dr. Ray, as you sit here today, sir, do you have an
7 opinion as to whether or not the ET-Plus system is accepted
8 by the Federal Highway Administration today?

9 A. Oh, I have no doubt that it's accepted today.

10 Q. And how do you know that, sir?

11 A. Well, certainly we have this acceptance letter and
12 Federal Highway has also issued subsequent letters
13 reaffirming and reiterating that fact.

14 MR. BROWN: Mr. Hernandez, may I see Defendants'
15 Exhibit 2, please?

16 Q. (By Mr. Brown) Dr. Ray, have you had an opportunity to
17 review this particular item?

18 A. Yes, sir, I have.

19 Q. Did it, in fact, form the basis of the opinion that you
20 have that it continues to have eligibility today, sir?

21 A. Yes, sir, it does.

22 MR. BROWN: Thank you, Your Honor. Pass the
23 witness.

24 THE COURT: Cross-examination?

25 MS. DYER: Thank you, Your Honor.

1 THE COURT: You may proceed, Ms. Dyer.

2 MS. DYER: Thank you.

3 CROSS-EXAMINATION

4 BY MS. DYER:

5 Q. Dr. Ray, when did you form your opinion about
6 eligibility?

7 A. Probably back around the time of my first report.

8 Q. And that was in May, right?

9 A. Yes.

10 Q. And the letter that you were just shown is after that
11 report, correct?

12 A. Yes, sir (sic).

13 Q. So it didn't form the basis of your opinion, correct?

14 A. I guess to be technical, I wrote a supplemental report
15 in June, I guess, and it -- it basically confirms what had
16 already been my opinion in May.

17 Q. Dr. Ray, how many times have you visited an accident
18 scene involving an ET-Plus?

19 A. Oh, probably six or eight, perhaps more, but six or
20 eight, I think.

21 Q. And have you drawn any conclusions with regard to those
22 in terms of accident reconstruction?

23 A. In some of them I have, yes.

24 Q. Now, in this case, you didn't perform any crash testing
25 on the four-inch ET-Plus head that's at issue, correct?

1 A. No.

2 Q. And you didn't perform any static testing, as well?

3 A. No, I did not.

4 Q. And how many heads did you have access to for four-inch
5 channels?

6 A. For testing?

7 Q. Yes.

8 A. I -- I suppose if I had wanted to do the test, I'm sure
9 I could have gotten as many as I wanted.

10 Q. Sure. You had -- you had an endless supply from
11 Trinity, right?

12 A. Perhaps not endless, but a big one, yeah.

13 Q. And you had access to TTI, correct?

14 A. I suppose I did.

15 Q. Okay. Now, you claim that the -- the 2005 test -- the
16 May 2005 test, actually used a four-inch guide channel,
17 correct?

18 A. Yes.

19 Q. Okay. And that's your first conclusion in your reports,
20 as a matter of fact, right?

21 A. Could be.

22 Q. And you believe that the prototype that was used was
23 consistent with the Revision 4 weldment drawings that
24 Trinity had?

25 A. Yes. Although when I say Revision 4, that really means

1 all of the revisions that had to do with going to the 4-inch
2 channel.

3 Q. So now it's your testimony that it actually includes
4 revisions that are after Revision 4; is that correct?

5 A. Well, I think that was my testimony before as well.

6 Q. So it includes up through what Revision 9?

7 A. About 9, yes.

8 Q. So your testimony is what was tested on May 27, 2005, is
9 actually something that wasn't drawn until Revision 9, which
10 is several months afterwards, correct?

11 A. Yes. Well, those are production drawings, so you
12 wouldn't modify production drawings until after the test was
13 done and you knew that you were going to change your
14 production.

15 Q. Now, you didn't personally inspect any of the heads that
16 Dr. Coon actually used or inspected; is that correct?

17 A. No, I didn't.

18 Q. But you did -- you actually did measure some in Ohio,
19 right?

20 A. Yes, I measured a number of them.

21 Q. Okay. And when you measured some of the ones in Ohio,
22 what you found is there were exit gaps that were actually
23 greater than 1-inch?

24 A. Yeah. There were some that were greater than an inch.

25 Q. And these were 4-inch?

1 A. Actually --

2 Q. -- ET-Plus?

3 A. Actually, there were a variety of them. There were
4 ET-2000s, 5-inch guide channel ETs, 4-inch guide channel
5 ETs. And the majority of them, as I recall, had exit gaps
6 that were within tolerance of 1-1/8.

7 Q. Okay.

8 MS. DYER: Mr. Diaz, can you, please, put up Ray
9 Demonstrative 38, Defendants' 38, please?

10 Q. (By Ms. Dyer) This shows measurements of some 4-inch and
11 5-inch, correct?

12 A. Yes.

13 Q. This is what you did in Ohio?

14 A. Correct.

15 Q. Okay. And if you look, you'll see that there's, for
16 example, an ET-Plus with an exit gap of 1 and a quarter inch
17 there, right?

18 A. Yes.

19 Q. And that's outside the manufacturing tolerances,
20 correct?

21 A. That's true. That was one that was outside.

22 Q. And Mr. Hopkins also measured some exit gaps that were
23 right greater than 1 inch when he measured some of the heads
24 for you, correct?

25 A. The ones that were in the Plaintiff's possession that

1 we're talking about. Yes.

2 MS. DYER: And if you go to Exhibit 1047,
3 Mr. Diaz.

4 Q. (By Ms. Dyer) You'll see at --

5 MS. DYER: If you could go to Page 585, please.

6 Q. (By Ms. Dyer) You'll see that this is one that
7 Mr. Hopkins measured, right?

8 A. Yes.

9 Q. And this is a 5-inch head, correct?

10 A. Yes, it is.

11 Q. And your testimony has been that there's no substantial
12 change or substantial difference between the 4-inch and
13 5-inch ET-Plus; is that correct?

14 A. That's true.

15 Q. Okay. That's your testimony. And it's also, I believe,
16 your testimony that the 4-inch has a 1-inch exit gap,
17 correct?

18 A. Yes.

19 Q. Okay. We've already seen the one that you measured in
20 Ohio, the 5-inch, that has a different exit gap, correct?

21 A. Yes.

22 Q. Okay. And then we also see that Mr. Hopkins measured
23 some 5 inches that have a different exit gap than the
24 4-inch.

25 A. Well, this particular one. To be -- to be fair --

1 Q. And I'm asking about this particular one.

2 A. For this particular one, it's greater, yes.

3 Q. Dr. Ray, how many times have you acted as an expert for
4 Trinity?

5 A. I -- actually, I meant to count that up on my vitae, and
6 I don't know precisely, but perhaps 15 or 16, something like
7 that.

8 Q. Well, if I were to tell you that your CV showed 24
9 times, would you be surprised?

10 A. A little more than I would expect, but --

11 Q. You don't disagree with that?

12 A. No.

13 Q. And I think you testified previously that you estimated
14 about 20 to \$30,000 per -- per case. Is that correct, that
15 you collect from Trinity?

16 A. I think a good average number is -- is probably 20,
17 sometimes you don't get any more than 5 or 6; sometimes it
18 goes to 50, but I think 20 is probably a good average.

19 Q. Okay. So let's just take 20 times 24, so we're talking
20 about 450, \$460,000, something like that?

21 A. Yes. Since I've been working doing cases with Trinity,
22 since, I think, 2006 or so.

23 Q. How many of those cases are currently active that you're
24 doing work for Trinity for?

25 A. That's a good question. Probably I would say on the

1 order of six or so.

2 Q. Would 10 surprise you, looking at your CV?

3 A. No, that -- that may be true.

4 Q. In all of these 24 cases that you've done for Trinity,
5 including the 10 current ones, have you ever given an
6 opinion that Trinity wasn't right in any of those cases?

7 A. I don't think that's ever been my charge, to determine
8 whether they were right.

9 MS. DYER: Could we pull up, Mr. Diaz, the Report
10 350 chart that we were looking at on direct examination? Is
11 that possible to do, sir?

12 THE TECHNICIAN: Do you know the number?

13 MS. DYER: We'll -- we'll move on. I'll come back
14 to it.

15 There we go. Thank you.

16 Q. (By Ms. Dyer) I think you talked about this on direct
17 examination, Dr. Ray, and you listed some test up at the
18 top. You have a 1987, 1989, 2005, and 2010 test, correct?

19 A. Correct.

20 Q. You don't list the 1999 test here?

21 A. Well, that's because Report 350 --

22 Q. I just asked you whether you listed it. Yes or no?

23 A. No.

24 Q. Okay. Now, you have a business relationship with
25 Trinity, don't you?

1 A. Well, I did have a business relationship with Trinity.

2 Q. Okay. And you actually received licensing fees from
3 Trinity, correct?

4 A. I did. That actually has been canceled.

5 Q. When was that canceled, sir?

6 A. Back in the summer, I think August or so, right --
7 probably more properly, it's being renegotiated.

8 Q. Let's talk a little about the flared test that you
9 discussed on direct. You said, I believe, that it's
10 completely different in your opinion; is that correct?

11 A. Yes, it is different.

12 Q. Okay. And you also looked at --

13 MS. DYER: Can we pull up Slide 64, please?

14 Q. (By Ms. Dyer) You -- you cited some Roadside Design
15 Guide on what a tangent terminal should be flared, correct?

16 A. Can -- can you repeat your question? I didn't quite
17 hear it.

18 Q. Sure. You cited to what we have up here on the screen,
19 the Roadside Design Guide, to say that a straight -- that a
20 tangent terminal can have a straight flare of 25 to 1.

21 A. Yes.

22 Q. So it can be flared some, correct?

23 A. Yes.

24 Q. Okay. And this is a 2011 Roadside Design Guide --

25 A. Yes.

1 Q. -- is that right?

2 It didn't actually have such a limitation before 2011,
3 correct?

4 A. It -- it was -- we'll just say the language has become
5 more specific as the additions have gone on.

6 Q. The 25 to 1 suggestions were not in the Roadside Design
7 Guide until 2011, right?

8 A. Correct.

9 Q. And Trinity actually has a design guide that says
10 something different, correct?

11 A. No. I believe their installation manual says to install
12 it with up to a 2-foot offset.

13 Q. It doesn't say 50 to 1? I'm sorry. 50 -- 25 to 1? Or
14 25 to 2? Excuse me. It doesn't say 25 to 2?

15 A. I don't think so. I think it allows up to a 2-foot
16 offset.

17 Q. Did you look at it?

18 A. Yes, I did.

19 Q. Okay. Why did you use the Roadside Design Guide?

20 A. Oh, because if you're -- if you're a guy in the field or
21 a designer in the field wondering, you know, can I offset my
22 tangent terminal, that would be the place you would go to
23 find out if you can and how much you can do.

24 Q. So Trinity wouldn't tell people that they could do
25 something different, correct?

1 A. No. I'm sure Trinity would want to be in compliance
2 with what the Roadside Design Guide says.

3 MS. DYER: Can you please pull up 1257, please,
4 Mr. Diaz?

5 Q. (By Ms. Dyer) And if you look at Page 2, you see this is
6 from a Don Gripne. Do you know who Mr. Gripne is?

7 A. Yes.

8 Q. And do you see where he says: Based on these tests, it
9 is acceptable to install a tangent NCHRP 350 terminal at the
10 end of a flared line of guardrail that is flared for length
11 of need calculations on the same flare rate of the line
12 guardrail that is 15 to 1?

13 A. I see that.

14 Q. Okay. A 15-to-1 would be greater than 25-to-1 flare,
15 correct?

16 A. Yes, it would be, although he's --

17 Q. I just --

18 A. Okay.

19 Q. -- wanted to know if it would be greater.

20 A. Uh-huh.

21 Q. It would be greater than the flare that is in the
22 Roadside Design Guide, correct?

23 A. Yes, it would.

24 Q. Can you -- well, let me just ask this: In Exhibit B
25 of your report, do you recall listing a number of tests

1 that were submitted by Trinity for FHWA acceptance?

2 A. I believe so, yes.

3 Q. Okay. And one of those tests out of a list of about 20
4 was the May 2005 test, correct?

5 A. Yes.

6 Q. And that's the only test listed there that actually was
7 a 4-inch guide channel?

8 A. No. That -- that -- that table also lists the 2010
9 test, I believe.

10 Q. Okay. Prior to 2005, you list a number of tests,
11 however, correct?

12 A. Yes.

13 Q. Do you list any prior to 2005 that have a 5-inch guide
14 channel?

15 A. That have 5-inch guide channel?

16 Q. I mean, 4-inch guide channel.

17 A. No.

18 Q. Now, you said in your supplemental report that you wrote
19 a week ago Monday, October 6th, that the ET-Plus impact head
20 with a 4-inch guide channel was not even manufactured or
21 sent to TTI for consideration and testing until 2005; is
22 that correct?

23 A. That was my understanding.

24 Q. Okay. And your understanding has changed, hasn't it?

25 A. Yes.

1 Q. Okay.

2 MS. DYER: Your Honor, may we approach?

3 THE COURT: You may.

4 (Bench conference.)

5 MS. DYER: I want to make sure --

6 THE COURT: Wait until they get here.

7 Go ahead, Ms. Dyer.

8 MS. DYER: I want to make sure there's no issue,
9 because I'm going to go into the 2003 he's already said in
10 his deposition. I believe it's appropriate impeachment
11 based on his report.

12 THE COURT: Any objection, Mr. Brown?

13 MR. BROWN: Yes, sir. It was -- as I understand
14 the Court's ruling, that was not to be gone into, unless
15 opened up on a direct. And I absolutely did not open that
16 issue up on direct, Your Honor.

17 MS. DYER: He's talking about all this testing
18 that was done and why the energy is different and all
19 that -- or why the energy is the same. I think we can --

20 MR. BROWN: Your Honor recalls the hearing that we
21 had on the subject of that particular device and how the
22 head wasn't engaged. My understanding from the rulings that
23 were made in chambers with Mr. Mann and Mr. Shaw was that
24 unless he went into that, it would not be before the jury.

25 And, Your Honor, I purposefully did not go into

1 that issue with him. It has not been put before the jury,
2 and now bringing it before the jury is improper.

3 MR. CARPINELLO: That was the ruling. The ruling
4 was let's see what he says, what he testifies to. The --
5 the 2003 issue is implicated in his report. We can impeach
6 him with the fact that he made statements inconsistent with
7 TTI and Trinity's own documents. He specifically said that
8 there wasn't a 4-inch --

9 MS. DYER: And he --

10 THE COURT: Tell me specifically what you want to
11 ask him, Ms. Dyer.

12 MS. DYER: All I want to ask him is, if he's aware
13 of the test that was done in 2003 that had a 4-inch. That's
14 all I'm going to ask him. And it's not listed. He didn't
15 look -- he lists all these tests. He talks about all these
16 tests. He talks about all the energy dissipation. He
17 doesn't look at that when his client didn't even tell him
18 about it, supposedly.

19 MR. BROWN: As Your Honor is aware from the
20 hearing that we had on this, there was lots of argument made
21 at the 2003 test being a pendulum test, and the Court asked
22 what happened here. I believe I told the Court that rail
23 was pulled out of the head. The guardrails were not
24 engaged. There was no extrusion forces on the head.

25 Your Honor, this would be misleading and confusing

1 to the jury -- excuse me, ma'am -- to suggest that perhaps
2 there was some sort of energy dissipation that occurred with
3 this ET-Plus head that was used in those tests.

4 MS. DYER: Well, on Exhibit B of Dr. Ray's report,
5 he lists pendulum tests. I'm not -- I'm not going to say
6 anything about the energy dissipation necessarily, but he
7 lists -- he identifies pendulum tests. They just don't
8 happen to be the one -- they hid it from him apparently.

9 MR. BROWN: Your Honor, that exhibit is not before
10 the jury and in evidence in this particular case.

11 MS. DYER: It was a demonstrative that they gave
12 to us the other day.

13 MR. BROWN: We may have given it, Judge, but it
14 wasn't used. There was nothing presented to this jury to
15 suggest that anything other than --

16 THE COURT: All right. I've heard enough. I'm --
17 I'm going to deny the request for leave. Let's go forward.

18 (Bench conference concluded.)

19 Q. (By Ms. Dyer) Going back to the flared test, Dr. Ray,
20 the first post that was used in those flared tests that you
21 talked about -- let me ask you first. When did you first
22 see the flared tests?

23 A. Well, roughly a couple weeks ago.

24 Q. And you didn't see them before you actually gave your
25 original opinions in May of this year in your report; is

1 that correct?

2 A. Oh, certainly not, no.

3 Q. Okay. Did you ask whether any such tests have been
4 done?

5 A. Did I ask whether any flared -- no, I didn't.

6 Q. So you learned about them when? A couple weeks ago?

7 A. A couple weeks, yes.

8 Q. And when you did learn about them, did you view the
9 tests?

10 A. Oh, as soon as I got the materials, I viewed them right
11 away. Yes.

12 Q. Okay. And you talked a little bit on direct about the
13 posts and how the posts were different --

14 A. Yes.

15 Q. -- in your view. And can you tell me with regard to the
16 posts whether they have been approved or not approved by the
17 FHWA?

18 A. They have been approved by the FHWA.

19 Q. Okay. So the posts used on the flared test were
20 approved by the FHWA, correct?

21 A. Yes, yes.

22 Q. Okay. And the head used on the flared test was the
23 exact same head that we're talking about here; is that
24 correct?

25 A. Yes.

1 Q. Now, I think you said in your deposition that it didn't
2 concern you that there were these five tests that showed
3 failed results, correct?

4 A. I don't think they're relevant to the tan -- performance
5 of the tangent ET-Plus. No.

6 Q. And, in fact, you said you would sleep like a baby
7 just -- even knowing that these tests had occurred, correct?

8 A. Sure.

9 Q. Didn't bother you at all that it showed that these cars
10 might flip over?

11 A. This device isn't on the road.

12 Q. There's no flare to any ET-Plus head, in your view,
13 that's on the road?

14 A. That's not what I said. I said the flared terminal that
15 was tested by TTI is not on the road. It is nowhere on the
16 road.

17 MS. DYER: Your Honor, can I have a moment?

18 THE COURT: You may.

19 (Pause in proceeding.)

20 Q. (By Ms. Dyer) Dr. Ray, you mentioned some LS-DYNA
21 testing, I believe, on direct; is that correct?

22 A. Yes.

23 Q. And you have actually identified certain materials that
24 should be actually looked at for LS-DYNA testing or
25 materials that -- that might be of interest to people who

1 are looking into LS-DYNA testing, right?

2 A. I guess I don't follow your question exactly.

3 Q. Sure. You -- you've in some writings actually listed
4 some publications of other people to use as resources for
5 LS-DYNA testing, correct?

6 A. I'm sorry. I'm still not following exactly where
7 you're --

8 Q. Have you ever cited to Dr. Coon's materials in any of
9 your LS-DYNA testing materials?

10 A. Oh, I might have. I don't recall.

11 Q. Do you know how many times?

12 A. Don't know.

13 Q. Would five times surprise you?

14 A. No. I think you're probably referring to an NCHRP
15 report that I wrote, which is a pretty comprehensive
16 document dealing with the use of LS-DYNA, and I think there
17 were hundreds of references in that.

18 Q. And you --

19 A. So it wouldn't surprise me.

20 Q. And you referenced Dr. Coon, correct?

21 A. I don't specifically recall that, but I wouldn't be
22 surprised.

23 MS. DYER: I have no further questions.

24 THE COURT: All right. Further direct, Mr. Brown?

25 MR. BROWN: If I may briefly, Your Honor.

1 THE COURT: All right. You may proceed.

2 MR. BROWN: Mr. Hernandez, can you pull
3 Plaintiff's Exhibit 1257 up, please?

4 REDIRECT EXAMINATION

5 BY MR. BROWN:

6 Q. Dr. Ray, when Ms. Dyer was visiting with you, she asked
7 you some questions about this particular document. Do you
8 recall that?

9 A. Yes.

10 Q. And you were going to explain something about this
11 document, sir. Can you please go forward and do that?

12 A. Yes. What the documents really -- it's not talking
13 about a flared terminal. It's talking about if you flare
14 the guardrail itself, not just the terminal, away from the
15 roadway and then use a tangent terminal at the end of that
16 flared guardrail.

17 So I know the language sounds similar, but it's a
18 different thing. We're not talking about a flared terminal.
19 We're talking about using a tangent terminal at the end of a
20 guardrail that's been flared before it gets to the terminal
21 section.

22 Q. All right, sir. Does this particular document in any
23 way suggest that the experimental testing that was done out
24 at TTI can somehow be installed on the roadways today?

25 A. Oh, certainly not. The -- the device -- or I should say

1 the devices tested by TTI, because there were five different
2 ones, didn't get to first base in terms of passing the
3 Report 350 criteria.

4 Q. Dr. Ray, based upon your experience and training, do you
5 have an opinion as to whether if individual components
6 themselves are somehow approved by Federal Highway? That
7 means, that if they appear in some sort of system, they are
8 also accepted?

9 A. No. It's always the performance of the system that's --
10 that's relevant, and that includes all the components of the
11 system.

12 Q. So just because a post or a head may have been
13 approved in another system does not mean they somehow
14 can freely be installed on the roadway; is that correct?

15 A. That's correct, yes.

16 Q. Dr. Ray, let me ask you a little bit -- you were asked
17 questions about your business relationship with Trinity.

18 Sir, are you an inventor yourself?

19 A. Yes, sir.

20 Q. Is that one of the other things that you do in your
21 particular company?

22 A. Yes, it is.

23 Q. Do you hold patents, sir?

24 A. Yes, I hold patents.

25 Q. And do you attempt in the process of doing that, like

1 Dr. Sicking and others, to commercialize your patent?

2 A. Yes, I do.

3 Q. All right. You were talking about measurements that you
4 made along the Ohio Turnpike. In your measurements, did you
5 find measurements that had an exit gap of 1-inch with a
6 4-inch guide channel that was within tolerance?

7 A. I think the majority of them --

8 Q. All right.

9 A. -- were of that type.

10 Q. Dr. Ray, based upon your experience and training, do you
11 have an opinion as to how an exit gap could perhaps not be
12 1-inch within tolerance, if installed on the roadways?

13 A. Yes. The exit gap can get bigger by use. If you feed
14 splices -- if you feed guardrail and splices through the
15 head, it's going to stretch it out. So when we have devices
16 that have been out there for a number of years and then hit,
17 one, two, however many times, the exit gap can get bigger,
18 but the exit gap can never get smaller. So I know how they
19 get bigger, but they can't get smaller.

20 Q. Is the problem if the gap becomes smaller?

21 A. Oh, that would be a problem. I don't know any physical
22 way for that to happen, but getting smaller would be a
23 problem. Getting bigger with use isn't really a big
24 problem.

25 Q. And when you say smaller, you mean smaller than 1-inch?

1 A. 1-inch, yes.

2 Q. And finally, Doctor, when you made your particular chart
3 that the jury saw before and when we talked about occupant
4 risk factors, do you have an opinion as to whether the
5 safety is the same for an occupant with an ET-2000 impact
6 and an ET-Plus impact with 4-inch guide channels?

7 A. Oh, that's clearly what that chart shows. It shows,
8 when you evaluate it according to the Report 350 occupant
9 risk values, both of them are acceptable and both of them
10 are substantially the same. So you have the same risk of
11 injury for both of those devices.

12 MR. BROWN: Thank you, Your Honor. Pass the
13 witness.

14 THE COURT: Additional cross?

15 MS. DYER: Thank you, Your Honor. Could we look
16 at Exhibit 1047, please, Mr. Diaz?

17 RECROSS-EXAMINATION

18 BY MS. DYER:

19 Q. If -- if you look at that page we were looking at, which
20 I believe is 85, now, this has an exit gap of 1-5/8 inches,
21 correct?

22 A. Yes.

23 Q. And as Mr. Hopkins said, it's not impacted, correct?

24 A. Yes, he did say that.

25 Q. No evidence that it was used, correct?

1 A. Well, that was his opinion.

2 Q. Okay. And you relied upon his measurements, correct?

3 A. Yes, I did.

4 Q. And you didn't do anything to inspect this to see that
5 there was an impact here, right?

6 A. It could be very difficult to detect if there was
7 impact.

8 Q. But you didn't even try. You had Mr. Hopkins go out and
9 measure these, right?

10 A. Yes, I did.

11 Q. And you relied upon what he said, and one of the things
12 he said is this is bigger than 1-inch and it's not impacted,
13 correct?

14 A. Correct.

15 Q. Now, the flared tests that you talked about, those used
16 a tangent terminal, right?

17 A. No.

18 Q. They used the same ET-Plus head that we've been talking
19 about for a week here.

20 A. That's absolutely incorrect. They used the same ET
21 head, but it is not the same terminal. It is a completely
22 different terminal, and a terminal is the whole system.
23 It's all the components of that either 37 and a half feet or
24 50 feet. It's not just the head. It's the whole thing.

25 Q. Well, it used -- it used the head that we've had here.

1 A. Correct.

2 Q. It used posts that were approved by the FHWA.

3 A. Some -- yes.

4 Q. Now, you said you testified for Trinity. How long have
5 you been testifying for Trinity?

6 A. I -- I think since maybe 2006 or so. I may be wrong on
7 that, but I think that's close.

8 Q. Okay. And were you receiving royalties from Trinity at
9 the time you were also acting as a testifying expert for
10 them?

11 A. Yeah, I guess so. I think altogether, I've received all
12 of -- well, me personally, probably \$1200 --

13 Q. I didn't ask -- I wasn't asking the amount.

14 A. Okay.

15 Q. My question was, sir, did you receive royalties at the
16 same time you were purporting to be an independent expert
17 for Trinity?

18 A. Yes. And the royalties I received were on a --

19 Q. Thank you.

20 THE COURT: Dr. Ray, she didn't ask you what the
21 royalties came from. Keep your answers to the questions
22 asked.

23 THE WITNESS: Yes, sir.

24 Q. (By Ms. Dyer) Did you stop receiving royalties?

25 A. I haven't received any in a while, yeah.

1 Q. When?

2 A. I think the last -- well, really the only royalty
3 payment I got was --

4 Q. I just asked -- Dr. Ray, with all due respect, when did
5 you stop receiving royalty payments?

6 A. Well, that's why -- I'm trying to think. I think
7 probably 2011 perhaps.

8 Q. Was that before or after you were retained for this
9 matter?

10 A. Oh, it would be before I was retained for this matter.
11 Yes.

12 Q. Now, is it your opinion that only crash-tested designs
13 should be on the roadway?

14 A. Is -- is it my opinion that crash test --

15 Q. Only crash-tested designs should be on the roadway,
16 correct?

17 A. Sure.

18 MS. DYER: No further questions.

19 THE COURT: Additional direct?

20 MR. BROWN: Very briefly, Judge.

21 REDIRECT EXAMINATION

22 BY MR. BROWN:

23 Q. Dr. Ray, if a post is accepted and an anchor bracket is
24 accepted, but those particular components are as part of the
25 system and that system is not accepted, does it mean they're

1 entirely different systems, sir?

2 A. Yes. You -- you can't mix and match approval letters,
3 you know. They -- a system is a system. A system is all
4 the components that go with the system. You can't take an
5 approved piece here and an approved piece there and somehow
6 make a -- a new approved piece.

7 Q. My final question is -- is just because there happened
8 to be some components in what was tested out at Texas A&M
9 that are in the ET-Plus system as commercialized, does it
10 mean that the systems were the same, sir?

11 A. No, they're most definitely not. It's a completely
12 different arrangement, different components. It's a
13 different system.

14 MR. BROWN: No further questions, Judge.

15 THE COURT: Additional cross?

16 MS. DYER: No, Your Honor.

17 THE COURT: All right. You may step down,
18 Dr. Ray.

19 MR. BROWN: Your Honor, may the witness be
20 excused?

21 THE COURT: Is there objection?

22 MS. DYER: No objection, Your Honor.

23 THE COURT: Dr. Ray, you're excused. You're
24 welcome to stay; you're also free to leave.

25 Defendant, call your next witness.

1 MR. SHAW: Dr. Matthews, Your Honor --

2 Mr. Matthews. I'm sorry.

3 THE COURT: If you'll come forward, please,
4 Mr. Matthews, and be sworn.

5 (Witness sworn.)

6 THE COURT: Please come around and have a seat
7 here at the witness stand.

8 All right. Ms. Teachout, you may proceed.

9 MS. TEACHOUT: Thank you, Your Honor.

10 JEFF MATTHEWS, DEFENDANTS' WITNESS, SWORN

11 DIRECT EXAMINATION

12 BY MS. TEACHOUT:

13 Q. Mr. Matthews, can you describe your background and
14 experience, please?

15 A. Yes. I'm Jeff Matthews. I'm a vice president with
16 Charles River Associates, and I'm a CPA and a CFE. And I
17 graduated college in 1995 from the University of Louisiana
18 in Monroe, and I got a degree in accounting.

19 And once I graduated, I moved down to Baton Rouge and
20 conducted fraud investigations for the Legislative Auditor's
21 Office for Louisiana. And so I did that for four years, and
22 then in 1999, I was recruited to move to Dallas, and I've
23 been doing fraud investigations and damage calculations ever
24 since.

25 Q. You mentioned that you have a CFE. What is a CFE?

1 A. That's a certified fraud examiner, and that suggests
2 that I've met the years of experience criteria, and I've --
3 I've passed an exam. And I have kept up with my continuing
4 education credits.

5 Q. Have you ever testified in cases involving allegations
6 of fraud?

7 A. I have.

8 Q. And were you qualified as an expert in those cases?

9 A. Yes, ma'am.

10 Q. Can you generally describe what the subjects were that
11 you testified in those cases involving fraud?

12 A. Well, it was -- it was a lot. It was anywhere from
13 fraudulent financial statements to employee
14 misappropriations, to vendor collusion, theft from federally
15 funded programs, you name it. It was a lot.

16 Q. You mentioned working as an auditor for the State of
17 Louisiana. In your role as an auditor, did you investigate
18 fraud in state government programs?

19 A. I did.

20 Q. And in that role, did you quantify damages to the state
21 resulting from allegations of fraud?

22 A. Yes, ma'am.

23 Q. Do you also teach at of the University of Texas at
24 Arlington?

25 A. I do. The University of Texas at Arlington approached

1 me three years ago to actually write a class -- to develop a
2 class for forensic account and fraud investigations for
3 their -- their graduate program, so I did that and I've
4 taught ever since.

5 MS. TEACHOUT: Your Honor, at this time we would
6 offer Mr. Matthews as an expert on valuation of damage in
7 the case.

8 THE COURT: Is there objection?

9 MR. WARD: No, Your Honor.

10 THE COURT: The Court will recognize Mr. Matthews
11 as an expert on damage valuations.

12 Proceed.

13 Q. (By Ms. Teachout) Mr. Matthews, what were you asked to
14 do in this case?

15 A. I was asked to analyze Mr. Chandler's opinion on damages
16 in this False Claims Act matter.

17 Q. And do you have an opinion as to the reliability of the
18 amount of damages Mr. Chandler has estimated in this case?

19 A. I do. I don't feel Mr. Chandler has a reasonable basis
20 to reach those conclusions.

21 Q. Have you reviewed Mr. Chandler's opinion and the
22 methodology that he's used to estimate the amount the
23 Federal Government reimbursed states for ET-Plus units?

24 A. Yes, ma'am, I have.

25 Q. And is this the 218-million-dollar number that

1 Mr. Chandler has estimated the Federal Government paid for
2 ET-Pluses?

3 A. It is.

4 Q. And can you explain, sir, how he came up with this
5 estimate?

6 A. Yes. Mr. Chandler has determined that because a state
7 spends 83 percent of its highway budget on federal highways,
8 that the Federal Government must have also purchased and
9 reimbursed 83 percent of the ET-Pluses that Trinity has
10 sold.

11 Q. And how does specifically he come up with this 83
12 percent percentage of state spending on -- on highways?

13 A. He takes everything, everything a state spends on a
14 federal highway, and divides it by everything they've spent
15 on all highways.

16 Q. And what data does Mr. Chandler use to calculate this
17 percentage?

18 A. Well, Mr. Chandler goes out to the Internet and he
19 downloads some -- some federal highway statistics. He looks
20 at that information, and then he reaches that determination.

21 And, again, that information includes everything that
22 was spent, whether it's on a bridge, a tunnel, an overpass,
23 the paving itself, everything that has spent -- been spent
24 on those highways is included in that amount.

25 Q. Is the data broken out by particular products that a

1 state may have purchased?

2 A. No, ma'am.

3 Q. Can you tell from the data how much any state, if at
4 all, has spent on actual purchases of ET-Plus units?

5 A. No, you can't.

6 Q. Does the data at all speak to or -- or does it show
7 actual reimbursements by the Federal Government for
8 ET-Pluses?

9 A. No, no, it doesn't.

10 Q. Do you see this to be a reliable methodology that
11 Mr. Chandler has used to estimate the amount the Federal
12 Government has paid for ET-Pluses?

13 A. No, no, I don't. It does not pertain to a purchase or a
14 reimbursement for an ET-Plus. If I'm going to use that as a
15 basis, I have to answer a couple of questions. What did the
16 state submit for reimbursement and what did the Federal
17 Government pay? This information pertaining to -- to a
18 state expenditure has no correlation to the -- to the sale
19 or the purchase of an ET-Plus. And Mr. Chandler actually
20 agrees with us on that point.

21 Q. Did Mr. Chandler have or use data that shows what states
22 actually submitted to the Federal Government for ET-Plus
23 sales? Does he have that data?

24 A. He does not have that data.

25 Q. Does he -- has he used any data or does he have it in

1 terms of what the federal government actually paid or
2 reimbursed states for ET-Pluses?

3 A. No, he doesn't. Mr. Chandler does not have data to
4 support what the state billed or what the Federal Government
5 paid.

6 Q. And was Mr. Chandler able to trace at all ET-Plus sales
7 to support this 218-million-dollar number to actual federal
8 reimbursements?

9 A. No, he hasn't.

10 Q. And what, in your opinion, is the effect on the
11 reliability of his estimate, given this lack of data?

12 A. Again, if I have zero data, if I can't determine what
13 the Federal Government has paid -- again, if I have no data,
14 I can't reach an opinion. I can't go to Walmart and ask for
15 a reimbursement if -- or a refund if I can't prove that I
16 made a payment and they have no record of me buying
17 anything. If I have no data, I can't reach an opinion.

18 Q. What are your opinions, sir, on Mr. Chandler's use of
19 Arkansas data in relation or to corroborate his \$218 million
20 in federal reimbursements that he claims?

21 A. Well, I have a lot of questions about that Arkansas
22 data. It appears to be very inconsistent, and it doesn't
23 appear to reconcile to any Trinity sales that I can see.

24 Q. And what is the Arkansas data that Mr. Chandler is
25 referring to?

1 A. Mr. Chandler has a 16-page spreadsheet that represents
2 the -- Arkansas's purchase of a -- Type 2 guardrail system.
3 That information contains a number of things, but I can't
4 tell how many ET-Pluses it includes.

5 Q. Does the document identify particular ET-Pluses or that
6 all of the data in the 16-page spreadsheet relates to
7 ET-Plus sales?

8 A. No. It appears that it relates to things in addition to
9 or even if it includes -- assuming it includes ET-Pluses.

10 MS. TEACHOUT: Mr. Hernandez, could you pull up
11 Slide 4, please?

12 Q. (By Ms. Teachout) Mr. Matthews, do you see
13 inconsistencies between the 16-page spreadsheet from
14 Arkansas that Mr. Chandler referenced and the sales data
15 from Trinity?

16 A. Yes, I do. This is a very simple illustration. If you
17 look at the first column there, during this period of time
18 from 2006 through 2013, Trinity sales data suggests that
19 they have sold \$626,000 in -- in the state of Arkansas -- to
20 Arkansas customers. And I heard Mr. Chandler represent that
21 the information that he had from Arkansas pertained
22 exclusively to ET-Pluses. And if I look at that data that
23 he's produced, it shows that Arkansas purchased \$1.9 million
24 in terminals during this period of time. That's three
25 times -- that's over three times the amount of ET-Pluses

1 that I see has been sold in that state during that period of
2 time.

3 Q. Had -- to your knowledge, has Mr. Chandler addressed or
4 been able to reconcile the inconsistencies in the data from
5 the Arkansas spreadsheet?

6 A. I -- I haven't see where Mr. Chandler's even
7 acknowledged this discrepancy, much less addressed it.

8 MS. TEACHOUT: Mr. Hernandez, can you pull up
9 Slide 6, please?

10 Q. (By Ms. Teachout) Mr. Matthews, do you agree that
11 somehow you could use data from Arkansas to extrapolate or
12 draw a conclusion as to all 50 states concerning ET-Plus
13 reimbursements?

14 A. So let's say that I could get comfortable with the --
15 the issues that I have with that data, if I'm somehow able
16 to reconcile that difference, I still don't see how Arkansas
17 is a reasonable basis to reach any sort of conclusion. If I
18 look at this chart, you can see that Arkansas ranks 40th out
19 of the -- the 50 states that Trinity does business in. And
20 so if I -- if I look at that, that represents .2 percent of
21 the ET-Plus units that have been sold. I can't look at .2
22 percent of -- of sales data and reach any sort of reasonable
23 conclusion or reasonable basis that the rest of the sales
24 look exactly like those. It's just too small of a number.
25 The sales are immaterial. I can't look at this small of a

1 subset and assume that everyone else in the country acts
2 just like Arkansas. I just can't do that.

3 Q. In the end, did Mr. Chandler actually use any of the
4 Arkansas data, the spreadsheet, to come up with the \$218
5 million he estimates the Federal Government paid for
6 ET-Pluses?

7 A. No, I don't believe he uses any of the Arkansas data.

8 Q. To come up with the \$218 million to be able to determine
9 what the Federal Government actually paid for ET-Pluses in
10 this case, what data, in your opinion, do you think needs to
11 be looked at and analyzed before you could reach an opinion?

12 A. I've got to look at a couple of things. I have to
13 determine if an ET-Plus was used on a federal eligible
14 highway. I have to make that determination first. Was it
15 an eligible product? Was it on an eligible highway? Did
16 that information get submitted to the Federal Government for
17 reimbursement? Did the Federal Government agree with that?
18 Did the Federal Government find money available for that?
19 And did the Federal Government make the reimbursement?
20 The most important thing there is did the Government make
21 the -- the reimbursement? I have seen no documentation
22 to -- to -- to suggest that -- that we have it.

23 Q. And do you think Mr. Chandler's estimate of \$218 million
24 of federal reimbursements is reliable, given this lack of
25 data?

1 A. No, no, I don't.

2 Q. Are you aware that Mr. Chandler has used in his damage
3 analysis a scrap value for the ET-Plus?

4 A. I'm aware of that.

5 Q. And is this the value that Mr. Chandler says the
6 Federal Government received for ET-Pluses that it paid
7 reimbursement for?

8 A. That's correct.

9 Q. Have you seen support suggesting that the ET-Pluses sold
10 from 2006 to 2013 should be given no value other than scrap
11 value?

12 A. I've seen no support for that statement. In fact, I've
13 seen evidence contrary to that.

14 MS. TEACHOUT: Mr. Hernandez, can you pull up
15 Slide 7, please?

16 Q. (By Ms. Teachout) What information have you considered,
17 Mr. Matthews, in evaluating the value the FHWA has received
18 for the ET-Plus?

19 A. Well, I've looked at Trinity's sales data. I've looked
20 at Trinity's return refund data, and then I've looked at
21 what the FHWA has said and what the FHWA has done.

22 And if you look at this slide, the FHWA has said that
23 they have no reliable data; that the ET-Plus is not
24 performing as intended. The FHWA has stated to the state
25 Department of Transportation that the ET-Plus with the

1 4-inch guide channel is eligible for reimbursement. The
2 FHWA has stated in a June 2014 memo that there's an unbroken
3 chain of eligibility for federal funding, and it has existed
4 since 2005, September 5th, 2005, on the ET-Plus.

5 The FHWA, as I sit here, continues to reimburse for and
6 allow the use of the ET-Plus.

7 Q. Have you --

8 A. I've seen no evidence that they have modified or revoked
9 that acceptance.

10 Q. Have you seen any evidence that the FHWA has asked for
11 all or part of their money back for any ET-Plus
12 reimbursements they made from 2006 to 2013?

13 A. No. I have seen no evidence of that.

14 Q. Mr. Matthews, if the jury finds that the ET-Plus has the
15 value of what was paid by the United States Government, what
16 would the damages in this case be?

17 A. The damages would be zero, and I think that's exactly
18 what's happened here.

19 Q. In considering Mr. Chandler's scrap value opinion, did
20 you also review Trinity's sales data?

21 A. I did, yes, ma'am.

22 MS. TEACHOUT: Mr. Hernandez, could you pull up
23 Slide 8, please?

24 Q. (By Ms. Teachout) And could you explain, Mr. Matthews,
25 what we are looking at here?

1 A. This is the annual units shipped of the ET-Plus, and if
2 you -- if you look at this schedule, I have gone all the way
3 back to 2002, and I have traced the number of units shipped
4 all the way through 12/31, December 31st, 2013.

5 And if you look at this -- this data, there's a
6 consistent trend before these modifications were made and
7 after the modifications were made. And so I would assume,
8 if the FHWA had determined that this was worth nothing more
9 than scrap value, I would have expected to see a decline in
10 sales during this period of time, after the modifications
11 had been made.

12 Q. Have you, Mr. Matthews, heard an allegation in this case
13 that prior to the change in the guardrail in 2005 that the
14 ET-Plus was somehow reusable, and that after the change in
15 2005, the product was not reusable?

16 A. I've heard that allegation.

17 Q. If this allegation were true, what would you expect to
18 see in terms of the Trinity sales data?

19 A. Again, I would expect to see that -- if it was somehow
20 reusable before the change, I would expect to see an
21 increase in the units shipped, after the change was made,
22 because the states would have to replace them more
23 frequently. I just see no data here to suggest that there's
24 any change in the units shipped before or after this change.

25 Q. Mr. Matthews, have you analyzed Mr. Chandler's

1 calculation of the number of what he alleges are false
2 claims in this case?

3 A. I have.

4 Q. And what is your opinion about that calculation?

5 A. Well, I don't believe he has any support or any basis
6 for that number either.

7 Q. I mean, is this the number that he came up with roughly,
8 16,000 invoices, Trinity customer invoices?

9 MR. WARD: Your Honor, objection to the continued
10 leading.

11 THE COURT: Sustained as to leading. Avoid
12 leading, Counsel.

13 Q. (By Ms. Teachout) What -- what conclusion did
14 Mr. Chandler reach concerning roughly the number of invoices
15 he claims represented false claims?

16 A. I think Mr. Chandler reached an opinion that there are
17 over 16,000 individual claims in this matter.

18 Q. And how did Mr. Chandler attempt to determine the number
19 of Trinity customer invoices?

20 A. Mr. Chandler looks at -- at an Excel spreadsheet, and he
21 basically counts the lines on an individual spreadsheet and
22 then assumes that each line represents an invoice. He then
23 applies this 83-percent number.

24 Remember, the number that represents the percentage
25 that a state spends on its federal highways, he takes that

1 number and he applies it to the number of lines on the
2 spreadsheet. And that's how he gets to his 16,000.

3 Q. Do you see a problem with the methodology in what he's
4 doing here?

5 A. Yes. Just as Mr. Chandler has testified, there's no
6 correlation between that percentage and an actual
7 reimbursement by the Federal Government.

8 Q. Has he traced those 16,000 customer invoices to a sale
9 that was actually federally reimbursed?

10 A. No.

11 Q. And if Mr. Chandler was going to try to do that and
12 determine whether ET-Plus sales resulted in federal
13 reimbursement, what, in your opinion, would he need to do?

14 A. If you were going to use this methodology, you would
15 need to go invoice by invoice or at least perform some sort
16 of sampling. You would have to take that invoice and trace
17 it to its end result. You would have to trace it through
18 that entire process that we discussed earlier. Did it go to
19 a state? Did it go to an agency? Was it used on an
20 eligible project? Was it somehow submitted for
21 reimbursement, and did the Federal Government actually make
22 the reimbursement?

23 Q. Are there ET-Plus sales that are not eligible for
24 federal reimbursement?

25 A. Yes, there are.

1 Q. Are you aware if states or local counties can pay for
2 ET-Pluses with their own funds?

3 A. I am. You can look at an invoice and there are some
4 invoices that you could immediately exclude from that
5 analysis. If it went to a state, if it went to a private
6 party, if it went to an insurance company, if it was sold to
7 a company for stock or inventory or resale, that may at some
8 point end up on a federal project.

9 But that invoice doesn't necessarily show that, and so
10 you couldn't assume by default that every single invoice is
11 there, when you have the data or you have the actual
12 invoices, and can go through that process and exclude them.

13 Q. Has Mr. Chandler attempted to take these invoices and
14 actually trace them to federal reimbursement?

15 A. No, he hasn't.

16 Q. And do the Trinity invoices contain, Mr. Matthews, the
17 certification concerning NCHRP 350-compliance -- the
18 certification at issue?

19 A. No, they do not.

20 Q. Have you seen any analysis indicating that Mr. Chandler
21 has tried to count or quantify the certifications?

22 A. No. I believe he testified that he has not done that.

23 Q. And what do you understand Mr. Chandler's position to be
24 with regard to using invoices to count instead of counting
25 certifications?

1 A. Mr. Chandler takes an invoice and he states that it
2 references a bill of lading, and that bill of lading is in a
3 file that may or may not include this certification. But
4 even then, there's -- there's no documentation or support
5 that that certification ultimately results in a federal
6 reimbursement.

7 Q. Mr. Chandler has calculated that the Federal Government
8 has been damaged in this case \$218 million. Is that figure
9 reliable, in your opinion?

10 A. No, it's not. Again, that figure does not pertain to
11 any -- any evidence or any documentation that suggests a --
12 a federal reimbursement was made.

13 He does not have information showing what the states
14 billed the Federal Government. He doesn't have information
15 suggesting that the Federal Government paid an amount for
16 those ET-Plus sales.

17 Q. Mr. Matthews, if the jury finds that the ET-Plus has the
18 value of what was paid by the U.S. Government, what would
19 the damages in this case?

20 A. The damages would be zero, and I think that's exactly
21 what has happened here.

22 MS. TEACHOUT: I would pass the witness, Your
23 Honor.

24 THE COURT: All right. Before we proceed with
25 cross-examination of this witness, Counsel, we're going to

1 take a short recess.

2 Ladies and Gentlemen of the Jury, you can leave
3 your notebooks in your chairs. Don't discuss the case among
4 yourselves. Take this opportunity to stretch your legs and
5 get a drink of water. And we'll be back in here shortly for
6 the Plaintiff's cross-examination of the witness. You're
7 excused for a recess at this time.

8 COURT SECURITY OFFICER: All rise.

9 (Jury out.)

10 THE COURT: Be seated, please.

11 Ms. Teachout, twice you've asked this witness if
12 the Federal Government's asked for a refund of any of the
13 money that they've paid out on these systems. I want you to
14 understand the Court believes that is very close to crossing
15 the line on the motion in limine that prohibits you from
16 asking about whether the Government is intervening in this
17 case or not.

18 That's not an express violation, but it's -- it's
19 very close. And I would instruct you to stay away from that
20 on any redirect.

21 All right. We'll take a short recess.

22 COURT SECURITY OFFICER: All rise.

23 (Recess.)

24 (Jury out.)

25 COURT SECURITY OFFICER: All rise.

1 THE COURT: Be seated, please.

2 Let's bring in the jury, Mr. McAteer.

3 COURT SECURITY OFFICER: Yes, sir.

4 All rise for the jury.

5 (Jury in.)

6 THE COURT: Please be seated, ladies and
7 gentlemen.

8 All right. We'll continue with the Plaintiff's
9 cross-examination of the witness.

10 You may proceed, Mr. Ward.

11 MR. WARD: Thank you, Your Honor.

12 CROSS-EXAMINATION

13 BY MR. WARD:

14 Q. My name is John Ward. I don't believe we've ever met
15 before.

16 A. Well, good morning, Mr. Ward.

17 Q. You've been hired by Trinity to come in here to give
18 your opinion, correct?

19 A. I've been hired by counsel for Trinity. Yes, sir.

20 Q. Well, is Trinity paying you or is counsel paying you?

21 A. I assume Trinity.

22 Q. How much are you charging?

23 A. How much am I charging? I charge -- my firm charges
24 \$545 an hour for my time.

25 Q. And you've been here all week, haven't you?

1 A. Most of the week, yes, sir.

2 Q. All right. Let me see if I understand your position
3 that -- you have said damages are zero. Even if this jury
4 comes in and finds that Trinity committed fraud and sold
5 these ET-Plus heads, millions and millions of dollars of
6 them, you say the damages are zero. Have I got that right?

7 A. I don't know that that's what I've said.

8 Q. All right. Well, if the jury finds that there is
9 liability, what calculation did you offer them at any time
10 as to what the amount of damages would be? What is your
11 alternate calculation?

12 A. My calculation is based on the benefit of the bargain.

13 Q. Okay. What is the amount?

14 A. The amount is -- is zero, based on the evidence that
15 I've seen.

16 Q. Okay. So if they find liability and that there's been
17 fraud committed on the Government, you still say the damages
18 are zero, correct?

19 A. That's correct.

20 Q. All right. And you know this head is not approved in
21 Virginia. It's been taken off the approved list in
22 Virginia, Massachusetts, Nevada, Missouri, don't you?

23 MS. TEACHOUT: Objection, Your Honor. I think
24 it's outside the scope of my examination and not relevant to
25 the issue of federal reimbursement claims.

1 THE COURT: I'll overrule. Answer the question.

2 A. Would you please ask that again?

3 Q. (By Mr. Ward) I said you know that this ET-Plus can not
4 be used in four states, Virginia, Massachusetts, Missouri,
5 and Nevada?

6 A. I don't believe that's true at all.

7 Q. You don't -- okay. So you disagree with the statements
8 that have been introduced from those states that say it's
9 not on their qualified product list?

10 A. I've seen evidence that suggests that the FHWA would
11 disagree with your statement.

12 Q. I said have you seen those from the four states that say
13 they can't be used in those four states?

14 A. I've seen evidence that those states are no longer using
15 the product.

16 Q. Well --

17 A. But I have seen no evidence to suggest --

18 MR. WARD: I object, Your Honor, to the
19 non-responsiveness of that answer.

20 THE COURT: I'll instruct the witness to limit his
21 questions to the answers -- limit his answers to the
22 questions asked.

23 I'm also going to instruct both of you to make
24 sure the other one has finished before you proceed. I don't
25 want either of you talking over each other.

1 Let's continue.

2 Q. (By Mr. Ward) The opinion that you've rendered here
3 today is based upon the assumption that Trinity told the
4 FHWA everything it knew about the ET-Plus head when they met
5 with them in February of 2012, correct?

6 A. I don't think that's my opinion.

7 MR. WARD: Would you read from Mr. Matthews'
8 deposition -- or put the slide up on Page 54, Lines 12 to
9 19.

10 Q. (By Mr. Ward) The question was: So your report assumes
11 that Trinity told the FHWA everything that it knew about the
12 ET-Plus in connection with the approvals, as you term them;
13 is that correct?

14 Your answer was: As of 2012, whatever the date of the
15 meetings were, I assume that they told them everything they
16 knew at that time.

17 Did I read that correctly?

18 A. You read that correctly.

19 Q. All right. And you also consider -- actually, you
20 consider what this Judge and jury -- Judge and jury do in
21 this case is irrelevant to your damage opinion; isn't that
22 right?

23 A. That's correct.

24 MR. WARD: That's all the questions I have.

25 THE COURT: Redirect, Ms. Teachout?

1 REDIRECT EXAMINATION

2 BY MS. TEACHOUT:

3 Q. Mr. Matthews, whatever value the jury decides the FHWA
4 received for an ET-Plus, whatever value they attribute to
5 that, is there a reliable basis to determine that there's
6 been \$218 million in damages in this case?

7 MR. WARD: Objection to the leading nature.

8 THE COURT: Sustained. Avoid leading, Counsel.

9 Q. (By Ms. Teachout) Is there a reliable basis to determine
10 that there's \$218 million in federal reimbursements in this
11 case?

12 A. No, there's not. Even if we were able to determine that
13 value, I still would have to calculate the amount the
14 Federal Government paid, and I have seen no evidence and no
15 documentation in which I'm able to do that.

16 MS. TEACHOUT: Pass the witness, Your Honor.

17 THE COURT: Further cross-examination?

18 MR. WARD: Nothing further, Your Honor.

19 THE COURT: All right. You may step down,
20 Mr. Matthews.

21 May this witness be excused? Is there objection
22 from either side?

23 MR. SHAW: We ask that he be excused, Your Honor.

24 MR. WARD: We have no objection.

25 THE COURT: Mr. Matthews, you're released and

1 you're excused.

2 Defendants, call your next witness.

3 MR. SHAW: Your Honor, may we approach?

4 (Bench conference.)

5 MR. SHAW: Judge, that is our last witness. We
6 are ready to rest our side of the case, but we do need to
7 either ask the Court to rule on those offers of proof or
8 tell me that I'm not waiving them by not getting a ruling
9 now, and you can rule on them after we rest our case.

10 That's what the lawyers are telling me. Outside
11 those offers of proof having been given to Mr. Carpinello,
12 they've been filed with this Court. If I could read the
13 docket numbers in that reference those and either ask you to
14 overrule. This deals with the evidence that we tried to put
15 in.

16 THE COURT: Here's what I'd like you to do, if
17 you're agreeable. I'm not telling you how to practice law.
18 I'd like you to announce on the record in the presence of
19 the jury that you rest your case-in-chief --

20 MR. SHAW: Yes, sir.

21 THE COURT: -- subject to taking up pending offers
22 of proof with the Court.

23 MR. SHAW: That's fine.

24 THE COURT: And I'll make it clear on the record
25 that I'll accept that and that you're not waiving those

1 offers of proof, and we'll take them up later.

2 MR. SHAW: Thank you so much.

3 MR. CARPINELLO: Judge, can you tell us our time?

4 THE COURT: You're about 50 minutes a side.

5 It's -- I don't have the exact number in front of me.

6 Let's calculate it real quickly, Mr. DeArman.

7 MR. MANN: Your Honor, while he's doing that --

8 THE COURT: I'm sure somebody will take advantage.

9 MR. MANN: Since we're about to rest, if they're
10 going to have rebuttal witnesses, we'd like to take that up
11 while we're up here, too, Your Honor, to save the Court a
12 little time.

13 THE COURT: Take it up how?

14 MR. MANN: If there are going to be rebuttal
15 witnesses, we need to know that to -- if we have any
16 objection whether it actually is rebuttal or matters they
17 could have brought up in the case-in-chief.

18 THE COURT: Well, what's the --

19 MR. CARPINELLO: We're putting up Dr. Coon and Mr.
20 Chandler to directly rebut the opinions that were expressed
21 in their case directly, and I assume if they have an
22 objection to the line of questioning, we'll raise it then.

23 THE COURT: They appear to be proper rebuttal
24 witnesses to me.

25 MR. MANN: Well, it's depending on what it is,

1 Your Honor.

2 MR. SHAW: You don't know what they're going to
3 say.

4 THE COURT: You can raise it at the time.

5 Let's get that time, though. Do you have that,
6 Mr. DeArman?

7 All right. Counsel, we'll calculate it and I'll
8 give you instruction. Take your places.

9 MR. SHAW: Judge, I'm going to close subject to
10 offers and pending motions. Is that appropriate?

11 THE COURT: That's fine.

12 (Bench conference concluded.)

13 THE COURT: All right. Based on our
14 conference at the bench, I'll ask again for the
15 Defendants to call their next witness.

16 MR. SHAW: Your Honor, the Defendant, Trinity
17 Industries and Trinity Highway Products, rests its case
18 subject to the offers and other pending motions.

19 THE COURT: All right. Ladies and Gentlemen of
20 the Jury, the Defendants have rested their case-in-chief.

21 We'll now proceed to the Plaintiff's rebuttal
22 case, if the Plaintiff chooses to bring rebuttal witnesses.

23 Does the Plaintiff have a rebuttal case to offer?

24 MR. CARPINELLO: Yes, we do, Your Honor.

25 THE COURT: All right. Plaintiff, you have 47

1 minutes remaining. You may call your first rebuttal
2 witness.

3 MR. GRAVANTE: Your Honor, the Plaintiffs call
4 William Chandler as a rebuttal witness.

5 THE COURT: All right. Mr. Chandler, if you'll
6 come forward. You remain under oath. Just come to the
7 witness chair.

8 Defendants, you have 51 minutes remaining.

9 When you're ready, Counsel.

10 MR. GRAVANTE: Thank you.

11 WILLIAM CHANDLER, PLAINTIFF'S WITNESS, PREVIOUSLY SWORN

12 DIRECT EXAMINATION

13 BY MR. GRAVANTE:

14 Q. Mr. Chandler, were you in Court this morning and did you
15 just hear Mr. Matthews' testimony regarding the damages that
16 you testified to earlier in this case?

17 A. Yes, I was.

18 Q. And did you hear his testimony regarding the false --
19 number of false claims that you testified to in this case?

20 A. I did.

21 Q. Do you agree with his conclusions?

22 A. Not at all.

23 Q. Are they wrong?

24 A. They are.

25 Q. You heard him say, did you not, that Arkansas is not a

1 large enough data set in order to reach your conclusions?

2 Do you agree with that?

3 A. No, I do not.

4 Q. Can you explain to this jury why not?

5 A. Because it's a certification given by Arkansas that
6 these sales -- purchases that they made during this period
7 of time were all ET-Plus units, and they gave precisely for
8 each purchase the amount that they received as a
9 reimbursement from the Federal Government. It's accurate
10 data. It's perhaps one of the most accurate state
11 productions that we've received in this litigation.

12 Q. And why did you look at the Arkansas data to make
13 absolutely sure your calculations were estimated with the
14 greatest degree of accuracy possible, given the documents
15 produced to you in this litigation?

16 A. Well, there are three components to my calculation, as I
17 had indicated previously.

18 The first is that Trinity invoices were produced by
19 Trinity. Those are actually numbers. They're not in
20 dispute.

21 The second amount -- and Mr. Matthews does not
22 disagree -- the 80-percent factor that I have used as a
23 reimbursement rate by the Federal Government to the extent
24 that those ET-Plus units were placed on federal-aid
25 highways, I used 80 percent. The range is between 80 and

1 100 percent. I selected the 80 percent. He doesn't dispute
2 that.

3 What he says is that the 83 percent, which is how much
4 of the ET-Plus units were installed on federal-aid highways
5 is not supported by evidence. The factors that I used based
6 on the highway statistics shows where the states spent their
7 money. There is no evidence that I have seen to suggest
8 that the states spent in a different fashion for the ET-Plus
9 units to cause that to be less than 83 percent.

10 What I saw with Arkansas, as I indicated before, was
11 that 95 percent of those units were placed on federal-aid
12 highways. That corroborated my analysis.

13 Q. And what is the basis for your conclusion that the
14 Arkansas data on which you relied is reliable data?

15 A. Well, it's certified by Arkansas to be reliable.

16 MR. GRAVANTE: Mr. Diaz, could you please display
17 Exhibit P-683?

18 Q. (By Mr. Gravante) Mr. Chandler, have you seen this
19 document before?

20 A. I have, yes.

21 Q. What is it?

22 A. It is the certification of the data that was produced in
23 this litigation by Arkansas.

24 Q. And I would ask you to read for the jury in the second
25 paragraph the first sentence of that paragraph.

1 A. Yes. As systems administrator for site manager, I
2 certify that the attached documents constitute a true,
3 correct, and accurate compilation of data related to the
4 Department federal-aid contracts from January 1, 2005, to
5 December 4th, 2013, concerning ET-Plus terminals referenced
6 in the subpoena to the Department in the captioned federal
7 case and federal costs for same on Department federal-aid
8 contracts during the stated period.

9 Q. And is it your understanding that the captioned federal
10 case is the case in which you are testifying here today?

11 A. Yes.

12 Q. Okay. Now, doesn't this certification -- who is this
13 signed by?

14 A. It's Benjamin Browning.

15 Q. And who is he?

16 A. He is the systems administrator for the Construction
17 Division of the Arkansas State Highway and Transportation
18 Department.

19 Q. Doesn't this certification amount to a sworn statement
20 that this is all the data concerning the ET-Plus units
21 purchased by Arkansas?

22 MS. TEACHOUT: Objection, Your Honor. Leading.

23 THE COURT: Sustained.

24 Q. (By Mr. Gravante) What does this certification reflect
25 with respect to the data concerning the number of Trinity

1 ET-Plus units purchased by the State of Arkansas during the
2 damages period?

3 MS. TEACHOUT: Objection, Your Honor. I think the
4 documents speak for itself.

5 THE COURT: I'll allow the question.

6 Go ahead and answer.

7 THE WITNESS: Okay.

8 A. It's a certification of the content and accuracy of the
9 content that was produced by Arkansas in this litigation.

10 Q. (By Mr. Gravante) Did you have data available to you to
11 trace every ET-Plus sale to re -- that was reimbursed by the
12 Federal Government?

13 A. No. The -- as I indicated previously, what happens
14 in -- in the tracing of data, which is the reason that I
15 used the highway statistics, is that Trinity sells to
16 contractors. Trinity hasn't -- doesn't have the records to
17 indicate where its units are actually installed.

18 So the fault, for example, where Mr. Matthews says I
19 can't reconcile sales -- Trinity sales to the Arkansas data
20 has nothing to do with the accuracy of the Arkansas data.
21 The Arkansas data is fine.

22 It's Trinity's lacking of being able to identify where
23 its units were installed that's the problem. It's the lack
24 of information in the Trinity files. It's not the
25 inaccuracy of the Arkansas data.

1 MR. GRAVANTE: I would ask, Mr. Diaz, could you
2 pull up the slide that was just shown to the jury during
3 Mr. Matthews' testimony? I believe it was Demonstrative 4.

4 Q. (By Mr. Gravante) Mr. Chandler, did you hear
5 Mr. Matthews' testimony concerning this demonstrative?

6 A. I did.

7 Q. Do you agree with it?

8 A. No.

9 Q. Could you explain to the jury what -- why you disagreed
10 with the testimony that Mr. Matthews just gave to the jury?

11 A. Yes. The 1,978,830 is the amount that Arkansas
12 represented they had purchased during the -- during the
13 damage period. The \$626,931 comes from the Trinity
14 invoices. Now, the Trinity invoices would reflect sales to
15 contractors located in Arkansas, because the only way you
16 can match them is to say I sold it to Trinity and Trinity --
17 I mean, Trinity sold it to a contractor and the contractor's
18 address is in Arkansas. So that's how that allocation would
19 be made.

20 Trinity could sell to a contractor in Tennessee who
21 installed the units in Arkansas to explain the difference of
22 why these numbers don't reconcile. And there's no way to
23 really get back from the Arkansas data into Trinity's data
24 because Trinity doesn't have that information in its files.

25 Q. And based on your years of experience, is there any

1 validity to the criticism that Mr. Matthews made of your
2 damage analysis based on his use of the numbers in this
3 demonstrative?

4 A. No, absolutely not.

5 Q. Did you hear Mr. Matthews testify that you simply
6 assumed that a line on a spreadsheet was a Trinity invoice?

7 A. I did hear that. Yes.

8 Q. Do you agree with that testimony?

9 A. Absolutely not.

10 Q. Can you explain to the jury why you disagree with
11 that testimony?

12 A. Yes. The -- the line items are the Trinity information
13 and summary of invoices. But Trinity produced the
14 supporting invoices and the bill of lading files that
15 support those. And I relied on those -- that information.
16 I looked at each of those.

17 That's how I allocated or attempted to allocate the
18 sales of Trinity units to each of the states, by looking at
19 the address on the invoices and allocating the sales in that
20 fashion. Those invoices have been made available. They're
21 actual invoices. They're not simply line items that I
22 extracted from a spreadsheet without looking at what the
23 underlying content was.

24 Q. And is each and every one of those invoices a Trinity
25 invoice?

1 A. Yes, it is.

2 Q. How many ET-Plus units were sold by Trinity during the
3 relevant damages period?

4 A. 284,153.

5 Q. How did you conclude the percentage of those that were
6 installed in federal -- that were not installed on
7 federal-aid highways?

8 A. Well, that would be the difference that I allowed for
9 units that would not be eligible for reimbursement based
10 upon the 83 percent. So the ones that were not installed on
11 eligible highways would be 17 percent.

12 And if you look at all the different places in which a
13 unit could be installed, as we indicated before for a county
14 road or other types of private roads or places that it would
15 not be eligible, and you take the 17 percent times that
16 284,000, it accounts for 48,000 units that would have been
17 placed on roads that were not eligible for federal-aid
18 reimbursement. And they're not included in my damage
19 calculations.

20 Q. Mr. Chandler, you testified in your direct examination
21 on several different occasions that the numbers you used in
22 calculating the damages that have been caused in this case
23 were conservative.

24 Do you recall that?

25 A. I do.

1 Q. Can you explain to the jury each of the instances in
2 which you picked numbers that you utilized in your
3 calculations rather than different numbers you could have
4 chosen which would have resulted in higher damages being --
5 being calculated by you in this case?

6 MS. TEACHOUT: Objection, Your Honor. It's
7 outside the scope. This was not an issue raised on my
8 examination.

9 THE COURT: Overruled.

10 A. Yes. There are a number of instances in which I
11 selected more conservative damage analyses and conclusions.

12 Q. (By Mr. Gravante) Let's start with the first one.

13 A. The first one would have been the 80-percent
14 reimbursement rate. As I said before, the rate of
15 reimbursement range in the Federal Highway Administration's
16 publications, between 80 percent and 100 percent. I picked
17 the 80 percent.

18 If you look at the Arkansas data, that's an 88-percent
19 reimbursement for those units placed on eligible highways.
20 If I had used 88 percent rather than 80 percent in my
21 calculations, that would be approximately \$20 million more
22 in damages -- 22 million, I believe, and would have
23 increased the 218 million to 240 million, or approximately
24 240 million.

25 Q. Now, what's the next area in which you've made a

1 conservative assumption, which, if you had not made, would
2 have led to higher damages in this case?

3 A. Well, as I indicated before, I performed a calculation
4 of -- of the value of the scrap metal. That's not my
5 conclusion that that's what the benefit is. The jury will
6 determine that benefit. But I performed a calculation that
7 used conservative numbers.

8 And there's two components to that. First of all,
9 there's the weighting.

10 Q. Let's start with just the weighting right now.

11 A. The weighting --

12 Q. Can you explain what you did with the weighting?

13 A. I looked at the weighting and I took the weight of the
14 systems, which is 1,065 pounds on average. However, in --
15 in determining that weight, many of the sales by Trinity
16 were simply heads, and they didn't weigh 1,065 pounds. The
17 average weight for a head alone is only 167 pounds, but I
18 weighed it at the higher weight, which would have resulted
19 in a higher scrap value; and, therefore, if the jury accepts
20 that as one of the benefits, a lower damage calculation.

21 Q. Sir, just to stop you there. So even though what's at
22 issue in this case is the modified head that is the part of
23 the ET system, the system they keep talking about, and that
24 head only weighs 167 pounds, you nevertheless used, in
25 calculating the scrap metal value that the jury could

1 choose, if it wants to deduct from your other damage
2 calculations, you used the figure of 1,065 pounds rather
3 than 167 in your calculations?

4 MS. TEACHOUT: Objection. Leading, Your Honor.

5 THE COURT: Sustained.

6 Q. (By Mr. Gravante) Can you -- what is the difference
7 between the weight of the head that's at issue in this case,
8 the allegedly and properly modified head and the ET-Plus
9 system on which you based your scrap metal value
10 calculations?

11 A. The head -- head weighs 167 pounds, the -- on average.
12 The system weighs 1,065 pounds. I weighed all units as
13 system weight at 1,065 pounds rather than the 167 pounds,
14 which results in a much higher scrap value and lower
15 potential damages.

16 Q. So if the jury believed in this case that the only
17 defective improper product that Trinity sold was the actual
18 header rather than the ET-Plus system, then how much less
19 would this jury deduct from the 200-plus-million-dollar
20 damage figure that you have calculated than the number
21 you've suggested?

22 MS. TEACHOUT: Objection. Leading and outside the
23 scope, Your Honor.

24 THE COURT: I'll sustain as to leading.
25 Counsel, avoid leading.

1 MR. GRAVANTE: Okay.

2 Q. (By Mr. Gravante) Could you explain to the jury what the
3 difference would be had you chosen to just use the weight of
4 the allegedly modified head -- improperly modified head as
5 opposed to the entire system?

6 A. Well, if that -- if the only component of the -- of the
7 benefit that's being looked at is -- I can't -- I can't give
8 you the exact calculation here. I just don't know offhand.

9 Q. Well --

10 A. It would be a substantially lower number.

11 Q. -- is it fair to say that just being conservative, 167
12 is -- it's less than 20 percent of a -- of 1,065?

13 MS. TEACHOUT: Objection as to leading, Your
14 Honor.

15 THE COURT: Sustained.

16 Q. (By Mr. Gravante) Would you give me a rough estimate of
17 1,065 divided by 167?

18 A. Yes. That would be approximately, you know, a
19 20-percent number.

20 Q. Okay. So that would mean that if this jury believes
21 that the value of the scrap metal that should be deducted is
22 only the value of the head that's actually at issue in this
23 case, then the jury would only subtract approximately --
24 what percent did you just give me?

25 A. 20 percent.

1 Q. The jury would only deduct 20 percent of the scrap value
2 that you calculated and presented to them in your earlier
3 testimony. Is that accurate?

4 MS. TEACHOUT: Objection as to leading, Your
5 Honor.

6 THE COURT: That's a leading question, Counsel.
7 I'll sustain --

8 Q. (By Mr. Gravante) Can you explain to the jury --

9 THE COURT: I'll sustain the objection. Let me
10 finish my ruling before you go on.

11 MR. GRAVANTE: Thank you.

12 THE COURT: Now ask your next question.

13 Q. (By Mr. Gravante) Can you explain to the jury what
14 difference it would make in your calculations, if all --
15 approximately, if all you had done was used the weight of
16 the head as opposed to the weight of the entire system?

17 A. Well, that -- that would change the -- the value, but I
18 think you have the numbers reversed. What I'm assuming that
19 the Government would keep all of the scrap metal that was
20 installed, but the only unit that had no benefit would be
21 the 167 pounds. The rest of the unit, I'm assuming -- I
22 don't know how it would be -- I don't know how you'd
23 separate the two.

24 But the -- so my -- my -- my thinking would be that it
25 would be -- the 167 pounds would be the -- the number that

1 you would use to subtract from the -- the damage
2 calculation, not the component parts. So I think you'd have
3 to take the damages and reduce them by 20 percent -- the
4 calculation of scrap reduced by 20 percent, not 80 percent.

5 Q. The calculation of scrap?

6 A. Yes.

7 Q. Okay. And -- and if that were done, then how would that
8 increase the damages that Plaintiffs are alleging in this
9 case?

10 A. Well, it would lower the scrap value by 20 percent; and,
11 therefore, would increase the damages by the 20-percent
12 reduction in the scrap value. That would be about an
13 8-million-dollar change.

14 Q. Okay. You testified that you also made a conservative
15 assumption with respect to the -- the price of scrap metal,
16 did you not?

17 A. That's correct.

18 Q. Can you explain why you were conservative in your
19 calculation of using the price of the scrap metal that's
20 used in your damage report?

21 A. Well, I used the -- the -- the highest reported
22 published price by the U.S. geological survey, which
23 produces these monthly prices. And then I used the
24 composite average for each year. And I used the highest
25 price, the heavy metal steel Category 1 which is the

1 highest -- highest pricing component.

2 MR. GRAVANTE: Mr. Diaz, can you please pull up
3 Chandler Demonstrative 11?

4 Q. (By Mr. Gravante) Mr. Chandler, what is this document?

5 A. This is a summary of my calculation of the number of
6 asserted false claims.

7 Q. And did you hear Mr. Matthews' testimony earlier
8 criticizing your calculation of 16,771 false claims made by
9 Trinity in this case?

10 A. Yes, I did.

11 Q. Okay. Was your calculation of that number conservative
12 in any way?

13 A. Yes, it was.

14 Q. Can you explain to the jury how it was conservative?

15 A. Yes. If you see the numbers on the -- my screen is
16 blank, so I don't know what other people have -- on the far
17 left-hand column, the second column over where it says
18 number of claims, these are the total number of invoices
19 issued by Trinity during the period. These are produced by
20 Trinity. Mr. Matthews had said that I just assumed that
21 these were invoices based upon the Excel spreadsheet. These
22 are, in fact, the Trinity invoices -- 21,836. Some of those
23 invoices I indicated before were the same invoice number,
24 but apparently issued on more than one occasion. So they
25 would have been reissued -- it's a legal issue whether or

1 not a reissuance of --of an invoice of that type of a change
2 in the description of the product actually represents a
3 false claim. My count excludes them taking some -- taking
4 just a -- a calculation to reduce them by any invoice that
5 was counted twice because it had been reissued. So that
6 1,597 I subtracted from the 21,836 total invoices to come up
7 with a net amount of 20,239.

8 And the second reduction was, again, to assume, as I
9 did using my estimates for the damages, that to the extent
10 that a Trinity invoice was not representing the sale to the
11 United States Government, as it went through the system, I
12 reduced that by the -- I reduced the 20,239 by the
13 approximate 83 percent of sales that would be on federal-aid
14 highways. So these 16,771 units are only those Trinity
15 invoices that I estimate supported a reimbursement request
16 from the United States Government.

17 Q. And absent the conservative assumptions you just
18 described to this jury, what number of false claims could
19 you have otherwise concluded were the number of false claims
20 made by Trinity in this case?

21 A. Well, the 21,836 would then be reduced by the 17 percent
22 approximate allocation to locations that were not placed on
23 federal-aid highways. I'd have to redo the math. I don't
24 have it up here. I don't want to be inaccurate about it,
25 but that's -- that would be the calculation.

1 Q. And can you give me a rough es -- guesstimate of what
2 that 16,771 number would increase to but for your
3 conservative assumptions?

4 A. Well, it would increase by the 1,597 units. So it would
5 be the 21,836.

6 Q. Okay.

7 A. And then them multiplied by --

8 Q. I'm sorry.

9 A. -- 83 percent.

10 Q. Is there anything that Mr. Matthews just testified to
11 that gives you any doubt about the estimate regarding total
12 damages that have you testified to in this case?

13 A. No.

14 Q. Is there anything that Mr. Matthews just testified to
15 that gives you any doubt about your calculation of the
16 number of false claims at issue in this case?

17 A. No.

18 MR. GRAVANTE: I pass the witness.

19 THE COURT: Cross-examination.

20 CROSS-EXAMINATION

21 BY MS. TEACHOUT:

22 Q. Mr. Chandler, you did not calculate your estimate of
23 \$218 million of federal reimbursements for ET-Pluses using
24 any data from the Arkansas spreadsheet, did you?

25 A. I used it to corroborate the reasonableness of my

1 calculations, but I did not directly incorporate that data
2 into my damage analysis.

3 Q. You didn't use it in your damage analysis directly to
4 come up with the 218 million; isn't that correct?

5 A. I used it to support my calculation, so I can't say that
6 I didn't use it. I relied on it to corroborate the
7 reasonableness of my allocations.

8 Q. Your damage number of \$218 million is not based on a
9 specific project-by-project ET-Plus head by ET-Plus head
10 analysis, is it?

11 A. No, it's not.

12 Q. In fact, in your analysis concerning the \$218 million,
13 you have not seen specific payments by the Federal
14 Government for any reimbursement for ET-Pluses; isn't that
15 correct?

16 A. Well, other than the Arkansas data, which has been
17 certified to me, I didn't see the direct data. I saw their
18 certification. But outside of that, I have not seen U.S.
19 Government reimbursements, that's correct.

20 MS. TEACHOUT: Mr. Hernandez, can we pull up
21 Mr. Chandler's deposition at Page 58, Line 17?

22 Q. (By Ms. Teachout) In your deposition, you were asked,
23 Mr. Chandler: You've not seen specific payments by the
24 Federal Government for any reimbursement for ET-Pluses?
25 And your answer was: I haven't seen any payments, any

1 specific payments by the Federal Government itself, no.

2 Did I read that correctly, Mr. Chandler?

3 A. That's the same as the answer I'm giving you now.

4 Q. Sir, if sufficient data does not exist to be able to
5 reach a conclusion with a reasonable degree of certainty, as
6 an expert -- as an expert, don't you agree that you
7 shouldn't reach the conclusion?

8 A. If sufficient evidence doesn't exist. But if it does,
9 you reach the conclusions.

10 Q. And if it doesn't exist, sir, would you agree with me
11 that you shouldn't reach the conclusion?

12 A. You can't reach the conclusion if it doesn't exist.

13 MS. TEACHOUT: I pass the witness, Your Honor.

14 THE COURT: Further direct?

15 REDIRECT EXAMINATION

16 BY MR. GRAVANTE:

17 Q. Mr. Chandler, based on your years of experience and
18 based on your consideration of every document that you
19 analyzed in this case, do you believe that the data on which
20 you rely to calculate your damage and false claims figures
21 in this case is based on reasonably sufficient data?

22 A. Yes, I do.

23 MR. GRAVANTE: No further questions. I pass the
24 witness.

25 THE COURT: Further cross-examination.

1 MS. TEACHOUT: No further questions, Your Honor.

2 THE COURT: All right. You may step down,

3 Mr. Chandler.

4 Counsel, approach the bench, please.

5 (Bench conference.)

6 THE COURT: You have one more rebuttal witness;

7 is that correct?

8 MR. CARPINELLO: Yes, Your Honor.

9 THE COURT: And that's Dr. Coon?

10 MR. CARPINELLO: Yes, Your Honor.

11 THE COURT: Okay. If you'll give me just a

12 second, I'll give you a running update on your time.

13 MR. CARPINELLO: Thank you. Should we sit down?

14 THE COURT: Plaintiff has 24 minutes. Defendant

15 has 48 minutes.

16 MR. SHAW: All right.

17 MR. CARPINELLO: Thank you.

18 THE COURT: All right. Let's proceed.

19 (Bench conference concluded.)

20 THE COURT: All right. Plaintiff, call your next

21 rebuttal witness.

22 MS. DYER: Your Honor, at this time we call Dr.

23 Coon.

24 THE COURT: All right. Dr. Coon, if you'll return

25 to the witness stand. I remind you, you remain under oath.

1 Ms. Dyer, you may proceed when you're ready.

2 MS. DYER: Thank you, Your Honor.

3 DR. BRIAN COON, PLAINTIFF'S WITNESS, PREVIOUSLY SWORN

4 DIRECT EXAMINATION

5 BY MS. DYER:

6 Q. Dr. Coon, were you here this morning for the testimony
7 of Dr. Ray?

8 A. I was.

9 Q. And do you agree with his conclusion that the change
10 from the five-inch ET-Plus model to the four-inch ET-Plus
11 model is not substantial?

12 A. I do not agree.

13 MS. DYER: Could you please pull up Dr. Ray
14 Exhibit 46?

15 Q. (By Ms. Dyer) Do you recall, Dr. Coon, talking a little
16 bit about the force levels?

17 A. I do.

18 Q. And does this reflect what he was talking about?

19 A. I believe there is a Table 1 that reflects that.

20 Q. As well?

21 A. Yes.

22 Q. Is this -- is this the table that you're referring to?

23 A. It is.

24 Q. And -- and this was a table that Dr. Ray spoke about
25 this morning?

1 A. It is.

2 Q. And what is the relevance of this table?

3 A. Dr. Ray, when he -- during his examination, said that it
4 hovered around 14 or 15, and these numbers are basically the
5 same. But I notice that the -- in the bottom column where
6 it says longitudinal occupant ride down accelerations, I
7 noticed that the 2010 test had a 12g ride down and that the
8 1989 test had a 17.3 ride down. And the -- the ride down
9 accelerations are basically the forces seen by the car as
10 it's being slowed down. And those two numbers aren't just
11 14 or 15. It is 12 versus 17. And I also note that 17.3 is
12 out of the recommended values and -- and -- but it's
13 underneath the maximum values, so it would be something
14 called a marginal pass.

15 Q. So if Dr. Ray relied at least in part on these force
16 levels to say that changes to the ET terminal were
17 insubstantial, would you agree or disagree?

18 A. I would say that the force levels -- you can see that
19 they are actually, in fact, different, and it's not just 14
20 or 15, but it's 12 versus 17. So something else was going
21 on in those heads.

22 Q. And, Dr. Coon --

23 MS. DYER: If I could show you Dr. Coon
24 Demonstrative 120, please?

25 Q. (By Ms. Dyer) Can you tell me what this is?

1 A. This is from my -- my fifth supplemental report. This
2 is after we received the five ET-Plus tests that were on a
3 flare, and on the -- in the left-hand side, you can see that
4 the beginning portion of the impact is actually straight
5 except for there -- there's one that -- No. 4 that has more
6 of a curve to it, but one, two, three, and then five are
7 straight. And if you see the first one, that first portion
8 of the rail is actually being impacted. It's a straight
9 piece of guardrail, and it's being impacted at about six
10 degrees. And you should expect that the NCHRP Report 350
11 crashworthy device should pass impact criteria between zero
12 and 15 degrees. It's tested at zero, tested at 15, and you
13 should expect it to work in between. You don't have to test
14 every single angle, but you're -- it's expected to work
15 there. If you know it's going to be installed at a
16 different angle, it should be so tested. And the guardrails
17 we're seeing installed on the road, they recommend a 1 and
18 25 flare, which is a 2 and 50 flare offset. So they're
19 installing them at a flare. Then their sales representative
20 recommends a 1 and 15 flare. That's a 3-foot, 4-inch or
21 3.33-foot flare. And these are -- Dr. Buth said were a 4
22 and 50 flare is what he identified, and he was actually
23 there during the testing, so I look at that -- that -- to be
24 consistent, that's what I identified, and that's what Dr.
25 Buth identified.

1 Q. So -- so, Dr. Coon, just -- just briefly, these -- these
2 are the flared tests. These are just photos of the flared
3 tests you just described?

4 A. Absolutely.

5 Q. I think you've answered some of this, but -- but why are
6 the flared tests relevant -- well, let me --

7 MS. DYER: Let me ask you to please take a look at
8 Exhibit 1162 at Page 770, Mr. Diaz?

9 Q. (By Ms. Dyer) What is this -- just tell me what this
10 is.

11 A. What you see here is a -- a straight piece or a -- a
12 tangent piece of guardrail, and it is flared away from the
13 road. And you flare it away from the road so that it comes
14 up more gently to the roadway, rather than just appearing on
15 the roadway. It's good for snow plows. If you don't want
16 the snow to be pushed against it and break your guardrail
17 and then have a danger from that. So this would be a flared
18 installation.

19 Q. And this -- this is actually out on the roadway?

20 A. It is.

21 Q. Okay. Why then are the flared tests relevant to the
22 tangent terminal we've been talking about here this week?

23 A. Because the 1 and 50 is a flared installed on the roads.
24 The 2 and 50 is flared and installed on the roads. And the
25 1 and 15 recommended by their sales people is -- and even

1 more so, but the 1 and 15 recommended by their sales people,
2 that's a 3-foot, 4-inch flare is actually implemented on the
3 roadways.

4 Q. So what you're saying is flared -- flared -- the ET-Plus
5 on a flare is being used out on the road today; is that what
6 you're saying?

7 A. That's correct.

8 Q. And, Dr. Coon, before putting a -- the ET-Plus
9 terminal -- I'm talking about the one that's actually out on
10 the road today, before putting it out on the road, is it
11 supposed to be tested just at a zero degree or is it
12 supposed to be tested at an angle?

13 A. During the seven tests or --

14 Q. Under 350?

15 A. Under NCHRP Report 350, there are -- are seven tests,
16 two of which would be zero degree on to it which would be 15
17 degree on and that's on -- on the end of the terminal, and
18 it's expected to work at all the angles in between. If you
19 install something or recommend it at -- to be installed
20 oriented otherwise, NCHRP Report 350 specifically states
21 that it should be so tested. So you should test what you're
22 putting on the road. You should crash test it, and that's
23 absolutely what NCHRP Report 350 says.

24 MS. DYER: Mr. Diaz, could you pull up
25 Exhibit 748, please, at Page 21, which I believe is Bates

1 Page 4499? Right here. Thank you. Different Bates page,
2 but thank you very much.

3 Q. (By Ms. Dyer) Can you tell me, Dr. Coon, what this
4 chart that's at the top is?

5 A. This is the Test Level 3 which is your high speed test
6 criteria basic level.

7 Q. And this is the -- the -- the testing that you were just
8 referring to?

9 A. Yes, it is -- that the 820 C is a little small car. And
10 the 200 P is what would be the pickup.

11 Q. So -- so if I put that terminal that was sitting in here
12 the other day, the four-inch terminal out on the roadway on
13 what I call a straight non-flared configuration, what do I
14 have to do before I put it out there?

15 A. It -- if it's a new terminal?

16 Q. Yes.

17 A. You would need to test it to the -- the seven tests.

18 And that would include two zero degrees and two at 15
19 degrees. And if you have reason to believe that it's not
20 going to work between those angles, if you have a suspicion
21 or you've done other testing and there may be a problem or
22 you're going to orient it otherwise in the field, NCHRP
23 Report 350 says that it should be so tested.

24 Q. Dr. Coon, in your experience -- well, have you ever been
25 involved in crash testing?

1 A. Extensively.

2 Q. And crash testing terminal heads for highway systems?

3 A. Energy-absorbing end terminals, guardrail, longitudinal
4 barriers.

5 Q. About how many times?

6 A. Enough. I -- I wouldn't hazard to guess. A lot.

7 Q. In your experience, have you tested the -- the terminal
8 first and then drawn the pictures of it known as the
9 weldment drawings, or have you done it the opposite way?

10 A. When we were working on the drawings of the SKT, we
11 actually made sure -- I put lines horizontally and
12 vertically on the drawing. So if you took it to a
13 photocopier, you could actually scale up the drawing and
14 build your own SKT off of it because I wanted to make sure
15 that the drawings were accurate. I wasn't concerned about
16 patent infringement. If they want to build it, I wanted to
17 be able to have correct drawings so that anyone could build
18 it. I didn't want to hide the information.

19 Q. Okay. Dr. Coon, but my question: Do you test first and
20 then draw, or do you draw first and then test?

21 A. You -- you have to draw first or you don't know what
22 you're building.

23 Q. And -- and here what did they supposedly do?

24 A. They apparently built a Sunday special, and then made
25 the drawing --

1 MR. SHAW: Objection, Your Honor. Objection, Your
2 Honor, it's beyond the scope of -- it's improper rebuttal.
3 It's something that should have been handled in their
4 case-in-chief.

5 THE COURT: Overruled. I'll allow the question.

6 Q. (By Ms. Dyer) You may proceed.

7 A. It was something that was built as what I call a -- a
8 Sunday special or one out of the line custom-made. And then
9 they crash tested it, and then they, from memory, apparently
10 drew up whatever they apparently made from memory at several
11 months later and then made some other changes to it, too.

12 Q. And, Dr. Coon, do you know if the drawings that we're
13 talking about, the ones that were drawn after the test, were
14 ever submitted to the FHWA?

15 A. It's my understanding that they've never been submitted
16 to the FHWA.

17 MS. DYER: No further questions at this time.
18 Pass the witness.

19 THE COURT: Cross-examination by the Defendants.
20 You may proceed when you're ready, Mr. Shaw.

21 MR. SHAW: Thank you, Your Honor.

22 CROSS EXAMINATION

23 BY MR. SHAW:

24 Q. Dr. Coon, if you could --

25 MR. SHAW: Or, Mr. Hernandez, if you could pull up

1 Dr. Ray's demonstrative, Table No. 1.

2 Q. (By Mr. Shaw) Dr. Coon, you had an opportunity to visit
3 about Table No. 1. This is from Dr. Ray's analysis, is it
4 not?

5 A. That is correct.

6 Q. And we see here in this particular diagram, do we, where
7 he has made comparisons of objective figures that have been
8 derived from the actual crash test reports that have been
9 provided to the FHWA; is that right?

10 A. That is my understanding.

11 Q. These aren't figures that Dr. Ray has made up and just
12 kind of invented out of thin air, are they?

13 A. Oh, no.

14 Q. These are the actual data that's contained within the
15 many crash reports that TTI has provided to the FHWA?

16 A. That is correct.

17 Q. And you see at the top of this particular chart, do we
18 not, sir, the different crash testing dates, the 2010, 2005,
19 the 1989, and the 1987 test. Do you see that?

20 A. I do.

21 Q. And you, in fact, have had access to this data, as well,
22 have you not?

23 A. I have.

24 Q. If we look -- the 1989 test, that's of the ET-2000,
25 isn't it?

1 A. That is correct.

2 Q. And the ET-2000 is actually, I think, when we talked
3 about this with you the other day, the head that I think we
4 described as a work of art?

5 A. That is correct.

6 Q. That was a head that was -- in fact, that your mentor,
7 Dr. Sicking, was part of being an inventor in; isn't that
8 right?

9 A. That is correct.

10 Q. And all of the data on this particular chart, you
11 focused on the last -- as part of your testimony here now,
12 the last column there, the longitudinal ARA (sic); is that
13 right?

14 A. That's incorrect.

15 Q. That's what you just talked about, isn't it?

16 A. It's -- it's not focusing solely on that. I'm looking
17 at all of the data on it.

18 Q. Let's talk at the ones that you just testified about,
19 the longitudinal ORA. Do you see that particular column?

20 A. I do.

21 Q. And do you see the results from 1989 there?

22 A. Yes.

23 Q. And it says 17.3, does it not, sir?

24 A. That is correct.

25 Q. And then the 17.3, that's the amount of g's that are put

1 upon an individual when they're involved in an impact with
2 that particular ET-2000 head; is that correct?

3 A. That is correct.

4 Q. And then when we take a look then that's -- the g's are
5 -- is that how far your body and how fast your body is
6 moving upon impact?

7 A. No, it is not.

8 Q. Well, tell me what g's are then?

9 A. Well, g's are -- well, g's -- in general, g's refers to
10 gravities or the -- the -- when you multiply it by
11 acceleration of gravity, how much forces your internal
12 organs or the vehicle would be under. It's not the impact
13 speed. That's under occupant impact velocity. So as
14 you're -- the car is starting to slow down, you're going to
15 come in contact and -- it's called a flail space model, and
16 you'll come in contact with the steering wheel. That impact
17 is going to be at a certain speed, and you want to make sure
18 it doesn't hurt you then.

19 Then you go into where the ride down accelerations --
20 you're already against your steering wheel, and those ride
21 down accelerations are going to expose your internal organs
22 to damage. Those are -- are the longitudinal ride down
23 accelerations. You also have lateral and vertical
24 accelerations, but those are the forces that you see in
25 your -- in your body.

1 Q. All right. So the higher the speed, the higher the g,
2 that's the faster you're going, in essence, the 17.3 number?

3 A. It has nothing to do with the speed that you're going.
4 It has to do with the forces you're going under. If you tap
5 someone 10 times gently, that's going to, you know, alert
6 them that you want to talk to them. If you hit them one
7 time really hard, that's going to indicate you want to fight
8 with them. So the -- the two things -- you can't equate the
9 -- the two that way.

10 Q. So then the g's are a question of force?

11 A. Acceleration, mass, and -- F equals MA .

12 Q. So then F equals MA ?

13 A. Absolutely.

14 Q. All right. So then the higher the number, the more the
15 force; is that right -- in this chart -- under the ET-2000,
16 the 17.3?

17 A. Correct, the ride down accelerations were higher.

18 Q. They were higher. So when we compare that to the 2005,
19 the 14.3 under the 2005 crash test, they're 14.3; is that
20 right?

21 A. Absolutely.

22 Q. Actually better?

23 A. Different is --

24 Q. Well, actually better than they were under the ET-2000?

25 A. Actually you can't make that assertion.

1 Q. I'm just looking at the objective data, Dr. Coon. It
2 looks to me like one of them is lower than the other?

3 A. I can explain if you'd like.

4 Q. Let's take a look at that picture that we had that you
5 were talking about. I think it's Exhibit No. 1162. Do you
6 remember talking about this picture, Dr. Coon?

7 A. I do.

8 Q. Did you take this picture?

9 A. I did not.

10 Q. Did you find this spot from the Google Maps?

11 A. This would have been one of several hundred flared
12 installations that I'd look at a picture that was provided
13 geographic coordinates, so if I just put in the geographic
14 numbers it brings up, and I would -- could zoom in and see
15 where it was. I didn't actually visit the location.

16 Q. So is that a yes?

17 A. Yes.

18 Q. All right. You didn't take this picture?

19 A. No, sir.

20 MR. SHAW: If you could pull that picture up for
21 me, please, Mr. Hernandez?

22 Q. (By Mr. Shaw) I was just wondering that you're --
23 you're trying to show the configuration of this particular
24 picture, is that right, of how it relates to the roadway.

25 Is that what this picture is intended to depict?

1 A. Yes, sir.

2 Q. I'm just wondering, who -- who did you have take this
3 picture for you?

4 A. Counsel provided these pictures.

5 Q. Do you -- counsel provided these to you?

6 A. Yes, sir.

7 Q. You mean these counsel over here that are representing
8 Mr. Harman?

9 A. Yes.

10 Q. I'm just wondering, when you were talking to them, did
11 you instruct them to go get a picture for you?

12 A. I asked that typical installations on a flare be
13 provided.

14 Q. Did you tell them, by any chance, that it would help you
15 out if you could line up directly behind the installation
16 where you're head-on with the head plate so that the jury
17 could see how it was actually installed on the roadway? Did
18 you tell them to do that when they were taking these
19 pictures for you?

20 A. I'm sorry, I don't understand the question.

21 Q. Did you -- did you tell the -- the lawyers that are
22 representing Mr. Harman when they were taking pictures for
23 you that it would help you really describe this to the jury
24 if you were to get directly behind -- directly where you're
25 lined up directly on it -- just directly on it so that the

1 jury could really see what the tangent installation looked
2 like? Did you tell them to do that?

3 A. I told them that I wanted them to be in a position where
4 the car would be about to impact the end terminal so that
5 they could see what they were about to hit. I felt that
6 that was the most representative.

7 Q. Did you tell them that they could maybe -- if we're
8 looking down this road and this Exhibit 1162, that it
9 probably would help this jury understand what it looked like
10 if you were to turn -- go to the -- to the left just a
11 little where we're looking right down the installation, as
12 opposed to at an angle on top of it? Did you tell them that
13 that might help?

14 A. No, I did not.

15 Q. You didn't? Well, when they brought this picture to
16 you, did you tell them in any way that perhaps we need to go
17 back out there and take a picture of one that's directly
18 down the roadway when we're right behind it, as opposed at
19 an angle where we can really orient and know what we're
20 looking at? Did you tell them that?

21 A. I wouldn't, no.

22 Q. You wouldn't do that?

23 A. No.

24 Q. Let's take a look at Defendants' Exhibit No. 273. Are
25 you familiar with Defendants' Exhibit No. 273?

1 A. I would say I've seen it before, but I wouldn't be able
2 to recite it verbatim.

3 MR. SHAW: Well, let's take a look at
4 Page 2 -- Page 12 of Defendants' Exhibit No. 273, which
5 is installation instructions.

6 Q. (By Mr. Shaw) Isn't that what this document is, the
7 installation instructions?

8 A. Absolutely.

9 Q. These are the instructions that Trinity Highway Products
10 provides to the people who were actually installing the
11 guardrail; isn't that right?

12 A. In addition to training and to what their sales and
13 marketing people tell them.

14 MR. SHAW: If we could look at Page 12 at the top
15 page -- top of that page. If we can bring that up where it
16 says site preparation, the very top of the page, please, Mr.
17 Hernandez, site preparation, Page 12.

18 There you -- if you could highlight that for me,
19 that first paragraph, Mr. Hernandez, site preparation.

20 Q. (By Mr. Shaw) When the guardrail is installed and in
21 line with the edge of the shoulder without any offset, a
22 12 -- a 25-to-1 or flatter straight flare over the length of
23 the systems can be used to position the ET-Plus extruder
24 head further away from the edge of the shoulder.

25 Did I read that correctly?

1 A. You did.

2 Q. And is that, in fact, what they're telling their
3 particular customers in the roadway -- in the -- in the
4 industry?

5 A. That's what they're telling them in this installation
6 manual.

7 Q. In this installation manual. And, in fact, that is --
8 comports with what the Roadside Design Guide says, does it
9 not, sir?

10 A. The 2011 would say that, but I believe the 2001 says 1
11 and 50.

12 Q. 1 and 50 in 2011?

13 A. 2001, it would be 1 and 50, a flatter, and then in 2011,
14 it goes to 1 and 25 or 2 and 50.

15 Q. All right. So we're in compliance with the current
16 standards; is that right, this installation guide?

17 A. I don't understand that question.

18 MR. SHAW: Thank you. That's all I have, Your
19 Honor. Thank you.

20 THE COURT: All right. Redirect?

21 MS. DYER: Thank you, Your Honor.

22 REDIRECT EXAMINATION

23 BY MS. DYER:

24 Q. Dr. Coon --

25 MS. DYER: If you could put that installation

1 guide back up, please.

2 Q. (By Ms. Dyer) In the meantime, let me just ask you:
3 Mr. Shaw showed you the installation guide. Did Trinity
4 have any other marketing materials where it talked about a
5 flare?

6 A. I've also seen emails and they've discussed flares.
7 Yes.

8 Q. And do you know who that email was from?

9 A. A gentleman named Don Gripne, I believe. He's one of
10 the directors of sales and marketing. I don't know his
11 exact position.

12 Q. And do you recall what Mr. Gripne said folks should do
13 with this straight terminal that we had here earlier this
14 week?

15 A. Mr. Gripne said that you can install it at a 3-foot
16 4-inch flare, straight flare. That's 4 -- or 3.33 feet of a
17 straight flare.

18 Q. What about the fact that Dr. Ray says, but, no, no, no,
19 that wasn't what Mr. Gripne was talking about?

20 A. I'm not quite sure what else that would mean, if a
21 reasonable person would interpret Gripne -- Mr. Gripne's
22 email to be if you install it on a 1 and 15, which is a
23 3.33-foot straight flare.

24 Q. So on the basis of Mr. Gripne's email, Trinity was
25 telling people that they could actually install this at a

1 greater angle than that Roadside Design Guide that Dr. Ray
2 talked about or the specifications that Mr. Shaw showed you,
3 right?

4 A. That is correct.

5 Q. Now, Dr. Coon, you were asked about the force level
6 chart again by Mr. Shaw. Do you remember that?

7 A. I do.

8 Q. Okay. And I think you said that you could explain why
9 his conclusion was not accurate. Can you explain that,
10 please?

11 A. I apologize. The difference between these -- these
12 tests is, for first, the '87 and the '89 tests are at a
13 lower speed with a much heavier head. You were looking at
14 the ET-2000, which is well over 250 pounds. And at that
15 time, it's accelerating that head. So once it gets that
16 head up to speed, that's when you start looking at your ride
17 down accelerations, after the occupants impacted the
18 steering wheel.

19 And I noticed that both of those two tests are below
20 the 350 speed by very little, but it should be at 62.2 miles
21 an hour. Those were a little bit under speed. And I
22 noticed that 17.3 and 12.1 are just fundamentally different
23 values. So when you're looking at that, they're
24 fundamentally different.

25 And the third probably most important thing that really

1 causes me to question this is that at the top of this chart,
2 it says Test 3-30 results for the ET-Plus and ET-2000.

3 That's not correct. The test needs to be at 100
4 kilometers per hour; that's 62.2 miles per hour.

5 And if you look at the impact speed of the 2010 tests,
6 it is 68.66 miles per hour. That's about 110.8 kilometers
7 per hour. So it can't be a 3-30 test because it's out of
8 compliance for this speed. This was also run straight on,
9 dead center hitting the car, not offset.

10 What happens when you hit it straight on is it makes it
11 easier for the rail to feed through. It doesn't cause the
12 car to yaw out and spin backwards into traffic or expose
13 that driver's side door to the guardrail and impale the
14 vehicle.

15 Q. Dr. Ray (sic), I noticed that there's not a --

16 THE COURT: Dr. Coon.

17 MS. DYER: I'm sorry. Dr. Coon. My apologies.

18 Q. (By Ms. Dyer) I notice that there's not a 1999 test on
19 here. Do you see that?

20 A. I noticed that as well.

21 Q. Okay. Does this chart tell you anything about whether
22 that 5-inch guardrail that we had here earlier this week is
23 going to perform better or better than the 4-inch guardrail
24 that we have here?

25 A. All this tells you is that it's a 12.1. Dr. Ray asserts

1 a 12.1 ride-down acceleration is the same as a 17.3
2 ride-down acceleration. It's just a little bit difference,
3 when I consider those two numbers to be considerably
4 different.

5 And, in fact, NCHRP Report 350 says that 17.3 is a
6 marginal pass. So it doesn't indicate that these were the
7 same heads. And, in fact, they're actually different heads
8 comparing completely different designs.

9 Q. Dr. Coon, does this tell you anything about whether that
10 4-inch head is really going to fail or not?

11 A. No, it doesn't.

12 Q. And, Dr. Coon, the pictures you were shown --

13 MS. DYER: I believe it's 1162, Mr. Diaz, the
14 picture of the flare, 1162.

15 Q. (By Ms. Dyer) Did you ask anybody to take these pictures
16 at an angle that would make it look like a flare?

17 A. I asked them to take pictures as an impacting car just
18 about they were -- before they would hit. So you have to be
19 on the roadway departing the roadway. If you take the
20 picture where it would appear straight, you would be
21 four-wheeling through the ditch coming up and impacting the
22 head, because it's angled away from the roadway. I wanted
23 it to represent what the driver would see before they
24 impacted one of these devices.

25 Q. In your opinion, is this an actual flare, or is this

1 just a picture to look like a flare?

2 A. This is -- you can see that it's flared away.

3 Underneath the Roadside Design Guide, a flared barrier is
4 one that is not parallel to the roadway. So this is flared.
5 And the Trinity installation information says that a 1 and
6 50 flare is just fine; a 2 and 50 flare is just fine; and
7 their marketing people say that a 3-foot 4-inch flare is
8 just fine.

9 Q. And have you seen actual flares on the roadway?

10 A. I've seen a lot.

11 MS. DYER: Can we pull back up the picture of the
12 flared test, the five flared tests, Mr. Diaz?

13 Q. (By Ms. Dyer) Let me ask you, while he's pulling that
14 up: Are these flares within the range of a 0-to-15-degree
15 angle that's required to be tested by the FHWA?

16 A. The -- the -- No. 4 is a little bit weird. I wouldn't
17 include it probably in the -- in that characterization.

18 Q. What about the others?

19 A. The one, two, three, and five were, from what I can
20 identify and what Dr. Buth testified, were 4 and 50 four
21 -- 4 foot and 50 foot flares, and the end is a straight
22 piece of guardrail.

23 Q. So are these roughly within the angles that are supposed
24 to be tested under NCHRP 350?

25 A. Yes. Sorry, I didn't understand the question. Yes,

1 these would be roughly about five -- almost six degrees, so
2 it would be within the range of 15 to zero degrees. It
3 would be what -- well between the two.

4 THE COURT: You have five minutes left, Ms. Dyer.

5 MS. DYER: Thank you, Your Honor.

6 Q. (By Ms. Dyer) And, Dr. Coon, last question, in looking
7 at each of these tests, you saw -- you saw five test videos,
8 correct?

9 A. I did.

10 Q. In your opinion, did the post cause these tests to fail?

11 A. No, it did not.

12 Q. Why do you believe that?

13 A. As -- as Dr. Ray testified, the first post appears to
14 function properly. It releases the cable anchor brackets,
15 and it releases properly. This looks -- the first post
16 appears to be an accepted product to put on the roadway by
17 Trinity. And the cable anchor bracket released and the head
18 was driven down the line and began to extrude rail. So it
19 would be very comparable.

20 Q. In any of these five tests, do you believe that the post
21 is what caused it to fail?

22 A. The -- no.

23 Q. What caused it to fail?

24 A. The common denominator in all of these tests is the
25 ET-Plus modified four-inch head.

1 MS. DYER: Pass the witness, Your Honor.

2 THE COURT: Further cross, Mr. Shaw?

3 MR. SHAW: Yes, Your Honor.

4 RECROSS EXAMINATION

5 BY MR. SHAW:

6 Q. Dr. Coon, were you at any of those tests?

7 A. No, I was not.

8 Q. In fact, those tests were conducted by the people at
9 TTI; isn't that right?

10 A. That is correct.

11 Q. Conducted by Dr. Gene Buth? He was there, wasn't he?

12 A. I am told so, yes.

13 Q. Were you here when he testified about these yesterday?

14 A. I was.

15 Q. Do you -- do you realize he was right there, the person
16 conducting the test, when he was telling the Ladies and
17 Gentlemen of the Jury about this experimental project? Do
18 you understand that?

19 A. I realize that he was there, yes.

20 Q. And you realize that he was one of the people who set it
21 up?

22 A. Yes, I do.

23 Q. And do you understand that he's the person who knows --
24 because of -- he was the person in charge of running it and
25 setting it up, what was occurring out there. Do you

1 understand that?

2 A. I don't know if he set it up or not.

3 Q. Well, you certainly understand he was there?

4 A. That it's my understanding.

5 Q. And we certainly understand you weren't there?

6 A. No, I was not.

7 Q. Let's take a look at P 1257. Do you recognize this
8 email?

9 A. This is the Gripne email.

10 Q. Is this part of a chain of emails?

11 A. It is.

12 MR. SHAW: Let's open this up, please, Mr.
13 Hernandez.

14 Q. (By Mr. Shaw) You understand this is a chain of emails?

15 A. I do.

16 Q. And you understand that in this chain of emails, there
17 are other participants that are involved in this particular
18 chain, is there not?

19 A. Yes.

20 Q. In fact, there's discussions here with Nick Artimovich
21 on this chain of emails; isn't that right?

22 A. That is correct.

23 Q. In fact, there's discussions with people who work at the
24 University of Nebraska. Do you remember that?

25 A. I don't remember all of the participants in the email

1 chain, but there were a lot of people on the email chain.

2 Q. And there were a lot of other individuals, other than
3 just Dr. Don Gripne; is that right?

4 A. That is correct.

5 Q. In fact, Nick Artimovich, as we know, works for the
6 FHWA, right?

7 A. I would -- again, recalling from memory, I believe there
8 were quite a few people on that email.

9 Q. So I guess my question to you is, Mr. -- Dr. Coon, is
10 does it make any sense to you that somehow or another Don
11 Gripne is engaged in some type of secret or some type of
12 hidden instructions when he's basically telling -- whatever
13 he's saying in this email to people even at the FHWA? Does
14 that make any sense to you?

15 A. I don't believe it was hidden at all.

16 Q. Okay. In fact, what Don Gripne was saying to the people
17 at FHWA and everybody else about how the flared -- the
18 tangent ET would be installed was right there and open for
19 everybody to see, was it not?

20 A. Exactly.

21 Q. Have you seen anywhere where any of these people have
22 ever emailed and told Don Gripne in any of the evidence in
23 this case that he was wrong to be saying that? Have you
24 seen that anywhere?

25 A. No, I have not.

1 Q. Okay. Let's turn to that chart, Table No. 1. Let's
2 look across the top of this chart again, Dr. Coon, 2010 test
3 that indicates -- indicates the test -- the -- the year of
4 the test, Mr. --

5 MR. SHAW: Mr. Hernandez, 2010, 2005, 1989, 1987.

6 Q. (By Mr. Shaw) Did all of these involve cars?

7 A. Yes, they did.

8 Q. All involved cars; is that right?

9 A. That -- that's correct.

10 Q. Now, when we look at the 2010 test, we've got an impact
11 speed of 68.66; is that right?

12 A. That's correct.

13 Q. That's faster than the 2005 test which was at 63.3?

14 A. That is correct.

15 Q. And that's faster than the 59.6 impact speed that was on
16 the ET-2000?

17 A. That is correct.

18 Q. Is that right? We know that the g forces, the
19 longitude -- longitudinal g forces are 17.3 on the 2000 --
20 ET-2000 test conducted in 1989; isn't that right?

21 A. That's correct.

22 Q. And we know that going faster, 63.3 impact speed on the
23 2005 test, that the longitudinal g's have decreased to 14.3,
24 even going faster; is that right?

25 A. That is correct.

1 Q. And then even going faster than that, on the 2010 test,
2 the longitudinal forces have decreased to 12.1; isn't that
3 correct?

4 A. Absolutely.

5 Q. Would you rather have longitudinal forces of 12.1 or
6 17.3 if you were involved in an impact?

7 A. It depends on the impact.

8 MR. SHAW: That's all I have. Thank you.

9 THE COURT: Any further direct?

10 MS. DYER: Yes, Your Honor.

11 Could we pull up, please, Mr. Diaz, Exhibit 1257,
12 Page 2, please?

13 THE COURT: You have three minutes, Ms. Dyer.

14 MS. DYER: Thank you.

15 REDIRECT EXAMINATION

16 BY MS. DYER:

17 Q. Dr. -- Dr. Coon, here, was Mr. Gripne telling
18 Mr. Artimovich of the FHWA that he should allow this
19 terminal that we've been talking about this week on a flare
20 of up to 15 to 1?

21 A. That is correct.

22 Q. Okay. So the only -- so they weren't hiding that,
23 right?

24 A. Correct.

25 Q. They -- they were, in fact, shouting that they should

1 use it on a flare, right?

2 A. Yes.

3 Q. The only thing they were hiding is the five tests where
4 it failed?

5 A. That is correct.

6 Q. And it failed on a flare that was similar to 15 to 1,
7 correct?

8 A. It's a little bit more angled than 15 to 1. 3.33 feet
9 would be the 1 and 15, and then the failed tests were 1 and
10 4, so -- or, excuse me, 4 feet and 50.

11 Q. And it failed on a flare that was less than what the
12 FHWA required in testing, correct, or roughly what the FHWA
13 required in testing?

14 A. Right, within that angle, yes. Range of angle.

15 MS. DYER: Thank you. No further questions.

16 THE COURT: Any further cross-examination?

17 MR. SHAW: Nothing further, Your Honor.

18 THE COURT: All right. You may step down, Dr.
19 Coon.

20 THE WITNESS: Thank you, Your Honor.

21 THE COURT: Does the Plaintiff have any other
22 rebuttal witnesses?

23 MR. SHAW: May I confer -- oh, I'm sorry, Your
24 Honor. Plaintiff. I thought you said Defendant, I'm sorry.

25 MR. CARPINELLO: No, Your Honor.

1 THE COURT: All right. Does this complete the
2 Plaintiff's rebuttal case then?

3 MR. CARPINELLO: Yes, Your Honor.

4 THE COURT: All right. Ladies and gentlemen, both
5 sides have rested in their cases-in-chief, and the
6 Plaintiffs have presented and rested its rebuttal case.
7 This now completes all the evidence that you're going to
8 hear in this case.

9 There are several matters I have to take up with
10 counsel that don't require your presence, and they will take
11 up most of the afternoon today. It's lunchtime now. So
12 what all this means is I'm about to let you go for the day.
13 And I want to have you back at 8:30 on Monday. It may be we
14 start at 9:00 o'clock. It may be at 8:30. You'll have to
15 be flexible with us, and we'll be flexible with you. There
16 are quite a few moving pieces to this process. Many of them
17 take place outside your presence. But I'm confident that we
18 can do what we need to do so that we're ready to proceed
19 with the final instructions to you and the closing arguments
20 from the attorneys Monday morning.

21 So please take your notebooks and leave them on
22 the table in the jury room. I remind you one -- one more
23 time how important it is that you not discuss this case with
24 anyone, especially over the weekend, and that you not
25 discuss it with each other. I hope you have a good weekend.

1 I ask you to travel safely to your homes and back
2 again Monday morning. And you are excused with these
3 instructions until Monday morning.

4 COURT SECURITY OFFICER: All rise.

5 (Jury out.)

6 THE COURT: Be seated, please.

7 Plaintiff, you gave back about a minute and 30
8 seconds.

9 MR. CARPINELLO: I got another witness --

10 THE COURT: Defendants, you gave back about 30
11 minutes.

12 We're going to break for lunch. Before you leave,
13 Mr. Mann and Mr. Carpinello, make sure that my law clerks
14 have your personal cell phone numbers and we'll be -- you'll
15 be the contact persons we'll call to give you a time to get
16 back for the Rule 50 motions that we'll take up after lunch.
17 But that will be sometime at or about 1:00 o'clock, but
18 we'll give you a phone call and give you an exact time.

19 We stand in recess until then.

20 COURT SECURITY OFFICER: All rise.

21 (Recess.)

22 *****

23

24

25

CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/ Shelly Holmes
SHELLY HOLMES, CSR, TCRR
Official Court Reporter
State of Texas No.: 7804
Expiration Date 12/31/14

10/17/14
Date

/s/ Susan Simmons
SUSAN SIMMONS, CSR
Deputy Court Reporter
State of Texas No.: 267
Expiration Date 12/31/14

10/17/14
Date

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

UNITED STATES OF AMERICA	*	Civil Docket No.
EX REL JOSHUA HARMAN	*	
	*	2:12-CV-89
VS.	*	Marshall, Texas
	*	
	*	October 20, 2014
TRINITY INDUSTRIES, INC. &	*	
TRINITY HIGHWAY	*	
PRODUCTS, LLC	*	8:08 A.M.

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE RODNEY GILSTRAP
UNITED STATES DISTRICT JUDGE

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(Proceedings recorded by mechanical stenography, transcript produced on CAT system.)

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PROCEEDINGS

(Jury out.)

COURT SECURITY OFFICER: All rise.

THE COURT: Be seated, please.

All right. Is the Plaintiff prepared to read into the record those items from the list of preadmitted exhibits that were used on the last day of the trial? If so, please proceed.

MS. MONROE: Good morning. Teresa Monroe for the Plaintiff.

Reading into the record the exhibits used on

Friday, October 17th: P-1047 and P-1162.

THE COURT: Any objection from the Defendants?

MR. MEIER: Brennan Meier, Akin Gump, for the Defendants. No objection.

THE COURT: Do the Defendants have a similar list to read into the record?

MR. MEIER: We do. D-81 and D-273.

THE COURT: All right. Any objection from the Plaintiff?

MS. MONROE: No objections, Your Honor.

THE COURT: All right. I understand there is some dispute about demonstratives to be used during closing arguments.

Counsel, what's the status of those disputes?

Let's take them up now. I'll hear from the Plaintiff first.

MR. CARPINELLO: Your Honor, Plaintiff's only objection to Defendants' demonstratives is the use of the demonstrative heads that were shown to the jury during the trial. We renew the same objections we made before. And most particularly, we don't want the Defendants to be allowed to manipulate in any way the guardrail -- if they're going to bring out the one with the guardrail, to manipulate the guardrail in any way for the reasons we said before.

THE COURT: My understanding is that the Defendants intend to use the two vertically positioned

halves of guardrails that were cut in half, and -- and only that as a demonstrative.

Can the Defendants address that for me?

MR. MANN: Yes, Your Honor. Mark Mann.

We only -- we do not intend to use the one with the guardrail that was in it, the ones that are laying horizontally.

THE COURT: Tell me what you do intend to use.

MR. MANN: Just the two -- one 4-inch and one 5-inch that are vertical that we showed to the jury earlier. Those would be the only ones we would want to use, Your Honor.

THE COURT: Do the Plaintiffs intend to use the preadmitted exhibits of heads that they presented to the jury during their case-in-chief as a part of closing? I'm a little concerned about the back and forth movement of guardrail heads in and out of the courtroom.

MR. CARPINELLO: I'm not certain, but I think there is a possibility we'll -- we will use those -- those -- the heads that have been admitted into evidence.

THE COURT: Okay. Ms. Dyer, can you add some light to that?

MS. DYER: Your Honor, I'm -- I'm virtually certain that we are intending to use them, unless there is obviously a time limit that results in -- in that having to

<p style="text-align: right;">Page 6</p> <p>1 be shifted -- a -- a time limit in that someone runs out of</p> <p>2 time or something like that. But, yes, the plan currently</p> <p>3 is to use them.</p> <p>4 THE COURT: All right. Do you know and you may</p> <p>5 not know -- do you know if you're going to use them, whether</p> <p>6 they'll be in your first closing argument or your final</p> <p>7 closing argument?</p> <p>8 MS. DYER: I expect that they'll be in the first</p> <p>9 closing argument.</p> <p>10 THE COURT: Okay. And can you identify for me</p> <p>11 precisely which exhibits you might be using?</p> <p>12 MS. DYER: I believe it is the two out there that</p> <p>13 are intact, so I don't have the numbers, but they are the</p> <p>14 two right in the hallway that are --</p> <p>15 THE COURT: Are they mounted horizontally or</p> <p>16 vertically?</p> <p>17 MS. DYER: They are mounted horizontally, yes.</p> <p>18 THE COURT: Okay.</p> <p>19 MS. DYER: I'm sorry -- vertically. They're the</p> <p>20 -- they're -- they're the ones -- we have the ones that are</p> <p>21 mounted vertically. I apologize.</p> <p>22 THE COURT: Okay. So Plaintiffs have the vertical</p> <p>23 ones that are not cut in half. The Defendants have the</p> <p>24 vertical ones that are cut in half. Is that pretty</p> <p>25 accurate?</p>	<p style="text-align: right;">Page 8</p> <p>1 MR. MANN: They are demonstratives only, but it --</p> <p>2 they're not evidence. They're not going back. The -- the</p> <p>3 picture is something that if they intended for it to be</p> <p>4 important enough to show the jury, they should have shown it</p> <p>5 during the trial.</p> <p>6 THE COURT: Okay. That's the basis of your</p> <p>7 objection?</p> <p>8 MR. MANN: Yes, Your Honor.</p> <p>9 THE COURT: Okay. All right. Both objections are</p> <p>10 overruled. The Defendants may use their vertically mounted</p> <p>11 heads that are cut in half as demonstratives.</p> <p>12 The Plaintiffs may use the photograph of Dean</p> <p>13 Sicking as a demonstrative.</p> <p>14 Before we bring the jury in for my final jury</p> <p>15 instructions and closing arguments, I want all the heads</p> <p>16 that are going to be used to be prepositioned in the</p> <p>17 courtroom so that there's as little disruption as possible.</p> <p>18 We can talk about the logistics in a minute, but I</p> <p>19 would assume we might move this easel and try to put the</p> <p>20 heads over here. And then as you want to use one, roll it</p> <p>21 out in front of the podium and then roll it back. I don't</p> <p>22 think it's fair to put all of them out here in front of the</p> <p>23 podium where one's blocking the other, and you have to move</p> <p>24 them around and they bump into each other.</p> <p>25 I want this to be as orderly as possible and to</p>
<p style="text-align: right;">Page 7</p> <p>1 I see heads shaking up and down.</p> <p>2 MR. MANN: Yes, Your Honor.</p> <p>3 MS. DYER: Yes.</p> <p>4 THE COURT: Okay. All right. And then I</p> <p>5 understand there's a dispute over a photograph involving</p> <p>6 Dean Sicking, as a demonstrative during closing.</p> <p>7 MS. DYER: Yes, Your Honor.</p> <p>8 THE COURT: What's -- I assume that's Plaintiff's</p> <p>9 objection to an intended -- or Defendants' objection to an</p> <p>10 intended Plaintiff demonstrative?</p> <p>11 MR. MANN: Yes, Your Honor. We -- we object.</p> <p>12 It's -- it's actually -- it should have been evidence, if</p> <p>13 they wanted to introduce it. I mean, they did talk about</p> <p>14 that.</p> <p>15 THE COURT: Is it on the preadmitted exhibit list?</p> <p>16 MR. MANN: No, sir, it is not.</p> <p>17 THE COURT: Okay.</p> <p>18 MR. MANN: So that's why we would object. I mean,</p> <p>19 it really truly should be a piece of evidence, if they</p> <p>20 wanted to introduce it. It's not a demonstrative. It's not</p> <p>21 something the Court should take judicial notice of, so we --</p> <p>22 THE COURT: I guess the same argument could be</p> <p>23 made about your halving two heads, Mr. Mann.</p> <p>24 MR. MANN: Well, except --</p> <p>25 THE COURT: They're demonstratives only, too.</p>	<p style="text-align: right;">Page 9</p> <p>1 cause as little disruption as possible, but we'll work</p> <p>2 through the precise instructions on how to do that before we</p> <p>3 bring the jury in.</p> <p>4 Are there any other disputes regarding</p> <p>5 demonstratives for closing?</p> <p>6 MR. CARPINELLO: No, Your Honor.</p> <p>7 MS. DYER: No.</p> <p>8 THE COURT: From the Defendant?</p> <p>9 MR. MANN: Not from Defendants, Your Honor.</p> <p>10 THE COURT: Okay. All right. That being done,</p> <p>11 then, Counsel, we'll next move to conduct the Court's formal</p> <p>12 charge conference.</p> <p>13 Previously last Friday, the Court met at length</p> <p>14 with Counsel for both -- for all the parties in chambers and</p> <p>15 informally for -- oh, well over an hour, closer to an hour</p> <p>16 and a half, took up and heard input from both sides on the</p> <p>17 jointly submitted proposed jury instructions and verdict</p> <p>18 form discussing at length the various positions of both</p> <p>19 sides.</p> <p>20 The Court received broad input from both sides on</p> <p>21 all the disputed issues in the joint submission in all the</p> <p>22 areas where the parties were not in agreement. Over the</p> <p>23 weekend the Court, taking that input into account, revised</p> <p>24 the final jury instructions and verdict form and delivered</p> <p>25 those electronically to the parties yesterday evening.</p>

<p style="text-align: right;">Page 10</p> <p>1 The Court will now, on the record, conduct a</p> <p>2 formal charge conference and hear objections from both sides</p> <p>3 as to the current form of the final jury instructions and</p> <p>4 verdict form.</p> <p>5 The simplest way to do this, Counsel, is whoever</p> <p>6 is going to speak for the Plaintiff and whoever is going to</p> <p>7 speak for Defendants should both be at the podium together,</p> <p>8 and I will move through the instructions and the verdict</p> <p>9 form on a page-by-page basis.</p> <p>10 If you have an objection for anything that is</p> <p>11 either set forth on that page or something that's been</p> <p>12 omitted completely, but you believe it should have been on</p> <p>13 that page, then at that point, offer your objections into</p> <p>14 the record.</p> <p>15 So with those instructions, we'll turn to the</p> <p>16 current draft of the final jury instructions first, and I'll</p> <p>17 ask if there are objections from either side to anything on</p> <p>18 Page 1.</p> <p>19 Are there any objections on Page 1 from the</p> <p>20 Plaintiff, Mr. Carpinello?</p> <p>21 MR. CARPINELLO: Oh, I'm sorry. No objections on</p> <p>22 Page 1.</p> <p>23 THE COURT: Mr. Roach, Page 1?</p> <p>24 MR. ROACH: No objections, Your Honor.</p> <p>25 THE COURT: All right. Turning to Page 2 of the</p>	<p style="text-align: right;">Page 12</p> <p>1 MR. CARPINELLO: No objections, Your Honor.</p> <p>2 THE COURT: Any objections from the Defendants on</p> <p>3 Page 6?</p> <p>4 MR. ROACH: Yes, Your Honor.</p> <p>5 THE COURT: All right. State your objections.</p> <p>6 MR. ROACH: Randy Roach for Defendants, Your</p> <p>7 Honor.</p> <p>8 We have previously filed Docket No. 569, and on</p> <p>9 Page 2 of that, we refer to the elements of the FCA claims,</p> <p>10 Your Honor. This is something we have discussed before,</p> <p>11 Your Honor. I'm happy to go through our -- our written</p> <p>12 objection, or if the Court would prefer, just to say that it</p> <p>13 has considered it and -- and overruled it. We could do it</p> <p>14 that way. I'm here at the Court's pleasure.</p> <p>15 THE COURT: I'm aware of your objection. I have</p> <p>16 considered it, and it's denied.</p> <p>17 MR. ROACH: Thank you very much, Your Honor.</p> <p>18 THE COURT: We'll move -- unless there's something</p> <p>19 further, we'll move to Page 7.</p> <p>20 MR. CARPINELLO: Your Honor, I apologize. At the</p> <p>21 very bottom of Page 6, to the extent that you're asking the</p> <p>22 jury to ask what is material, we just simply renew our</p> <p>23 objection that materiality is an issue for the Court rather</p> <p>24 than the jury. That appears at the very bottom of Page 6.</p> <p>25 THE COURT: All right. Mr. Carpinello, that</p>
<p style="text-align: right;">Page 11</p> <p>1 current version of the final jury instructions, are there</p> <p>2 objections from the Plaintiff to anything on Page 2?</p> <p>3 MR. CARPINELLO: No objection to Page 2, Your</p> <p>4 Honor.</p> <p>5 THE COURT: Defendants?</p> <p>6 MR. ROACH: No, Your Honor, no objection.</p> <p>7 THE COURT: Turning to Page 3, are there</p> <p>8 objections from the Plaintiff?</p> <p>9 MR. CARPINELLO: No objections on Page 3, Your</p> <p>10 Honor.</p> <p>11 THE COURT: Defendants?</p> <p>12 MR. ROACH: No objection, Your Honor.</p> <p>13 THE COURT: Turning to Page 4, are there</p> <p>14 objections from the Plaintiff?</p> <p>15 MR. CARPINELLO: No objections, Your Honor.</p> <p>16 THE COURT: Defendants?</p> <p>17 MR. ROACH: No objection, Your Honor.</p> <p>18 THE COURT: Turning to Page 5, are there any</p> <p>19 objections from Plaintiff?</p> <p>20 MR. CARPINELLO: No objections, Your Honor.</p> <p>21 THE COURT: Any objections from Defendants?</p> <p>22 MR. ROACH: No objection, Your Honor.</p> <p>23 THE COURT: Turning to Page 6 of the current</p> <p>24 version of the final jury instructions, are there objections</p> <p>25 from the Plaintiff?</p>	<p style="text-align: right;">Page 13</p> <p>1 objection, likewise, is overruled.</p> <p>2 Now, turning to Page 7, are there objections on</p> <p>3 Page 7 from the Plaintiff?</p> <p>4 MR. CARPINELLO: No objection, Your Honor.</p> <p>5 THE COURT: From the Defendants?</p> <p>6 MR. ROACH: No objections, Your Honor.</p> <p>7 THE COURT: Page 8 of the current version of the</p> <p>8 final jury instructions, are there objections from the</p> <p>9 Plaintiff?</p> <p>10 MR. CARPINELLO: Yes, Your Honor.</p> <p>11 THE COURT: State your objections.</p> <p>12 MR. CARPINELLO: In two places on Page 8, and</p> <p>13 again on Page 9, Your Honor directs the jury that in order</p> <p>14 to find -- to recover damages, the full -- the allegedly</p> <p>15 false or fraudulent claim must directly cause the United</p> <p>16 States Government to pay an amount of money. And the next</p> <p>17 paragraph talks about direct entry to the United States,</p> <p>18 and, again, on Page 9 in the first full paragraph, directly</p> <p>19 cause the United States to pay money.</p> <p>20 The -- the term -- the phrase directly comes from</p> <p>21 the Plaintiff's proposed charge of which I think it's 23.</p> <p>22 You took the first paragraph --</p> <p>23 THE COURT: From the Plaintiff's proposed --</p> <p>24 MR. CARPINELLO: I'm sorry, Defendants' --</p> <p>25 Defendants' proposed charge. I guess that would have been a</p>

<p style="text-align: right;">Page 14</p> <p>1 waiver if it was Plaintiff's charge.</p> <p>2 And the only citation they cite for that is the</p> <p>3 lower court decision in Longhi. They take that statement</p> <p>4 from a provision in Longhi that talks about direct versus</p> <p>5 consequential damages. In fact, the statute and all the</p> <p>6 case law that direct -- addresses the issue says that the</p> <p>7 injury does not mean to be direct. And specifically the</p> <p>8 statute makes it very clear that the claim may be made and,</p> <p>9 therefore, the injury suffered indirectly by the Government</p> <p>10 by the claim being made specifically to a contractor is</p> <p>11 right in the statute.</p> <p>12 And we cite in our objection the -- the provision.</p> <p>13 And as I said, all of the case law that has dealt with this</p> <p>14 issue holds expressly to the contrary that it is not -- it</p> <p>15 can be direct or indirect, and we cited the Veredyne case</p> <p>16 from the Federal Circuit, the Halliburton case from the DC</p> <p>17 District Court, which cites Allison Engine which is a</p> <p>18 Supreme Court case, and every single case that we've looked</p> <p>19 at that deals with this says -- and as -- again, as I say,</p> <p>20 the statute speaks in terms of that the claim may be made</p> <p>21 and, therefore, the injury suffered indirectly by the</p> <p>22 Government. And I think the use of the word directly,</p> <p>23 especially three times, gives the Defendants the opportunity</p> <p>24 to erroneously argue to the jury that Plaintiff has failed</p> <p>25 to prove his case because he didn't prove that the claim was</p>	<p style="text-align: right;">Page 16</p> <p>1 correct. The direct cause to pay is a liability issue, and</p> <p>2 that goes to presentment. But direct causation of damages</p> <p>3 is straight out of the Fifth Circuit's controlling authority</p> <p>4 in Longhi. They used the word direct. So the argument that</p> <p>5 you are hearing confuses presentment and -- and damages, but</p> <p>6 -- but for purposes of damages, which is the only way the</p> <p>7 Court is instructing on Pages 8 and 9 with respect to</p> <p>8 damages, the nexus has to be direct. It has to be</p> <p>9 substantial, and it's not a presentment issue, Your Honor.</p> <p>10 So the Court's got it right.</p> <p>11 MR. CARPINELLO: Actually the language is not from</p> <p>12 the Fifth Circuit. The language is from the District Court.</p> <p>13 And, again, the District Court when it used the word</p> <p>14 direct -- actually it didn't -- it used the language that</p> <p>15 Defendants put in their charge.</p> <p>16 What the other Court in Longhi says is there must</p> <p>17 be a direct nexus, and they were talking about direct</p> <p>18 damages versus consequential damages. So the use of the</p> <p>19 word direct in Longhi had an entirely different meaning than</p> <p>20 the way the Defendants wants to use it in their charge. And</p> <p>21 that Longhi District Court language was the only support</p> <p>22 they put in their -- in their request to the charge to</p> <p>23 support the use of that word.</p> <p>24 THE COURT: All right. I'll carry this objection</p> <p>25 for the time being.</p>
<p style="text-align: right;">Page 15</p> <p>1 made directly to the Federal Government.</p> <p>2 The statute expressly says you can make the claim</p> <p>3 to a contractor as long as it results in a payment by the</p> <p>4 Federal Government. And so we think that either -- either</p> <p>5 directly should come out or it should be directly or</p> <p>6 indirectly.</p> <p>7 THE COURT: Well, this is -- this is not to the</p> <p>8 issue of liability. This is to the issue of damages.</p> <p>9 MR. CARPINELLO: And -- and I think -- exactly,</p> <p>10 and I think that -- as I say, the case law is very clear</p> <p>11 that you -- you don't have to directly cause the Government</p> <p>12 to pay. And that -- and what happened in this case is that</p> <p>13 they indirectly caused the Government to pay because they</p> <p>14 did not make the claim to the Federal Government. They made</p> <p>15 the certificate and the invoices to the contractor who then</p> <p>16 made them to the state. The state got reimbursement from</p> <p>17 the Federal Government. The Federal Government -- federal</p> <p>18 money ultimately went to Trinity for the ET-Plus, but it was</p> <p>19 a classic example of indirectly. And, again, the statute</p> <p>20 specifically says you can make the claim to a contractor.</p> <p>21 You don't have to make the claim to the Government as long</p> <p>22 as it results in a payment by the Federal Government.</p> <p>23 THE COURT: All right. Let me hear a response</p> <p>24 from the Defendants.</p> <p>25 MR. ROACH: Your Honor's distinction is entirely</p>	<p style="text-align: right;">Page 17</p> <p>1 Are there other objections from the Plaintiff on</p> <p>2 Page 8?</p> <p>3 MR. CARPINELLO: No, Your Honor.</p> <p>4 THE COURT: Are there objections from the</p> <p>5 Defendants on Page 8?</p> <p>6 MR. ROACH: Yes, Your Honor, one.</p> <p>7 With respect to the corporate knowledge</p> <p>8 instruction, again, this is Page 4 of our written</p> <p>9 instructions, which I know the Court has reviewed on Docket</p> <p>10 Entry 569.</p> <p>11 THE COURT: I have. Do you have a response to</p> <p>12 this objection, Mr. Carpinello?</p> <p>13 MR. CARPINELLO: I'm sorry, Your Honor, I wasn't</p> <p>14 pay -- I was reviewing my -- what was -- I'm sorry?</p> <p>15 THE COURT: Well --</p> <p>16 MR. CARPINELLO: Well, I think that's -- we're --</p> <p>17 we're certainly fine with that. What we objected to was</p> <p>18 their language that you had to -- that one person had to</p> <p>19 have all the knowledge, and that's not the law. And I think</p> <p>20 Your Honor's charge accurately states the law which the</p> <p>21 corporation have knowledge through the knowledge of its</p> <p>22 officers, directors, and employees. I think that's the law.</p> <p>23 THE COURT: All right. I have looked at this. I</p> <p>24 do think the Defendants have a point, and at the top of Page</p> <p>25 8, I'm going to change the current draft so that it says on</p>

<p style="text-align: right;">Page 18</p> <p>1 the second sentence: Corporations can obtain knowledge only 2 through their directors, officers, employees, or agents 3 whose knowledge is imputed to the corporation. And instead 4 of ending the sentence there, I'm going to add when their 5 directors, officers, employees, or agents act within the 6 course of their employment for the benefit of the employer. 7 I'm going to add that language by way of granting 8 the Defendants' objection. 9 MR. CARPINELLO: And for the reasons we stated 10 earlier, Your Honor, just for the record, we object to that 11 additional language because there's no issue in this case as 12 to whether any of the Trinity employees were acting within 13 the scope of their employment. 14 THE COURT: I understand that that's your 15 position, and I think it would be pretty disingenuous for 16 the Defendants to argue now that there is a dispute about 17 course of employment. I don't think that prevents the Court 18 from giving that instruction. 19 All right. Anything further on Page 8 from either 20 side before we move on? Plaintiff? 21 MR. CARPINELLO: No. 22 THE COURT: Anything further, Mr. Carpinello, on 23 Page 8? 24 MR. CARPINELLO: No, Your Honor. 25 THE COURT: Mr. Roach?</p>	<p style="text-align: right;">Page 20</p> <p>1 THE COURT: Any objections on Page 9 from 2 Defendants? 3 MR. ROACH: Yes, Your Honor, one, and this is on 4 Page 5 of our Docket 569 written objections. It's an 5 objection with the submission of the damages instruction 6 that would allow the Plaintiff to obtain an award of damages 7 greater than zero because there's no evidence in the record 8 to justify such a recovery, and that they've failed to 9 provide any evidence by which the jury may ascertain the 10 actual value of the ET-Plus. Further, that it constitutes 11 an incorrect statement of the law because it relieves Harman 12 of its burden of proof on damages. The record does not 13 provide a means to ascertain the market value of the ET-Plus 14 that would constitute a failure of proof by Harman. 15 THE COURT: So you're asking, Mr. Roach, for me to 16 instruct the jury this morning that the damages must be 17 zero? 18 MR. ROACH: No, Your Honor. 19 THE COURT: What are you asking? 20 MR. ROACH: To just eliminate the line -- well, I 21 guess I am. I think you're right. I think you're right, 22 Your Honor, I am. 23 THE COURT: All right. That objection is 24 overruled. 25 Anything else on Page 9 from either side before we</p>
<p style="text-align: right;">Page 19</p> <p>1 MR. ROACH: No, Your Honor. 2 THE COURT: All right. I'm carrying the direct 3 and directly matter, which laps over to the top of Page 9. 4 Other than that, any other disputes from Plaintiff or 5 objections from Plaintiff to anything on Page 9 of the 6 current version of the final jury instructions? 7 MR. CARPINELLO: Yes, Your Honor. We renew our 8 objection with regard to the calculation of damages. We 9 previously had argued to the Court the Aerodex standard that 10 we understand and believe where there's -- where there's a 11 false certification with regard to an article and the 12 certification is necessary to get payment for the article, 13 that the Plaintiff is entitled to the full amount of the 14 article and not a benefit of the bargain damages. 15 So to the extent that Your Honor references there 16 the -- you begin -- you begin the charge with damages there, 17 but we -- we renew our -- our objection based on Aerodex. 18 THE COURT: So your objection is my addition of 19 the language, less the value of what the Government actually 20 received? 21 MR. CARPINELLO: Yes, Your Honor. 22 THE COURT: All right. That objection is 23 overruled. 24 Any other objections on Page 9 from Plaintiff? 25 MR. CARPINELLO: No, Your Honor.</p>	<p style="text-align: right;">Page 21</p> <p>1 move on? 2 MR. CARPINELLO: No, Your Honor. 3 THE COURT: Anything else, Mr. Roach, from your 4 side on Page 9? 5 MR. ROACH: No, Your Honor. 6 THE COURT: All right. Moving to Page 10, are 7 there objections from Plaintiff? 8 MR. CARPINELLO: No, Your Honor. 9 THE COURT: From Defendants? 10 MR. ROACH: No, Your Honor. We -- we do have one 11 objection to an -- to an omission of something, I guess, on 12 Page 10. 13 THE COURT: All right. 14 MR. ROACH: This is on Page 6 of our written 15 objections. It concerns the claims counting issue which we 16 have discussed previously with Your Honor. Specifically, 17 the Defendants object to the failure of the instruction in 18 the verdict form to submit to the jury the task of 19 determining the number of claims and thus the amount of any 20 civil penalty per the pattern. 21 THE COURT: That objection is overruled. 22 Anything else on Page 10 from either side? 23 MR. CARPINELLO: No, Your Honor. 24 MR. ROACH: No, Your Honor. 25 THE COURT: Page 11, are there objections from</p>

<p style="text-align: right;">Page 22</p> <p>1 Plaintiff?</p> <p>2 MR. CARPINELLO: No, Your Honor.</p> <p>3 THE COURT: From Defendants?</p> <p>4 MR. ROACH: No, Your Honor.</p> <p>5 THE COURT: And the last page, Page 12, any</p> <p>6 objection from Plaintiff?</p> <p>7 MR. CARPINELLO: No, Your Honor, but we have two</p> <p>8 omissions that aren't on any particular --</p> <p>9 THE COURT: Well, let me hear from the</p> <p>10 Defendant on any page, and then I'll take up your</p> <p>11 remaining objections.</p> <p>12 Any objection on Page 12 from the Defendants?</p> <p>13 MR. ROACH: No, Your Honor.</p> <p>14 THE COURT: All right. What are your additional</p> <p>15 matters, Mr. Carpinello?</p> <p>16 MR. CARPINELLO: First, Your Honor, we object to</p> <p>17 the final jury instructions to the extent that they do not</p> <p>18 explain how the facts Plaintiff must prove his claim related</p> <p>19 to the facts of this case. And we provided a proposal to</p> <p>20 that regard that they don't explicitly correct that Your</p> <p>21 Honor's preliminary jury instructions ascribing Plaintiff's</p> <p>22 allegations.</p> <p>23 You recall, Your Honor, that we objected to the</p> <p>24 preliminary charge, because it's -- it described what</p> <p>25 Plaintiff intends to prove, and we felt that that was</p>	<p style="text-align: right;">Page 24</p> <p>1 Anything else from the Plaintiff, Mr. Carpinello?</p> <p>2 MR. CARPINELLO: No, Your Honor.</p> <p>3 THE COURT: Anything else on the final jury</p> <p>4 instructions from the Defendants, Mr. Roach?</p> <p>5 MR. ROACH: Your Honor, we have proffers that we</p> <p>6 have filed under Docket Order 568. Would that be</p> <p>7 appropriate to take up now?</p> <p>8 THE COURT: I've reviewed those proffers, and to</p> <p>9 the extent they haven't been already discussed, they're</p> <p>10 denied.</p> <p>11 MR. ROACH: Thank you very much, Your Honor.</p> <p>12 THE COURT: Let's turn next, Counsel, to the</p> <p>13 proposed verdict form. We'll do this in like manner. I'll</p> <p>14 ask if the Plaintiff has objection to anything on Page 1 on</p> <p>15 the proposed verdict form.</p> <p>16 MR. CARPINELLO: May I have just a moment, Your</p> <p>17 Honor?</p> <p>18 THE COURT: You may.</p> <p>19 (Pause in proceeding.)</p> <p>20 THE COURT: Apparently on the jury instructions,</p> <p>21 I've made both sides unhappy, which usually tells me I've</p> <p>22 done a pretty good job.</p> <p>23 MR. CARPINELLO: I have no problem with the</p> <p>24 verdict form, Your Honor. But I've been reminded by</p> <p>25 co-counsel that I did leave out, and if I had the Court's</p>
<p style="text-align: right;">Page 23</p> <p>1 erroneous, and we have urged upon the Court a statement to</p> <p>2 the jury as to what Plaintiff intend -- what Plaintiff's</p> <p>3 claim was in this case as it related to the False Claims</p> <p>4 Act.</p> <p>5 And so that's -- that -- that's the first</p> <p>6 omission, we believe.</p> <p>7 THE COURT: All right. That objection is</p> <p>8 overruled. What else?</p> <p>9 MR. CARPINELLO: The second objection on omission</p> <p>10 is that Your Honor has removed from its instructions any</p> <p>11 adverse inference with regard to Chris Harman, but the</p> <p>12 record, as it currently exists, has the Defendants asking --</p> <p>13 or stating in the form of a question three times that this</p> <p>14 Court has found that Chris Harman has intentionally</p> <p>15 destroyed documents.</p> <p>16 And we ask for a curative instruction with regard</p> <p>17 to the fact that the jury is left with the impression that</p> <p>18 Chris Harman has been sanctioned but not the Defendants. So</p> <p>19 we would ask the Court to disregard the line of questioning</p> <p>20 from Mr. Mann to -- directed at Chris Harman about a Court</p> <p>21 finding of intentionally spoliation and destruction of</p> <p>22 documents.</p> <p>23 THE COURT: I think the record is clear on the</p> <p>24 Court's analysis and action in this regard. Your objection</p> <p>25 is overruled.</p>	<p style="text-align: right;">Page 25</p> <p>1 indulgence, I would like to put on the record that we did</p> <p>2 object to the omission of any reference to the FHWA letters.</p> <p>3 Given the Defendants' continuous and central</p> <p>4 reliance upon the June 17, 2014 letter, the -- the failure</p> <p>5 of the Court to charge anything on that, we think, is -- is</p> <p>6 going to cause jury confusion. And we -- we've noted that</p> <p>7 previously to the Court.</p> <p>8 THE COURT: That objection is overruled.</p> <p>9 MR. CARPINELLO: No objection to the verdict form,</p> <p>10 Your Honor.</p> <p>11 THE COURT: All right. Is there objection to</p> <p>12 anything on Page 1 of the verdict form from the Defendants?</p> <p>13 MR. ROACH: Yes, Your Honor. And this is noted in</p> <p>14 our written objections, Docket 569, Your Honor.</p> <p>15 On Page 7, our objection to the verdict form, this</p> <p>16 is something the Court has considered previously.</p> <p>17 THE COURT: And that objection is overruled.</p> <p>18 MR. ROACH: Thank you very much, Your Honor.</p> <p>19 THE COURT: Any objection on Page 2 of the verdict</p> <p>20 form from the Defendant? Plaintiff's already indicated no</p> <p>21 objection to the form.</p> <p>22 MR. ROACH: No, Your Honor. That is our only</p> <p>23 objection to the verdict form.</p> <p>24 THE COURT: Okay. Well, having overruled that,</p> <p>25 then that appears to be all the matters in dispute with</p>

<p style="text-align: right;">Page 26</p> <p>1 regard to the proposed verdict form.</p> <p>2 Counsel, I will take a short recess to carry -- to</p> <p>3 consider the one carried objection that I did not rule on</p> <p>4 with regard to the final jury instructions. It's my</p> <p>5 intention to having resolved that, to then prepare enough</p> <p>6 copies for each Member of the Jury to have a copy of the</p> <p>7 final jury instructions and one verdict form, at which time</p> <p>8 I will then bring in the jury, give them my instructions,</p> <p>9 and hear closing arguments.</p> <p>10 Each side is afforded, under my pretrial order, 35</p> <p>11 minutes per side for closing. Certainly you're entitled to</p> <p>12 split your time among co-counsel, and if you want</p> <p>13 warnings -- because I will stop you when the time runs out,</p> <p>14 if you want warnings from the bench, simply ask for those.</p> <p>15 On the Plaintiff's side, who intends to present</p> <p>16 the closings for the Plaintiff?</p> <p>17 MR. CARPINELLO: Mr. Baxter, Your Honor.</p> <p>18 THE COURT: Both the initial and the final</p> <p>19 closing?</p> <p>20 MR. CARPINELLO: Yes, Your Honor.</p> <p>21 THE COURT: Who will present the closings from the</p> <p>22 Defendant.</p> <p>23 MR. SHAW: I will, Your Honor, Mr. Shaw.</p> <p>24 THE COURT: All right. You're not going to be</p> <p>25 sharing your time, Mr. Shaw?</p>	<p style="text-align: right;">Page 28</p> <p>1 Plaintiff, rather, that the Court carried and did not rule</p> <p>2 on during formal charge conference.</p> <p>3 The Court has determined that it should and it has</p> <p>4 in the final draft -- draft of the jury instructions deleted</p> <p>5 the word direct on the bottom of Page 8; directly on the top</p> <p>6 of Page 9. There may be one more place, but basically, I</p> <p>7 have granted the Plaintiff's objection and adjusted the</p> <p>8 charge accordingly.</p> <p>9 I've reviewed the authority relied on by the</p> <p>10 Defendants, principally the Longhi versus Lithium Power</p> <p>11 case, July 2009 opinion at 575 F3 458, authored by then</p> <p>12 Circuit Judge, now Chief Judge Carl Stewart of the Fifth</p> <p>13 Circuit. I note that this case was prior to the most recent</p> <p>14 statutory amendments to the False Claims Act. I note that</p> <p>15 this was both a presentment case and a false record case,</p> <p>16 and I note the language of the Court in the opinion, which,</p> <p>17 while not in my view, directly addressing this issue,</p> <p>18 provides clear guidance when the Court there says: The</p> <p>19 government argued that the False Claims Act requires proof</p> <p>20 only that the Defendants' false claims -- false statements</p> <p>21 could have influenced the Government's payment decision or</p> <p>22 had the potential to influence the Government's decision,</p> <p>23 not, the false claims actually did so. There the Court says</p> <p>24 we agree.</p> <p>25 Also, the Court says, under a discussion of the</p>
<p style="text-align: right;">Page 27</p> <p>1 MR. SHAW: No, Your Honor.</p> <p>2 THE COURT: Okay.</p> <p>3 MR. CARPINELLO: Your Honor, with regard to the</p> <p>4 matter you carried, we did send a brief -- a very brief --</p> <p>5 short brief --</p> <p>6 THE COURT: I've got it.</p> <p>7 MR. CARPINELLO: -- to the Court. Okay. Thank</p> <p>8 you.</p> <p>9 THE COURT: I've got it. I'll retire and look at</p> <p>10 that.</p> <p>11 In the meantime and before we bring the jury in,</p> <p>12 I'm going to direct both sides to bring in the Plaintiff's</p> <p>13 exhibits and the Defendants' demonstratives previously</p> <p>14 identified and discussed that you intend to use during</p> <p>15 closings. And when I get back on the bench, before I bring</p> <p>16 the jury in, we'll discuss fine-tuning as to where they're</p> <p>17 going to be prepositioned and how they're going to be moved</p> <p>18 around the courthouse.</p> <p>19 All right. With that, the Court stands in recess.</p> <p>20 (Recess.)</p> <p>21 (Jury out.)</p> <p>22 COURT SECURITY OFFICER: All rise.</p> <p>23 THE COURT: Be seated, please.</p> <p>24 All right. First, we're turning to the carried</p> <p>25 objection from the Defendants -- excuse me -- from the</p>	<p style="text-align: right;">Page 29</p> <p>1 materiality prong: The natural tendency to influence or</p> <p>2 capable of influencing test requires only that the false or</p> <p>3 fraudulent statements, either one; and then, two, have the</p> <p>4 ability to affect the Government's actions, even if this is</p> <p>5 the result of indirect or intangible actions on the part of</p> <p>6 the Defendants.</p> <p>7 That is all that is required under the test under</p> <p>8 materiality; therefore, the false or fraudulent statements</p> <p>9 have the potential to influence the Government's decision.</p> <p>10 I don't find anything that supports the</p> <p>11 Defendants' objection -- or response, rather, to the</p> <p>12 Plaintiff's objection, and I don't find that this case</p> <p>13 precludes the granting of the Plaintiff's objection to the</p> <p>14 charge. So as I stated earlier, I'm granting the</p> <p>15 Plaintiff's objection, and I've made that single adjustment</p> <p>16 to the charge.</p> <p>17 And Counsel should have delivered to them the</p> <p>18 final jury instructions with that and any other changes in</p> <p>19 final form.</p> <p>20 Let's turn to these -- Mr. Roach, I'm not going to</p> <p>21 go back through this again. We've had all the objections</p> <p>22 we're going to have.</p> <p>23 MR. ROACH: Okay.</p> <p>24 THE COURT: Do you understand what I've said?</p> <p>25 MR. ROACH: I have, Your Honor, and I understand</p>

1 that the Court is not going to entertain the objections to
2 the Court's revised charge; is that correct?

3 THE COURT: That's correct.

4 MR. ROACH: Thank you, Your Honor.

5 THE COURT: Okay. Counsel, I see the Plaintiff's
6 exhibits, the two vertically mounted heads, and I see the
7 Defendants' demonstratives, the two vertically mounted half
8 sections of respective heads. Let's talk about how they're
9 going to be used.

10 Mr. Baxter, you intend to use these as a part of
11 your first closing argument; is that correct?

12 MR. BAXTER: No. It will actually be the second
13 part, Your Honor.

14 THE COURT: All right. If it's going to be the
15 second part.

16 Mr. Shaw, you're going to use yours obviously
17 during your closing argument?

18 MR. SHAW: Yes, sir.

19 THE COURT: Do these need to be reversed so that
20 the Defendants are more at the front and can be easily
21 pushed out in front of the podium?

22 MR. SHAW: Judge, our suggestion to the Court was
23 going to be, if he's not going to use them, put ours first,
24 and then Mr. Mann and I will quickly situate them before I
25 start. Take 10 seconds or so, and then put them back at the

1 end of my -- my part of the closing argument, if that's okay
2 with the Court; or we'll do it however the Court wants to do
3 it.

4 THE COURT: Well, I'll agree with you they ought
5 to be reversed in their positioning. I also, though, think
6 that because they're demonstratives, once you're through
7 with them, rather than putting them back, I think between
8 your sitting down and Mr. Baxter coming up for his final
9 closing argument, they should be removed through the side
10 door and taken out of the courtroom.

11 Mr. Brown, Mr. Mann, associated counsel on the
12 Defense side can certainly do that in an unobtrusive way.
13 And then when Mr. Baxter gets up for his final closing
14 argument, their exhibits will be the only thing left, and he
15 can position them as you would have positioned your
16 demonstratives before he begins his second closing.

17 Is that understood?

18 MR. BAXTER: Yes, Your Honor.

19 MR. SHAW: Yes, sir.

20 THE COURT: All right. I want to say this to
21 those present including those in the gallery. The Court's
22 final instructions and Counsel's final -- and closing
23 arguments are, in large part, the pinnacle in this trial
24 process, in the Court's view. I want to make sure there is
25 no disruption from the gallery.

1 If anybody has a cell phone, make sure it's off
2 right now. And I don't want people -- once we start with
3 the final instructions and the closings, I don't want people
4 getting up, milling around, coming in and out of the
5 courtroom.

6 If you have something you don't -- if you don't
7 have something with you that you need from outside the
8 courtroom, go get it and come back now, because once I bring
9 the jury in, I want everybody to remain seated so that there
10 is no disruption from my instructions to the jury or
11 counsel's closing arguments from both sides.

12 All right. Let's reposition these.

13 (Pause in proceeding.)

14 MR. MANN: Is that okay, Your Honor?

15 THE COURT: That's fine.

16 MR. BAXTER: Your Honor, excuse me.

17 THE COURT: Yes.

18 MR. BAXTER: On that front, I have the two boards
19 I've used with Dr. Bligh that I might also want to use
20 during the final closing. We'll position those --

21 THE COURT: How do you intend to position those,
22 Mr. Baxter?

23 MR. BAXTER: I was going to put them right here on
24 an easel, Your Honor, if the Court please.

25 THE COURT: Are you going to do that the first

1 time or the second time?

2 MR. BAXTER: Second time.

3 THE COURT: All right. Well, when they remove
4 their demonstratives and your's are moved up, go ahead and
5 put your easel up. And then when you get ready to speak for
6 the second time, everything will be in place.

7 MR. BAXTER: Thank you, Your Honor.

8 THE COURT: All right. Is there anything else
9 from either party before we bring in the jury? Anything
10 further from the Plaintiff?

11 MR. CARPINELLO: No, Your Honor.

12 THE COURT: Anything further from the Defendants?

13 MR. SHAW: Nothing, Your Honor.

14 THE COURT: All right. Again, Counsel, let me
15 know if you want a warning on your time.

16 Do you want a warning on your first argument,
17 Mr. Baxter?

18 MR. BAXTER: At five minutes, if the Court please,
19 and then at one minute.

20 THE COURT: At five minutes left and one minute
21 left?

22 MR. BAXTER: Yes, Your Honor, on the first -- on
23 the first portion.

24 THE COURT: Well, how long do you want the first
25 portion to be? You've got 35 minutes.

<p style="text-align: right;">Page 34</p> <p>1 MR. BAXTER: I'm sorry, Your Honor.</p> <p>2 THE COURT: As I understand it, what you just</p> <p>3 asked me for is to tell you when 30 minutes was up.</p> <p>4 MR. BAXTER: And I apologize, Your Honor. I'm</p> <p>5 going to use 20 minutes in the first -- first portion.</p> <p>6 THE COURT: Okay. So you want a warning at 15 and</p> <p>7 at 19?</p> <p>8 MR. BAXTER: Yes, Your Honor.</p> <p>9 THE COURT: All right. 15 and 19 used.</p> <p>10 MR. BAXTER: Yes, sir.</p> <p>11 THE COURT: Mr. Shaw, what about you?</p> <p>12 MR. SHAW: If you can warn me at 10 and at 5.</p> <p>13 THE COURT: 10 minutes remaining and 5 minutes</p> <p>14 remaining.</p> <p>15 MR. SHAW: Yes, sir.</p> <p>16 THE COURT: All right. Let's bring in the jury,</p> <p>17 Mr. McAteer.</p> <p>18 COURT SECURITY OFFICER: Yes, sir.</p> <p>19 All rise for the jury.</p> <p>20 (Jury in.)</p> <p>21 THE COURT: Be seated, ladies and gentlemen.</p> <p>22 Ladies and gentlemen, you've now heard the</p> <p>23 evidence in this case. I will now instruct you on the law</p> <p>24 that you must apply. Each of you will receive a copy of</p> <p>25 these jury instructions for you to review when you retire in</p>	<p style="text-align: right;">Page 36</p> <p>1 the evidence means that you, the jury, must be persuaded by</p> <p>2 the credible or believable evidence that the claim is more</p> <p>3 likely true than not true. Sometimes this is talked about</p> <p>4 as being the greater weight and degree of credible</p> <p>5 testimony.</p> <p>6 In determining whether any fact has been proved by</p> <p>7 a preponderance of the evidence in the case, you may, unless</p> <p>8 otherwise instructed, consider the testimony of all</p> <p>9 witnesses, regardless of who may have called them, and all</p> <p>10 the exhibits received into evidence, regardless of who may</p> <p>11 have produced them.</p> <p>12 In determining the weight to be given to the</p> <p>13 testimony of a witness, you should ask yourself whether</p> <p>14 there was evidence tending to prove that the witness</p> <p>15 testified falsely concerning some important fact, or whether</p> <p>16 there was evidence that at some other time the witness said</p> <p>17 or did something or failed to say or do something that was</p> <p>18 different from the testimony the witness gave before you</p> <p>19 during the trial.</p> <p>20 You should keep in mind, of course, that a simple</p> <p>21 mistake by a witness does not necessarily mean the witness</p> <p>22 was not telling the truth as he or she remembers it, because</p> <p>23 people may forget things or remember things inaccurately.</p> <p>24 So if a witness has made a misstatement, you need</p> <p>25 to consider whether that misstatement was an intentional</p>
<p style="text-align: right;">Page 35</p> <p>1 a few moments. Accordingly, there's no need for you to make</p> <p>2 written notes on these instructions, unless you particularly</p> <p>3 want to do so.</p> <p>4 It's your duty to follow the law as I give it to</p> <p>5 you. On the other hand, as I have said previously, you, the</p> <p>6 jury, are the sole judges of the facts. Do not consider any</p> <p>7 statement that I have made in the course of the trial or</p> <p>8 make in these instructions as an indication that I have any</p> <p>9 opinion about the facts of this case.</p> <p>10 You're about to hear closing arguments from the</p> <p>11 attorneys. Statements and arguments of the attorneys are</p> <p>12 not evidence and are not instructions on the law. They're</p> <p>13 intended only to assist the jury in understanding the</p> <p>14 evidence and the parties' contentions.</p> <p>15 A verdict form has been prepared for you. You</p> <p>16 will take this verdict form to the jury room, and when you</p> <p>17 have reached unanimous agreement as to your verdict, you</p> <p>18 will have your foreperson fill in the blanks in that form,</p> <p>19 date it, and sign it. Answer each question in the verdict</p> <p>20 form from the facts as you find them. Do not decide who you</p> <p>21 think should win and then answer the questions accordingly.</p> <p>22 Your answers and your verdict must be unanimous.</p> <p>23 You must answer all the questions in the verdict</p> <p>24 form using the preponderance of the evidence standard. As I</p> <p>25 mentioned at the beginning of the trial, preponderance of</p>	<p style="text-align: right;">Page 37</p> <p>1 falsehood or a simple, innocent lapse of memory. And the</p> <p>2 significance of that may depend on whether it has to do with</p> <p>3 an important fact or with only an unimportant detail.</p> <p>4 While you should consider only the evidence in the</p> <p>5 case, you are permitted to draw such reasonable inferences</p> <p>6 from the testimony and exhibits as you feel are justified in</p> <p>7 the light of common experience. In other words, ladies and</p> <p>8 gentlemen, you may make deductions and reach conclusions</p> <p>9 that reason and common sense lead you to draw from the facts</p> <p>10 that have been established by the testimony and in evidence</p> <p>11 this case.</p> <p>12 Remember that the testimony of a single witness</p> <p>13 may be sufficient to prove any fact, even if a greater</p> <p>14 number of witnesses may have testified to the contrary, if,</p> <p>15 after considering all of the other evidence, you believe</p> <p>16 that single witness.</p> <p>17 There are two types of evidence that you may</p> <p>18 consider in properly finding the truth as to the facts in</p> <p>19 this case. One is direct evidence, such as the testimony of</p> <p>20 an eyewitness. The other is indirect or circumstantial</p> <p>21 evidence; that is, the proof of a chain of circumstances</p> <p>22 that indicates the existence or non-existence of certain</p> <p>23 other facts.</p> <p>24 As a general rule -- rule, the law makes no</p> <p>25 distinction between direct or circumstantial evidence, but</p>

<p style="text-align: right;">Page 38</p> <p>1 simply requires that you find the facts from a preponderance 2 of all of the evidence, both direct and circumstantial.</p> <p>3 When knowledge of a technical subject matter may 4 be helpful to you as the jury, a person who has special 5 training or experience in that technical field, called an 6 expert witness, is permitted to state his or her opinions on 7 those technical matters. However, you are not required to 8 accept those opinions. As with any other witness, it is up 9 to you to decide whether to rely upon it or not.</p> <p>10 In deciding whether to accept or rely upon the 11 opinion of any expert witness, you may consider any bias of 12 the witness, including any bias you may infer from evidence 13 that the expert witness may be or will be paid for reviewing 14 the case and testifying, or from evidence that he or she 15 testifies regularly as an expert witness and that his or her 16 income from such testimony represents a significant portion 17 of his or her overall income.</p> <p>18 Any notes that you have taken during this trial 19 are aids to memory only. If your memory should differ from 20 your notes, then you should rely on your memory and not your 21 notes. The -- the notes are not evidence. A juror who has 22 not taken notes should rely on his or her independent 23 recollection of the evidence and should not be unduly 24 influenced by the notes of other jurors. Notes are not 25 entitled to any greater weight than the recollection or</p>	<p style="text-align: right;">Page 40</p> <p>1 any reason, please give a written message or question to the 2 Court Security Officer who will bring it to me. I will then 3 respond as promptly as possible, either in writing or by 4 having you brought back into the courtroom so that I can 5 address you orally. I will always first disclose to the 6 attorneys your question and my response before I answer your 7 question.</p> <p>8 After you have reached a verdict, you are not 9 required to talk with the attorneys, the media, or anyone 10 about this case unless the Court orders otherwise or unless 11 you choose to do so.</p> <p>12 Contrary to my earlier instructions, which I gave 13 you repeatedly during the trial, it is now your sworn duty 14 to discuss the case among one another in an effort to reach 15 an agreement, if you can. Each of you must decide the case 16 for yourself, but only after full consideration of all the 17 evidence with the other Members of the Jury.</p> <p>18 While you're discussing this case, do not hesitate 19 to re-examine your own opinions and change your mind if you 20 become convinced that you were wrong. However, do not give 21 up on your honest beliefs solely because other -- others 22 think differently or merely to finish the case.</p> <p>23 Remember that in a very real way you are the 24 judges, the judges of the facts. Your only interest is to 25 seek the truth from the evidence in the case and to render a</p>
<p style="text-align: right;">Page 39</p> <p>1 impression of each juror about the testimony.</p> <p>2 When you retire to the jury room to deliberate 3 upon your verdict, you may take this charge with you. 4 You should first select your foreperson and then conduct 5 your deliberations.</p> <p>6 You may also request to review any exhibits which 7 the Court has admitted into evidence during the trial. If 8 you desire -- desire to do so, you should advise me by a 9 written note delivered to the Court Security Officer, and I 10 will then send that exhibit or those exhibits to you.</p> <p>11 Items shown to you during the trial as 12 demonstratives, however, are not exhibits but were used only 13 as jury aids to aid your understanding of the testimony. 14 Demonstratives are not evidence and may not be sent to the 15 jury during its deliberations.</p> <p>16 If you recess during your deliberations, follow 17 all of the instructions that the Court has given you about 18 your conduct during the trial. After you have reached your 19 unanimous verdict, your foreperson is to fill in the verdict 20 form with your answers to the questions, date it, and sign 21 it. Do not reveal your answers until such time as you are 22 discharged, unless otherwise directed by me. And you must 23 never disclose to anyone, not even to me, your numerical 24 division on any question.</p> <p>25 If you want to communicate with me at any time for</p>	<p style="text-align: right;">Page 41</p> <p>1 just and fair verdict after consideration of all the 2 evidence.</p> <p>3 Do not let bias, sympathy, or prejudice play any 4 part in your deliberations.</p> <p>5 A corporation and all other persons are equal 6 before the law and must be treated as equals in a court of 7 justice.</p> <p>8 You must give separate consideration to each claim 9 and each party in this case. Although there is more than 10 one Defendant in this action, it does not follow from that 11 fact alone that if one Defendant is liable to Plaintiff, all 12 Defendants are liable. Each Defendant is entitled to fair 13 consideration under all the evidence. Neither Defendant is 14 to be prejudiced should you find against the other.</p> <p>15 Unless otherwise stated, ladies and gentlemen, all 16 instructions I give to you during the case are as to the 17 Plaintiff and both Defendants.</p> <p>18 In this case, the Plaintiff must prove every 19 essential part of his claim by a preponderance of the 20 evidence.</p> <p>21 As I've instructed you before, the Plaintiff has 22 brought this case under the federal False Claims Act. In 23 order to prevail on his False Claims Act claim, the 24 Plaintiff must show by a preponderance of the evidence with 25 regard to the ET-Plus units at issue that the Defendants</p>

<p style="text-align: right;">Page 42</p> <p>1 knowingly made, used, or caused to be made or used a false 2 record or statement material to the false or fraudulent 3 claim.</p> <p>4 The term claim means any request or demand, 5 whether under a contract or otherwise, for money or property 6 that is made to a contractor, grantee, or other recipient if 7 the money or property is to be spent or used on the 8 Government's behalf or to advance a Government program or 9 interest. And if the Government: One, provides or has 10 provided any portion of the money or property requested or 11 demanded; or, two, will reimburse such contractor, grantee, 12 or other recipient for any portion of the money or property 13 which is requested or demanded.</p> <p>14 A claim may include a form, invoice, or any other 15 application for payment of the money.</p> <p>16 To satisfy his burden under the False Claims Act, 17 the Plaintiff must prove all of the following essential 18 elements by a preponderance of the evidence.</p> <p>19 One, Defendants made or used or caused to be made 20 or used a false record or statement.</p> <p>21 Two, Defendants knew that the record or statement 22 was false.</p> <p>23 Three, the record or statement was material to a 24 false or fraudulent claim for payment or approval by the 25 United States Government.</p>	<p style="text-align: right;">Page 44</p> <p>1 Defendants cannot be established merely by demonstrating 2 that the Defendants were negligent, careless, or foolish, 3 knowledge can be inferred if the Defendants deliberately or 4 intentionally blinded themselves to the existence of a fact.</p> <p>5 Reckless disregard is -- is an aggravated form of 6 gross negligence. Gross negligence means conduct beyond 7 ordinary carelessness, inadvertence, laxity, or 8 indifference.</p> <p>9 Reckless disregard does not involve simple 10 negligence or even inexcusable negligence. Instead, 11 reckless disregard involves carelessness approaching 12 indifference.</p> <p>13 The Defendants in the case are two related 14 corporations, Trinity Industries, Inc., and Trinity Highway 15 Products, LLC. Corporations can only obtain knowledge only 16 through their directors, officers, employees, or agents 17 whose knowledge is imputed to the corporation when their 18 directors, officers, employees, or agents act within the 19 course of their relationship for the benefit of the 20 corporation.</p> <p>21 However, knowledge as to a single instance of 22 conduct does not necessarily mean that the corporation had 23 actual knowledge as to other similar instances.</p> <p>24 Defendants claim that before the Plaintiff brought 25 this lawsuit under the False Claim Act, the United States</p>
<p style="text-align: right;">Page 43</p> <p>1 If the proof fails to establish any essential part 2 of the Plaintiff's claim by a preponderance of the evidence, 3 you should find for the Defendants as to that claim.</p> <p>4 A record or statement is false if it is an 5 assertion that is untrue when made or when used.</p> <p>6 A record or statement is material to a claim if it 7 has a natural tendency to influence or is capable of 8 influencing the making of a payment by the United States 9 Government.</p> <p>10 You may find that the Defendant knew that the 11 statements or records at issue were false and, therefore, 12 knowingly made, used, or caused to be made or used a false 13 record or statement if you find that the Defendant did any 14 of the following:</p> <p>15 One, Defendants had actual knowledge that the 16 records or statements were false;</p> <p>17 Two, Defendants acted in deliberate ignorance of 18 the truth or falsity of the information; or</p> <p>19 Three, Defendants acted in reckless disregard of 20 the truth or falsity of the information.</p> <p>21 Moreover, the Plaintiff is not required to prove 22 that Defendants specifically intended to defraud.</p> <p>23 Deliberate ignorance means that a Defendant 24 deliberately closed its eyes to what would otherwise have 25 been obvious to it. While knowledge on the part of the</p>	<p style="text-align: right;">Page 45</p> <p>1 Government, through various employees of the Federal Highway 2 Administration, already knew about the facts relating to the 3 statements, records, or claims that the Plaintiffs allege 4 were false concerning the ET-Plus system.</p> <p>5 In considering whether Defendants knowingly made 6 or caused to be made any false statement or record material 7 to a false or fraudulent claim, you must consider all direct 8 and circumstantial evidence concerning whether one or more 9 United States Government employees, with authority to act, 10 knew all of the relevant facts concerning the approval of 11 the ET-Plus system.</p> <p>12 In other words, if you find that the United States 13 Government employees with authority to act knew all of the 14 relevant facts, then you may consider that fact in 15 determining whether the Defendants submitted a false 16 statement or record that was material to a false or 17 fraudulent claim.</p> <p>18 In order to recover damages in a lawsuit under 19 the False Claim Act, the allegedly false or fraudulent 20 claim must cause the United States Government to pay an 21 amount of money that it would not have otherwise paid.</p> <p>22 In other words, for the Plaintiff to recover 23 damages, the Defendants' alleged false record or statement 24 must be a substantial and identifiable cause of the injury 25 to the United States Government. Proof of a violation of</p>

<p style="text-align: right;">Page 46</p> <p>1 the False Claim Act does not necessarily mean that the 2 Government was damaged. However, proof that the Government 3 was not damaged does not necessarily mean that there was no 4 violation of the False Claim Act.</p> <p>5 If you find that the Plaintiff has proven by a 6 preponderance of the evidence that the Defendants violated 7 the False Claim Act under all of the element -- elements 8 that you've been instructed on by me and you find that the 9 allegedly false or fraudulent claim caused the United States 10 Government to pay an amount of money that it would not have 11 otherwise paid, you must determine the monetary damages, if 12 any, sustained because of the violations.</p> <p>13 The damages that may be recovered under the False 14 Claim Act are equal to the difference between the amount of 15 money the United States Government paid for the ET-Plus end 16 terminals by reason of and in reliance upon the false 17 claims, records, or statements, less the value of what the 18 United States Government actually received.</p> <p>19 As with all of the issues to be addressed by you, 20 the jury, under the False Claim Act, the Plaintiff must 21 prove its damages by a preponderance of the evidence.</p> <p>22 Your award must be based on all the evidence 23 received during the trial and not upon speculation, 24 guesswork, or conjecture. However, the determination of a 25 damage award is not an exact science, and the amount of</p>	<p style="text-align: right;">Page 48</p> <p>1 MR. BAXTER: Thank you, Your Honor. May it please 2 the Court.</p> <p>3 Ladies and Gentlemen of the Jury, thank you very 4 much for your attendance this past week and your willingness 5 to hear this case. You know, frankly this is where we thank 6 the jury in every case, but this case is special. And as a 7 result of that, you got a special duty to consider all the 8 evidence. And it -- this time thank you for all the 9 attention you've paid during the trial. You know, we -- we 10 watch the jury like you watch us, and no one has strayed 11 off. No one's gone to sleep, and no one has not been 12 interested in this case.</p> <p>13 THE COURT: Let me interrupt you just a minute. 14 Defendants, pull your microphone down at the table. I think 15 that's causing some of the feedback.</p> <p>16 All right. Proceed, Mr. Baxter.</p> <p>17 MR. BAXTER: Thank you. This case is special, and 18 it gives you a special responsibility.</p> <p>19 You remember how we started off with this case, 20 and Mr. Ward over here said this case was about secret 21 changes that they made to their head and that they withheld 22 that information from the FHWA and that it was critical 23 information and that you -- you the jury are going to be the 24 very first people in America to hear the whole story about 25 what happened. And it turned out that played out to be</p>
<p style="text-align: right;">Page 47</p> <p>1 damages need not be proven with unerring precision. It's 2 proper to award a damages amount if the evidence shows the 3 extent of the damages as a matter of just and reasonable 4 inference.</p> <p>5 The Plaintiff has alleged that the government has 6 been damaged by a certain amount. You are not bound by that 7 amount. Based on the evidence presented at trial, you may 8 find that the United States Government was damaged by an 9 amount greater than or less than the amount specified or not 10 damaged at all. Moreover, you should not interpret the fact 11 that I have given you instructions about the Plaintiff's 12 damages as an indication in any way that I believe the 13 Plaintiff should or should not win this case.</p> <p>14 You're instructed that the Plaintiff may not 15 recover for violations of the False Claim Act accruing 16 before March the 6th, 2006, because any claims submitted 17 before that date are barred by the statute of limitations.</p> <p>18 Ladies and gentlemen, you've heard the evidence 19 about the Plaintiff and the Defendants' alleged lobbying 20 efforts or political contributions. Such conduct is not 21 illegal. To the contrary, lobbying and making political 22 contributions are constitutionally protected activities.</p> <p>23 At this time, we will hear the first closing 24 argument from the Plaintiff.</p> <p>25 Mr. Baxter, you may proceed to the podium.</p>	<p style="text-align: right;">Page 49</p> <p>1 true.</p> <p>2 But we heard something in the opening voir dire -- 3 remember when we gave statements during voir dire -- from 4 Trinity's lawyer. And here's what he said. He said, now, 5 first the important information that was needed by the 6 Federal Highway Administration was given to them. And, of 7 course, you now know even they say that's wrong. And then 8 he says testing was done by Texas A&M, and over a 70-page 9 report was sent to the Federal Highway Administration 10 showing that this product you see on the screen met crash 11 standards that have been set out by the Federal Highway 12 Administration.</p> <p>13 And I was struck with that at the time because I 14 had already had a preview of the evidence. And I knew that 15 wasn't right. And remember what he said, we've told you the 16 truth, and then he changed it to say, well, we better had 17 told you the truth. And it turns out they didn't.</p> <p>18 They didn't in 2005, and they haven't in this case 19 because the report they sent contained no mention of the 20 head that they changed that is now the crux of this lawsuit. 21 And if that's not right, I suspect they'll come up here and 22 correct me if there was one word -- one word about that head 23 in that report they sent, that 70-page report they were 24 proud of when we started just a week ago today, that they 25 said contained all the information they needed, and it turns</p>

<p style="text-align: right;">Page 50</p> <p>1 out that was simply untrue.</p> <p>2 Now, where did this case really start? Well, it</p> <p>3 started with a -- an email. It started with an email.</p> <p>4 PX-133. And by the way, the Judge will tell you that if you</p> <p>5 want exhibits -- I think he has told you, simply send a note</p> <p>6 out and he will give you the exhibits. If you want all the</p> <p>7 exhibits, say you'd like to have them all, and he'll send</p> <p>8 them all in there to you.</p> <p>9 But when you get them, look at this email. And</p> <p>10 what does it say? It says: Is there a way we can save</p> <p>11 money on the ET-Plus? Not can we make it better. Not we</p> <p>12 need improved performance. Not that it's having problems</p> <p>13 and we need to fix it, it was all about saving money. And</p> <p>14 they did the math, said they could come up with \$250,000 in</p> <p>15 five years. That was the savings they wanted to get. And,</p> <p>16 of course, there is the reusability issue that we'll talk</p> <p>17 about later.</p> <p>18 And then they said something that has plagued them</p> <p>19 and plagued Texas A&M ever since. If TTI agrees, I'm</p> <p>20 feeling that we could make the change with no announcement.</p> <p>21 We did pretty good with that in the TRACC changes. Now, all</p> <p>22 of a sudden they don't know what the TRACC changes are and</p> <p>23 they can't tell us about that. But we do know that right</p> <p>24 from the get-go, they wanted to make these changes and not</p> <p>25 tell anybody. And that's how it played out. That's exactly</p>	<p style="text-align: right;">Page 52</p> <p>1 The problem is when they're on that phone call, they</p> <p>2 didn't say one word, not one, that we're going to</p> <p>3 test a new head and the head's going to be changed</p> <p>4 and we're going to make significant changes and</p> <p>5 we're going to see how it does. Not the first word.</p> <p>6 We asked Mr. Mitchell, we said: Did you tell</p> <p>7 the FHWA you're going to change it?</p> <p>8 And he says: No, we didn't.</p> <p>9 We asked -- the next line, if we can. We asked</p> <p>10 Dr. Butth: Is it fair to say the FHWA knew nothing about it</p> <p>11 when they said yeah, use that little car? Did they know</p> <p>12 anything about a new head, did they?</p> <p>13 As far as I know, they did not.</p> <p>14 And so the second plan -- part was we're going to</p> <p>15 have a conversation with the FHWA and we're going to have</p> <p>16 this test on something else and we're going to sneak the</p> <p>17 prototype in and we're going to use it, but we're not going</p> <p>18 to tell them in advance, and they didn't.</p> <p>19 Well, what did they do then? They had the crash</p> <p>20 test. Remember the crash test they're proud of?</p> <p>21 Mr. Diaz, can you play that crash test for us?</p> <p>22 Here it is. This is the 2005 crash test. Watch</p> <p>23 this car. Now, that's a test that TTI said: Oh, it passed</p> <p>24 with flying colors. We're very proud of that test. And</p> <p>25 they've been proud of it ever since.</p>
<p style="text-align: right;">Page 51</p> <p>1 what happened in this case, and that's why there are false</p> <p>2 claims that are filed.</p> <p>3 Well, it started there, and then we found out --</p> <p>4 we found out from Dr. Bligh and we found out from Dr. Butth</p> <p>5 Were you having problems out there? And as he said under</p> <p>6 oath, if you'll go back to Dr. Bligh just a second -- we did</p> <p>7 not have indications of problems. And when I got Dr. Butth</p> <p>8 on the stand and they put him up there, I didn't even call</p> <p>9 him, we asked him, are there any complaints? And he said</p> <p>10 not to me, no, sir. How about to Trinity? Well, if there</p> <p>11 were any, we didn't hear about them, Trinity. So all the</p> <p>12 changes were made not to make the product better, but to</p> <p>13 save Trinity money.</p> <p>14 Later on, they came up with this wobble excuse,</p> <p>15 and said, where are the wobble tests? Where are the</p> <p>16 complaints? Did people out there say these things were</p> <p>17 failing? Did you ever fix them?</p> <p>18 And Dr. Butth, you want to know the truth, you just</p> <p>19 asked Butth. He said, no, there weren't any complaints. It</p> <p>20 was doing fine. But we were going to, quote, improve it.</p> <p>21 Well, what did they do? They had a -- they had a</p> <p>22 conversation with the FHWA, and they said we're going to</p> <p>23 conduct some tests because we're going to raise the height</p> <p>24 of the guardrail. Remember those conversations? They --</p> <p>25 they were all proud they got on the phone with the FHWA.</p>	<p style="text-align: right;">Page 53</p> <p>1 Here's the problem. When they sent the report to</p> <p>2 the FHWA, the thing that they're getting to pass or fail is</p> <p>3 not the new head, but whether or not the guardrail has been</p> <p>4 raised to 31 inches. And when that car lands out in the</p> <p>5 middle of the interstate, remember I asked Dr. Butth about</p> <p>6 that? And I said, did that give you any concern? He said:</p> <p>7 No, it didn't concern us. And it didn't. They didn't care.</p> <p>8 What they need to do --</p> <p>9 And let me see the -- Slide No. 10, if I could,</p> <p>10 please, Mr. Diaz?</p> <p>11 Here's what they needed to do -- and go to that</p> <p>12 one right there.</p> <p>13 This is what Dr. Butth said their situation was:</p> <p>14 TTI design does not need their acceptance because we're not</p> <p>15 manufacturing and selling them and putting them on the road.</p> <p>16 But we always do what we can to make the sponsor happy.</p> <p>17 And when they got those tests, when they went to</p> <p>18 Trinity, can you imagine how happy they were that the plan</p> <p>19 was working? No announcement, no mention, not a word.</p> <p>20 Well, we asked them: Did, in fact, after you ran</p> <p>21 this test, and even though you've got this car failing --</p> <p>22 remember we -- we showed you in 156 --</p> <p>23 Can you show -- can you show that, Mr. Diaz, the</p> <p>24 page from 156, where it says that it failed?</p> <p>25 But their excuse is, well, we told the Federal</p>

<p style="text-align: right;">Page 54</p> <p>1 Government that it failed. But they didn't. What they told 2 them was we're going to raise the guard height. That didn't 3 have anything to do with how the head was working. But it 4 failed, and it ran it out in the interstate. And I asked 5 Dr. Buth: Well, if that's true and a 18-wheeler comes along 6 as you're spinning out there, what happens to the soccer 7 team? 8 And he goes: No concern of ours. 9 Well, that's not quite true. He said something 10 else. He said -- 11 If I can go to Slide 11, Mr. Diaz? 12 I said, well, let me ask you this: Wouldn't it be 13 the prudent thing to do if you're really worried about 14 safety -- and remember, that's their paramount concern -- is 15 say let's do it again and let's see if -- if we can solve 16 the problem? 17 He said: Well, if we had an idea how to solve 18 that issue, I guess we could have done that. 19 So what happened was you didn't have any idea how 20 to solve the problem with the new changed heads or whatever 21 you want to call it. 22 Not at that time, I don't. 23 I said: How about now? 24 He said: Well, I'm retired. 25 I said: Well, how about when you retired, was</p>	<p style="text-align: right;">Page 56</p> <p>1 Well, we asked Mr. Mitchell: You said there was a 2 mistake in the document? There was a mistake in the letter 3 that Don Johnson sent; is that correct? Yes. They were 4 willing to say you changed five to the four and the other 5 changes. He says: It's included in none of the changes, 6 right? And he said: That's correct. 7 Trinity admits, as they have to, that they sent it 8 off with no mention of the changes, and that's, of course, 9 false. And we asked him later on if what he was submitting 10 wasn't false, and he said yes. 11 If I can go to Slide 14, Mr. Diaz. 12 We asked Dr. Buth, he said: Well, we apologized 13 for that. It's not clear to me if he apologized to the 14 driver of this car, but he apologized to someone. And he 15 said we shouldn't have left it out. It should have been in 16 there. So what they sent was false, and what they did 17 afterwards was covered up. 18 Now, we asked at Slide 15, Mr. Diaz -- we asked 19 Mr. Mitchell: If it wasn't true that the very first time 20 the FHWA knew anything about the changes was when Mr. Harman 21 blew the whistle? And Mr. Harman out here has brought this 22 lawsuit on behalf of the taxpayers of the United States of 23 America, and he has spent the last couple of years of his 24 life trying to get some action done. And he can't get it at 25 the FHWA, and we know why, but he can get it here. But he's</p>
<p style="text-align: right;">Page 55</p> <p>1 anybody working on that? 2 Not that I know of. 3 And so the problem was they wanted to make the 4 sponsors happy. And of course, they're all getting 5 royalties off of it. They're cashing those royalty checks 6 monthly. They're getting rich. They don't want a problem. 7 They want to make Trinity happy. 8 So what do they do? They send it despite the 9 requirements of the Federal Highway Administration. 10 And let me see those just a second, Mr. Diaz. 11 It's Slide 12, and we took these right out. 12 Here's the thing they're required to do in the 13 test. Describe the test article fully, record key 14 parameters, prepare a comprehensive test report, prepare 15 engineering drawings of the test article, and describe any 16 variation in the test article from the engineering drawings. 17 And they did none of that, not a word. And they 18 want to tell you what they sent the Government wasn't false 19 Well, they sent it to Trinity. And Trinity get its, and 20 they read it. We know at least two executives read it. I 21 expect there are more. And they said: Gosh, not a word 22 about the changed head. Let's send this puppy in. And they 23 did. And they kept quiet until 2012. 24 Remember the object was to get accuracy in the 25 report? Absolutely none of that.</p>	<p style="text-align: right;">Page 57</p> <p>1 the one that blew the whistle. 2 And remember we discussed with you in voir dire, 3 he doesn't have to be an employee. And Judge Gilstrap has 4 told you that. All he has to do is conduct an investigation 5 and learn facts and submit them to the agency and try and 6 get something done, which they wouldn't do. But he is the 7 hero in this case, and we'll talk more about that later. 8 We also asked Mr. Mitchell at Slide 16 who 9 certifies. And remember all that testimony that 10 Mr. Carpinello got out of Mr. Mitchell and -- about we 11 submit forms to the states and we certify it. And we asked 12 him: Who certifies it? 13 And he says: Trinity does. 14 And we asked him: Is it supposed to be 350 15 compliant? 16 And he says: Yes. 17 Have we sent it to the states? 18 And he says: Yes. 19 Next slide. 20 We -- we got one of these letters out. This is 21 just one of many that went to the states, and it says to 22 Vermont: The head we're sending you is the exact identical 23 in composition and test properties of that approved by the 24 FHWA. And that is false. And what they told the FHWA was 25 false. And what they told all of these states is false, and</p>

1 we finally asked him: So it's false -- is it false, sir?

2 And he finally said: Yes. In fact, he said it twice.

3 You remember the third time, he balked. And he
4 said: Well, I wouldn't say false. I'm saying it's
5 inaccurate. Well, isn't that false? No, no. It's
6 inaccurate. But it was false, and it is false. All of
7 those --

8 THE COURT: You've used 15 minutes, Counsel.
9 You've used 15 minutes.

10 MR. BAXTER: Thank you, Your Honor.

11 And all those forms they sent the Federal
12 Government were false -- absolutely false.

13 Now, we asked Mr. Stiles: Whose fault would it
14 be, TTI's or Trinity? He fessed it up. He's retired. He
15 doesn't have a dog in the fight anymore. He said: Well,
16 it's Trinity's fault.

17 And then we get to the issue of the five failed
18 tests. You are the very first people in America to see
19 those five failed tests. You saw them before the FHWA ever
20 heard about them. As we told you, you're going to hear
21 evidence that nobody else has heard. And thanks to Judge
22 Gilstrap's discovery orders, we got those tests and we were
23 able to present them to you.

24 And we know that there is one thing that's in
25 common with all the tests, and that is the head failed.

1 Now, here's what I kept waiting for, when
2 their expert said, oh, pay no attention to those tests
3 because it's experimental; it's different posts; it's
4 got a different bracket.

5 So I kept waiting for him to say, and I'm going to
6 show you the crash test, and we're going to stop it, because
7 we've got all kinds of views; we've got the fast motion;
8 we've got the slow motion; we've got the side views. You
9 just saw one of the -- one of the videos. There are a bunch
10 of them about these crash tests.

11 And he could put it up there and say stop the
12 action. See that post right there? That post jumped up in
13 that head and jammed and crammed it down, and that's why it
14 failed. That bracket failed. Look at that bracket. That's
15 terrible. It didn't have anything to do with the head.
16 Not one time did he ever try to explain to you why those
17 tests failed, other than waving his arms and say, well, it's
18 a different system.

19 But you know what? It's not a different system.

20 Let me see the next one, Mr. Diaz.

21 You heard Dr. Coon testify, and you didn't hear a
22 word of contradiction from their expert, Malcolm Ray, that
23 if you run a tangent test -- and that's the test we've all
24 talked about that runs parallel to the road that this head
25 is on out there everywhere across America -- it's got to

1 pass not only head-on, but it's got to pass 15 degrees
2 toward the roadway.

3 So if a car impacts it anywhere from 0 to 15
4 degrees, it's got to work. That's the FHWA requirement that
5 Dr. Coon testified about that you didn't hear a word from
6 them about. Never contradicted it.

7 So what happens? On the five failed tests, they
8 came in, even though hit the head at 0, in relation to the
9 road, it was at 6 degrees. And that's why those tests are
10 so critical, because they're exactly like the tangent test.
11 The head should have performed exactly the way you would
12 expect it to be performing with that test.

13 Let me see the crash test just a second, Mr. Diaz.

14 You've seen it. You'll see it again, I suspect,
15 but here's what happened. And it failed, and they've yet --
16 they've yet to tell the Federal Government about these
17 tests. They haven't sent them copies. They haven't said a
18 word. They haven't done anything to notify the FHWA about
19 the failed crash tests. And that, ladies and gentlemen, is
20 fraud by omission.

21 They also didn't change them about -- tell them
22 about the other changes in the head. It just isn't a 5-inch
23 to the 4-inch. It's inserting it into the throat. It's
24 changing the length of the channels. And it's changing the
25 angle of the extruder plate head. They've yet ever to tell

1 them about that. And all they've done is be dishonest with
2 the Federal Government.

3 Now, my time is about up to open, but I think
4 there are a few answers --

5 THE COURT: You've used 19 minutes.

6 MR. BAXTER: Thank you.

7 -- that the other side ought to answer. Let me
8 tell you what I think they are. Make notes if you wish.
9 Why did everyone at Trinity and TTI fail to tell the FHWA
10 about the changes to the head? They ought to explain that
11 to you.

12 No. 2, who's telling the truth in this case, Mr.
13 Mitchell or Dr. Sicking?

14 Remember, it's -- it's a test of credibility. And
15 who did you believe in that exchange? And they have an
16 obligation to tell you who they believe, whether Mitchell
17 told the truth or Dr. Sicking told the truth.

18 Third question is, why didn't Trinity do an
19 investigation when they found out about the accidents? And
20 why do they refuse to do so even today?

21 The fourth question is, why didn't Trinity tell
22 the FHWA about the five failed tests? They owe you an
23 answer for that besides just waving their arms and saying it
24 was experimental.

25 And how does Trinity explain why the ET-Plus head

<p style="text-align: right;">Page 62</p> <p>1 had no problems prior to 2005, and now spears cars and 2 people? And the only thing we know that changed were the 3 changes made in 2005.</p> <p>4 And the last question is, why didn't they just put 5 all this to rest and invite the FHWA down to A&M, say here's 6 our head; here's a pickup truck; we're going to crash it; it 7 will work like a charm.</p> <p>8 They won't do it then; they won't do it now. And 9 those are questions they owe you answers to.</p> <p>10 I'll look forward to talking to you again in just 11 a few minutes.</p> <p>12 Thank you, Your Honor.</p> <p>13 THE COURT: All right. Defendants may now present 14 their closing argument.</p> <p>15 MR. SHAW: Judge Gilstrap, as a preliminary 16 matter, we would object to Mr. Baxter and the Plaintiff's 17 failure to completely open. We're entitled to hear what the 18 argument was going to be about damages, so we would note 19 that for the record.</p> <p>20 THE COURT: All right. Let's proceed with your 21 final argument.</p> <p>22 MR. SHAW: Thank you.</p> <p>23 Good morning, ladies and gentlemen. Like 24 Mr. Baxter, I also would like to thank you. It's been my 25 great pleasure and responsibility to be here on behalf of</p>	<p style="text-align: right;">Page 64</p> <p>1 The Court provides to you a verdict form in this 2 particular case in which he asked you, based upon the 3 preponderance of the evidence, to answer that particular 4 question. In doing so, he provides you other instructions 5 that you'll have an opportunity to review.</p> <p>6 The definition of knowingly, the definition of -- 7 of reckless disregard, you'll have a chance to review these. 8 And you'll ask yourself, what in this case was knowingly? 9 Where is the actual knowledge that Trinity Industries did 10 anything to deliberately deceive anyone?</p> <p>11 Where is the knowledge of reckless disregard, as 12 the Court tells you in this particular instruction, is an 13 aggravated form of gross negligence?</p> <p>14 Gross negligence, the Court tells you in his 15 instructions, means conduct beyond ordinary carelessness. 16 It means conduct other than inadvertence or mere negligence. 17 It is an elevated intentional act on Trinity's part. 18 That's what Mr. Harman has to prove. It does not involve 19 simple negligence. We know the answers to these particular 20 questions.</p> <p>21 Trinity has provided you the answers to these 22 particular questions as has the FHWA. The answer to the 23 question is absolutely not. There is simply no evidence of 24 this.</p> <p>25 Where is the false statement here that the ET-Plus</p>
<p style="text-align: right;">Page 63</p> <p>1 Trinity. And I will speak on behalf of all the people who 2 are here on behalf of Trinity that -- hopefully, you have 3 seen the sincere -- sincerity in which we have produced our 4 case to you in this particular matter.</p> <p>5 We're now at a part of the trial where I'm -- the 6 last time I'm going to get a chance or opportunity to talk 7 to you. I'm not going to have an opportunity to visit with 8 you anymore and tell you what we believe the evidence has 9 been in this particular case.</p> <p>10 But I go back to the opening statement, and what I 11 told you in the opening statement initially was what? This 12 was a False Claims Act case. That's what it was about. And 13 it was about whether or not Trinity intentionally lied or 14 misrepresented anything to the Federal Government so they 15 could get federal reimbursement.</p> <p>16 We know now, as the Judge has instructed you in 17 this particular case, that this is a False Claims Act case. 18 In fact, he has told you in the instructions, when you get a 19 chance to review them, that in order to prevail on this 20 False Claims Act, the Plaintiff must show by a preponderance 21 of the evidence, because he bears the burden of proof that 22 with regard to the ET-Plus units at issue in this case, that 23 the Defendant knowingly -- knowingly made, used, or caused 24 to be made or used a false record or statement material to 25 the false or fraudulent claim.</p>	<p style="text-align: right;">Page 65</p> <p>1 is not 350-compliant?</p> <p>2 We know that it is 350-compliant. How do we know 3 this? We know this, because on June 17th of this particular 4 year -- this particular year, less than three or four months 5 or so ago, the FHWA answered these particular questions and 6 said to us that, in general, the FHWA's eligible -- 7 eligibility letters confirm that roadside safety hardware 8 was crash-tested to the relevant standards.</p> <p>9 The FHWA tells us that -- the FHWA tells us that 10 an unbroken chain of eligibility for federal-aid 11 reimbursement has existed since September 2nd of 2005, and 12 the ET-Plus continues to be eligible then as it is today.</p> <p>13 So from the very beginning of the introduction of 14 the ET-Plus, it has remained eligible for federal 15 reimbursement. As we sit here right now, knowing everything 16 that Mr. Harman is complaining about in this particular 17 case, the Federal Government is continuing to expend federal 18 dollars on that.</p> <p>19 Ask yourself, how has anything that Trinity has 20 done been knowingly, been deliberate with an intent to lie, 21 if, in fact, they know and continue to do it?</p> <p>22 Ask yourself, when you're looking at the 23 questions, how can anything that they have done been 24 material to their decision, if, in fact, they already know?</p> <p>25 Ask yourself, does it make any sense at all that</p>

<p style="text-align: right;">Page 66</p> <p>1 the very agency that Mr. Harman says is -- was lied to in 2 this particular case continues to pay on the ET-Plus, 3 knowing the allegations that he has made? 4 We know Mr. Harman wants to ignore the FHWA's 5 pronouncements. He doesn't want to talk to you about 6 that. He would rather talk to you about things that, 7 quite frankly, I respectfully believe don't have 8 anything to do with whether or not there has been an 9 intentional lie. He doesn't want to talk to you about 10 what the FHWA, the authoritative agency that's involved 11 in approving these particular devices -- he doesn't want 12 to do that. 13 Rather, what he wants to do is talk about things 14 that don't have to do with the factual issues I respectfully 15 submit that are before you. 16 What has really happened here? 17 I want to walk through the evidence with you very 18 briefly of what we know from the evidence. We know, if we 19 look at the timeline that I've had put up on the board, that 20 the FHWA issued an acceptance letter for the ET-Plus in 21 January of 2000. We know that. We know that. 22 We know that -- in the spring of 2003, TTI, Texas 23 A&M, the owner of this particular device, the inventors, the 24 designers, the patent owners, we know that they proposed the 25 use of a 4-inch guide channel.</p>	<p style="text-align: right;">Page 68</p> <p>1 the 4-inch head being crash-tested. 2 Ask yourself -- in this grand conspiracy that 3 Mr. Harman is alleging, ask yourself about the -- the -- the 4 unsultry (sic) conduct that he is alleging in this 5 particular case, why -- why is there so much evidence of it 6 out there, the -- what was going on? 7 We see the extruded rail in this particular point. 8 We hear Mr. Harman talking about in this particular case, 9 well, there was no 4-inch guide channel that was involved in 10 this particular test. That's kind of gone away, but 11 throughout the trial, you kind of heard little -- a little 12 mumbling that, oh, well, it never was tested. 13 What do we have in front of you? 14 You have the scaled diagram, the scaled picture 15 from TTI, when they went back to look in this, showing that 16 at that particular point in time at the crash test in 2005, 17 a 4-inch guide channel was there. 18 Ask yourself -- ask yourself, what is the 19 motivation for TTI or Trinity to not disclose that a 4-inch 20 guide channel was tested? What's the motivation to it? 21 It passed. The test was successful. It passed in all ways, 22 except for the area that Mr. Baxter pointed out to you. And 23 guess what? They disclosed that, too. 24 We know that Nick Artimovich knows that it was 25 crash-tested in 2005. Why do we know this?</p>
<p style="text-align: right;">Page 67</p> <p>1 How do we know that? We know that, because there 2 are emails that were around at that particular time. We 3 know that email from Hayes Ross -- you see the date, 4 February 27th, 2003. This was read to you in the trial: 5 We are thinking impact performance of the head may be 6 improved. Do you know of any reasons why this should not be 7 done? 8 We know that. We know that in May of 2005, TTI 9 crash-tested, pursuant to NCHRP 350 standards, a prototype 10 head that was built for them. We know this. How do we 11 know? 12 Wade Malizia came in and testified that he was 13 asked to make a head. He explained to you how he put that 14 head together. He explained to you what the changes that 15 were made to that particular head so that it could be 16 fabricated. He explained to you directly and concisely, we 17 took a 5-inch channel off and we put a 4-inch channel in. 18 We stuck it into the chute so it could match and fit 19 three-quarters of an inch, and we then used a fillet weld. 20 We know this. 21 We know that the ET-Plus at that particular time 22 was crash-tested. How do we know that? 23 Because we have documentation that it was 24 crash-tested at that particular time. Here you see in front 25 of you is the crash test of that particular event. That is</p>	<p style="text-align: right;">Page 69</p> <p>1 Because he has sworn testimony to that fact. What 2 does he say to you? 3 First of all, the 4-inch channel width is an 4 external measurement, but one action I did take was to 5 essentially replicate what I believed the TTI researchers 6 did, and that was to view the video documentation of the 7 crash testing of the original ET-2000, which is in our file 8 from 1998, and the video of the testing. I took a 9 screenshot. 10 And what does he say in the last part of this 11 testimony? 12 It is clear to me that the tests done in 2005 use 13 a terminal head with a feeder channel that was narrower than 14 the one conducted in 1998. 15 We know -- we know what they did at that 16 particular point in time. 17 Mr. Harman talks about splice bolts. You talk 18 about -- and you may remember the demonstration that 19 Mr. Baxter and Mr. Carpinello and the other lawyers did 20 where they will take a bolt and they'll drop it into these 21 heads that Dr. Coon somehow has found in this particular 22 country or have been provided to him. 23 Ask yourself, where have you heard any testimony 24 that the appropriate testing for any type of thing involves 25 dropping heads into heads. That's not the type of testing</p>

1 that is contemplated by the NCHRP 350.

2 Rather, what is contemplated are the testing
3 that -- the dynamic testing that -- the crash-testing in
4 2005. What do we see on the pictures here?

5 We see the extruded guardrail with the splice
6 bolts going through the guardrail at that particular time.
7 We know that splice bolts are extruded through there. We
8 know this.

9 Mr. Harman knows this as well. He raised this
10 with the FHWA many -- many years ago, and they still have
11 continued to approve this particular product.

12 There is the other splice bolts of the extruded
13 guardrail. There is the splice bolts of the excluded
14 guardrail as it goes through the extruder head.

15 We know that TTI successfully crash-tested this,
16 and we know they submitted a crash-testing report to
17 Trinity. In that, they say to Trinity that -- they say to
18 Trinity in the crash-testing report that it is our
19 understanding that this report is sufficient for obtaining
20 FHWA's approval for use of the terminal on the national
21 highway system.

22 This is the report that was provided by TTI to
23 Trinity so that they can then send it to the Federal
24 Government. Don't forget, ladies and gentlemen, that the
25 report is more than just an omitted drawing. In the report

1 something that -- about a drawing, when they, in fact, gave
2 the drawing to the people who are responsible for the
3 crash-testing together.

4 We know that after this event, everything goes
5 as it's intended to go. The product is manufactured and
6 is placed into the road -- onto the roadway.

7 We know in September of '011 (sic), Trinity and
8 TTI bring a patent infringement case against Mr. Harman's
9 company. We know at that time, in January of 2012, Mr.
10 Harman meets with the FHWA, and he provides to them a copy
11 of a SPIG presentation. He provides to them physical heads
12 to examine. We know from his document that is in evidence
13 in front of you that he compiled the failure assessment of
14 guardrail extruder terminals. He tells the FHWA everything
15 that he has told you in this trial.

16 He tells them the exit gap's less than 1.35 inch,
17 it may fail in a guardrail splice. He tells the FHWA that a
18 1.5 inch bolt has a hard time getting through a 1.17 inch
19 gap. He talks about the redesign in current production. He
20 talks about the reduced feeder chute with width from five to
21 four inches. He talks about reduced rail height from 15.375
22 to 14.875 inches. He talks about inserting rails .75 inches
23 deep into the extruder throat. He talks about changes to
24 critical dimensions within the extruder throat. He talks
25 about that this can drastically impact performance. He

1 there is data; there are videos; there are photos. You will
2 have the crash test report, if you would like to look at it.
3 It is all the analysis that takes place.

4 Why is this important?

5 It's important because you hear conversations in
6 this case -- or hear argument in this case that somehow or
7 another that the drawing was left out. You know from the
8 testimony that A&M says, yes, we left the drawing out, but
9 guess what? What do we know?

10 We know that Trinity -- we know that Trinity
11 provided A&M a drawing before the crash test report was ever
12 put together. We know that Trinity, in connection with this
13 event, provided the drawing. You have the documents to that
14 effect in front of you, the -- the email from Dean Alberson
15 to Gene Buth, forwarding the drawing on to the people at
16 TTI.

17 It's kind of hard for me to understand how Trinity
18 is engaged in some intent to deceive the Federal Government
19 about a 4-inch guide channel, when, in fact, they are
20 providing the drawings to the people who were actually doing
21 the crash-testing, the people at TTI, the people who are the
22 experts on this particular subject matter, the people that
23 Trinity relies upon for their expertise.

24 It is -- it is hard for me commonsensically to
25 understand how Trinity is the company that being blamed for

1 talks about that this can cause throat lock. He talks about
2 the current production fails to feed. He talks about exit
3 gaps causing the guardrail to lockup in the extruder throat.
4 He talks about the current production of the ET-Plus failing
5 at the guardrail splice. All of this is documentation that
6 he provided to the FHWA.

7 He talks about it having exit gaps that will
8 throat lock in the extruder throat when impacted. It goes
9 on and on, the information that he gives to them.

10 What happens at that particular time? The FHWA
11 contacts Trinity. They find out that Mr. Harman is making
12 these allegations. What does Trinity do immediately? What
13 do they do? They begin their own investigation to try to
14 find out what has happened. This -- they try to find out
15 immediately what was going on. Mr. Mitchell, new to the job
16 at that particular time, three weeks or so, he tells you, it
17 occupied their time tremendously. That was their main
18 focus, trying to figure out what was happening.

19 What did they do? They met with Nick Artimovich.
20 They went through this presentation with him page-by-page.
21 They talked to the people at TTI. And what did they find
22 out? The individuals at TTI told them upon their
23 investigation, it appeared that they, TTI, had failed to
24 include a drawing -- failed to include a drawing. That's --
25 that's the intent to deceive the Government. That's the

<p style="text-align: right;">Page 74</p> <p>1 intent to deliberately seek taxpayer dollars for federal 2 reimbursement, that TTI forgot to include a drawing? That's 3 what Mr. Harman's case boils down to here? That's what it 4 boils down to?</p> <p>5 What did Mr. Smith tell Mr. Artimovich as part of 6 his investigation? Please find our cover letter summarizing 7 all the information that you want. Please find what we will 8 provide -- please confirm back to me that this provides you 9 all that you have requested and as it related to you.</p> <p>10 Mr. Harman -- Mr. Harman continues in this 11 particular front. He continues to talk to Mr. Artimovich. 12 He meets with Mr. Artimovich at his -- at his lawyer's 13 offices. He looks at heads that he has brought there. Mr. 14 Artimovich examines the heads. He measures the heads. He 15 photographs the particular heads.</p> <p>16 At that particular point in time, we know that the 17 FHWA investigates Mr. Harman's claims for months. They 18 review the crash tests.</p> <p>19 We know that Mr. -- Dr. Bligh tells Mr. Artimovich 20 in this same time period, January -- February 2012, I can 21 confirm on behalf of TTI that the feeder rails tested at the 22 end-on impact of the ET-Plus in 2005, which is the subject 23 matter of this letter, were four inches wide.</p> <p>24 Look what Mr. -- Dr. Bligh says in this third 25 paragraph. Let me, again, apologize for the inadvertent</p>	<p style="text-align: right;">Page 76</p> <p>1 letters confirm that roadside safety hardware was crash 2 tested to the relevant criteria, that those crash tests were 3 presented to the FHWA, and that FHWA confirmed that the 4 device met the relevant crash test criteria. October 10th 5 of 2014, just last week. We know that.</p> <p>6 What do the states say about these particular 7 matters? Terry Hale from New -- New York DOT: Yes, we 8 definitely use the ET-Plus. As with any terminal, there 9 will be certain accidents that do not have desirable 10 outcomes. All indications are that the ET-Plus is actually 11 one of the better performers.</p> <p>12 What do we know from Utah? We have had no 13 problems with the performance.</p> <p>14 What do we know from Arizona? We have had no 15 issues or concerns raised in the application of the ET-Plus 16 and treatment.</p> <p>17 What do we know from the surveys that are out 18 there from all of the state DOTs that have weighed in on 19 this particular issue? Maine, Michigan, Illinois, 20 Mississippi, Georgia, Iowa, Connecticut, Oregon, Montana, 21 Tennessee, Alaska, Kansas, North Carolina, South Dakota, New 22 Mexico, Indiana, Nevada. In fact, Nevada, you've heard the 23 discussions about -- with Mr. Mitchell during his testimony.</p> <p>24 What do they say September 29th? Nevada DOT is in 25 the process of adding this product back to our qualified</p>
<p style="text-align: right;">Page 75</p> <p>1 omission of this detail from the test report. Inadvertent 2 omission. What is the Court telling you about inadvertent 3 admissions? The Court is telling you in an instruction that 4 that does not make reckless disregard. That does not mean 5 gross negligence. It is an inadvertent omission that 6 occurred by TTI, not Trinity.</p> <p>7 We go back during the time period in which Mr. 8 Harman is talking with the FHWA. The FHWA issues a letter 9 confirming the ET-Plus eligibility, stating that there were 10 no reliable data indicating any performance issue. FHWA in 11 April of that year, again, indicates it has received no 12 complaints from the states for the past seven years about 13 the ET-Plus.</p> <p>14 Mr. Harman's own lawyer sends letters to the FHWA 15 that you have in front of you, detailing all of the 16 allegations that he has. We know that the FHWA then in June 17 of 2014 issues the letter that we talked about, which is the 18 official statement for you and the world and everybody else 19 to see as it's posted as the official policy of the FHWA 20 that the ET-Plus remains eligible and has so since September 21 2nd of 2005. And the ET-Plus continues to be eligible to 22 this day.</p> <p>23 And just two weeks ago, October 10th, they issued 24 yet another letter. And what do they say in the second box, 25 the one on the bottom, in general? FHWA's eligibility</p>	<p style="text-align: right;">Page 77</p> <p>1 list in light of the allegations that are brought by Mr. 2 Harman.</p> <p>3 So why are we here? Unlike how Mr. Harman is 4 portrayed, he is not a whistleblower. What he really is, is 5 a competitor. He was a former customer and a competitor. 6 He was actually in the business of making, what? Can you 7 believe it? End terminals with four-inch guide channels.</p> <p>8 You're going to find out, and you do know, that 9 there are end terminals made by Mr. Harman that had the same 10 four-inch guide channel that were inserted in -- three 11 quarters of an inch into the head and that used a fillet 12 weld, just like the ones that he now claims are somehow 13 dangerous and shouldn't be on the roadway. We know that. 14 We know that Mr. Harman's plans through the statements -- 15 the official statements that he has made in the bankruptcy 16 court, we know -- that have been made in the bankruptcy 17 court, we know that through the people he is engaged in, 18 that they view this as a windfall opportunity for SPIG. The 19 opportunity to move into the vacuum that they hope will be 20 created by some verdict that you give against Trinity. They 21 then hope to take the money that you give to Trin -- to Mr. 22 Harman, his 30 percent share of that particular money, to 23 recapitalize his business so that he can go into competition 24 making end terminals, presumably like the ones that Trinity 25 manufactures.</p>

1 There's nothing wrong with competition. But
 2 that's not the type of competition that is contemplated that
 3 I'm aware of in this country. That's not the way that you
 4 go -- get ahead by being a professional Plaintiff, making
 5 allegations that are baseless, quitting your job, and
 6 traveling around this country looking for what you believe
 7 to be failed end terminal heads.

8 Rather, what you do is you work hard like Brent
 9 Hopkins, a man who spent his life working up and has become
 10 a plant manager over in South Carolina for Trinity. Or
 11 maybe someone like Wade Malizia, a third generation steel
 12 worker who has been in this particular industry and has
 13 worked his way up to an executive management-type role with
 14 Trinity now.

15 THE COURT: 10 minutes remaining, Counsel.

16 MR. SHAW: Thank you, Your Honor.

17 What has Mr. Harman really brought to you in this
 18 particular case? What has he really brought to you?
 19 He's talked to you about photographs. He's talked to you
 20 about things, as I have talked to you about, that were going
 21 to come up in this case. I believe it is an intent to
 22 confuse, to divert your attention to what's really going on.

23 As I told you in the opening statement, this case
 24 was not about accidents; that accident photos, while tragic,
 25 show simply that, that there had been an accident. We don't

1 know how the accidents happened. We don't know where they
 2 were. We don't know what happened. You've heard talk from
 3 the Plaintiff's side about hundreds of accidents.

4 What have you really seen about that? Two. Two
 5 accidents that were brought to you about this.

6 The Court is telling you do not let bias,
 7 prejudice, or sympathy play any part in your deliberations.
 8 I respectfully submit to you that the accidents in this
 9 particular case that you have heard of don't have anything
 10 to do with whether or not there has been a false statement
 11 in this particular case. They don't have anything to do
 12 with whether or not what Trinity did was intentional.

13 I think you recognize what's going on playing
 14 those accident pictures for you. There's not enough
 15 information there for you to conclude anything, much less
 16 the issues in this particular case.

17 You should also note that when we talk about the
 18 accidents, remember that no end terminal device -- whether
 19 it's Trinity's or Dr. Sicking's or perhaps the one that Mr.
 20 Harman hopes to go into business making, if you -- if you
 21 see fit to provide him the seed money to start his company
 22 again, no end terminal device works in every particular
 23 situation.

24 In fact, we know that from NCHRP 350-performance
 25 limitations. What do they tell us?

1 Even the most carefully researched device has
 2 performance limits dictated by physical laws,
 3 crashworthiness of vehicles, and limitations of resources.

4 For these reasons, safety features are generally
 5 developed and tested for selected idealized situations that
 6 are intended to encompass a large majority, but not all, of
 7 the possible in-service collisions.

8 But what, then, are we at -- where are we?

9 As we talk about this particular matter, we know
 10 that Mr. Harman now claims that the flared ET-testing is
 11 somehow or another now at this particular stage -- you know,
 12 his -- his -- his golden bullet, I guess, is what it would
 13 be. What do we know about this?

14 We know that the flared ET-testing was an
 15 experimental test conducted by Texas A&M. We know that the
 16 component parts of this particular system -- and this
 17 particular system is different from the ET-Plus. We know
 18 that the flared ET terminal -- and what does that mean,
 19 flared? That means, in essence, on a curve as opposed to
 20 the tangent system that's in a line.

21 We know that those particular tests failed. We
 22 know that TTI said that they failed. And we know that that
 23 particular experimental device has never been commercialized
 24 into this country anywhere. But most importantly what do we
 25 know?

1 We know that while Texas A&M was doing this
 2 particular research and development that Nick Artimovich and
 3 the people at FHWA were well-aware of it. We know that from
 4 the email that you have there in front of you where they're
 5 talking about the terminal discussion and about the ET --
 6 flared ET system and what they need to do with it.

7 What, then, has been brought to you by Mr. Harman?
 8 He's brought you Dr. Coon's testimony. What do we know from
 9 Dr. Coon?

10 Well, we know that Dr. Coon performed static
 11 testing that are not acceptable by the NCHRP 350 Report and
 12 by the FHWA for approval of end terminals. We know that in
 13 his static testing, as we see, even the static testing he
 14 performed was flawed.

15 We know from Dr. Coon that when we look at it, he
 16 says that in the context of the way that he went and
 17 gathered heads. The heads that were on an unattended
 18 trailer on a restaurant parking lot up in Kansas, what does
 19 he say to us? The testimony that he brings to you upon
 20 cross-examination, what does he say?

21 Well, that's not a very scientific way to go about
 22 evaluating a product. Those are his words; they're not my
 23 words.

24 THE COURT: Five minutes, Counsel.

25 MR. SHAW: Thank you, Your Honor.

1 What does he say to us?

2 The one thing -- when pushed on cross-examination,
3 the one thing that the NCHRP 350 says that the crash test
4 that was conducted on 2005 was crashworthy and passed that
5 test. He says it right there.

6 Is that your answer today?

7 Absolutely.

8 The Court has talked to you about damages in this
9 case. And why is that important?

10 Because the damages in this case are based upon
11 the difference between what the Government thought they were
12 buying and what they did buy, whether or not it has value.
13 Think about that in the context of Dr. Chandler in this
14 particular case.

15 Do we remember Dr. Chandler -- or Mr. Chandler?
16 He was the individual that provided you, at best, what I'll
17 describe as a guess about the damages. He made assumptions
18 that were provided to him by Plaintiff's counsel about the
19 value, the scrap value.

20 What did he refuse to accept?

21 That the FHWA continues to pay for this particular
22 product even today.

23 Why is that important?

24 Because it means it has value. It has value.

25 They're continuing to do it today. Remember that when you

1 look at the damages.

2 We talked about Dr. Sicking. What do we remember
3 about Dr. Sicking?

4 He's Trinity's largest competitor, who admittedly
5 has testified that Trinity should be worried about him
6 because of his past litigation experiences.

7 You heard from the Plaintiffs from the Defense
8 side from Mr. -- Dr. Ray. What did Dr. Ray tell us?
9 Simply stated, concisely, he took the objective evidence
10 from the crash test reports and compared them together,
11 compared those. And if we look across the bottom of that
12 sheet, what does that show?

13 That shows that the 2005 crash test with the
14 ET-Plus from the objective evidence is known by the FHWA
15 was -- actually performs better than the tests that were run
16 on previous devices. It was actually getting better, but
17 that's not much of a surprise, ladies and gentlemen, because
18 remember the testimony that there was no substantial
19 difference between it.

20 Remember what Brent Hopkins told us. Remember
21 what he said. Look, a 5-inch or a 4-inch fitting together.
22 There's no substantial change. It's not a surprise, and
23 these results are getting better. Why?

24 Because Texas A&M thought that, in fact, it would.

25 In the end, we know from Mr. Matthews, who summed this slide

1 up, that the FHWA has no reliable data that the ET-Plus is
2 not performing. They have stated this to the DOTs, and they
3 have said that there's an unbroken chain of eligibility.
4 They continue to reimburse it then, now, and presumably into
5 the future.

6 We know from the testimony in this case that the
7 FHWA has not modified or revoked the acceptance of the
8 ET-Plus in light of all the allegations that Mr. Harman has
9 made.

10 When you get to the back in this particular case
11 and you have an opportunity to answer the questions, I
12 respectfully submit to you that the answer to the question
13 is no. It's no.

14 Mr. Harman hadn't proved his case to you. There's
15 simply no evidence of an intent to defraud in this
16 particular case. At best, Mr. Harman has proved that
17 Trinity sent over a prototype that was crash-tested by TTI
18 and that TTI made what they call an honest mistake.

19 It's been my pleasure and my responsibility to be
20 here. Thank you.

21 THE COURT: All right. Counsel, let's handle
22 these demonstratives as mentioned.

23 MR. SHAW: Yes, Your Honor.

24 (Pause in proceeding.)

25 THE COURT: All right. Let's take our places.

1 Plaintiff may present its final closing argument to the
2 jury.

3 You have 19 minutes remaining, Mr. Baxter. Would
4 you like a warning on this time?

5 MR. BAXTER: Yes, sir. Five and one, please.

6 THE COURT: All right. You may proceed.

7 MR. BAXTER: Thank you, Your Honor. May it please
8 the Court.

9 Ladies and gentlemen, let me start out with a
10 legal question. And you heard Mr. Shaw say it not once
11 but four times during his argument, and they said it all
12 last week that the law was that they had to
13 intentionally file false claims.

14 Now, you heard Judge Gilstrap's charge, and he's
15 going to give you a copy. You go through it word by word,
16 and he never tells you that is the law. What he tells you
17 is they had to have actual knowledge or deliberate ignorance
18 or reckless disregard, but the word intentional is not
19 contained in his charge. And, once again, Trinity just
20 can't be honest with you. They won't tell you the truth
21 about even what the law is.

22 But you go through and see if what Mr. Shaw told
23 you is right, because it's not.

24 The second thing is, as we expected, they want to
25 talk about a lot about that June 14th letter. It's

1 interesting in several respects. The first one is, the only
2 change that's mentioned in that June 14th is 5 inches to 4
3 inches. And while they can say, oh, we told him about all
4 these other changes, that's not true.

5 When we asked Bligh, when we asked Artimovich,
6 when we asked Buth, when we asked Mitchell, we said what
7 else did you say, and the only thing they can remember was
8 the 5-inch to the 4-inch, and the rest of it they didn't
9 tell him.

10 He said, well, look, all the states have -- are
11 still using it.

12 Look at those state letters. You know what they
13 all say. We will closely monitor the situation. And we
14 know that four states already have pulled out and won't use
15 it anymore. And then we know from October the 10th that the
16 FHWA has not issued its final ruling on these heads. And
17 they said to all of their directors in the field, go find
18 out from the state DOT what's happening out there; go get a
19 survey; go find out; and then we're going to take another
20 hard look at this.

21 And that's exactly what they're doing. So to say
22 these things are approved, after they lied to them, and to
23 say they're approved, after they told them about one change
24 and didn't tell them the rest and kept those five failed
25 tests from them, and they've got the gall to tell you, oh,

1 everything is okay.

2 That's what they're saying. Everything is okay.
3 Don't bother with this. We're just too busy making money,
4 or as Mr. Mann said in voir dire, they're a big company with
5 lots and lots of money.

6 Well, what are the facts?

7 Well, first of all, the six questions that we
8 asked that Mr. Shaw at least consider telling you the
9 answers to, not one time -- not once did he try to answer
10 one of those questions. He skirted around who told the
11 truth between Mitchell and Sicking, but he wouldn't even
12 come out and tell you he would vouch for his president's
13 story, when he tried to intimidate a witness from coming to
14 court and testify.

15 He didn't want him here. We would smear you just
16 like we've smeared Josh Harman and run him out of business.
17 Now, it seemed to me he owed you some explanation of why
18 they won't do a crash test, why they haven't done a crash
19 test now, why they didn't do an investigation. How could in
20 the world everybody at Texas A&M suddenly get amnesia and
21 couldn't remember a test they did two months ago and
22 couldn't put in the report.

23 And when Trinity gets the report, not a word.
24 They don't say, oh, let's change it; let's send it back.

25 No, no, they forwarded it on. And he tried to say all they

1 left out was one little drawing. And that's untrue, too,
2 because what they left out are the requirements that have to
3 be in the report, and they didn't put a word in, and they
4 can't explain it to you now, and they won't explain it to
5 you now. And he owes you an explanation, and you can't get
6 it.

7 Now, we heard about poor Greg Mitchell. He's on
8 the job for two or three weeks and this gets dumped in his
9 lap. And you know what he said: I called all hands on
10 deck. That's a direct quote.

11 Mr. Diaz, have you got that?

12 All hands on deck. And there were two paths that
13 he could have gone down. Two. Right then, he could have
14 defined his career at Trinity and with the business world.
15 Here's the first path:

16 I'm going to do something. I'm going to find out.
17 I'm going to find out what's going on. I'm going to order
18 computer simulations. I'm going to get me a new crash test.
19 I'm going to get me an independent expert in here and
20 investigate this. I'm not going to depend on the A&M people
21 or the Trinity people. I'm going to get me an independent
22 expert. I'm going to get somebody to look at all these
23 accidents and see why they're happening. I'm going to do an
24 in-service review all over the country and find out what's
25 going on. I'm going to come clean with the FHWA about all

1 the changes that we made, and I at least would get my
2 testing people to come clean and to do more crash tests and
3 go tell them about the five failed tests.

4 Now, that's path one. He didn't do that.

5 He chose path two. Here's what path two was:

6 All hands on deck means let's get teams of lawyers
7 in here. And the first thing we're going to do is sue Josh
8 Harman in Marshall, Texas, for defamation. We're going to
9 sue him and we're going to put out a letter to all customers
10 that said we've sued him and he's lying.

11 Well, that lasted about a month until he said:
12 Give me your papers. I want to see discovery. And they
13 said, oh, discovery? No, no, we're not doing that. We'll
14 be dismissing our lawsuit.

15 And then you'd think they write a letter to all
16 their customers that said, well, we know we told you we sued
17 him in a defamation suit, but we had to dismiss it with
18 prejudice not once but twice. They didn't take that path
19 either.

20 What else didn't he do?

21 He didn't come clean with the F -- FHWA, but he
22 did threaten Dr. Sicking. So here we've got all hands on
23 deck means I'm going to get the lawyers and sue the
24 whistleblowers and see if I can't shut him up, and I'm going
25 to defame him, and I'm going to smear him everywhere I can,

<p style="text-align: right;">Page 90</p> <p>1 and I'm going to threaten his witnesses, but I'm not going 2 to do an investigation.</p> <p>3 Well, I think that's the Trinity way, and that's 4 how honest they've been with you in this case, is what they 5 do.</p> <p>6 Now, what did they do down at Texas A&M; and I was 7 curious that Mr. Shaw wanted to throw them under the bus. 8 And he said, well, it's not really Trinity. It's those 9 folks down at A&M. You need to blame them.</p> <p>10 And, of course, you know that Trinity is the one 11 that sent in the report. Trinity is the one that vouched 12 for it. And Texas A&M was their agent. And when I asked 13 Dr. Bligh how many of these tests he had run, what had he 14 done, how had he done it? And I got 20 zeros.</p> <p>15 I didn't do anything. We didn't do anything. 16 It's just the way they handled this case. And, ladies and 17 gentlemen, that is false, and it's dishonest, and it just 18 should not be approved.</p> <p>19 Now, what is it that they did do then? 20 Let me see Slide 36.</p> <p>21 Here's what they did. They decided that 22 deliberate ignorance was the way to go. We just won't find 23 out if a crash test will work. We won't explain why the 24 five failed tests -- and he wouldn't explain it up here just 25 a little while ago. He keeps waving his arms and says</p>	<p style="text-align: right;">Page 92</p> <p>1 Trinity Highway Products, and the answer, too, is yes. 2 And the third question is damages, and we suggest that you 3 put in \$218 million. You've heard the testimony. What you 4 heard from their expert -- if I can go back to the earlier 5 slide, Mr. Diaz, which I believe is Slide No. -- No. 4, is 6 one of the most shocking things I've ever heard in court.</p> <p>7 Their expert, Mr. Matthews, when asked by 8 Mr. Ward, you consider the jury in this case and the Judge 9 irrelevant for damages, don't you?</p> <p>10 He was so shocked, he sat down, but that's their 11 opinion.</p> <p>12 Here's how you can tell the number is right. 13 Go back to my verdict form, Mr. Diaz.</p> <p>14 Here's how you can tell. Just use Trinity's 15 numbers. Remember they said we can save \$250,000 at \$2 16 a head. That's 125,000 heads. Multiply that by the 17 cost, which is 1200, and then take 83 percent of it, and 18 you'll get awful close to the 218 that Mr. Chandler told 19 you was the right number. Trinity wants to blame him 20 for them not having good records. But these numbers are 21 actually highly conservative.</p> <p>22 And the reason you don't take scrap off is because 23 the Federal Government doesn't get the scrap. If they get 24 taken off the highways, the Federal Government is not going 25 to sell them. That belongs at Trinity or the states or</p>
<p style="text-align: right;">Page 91</p> <p>1 experimental. You heard Dr. Coon say all five of those 2 tests locked up, and you didn't hear Malcolm Ray explain a 3 one of those heads as something happened other than they 4 locked up, because they couldn't do it.</p> <p>5 We're just not going to investigate. We're not 6 going to go look. We're not going to go find out what's 7 happened. It's better, as Dr. Butth said, if you don't have 8 a fix, send it on out. We just don't have any concern about 9 the folks in those cars.</p> <p>10 Now, that's the path that they took, and that's 11 wrong.</p> <p>12 Well, let me ask you to get up the verdict form, 13 if I could, Mr. Diaz.</p> <p>14 This is what Judge Gilstrap's going to give you. 15 He's given us a copy of it.</p> <p>16 Let me see the first one.</p> <p>17 He's going to ask you in the very first 18 question --</p> <p>19 THE COURT: Five minutes, Counsel.</p> <p>20 MR. BAXTER: Thank you, Your Honor.</p> <p>21 Do you find that Trinity knowingly made not 22 intentionally used or caused to be made a false record? 23 And we think the answer is yes. And put a check or an X 24 mark there, or however you want to follow it.</p> <p>25 Question No. 2 is just belt and suspenders about</p>	<p style="text-align: right;">Page 93</p> <p>1 whatever it is. But certainly the Federal Government is not 2 going to get the money, and so the full amount. It's just 3 like the trees, you just don't pay for every other tree. 4 You ought to pay for all of it.</p> <p>5 Now, ladies and gentlemen, I've been practicing 6 law for 45 years. And like in a lot of cases, you could 7 help an individual or maybe an individual company, and I 8 know that many of you on a day-to-day basis help 9 individuals, whether you're a teacher or a safety expert or 10 a banker or your partner is a nurse or whatever those 11 situations are, individually we can help you.</p> <p>12 But this is the first case I've ever had in 45 13 years in which I got to help millions of unknown, unseen 14 people, people that are out there driving on the highways. 15 And this is an opportunity, then, for you, as you consider 16 these wrecks, not just a few of them, not two like Mr. Shaw 17 said, but hundreds as their witnesses explained, to make 18 sure this doesn't happen anymore. You can do collective 19 good in this case, not just to do good but because it's the 20 right thing to do and is what the evidence commands you to 21 do.</p> <p>22 And, ladies and gentlemen, we appreciate your 23 service, we appreciate your attention, and we know that you 24 will do the right thing.</p> <p>25 That's all I have, Your Honor. Thank you very</p>

<p style="text-align: right;">Page 94</p> <p>1 much.</p> <p>2 THE COURT: All right. If you'll put your easel</p> <p>3 down, Mr. Baxter, and return to your seat.</p> <p>4 MR. BAXTER: I will, Your Honor. Thank you, Your</p> <p>5 Honor.</p> <p>6 THE COURT: Ladies and gentlemen, I'd now like to</p> <p>7 provide you with a few final instructions before you begin</p> <p>8 your deliberations.</p> <p>9 Again, you must perform your duty as jurors</p> <p>10 without bias or prejudice as to any party. The law does not</p> <p>11 permit you to be controlled by sympathy, prejudice, or</p> <p>12 public opinion. The parties expect that you will carefully</p> <p>13 and impartially consider all of the evidence. Follow the</p> <p>14 law as I have given it to you and reach a just verdict,</p> <p>15 regardless of the consequences.</p> <p>16 Answer each question from the facts as you find</p> <p>17 them. Do not decide who you think should win and then</p> <p>18 answer the questions accordingly. Your answers and your</p> <p>19 verdict must be unanimous.</p> <p>20 When you retire to the jury room in a few minutes</p> <p>21 to deliberate on your verdict, you will each have your own</p> <p>22 copy of these final instructions. If you desire to review</p> <p>23 any of the exhibits which the Court has admitted into</p> <p>24 evidence, you should send me a written note, handed to the</p> <p>25 Court Security Officer requesting one or more exhibits, and</p>	<p style="text-align: right;">Page 96</p> <p>1 writing or by bringing you back into the courtroom where I</p> <p>2 can address you orally. I will always first disclose your</p> <p>3 question to the attorneys and my response before I answer</p> <p>4 your question.</p> <p>5 After you've reached a verdict and I have</p> <p>6 discharged you, you're not required to talk with anyone</p> <p>7 about the case unless the Court orders otherwise. However,</p> <p>8 you will then be free to discuss it with anyone of your</p> <p>9 choosing. Whether or not you discuss your service as jurors</p> <p>10 in this case is strictly up to you and you alone.</p> <p>11 I will now hand eight -- excuse me, seven copies</p> <p>12 of the final instructions and one clean copy of the verdict</p> <p>13 form to the Court Security Officer to deliver to the jury.</p> <p>14 Ladies and gentlemen, you may now retire to</p> <p>15 deliberate on your verdict. We await your decision.</p> <p>16 COURT SECURITY OFFICER: All rise.</p> <p>17 (Jury out.)</p> <p>18 THE COURT: The -- the Court stands in recess,</p> <p>19 awaiting the jury's verdict.</p> <p>20 (Recess.)</p> <p>21 *****</p> <p>22</p> <p>23</p> <p>24</p> <p>25 CERTIFICATION</p>
<p style="text-align: right;">Page 95</p> <p>1 I will send those to you.</p> <p>2 Once you retire, you should first select your</p> <p>3 foreperson and then begin your deliberations. If you recess</p> <p>4 during your deliberations, follow all the instructions the</p> <p>5 Court has given you about your conduct during the trial.</p> <p>6 After you've reached your verdict, your foreperson is to</p> <p>7 fill in your unanimous answers on the verdict form, date it,</p> <p>8 sign it, and deliver it to the Court Security Officer.</p> <p>9 Do not reveal your answers until such time as you</p> <p>10 are discharged, unless otherwise directed by me. And you</p> <p>11 must never disclose to anyone, not even to me, your</p> <p>12 numerical division on any question.</p> <p>13 Again, any notes you have taken are aids to your</p> <p>14 memory only. If your memory should differ from your notes,</p> <p>15 then you should rely on your memory and not your notes. The</p> <p>16 notes are not evidence. A juror who has not taken notes</p> <p>17 should rely on his or her independent recollection of the</p> <p>18 evidence and should not be unduly influenced by the notes of</p> <p>19 other jurors. Notes are not entitled any greater weight</p> <p>20 than the recollection or impression of each juror about the</p> <p>21 testimony.</p> <p>22 As I mentioned earlier, if you want to communicate</p> <p>23 with me at any time, please give a written message or</p> <p>24 question to the Court Security Officer who will bring it to</p> <p>25 me. I'll then respond as promptly as possible either in</p>	<p style="text-align: right;">Page 97</p> <p>1</p> <p>2 I HEREBY CERTIFY that the foregoing is a true</p> <p>3 and correct transcript from the stenographic notes of the</p> <p>4 proceedings in the above-entitled matter to the best of my</p> <p>5 ability.</p> <p>6</p> <p>7</p> <p>8</p> <p>9 /s/_Shelly Holmes_____10/20/14_____</p> <p>10 SHELLY HOLMES, CSR, TCRR Date</p> <p>11 Official Court Reporter</p> <p>12 State of Texas No.: 7804</p> <p>13 Expiration Date 12/31/14</p> <p>14</p> <p>15 /s/_Susan Simmons_____10/20/14_____</p> <p>16 SUSAN SIMMONS, CSR Date</p> <p>17 Deputy Court Reporter</p> <p>18 State of Texas No.: 267</p> <p>19 Expiration Date 12/31/14</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

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