

PUBLIC VERSION – CONFIDENTIAL INFORMATION REDACTED

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION**

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TRINITY INDUSTRIES, INC., <i>et al.</i> ,	)	
	)	
Plaintiffs	)	
	)	Civil Action No. 1:11-CV-937-CMH/TRJ
	)	
v.	)	
	)	
SPIG INDUSTRY, LLC, <i>et al.</i> ,	)	
	)	<b>CLOSED CASE</b>
Defendants.	)	
	)	
	)	

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**DEFENDANTS' OPPOSITION TO PLAINTIFFS'  
MOTION TO ENFORCE SETTLEMENT AGREEMENT**

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**INTRODUCTION**

Defendants SPIG Industry, LLC, SPIG Industry, Inc., and Selco Construction Services, Inc. (collectively, “Defendants”) respectfully submit this memorandum in opposition to Plaintiffs Trinity Industries, Inc. (“Trinity”) and The Texas A&M University System’s (“TAMUS”) (collectively, “Plaintiffs”) Motion to Enforce the Settlement Agreement. (Dkt. No. 443 (“Motion”).) Plaintiffs accuse Defendants’ principal, Joshua Harman, of disclosing the confidential terms of the parties’ Settlement Agreement (Exs. A & B (filed under seal)), on at least three occasions, by [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

None of these actions disclosed confidential terms of the Agreement. In reality, *Plaintiffs* have violated the Agreement by publicly disclosing one of its terms. (*See* Dkt. No. 442 at 1.) Moreover, Plaintiffs’ Motion—filed nearly three months after two of the alleged violations—is little more than an attempt to discredit Mr. Harman and enjoin his future participation in news stories detailing Plaintiffs’ violation of roadway safety standards. By citing record evidence—something Plaintiffs’ Memorandum entirely omits—this Opposition provides the proper background for this case and the instant motion.

The most crucial background fact is that *this case is closed*. Months ago, by Stipulation of Dismissal, the parties *dismissed all claims with prejudice*. (Dkt. No. 439.) In closing this case (Dkt. No. 440), the Court did not retain jurisdiction to enforce the Settlement Agreement—indeed, that document was never even filed with the Court, as Plaintiffs concede elsewhere. (Dkt. No. 442 at 2.) Plaintiffs nonetheless contend that the Agreement somehow confers jurisdiction, relying on a provision [REDACTED]

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██████████ If Plaintiffs wish to bring an enforcement claim in federal court, they must do so in a new case (subject, of course, to their Rule 11 obligations and diversity-jurisdiction requirements). As for this case, the only motion the Court *could* consider is under Rule 60(b). But Plaintiffs have not filed such a motion, and they cannot, as a matter of law, satisfy the stringent requirements for Rule 60(b) relief. Plaintiffs' Motion should be dismissed.

Even if this Court reached the merits, Plaintiffs provide no evidence whatsoever that Defendants have violated the Settlement Agreement. The Florida subpoena was likely prompted by the terms of the *public* Stipulated Protective Order, (Dkt. No. 141); indeed, if the Florida attorney had been aware of ██████████

██████████, no subpoena would have been necessary. Likewise, the Texas filing does not refer to any terms of the Settlement Agreement, and Mr. Harman's interview statement affirmatively acknowledges the Settlement's confidentiality.

Lastly, Plaintiffs provide no justification for any of the relief they seek. Issuing an injunction requiring compliance with the Settlement Agreement would not only disclose the Agreement's confidential terms, but also materially amend those terms and violate the First Amendment. This Court has no jurisdiction over a subpoena issued by the United States District Court for the District of Columbia for purposes of discovery in an action pending in the United States District Court for the Middle District of Florida. Finally, Plaintiffs offer no evidence or authority to support an award of damages or sanctions.

In sum, this case is closed and should remain so. If Plaintiffs truly believe they are entitled to substantive relief, despite the lack of any violation other than their own, they remain free to file a separate breach of contract action. The Court should deny Plaintiffs' Motion and grant Defendants their attorneys' fees.

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**FACTUAL BACKGROUND**

In an effort to discredit Defendants, Plaintiffs baldly accuse Mr. Harman of violating the Settlement Agreement and other unsavory conduct, such as [REDACTED] [REDACTED] (Dkt. No. 444 (filed under seal) at 3-4.) None of these allegations is true. Plaintiffs' conduct, by contrast, is indeed sinister. The evidentiary record proves that it is Plaintiffs who have defrauded government agencies and abused this Court's process to cover up their violation of roadway safety standards. Plaintiffs seek to distract from this story by shooting at the messenger, Mr. Harman, and hoping the message dies with him. Accordingly, this brief rebuts Plaintiffs' baseless accusations and provides the appropriate context for Plaintiffs' Motion. The following facts are all taken from publicly available documents and deposition testimony.<sup>1</sup>

**The Product Modifications.** Between 2002 and 2005, Plaintiffs modified critical dimensions of the ET-PLUS. (*See infra*, §§ A-B.) Despite being obligated to inform the Federal Highway Administration ("FHWA") and state Departments of Transportation ("DOTs") of these changes, Plaintiffs failed to do so. (*See infra*, § C.) Nonetheless, they sold hundreds of thousands of redesigned ET-PLUS terminals for use across the United States and abroad.

**The Cover Up.** Plaintiffs' modifications came to light only in 2012, after Defendants investigated the ET-PLUS, which allegedly embodies the Patents-in-Suit. Even then, Plaintiffs continued to cover up their violation by falsely claiming to have crash tested their undisclosed modifications. (*See infra* § D.) Plaintiffs also engaged in significant litigation misconduct to further conceal their violations. (*See infra*, § E.) Finally, Plaintiffs settled this litigation [REDACTED] [REDACTED] to avoid exposure of their misconduct at a public trial. (*See infra*, § F.)

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<sup>1</sup> An even more damning story would emerge from the material that Plaintiffs have hidden from public view through inappropriate "CONFIDENTIAL" and "HIGHLY CONFIDENTIAL" designations.



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**The Attack.** Plaintiffs' cover up failed. Numerous press outlets have reported stories about Trinity's unapproved redesign of the ET-PLUS and its highway failures. (*See* Dkt. No. 454 at 1-2 (citing two FOX reports, and articles in *Consortiumnews.com* and Australia's *Courier-Mail*).)<sup>2</sup> Once Plaintiffs learned of these stories, they filed this so-called Motion to Enforce. Plaintiffs' motion seeks to enjoin Defendants from further notifying the press and the public about the risks posed by Plaintiffs' products. The Settlement Agreement itself is just an afterthought. That is why Plaintiffs filed their motion just days after the news stories regarding their unapproved, failing product appeared, despite knowing of Defendants' alleged violations for months. This is also why Plaintiffs have vexatiously multiplied their litigation efforts against Defendants and the press. (*See infra*, § G.)

**A. Original 1999-2000 ET-PLUS Testing And Approval**

Plaintiff TAMUS designed, and Plaintiff Trinity sells, a guardrail end terminal system called the ET-PLUS. This is the product that allegedly embodies the '116, '150 and '735 patents at issue in the underlying infringement case.

Plaintiffs finalized their design of the original ET-PLUS in 1999. Although up to seven crash tests are prescribed to evaluate the performance of a gating guardrail end terminal, such as the ET-PLUS, Plaintiffs performed only one. (*See* Ex. F at 2, 4, 11.) Specifically, under the evaluation of Texas Transportation Institute (TTI), a subdivision of TAMUS, the 1999 ET-PLUS passed Test 3-31, which involves head-on collision with "[a] 2000 kg pickup truck" travelling at 60mph. (*Id.* at 4, 25.)

Dr. Hayes Ross of TTI then requested "approval by FHWA" of the ET-PLUS as "a design alternative for use with previously approved ET-2000 systems," *i.e.*, Plaintiffs' earlier

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<sup>2</sup> Additional articles and photographs of accidents involving the ET-PLUS are available at [www.failingheads.com](http://www.failingheads.com).

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end terminal. (Ex. G at 1.) Dr. Ross explained that Test 3-31 “is believed to constitute the most critical impact scenario as regards the evaluation of the impact performance of the PLUS head with the approved ET systems.” (*Id.* at 2.) FHWA approval is necessary for any product to be installed on the National Highway System. *See* FHWA Office of Eng’g, *Identifying Acceptable Highway Safety Features* 4 (July 25, 1997) (Ex. H) (A “device could be accepted by that state, with concurrence by its FHWA division office, for use on the NHS within that state.” (emphasis added)); *see generally* Ex. I (Dep. of N. Artimovich) at 20-21.)

As part of its request for FHWA approval, Trinity was required to provide scaled drawings that showed the critical dimensions of the product. *Id.* at 9 (“[A] high-quality, reproducible, letter-size, engineering drawing . . . showing all pertinent details . . . of the version(s) of the feature for which acceptance is being sought are to be included with the request for acceptance.”). That drawing, attached as page 2 of Exhibit J, shows the following critical dimensions, which Defendants have confirmed by measuring the physical product itself:

	<b>2000</b>
Exit Gate	1.3 to 1.5 inches
Feeder Channel Width	5 inches
Feeder Chute Assembly Height	
a. exterior	15 3/8 inches
b. interior	15 3/8 inches
Feeder Chute Assembly Length	37 inches

The FHWA approved this product by letter dated January 18, 2000. (Ex. J at 1.)

### **B. Design of the Modified ET-Plus in 2005**

Between 2002 and 2005, Plaintiffs secretly modified certain critical dimensions of the ET-PLUS. Although required to do so, Plaintiffs did *not* inform the FHWA of these changes, and they still have *not* provided any agency with scaled drawings of the secretly redesigned ET-PLUS. Furthermore, Trinity and TAMUS hid the drawings in this litigation by designating them as “HIGHLY CONFIDENTIAL.” Defendants nevertheless were able to publicly ascertain

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the critical dimensions of the secretly redesigned ET-PLUS by measuring the physical product. As the following chart shows, the dimensions of an ET-PLUS made no later than 2006 contained the follow dimensions:

	<b>2006</b>
Exit Gate	1.0 inches
Feeder Channel Width	4 inches
Feeder Chute Assembly Height	
a. exterior	14 7/8 inches
b. interior	14 3/8 inches
Feeder Chute Assembly Length	36 1/4 inches

Plaintiffs' redesigned product has never, to this day, received the approvals necessary to install it on the highways of any state in the union.

The process of secretly modifying the feeder chute of the ET-PLUS began sometime between January and May 2005, when Steve Brown (then president of Trinity Highway Products) asked Wade Malizia (then manager of Trinity's plant 31 in Girard, Ohio) to make an ET-PLUS prototype using 4-inch wide feeder channels. (*See* Ex. K (S. Brown Dep.) at 25-27, 49-52; Ex. L (W. Malizia Dep.) at 25-27, 35.) Mr. Malizia in turn delegated the task to the plant 31 welding shop. (Ex. L at 28, 36-37.) The welders attached 4-inch wide feeder channels to the standard extruder throat unit that Trinity had used since the 1980s. (*Id.* at 38.) No engineer was involved in the process to assure that all critical dimensions of the original, tested product were maintained. (*Id.* at 29.) These dimensions are extremely sensitive and imperative to the proper operation of an end terminal.

The welders did not make any drawings or document their work, so Trinity does not have any record of the dimensions of the prototype they created. (*E.g., id.* at 25-30; Ex. M (B. Smith (Trinity 30(b)(6)) Dep.) at 86-89; Ex. K at 51-55.) Trinity shipped the prototype to TTI in April or May 2005. (Ex. M at 85-86, 202; Ex. K at 50.) As discussed in greater detail below,

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the prototype may or may not have been subjected to NCHRP Test 3-30 (a test involving an 820kg car rather than a 2000kg truck) on May 27, 2005. No one made any drawings of the prototype tested on May 27, 2005, which was disposed of after the test, so there are no records of what was actually tested. (*See* Ex. M at 86-89; Ex. K at 51-55; Ex. L at 25-30.)<sup>3</sup>

Trinity began assembling drawings for an ET-PLUS with 4-inch wide feeder channels *after* the May 27 test. (*E.g.*, Ex. M at 89.) In the following three month period between May 31 and August 31, 2005, Trinity made at least seven changes to the drawings of the Feeder Chute Assembly portion of the ET-PLUS end terminal. It is apparent that someone was designing an ET-PLUS head with 4-inch wide feeder channels that could be manufactured efficiently. No TAMUS or Trinity witness deposed in discovery was willing to identify that person. (*E.g.*, *id.* at 188.) While no one admits to directing this engineering effort, discovery revealed that all of the drawings themselves were created by Jack Marley who was then a draftsman at plant 31 in Girard, Ohio. (*E.g.*, *id.* at 99-105; Ex. N. (J. Marley Dep.) at 20-25; Ex. L at 44-45, 67.) However, Mr. Marley cannot today remember having made the changes. (Ex. N at 20-25.)

Two changes made during this post-test period stand out.

*First*, on May 31, 2005, Mr. Marley produced the first drawing of a Feeder Chute Assembly that uses 4 inch wide feeder channels. (*See* Ex. N at 21-22.) That drawing showed two 4 inch channels inserted 3/4 of an inch *into* the extruding throat. (*See* Ex. M at 289; Ex. K at 54-58, 111-12.) This had the effect of reducing the *height* of the Feeder Chute Assembly at the upstream end (*i.e.*, where it meets the extruder throat) by 3/8 inches. (*See* Ex. M at 96-97; Ex. O (D. Johnson Dep.) at 33.) This apparently did not work well enough because Trinity later reduced the height of the feeder chute assembly by an additional 1/8th of an inch. (*See* Ex. M at

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<sup>3</sup> When the existence of the 2005 design change was first revealed to FHWA in January 2012, TTI was reduced to analyzing photographs to determine whether the feeder channels were 5 inches or 4 inches wide. *See infra* at 12.

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124-25; Ex. N at 23-24.) In total, the height of the upstream end of the Feeder Chute Assembly was reduced from 15 3/8 inches to 14 7/8 inches. The interior height was reduced even more (to 14 3/8 inches) because the steel feeder channels are parallel and therefore lose the benefit of the tapered roof and floor. This adds an extra half-inch to the existing half-inch reduction.

*Second*, on July 6, 2005, Trinity shortened the *length* of the Feeder Chute Assembly by 3/4 of an inch. (*See* Ex. M at 100-02, 123-24; Ex. O at 44-45; Ex. N at 22-23, 32-33; Ex. K at 67-69.) This was discussed at the highest levels of Trinity and TTI and, according to the e-mail traffic, was done to save costs by reducing scrap. (*See* Ex. M at 207-209.)

Shrinking these critical dimensions saved Trinity money in two ways: (i) Trinity reduced its raw material costs, and (ii) the change allowed Trinity to insert the feeder channels into the extruding throat, thereby requiring less labor to weld the two assemblies together.

**C. Trinity’s Fraud On FHWA, State DOTs, And The Public**

FHWA policy requires that a manufacturer of highway safety products sell exactly the same product as what was disclosed to the regulators when seeking approval. (*See, e.g.*, Ex. I at 115-17 (“All crashworthy devices are to replicate the crash tested device.”); Ex. H at 9 (requiring identification of “the complete design, construction, and installation details and specifications for the version(s) of the feature for which acceptance is being sought” where there has been “any variations in design or construction details . . . from those covered in the documentation of the testing of the feature” and noting “a purported installation of the accepted feature” must be “in substantial conformance with what was found acceptable”).)

Moreover, manufacturers are required to certify to buyers that they have not modified their product. FHWA’s standard approval letter—as sent to Trinity in 2005—states:

Please note the following standard provisions that apply to the FHWA letters of acceptance:

....

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- You will be expected to certify to potential users that the hardware furnished has essentially the same chemistry, mechanical properties, and geometry as that submitted for acceptance.

(*See, e.g.*, Ex. P at 2.) Despite these requirements, Trinity never disclosed to FHWA or any customer its changes to the ET-PLUS. It instead sold the terminals with false certifications.

What Trinity did with the states was even worse. No highway product can be installed on the roadways of a particular state without the express approval of that state's DOT. *See, e.g.*, 23 U.S.C. § 106(c)(1); Ex. Q (M. Cacamis Dep.) at 40. Thus, following FHWA approval of the original ET-PLUS in 2000, Trinity wrote each state DOT (with a drawing) and applied to have the ET-PLUS put on that state's approved product list. For example, a copy of Trinity's letter to VDOT is attached as Exhibit R.

Most states, such as Virginia, require a manufacturer to notify the DOT of any design changes to the product. (*See* Ex. Q at 170; Ex. S at 1 (“VDOT’s policy has been to require the system to be installed as tested . . . .”); VDOT, *Road and Bridge Specifications* § 105.10(c) (2007) (Ex. T) (“Items or component materials shall be identified by the specific contract item number and Specification reference in the Contract. Any changes from the requirements of the Contract shall be specifically denoted, together with justification, and submitted to the Engineer for review.”).) The manufacturer is, in effect, on the honor system to disclose product modifications. Trinity never notified VDOT (or any other state for that matter) that it had secretly changed the critical dimensions of the ET-PLUS.<sup>4</sup> To Defendants’ knowledge, it still has never done so. As a result, every ET-PLUS sold from the fourth quarter of 2005 until today was and is ineligible for installation in every state of the union.

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<sup>4</sup> The Trinity executive who would have been in charge of notifying state DOTs testified that his employees had never done so because they had never informed him about the change. (Ex. V at 23-28 (HIGHLY CONFIDENTIAL material redacted).)

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Other states require an annual affirmative certification that the product has not changed. Discovery revealed that, for those states, Trinity falsely certified its product had not changed.

This is not the first time that Trinity has been caught making false statements to highway regulators. In April 2012, Trinity paid \$142,000 to FHWA pursuant to a civil settlement with the United States Department of Justice for violations of the Buy America Act, *see* 23 C.F.R. § 635.410. The settlement arose out of the Montana DOT’s discovery that Trinity was selling guardrail components made from steel with “non-compliant documentation.” (Ex. U.)

**D. Plaintiffs’ Fraudulent Cover Up**

Defendants’ President and co-owner—Joshua Harman—discovered over time the secret, unapproved changes that TAMUS and/or Trinity had made. He summarized his findings in an extensive document which the parties call “The Presentation.” In January 2012, he provided The Presentation to Nicholas Artimovich of FHWA. Mr. Artimovich confirmed in deposition that he was previously unaware of the multiple secret changes Trinity had made to the ET-PLUS. (*See* Ex. I at 37-38.) This chart recaps those changes:

	2000	2006
Exit Gate	1.3 to 1.5 inches	1.0 inches
Feeder Channel Width	5 inches	4 inches
Feeder Chute Assembly Height		
a. exterior	15 3/8 inches	14 7/8 inches
b. interior	15 3/8 inches	14 3/8 inches
Feeder Chute Assembly Length	37 inches	36 1/4 inches

FHWA provided a copy of the Presentation to Plaintiffs, who promptly did two things. First, they sued Mr. Harman for defamation in the United States District Court for the Eastern District of Texas. *See Trinity Indus., Inc. v. Harman*, No. 12-cv-46 (E.D. Tex.). Second, they scheduled a meeting with Mr. Artimovich, not at his office, but at the American Traffic Safety Services Association (“ATSSA”) annual meeting in Florida.

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At that meeting, which occurred on February 14, 2012, TAMUS and Trinity confessed, for the first time, that they had indeed shrunk the width of the ET-PLUS's feeder channels from 5 inches to 4 inches (a 50% decrease in guardrail clearance). (Ex. I at 40-50.) However, they failed to tell Mr. Artimovich that they had also shrunk the interior vertical clearance of the feeder chute from 15.375 inches to 14.375 inches (a 30% decrease in guardrail clearance). (*Id.*) TAMUS and Trinity further failed to tell Mr. Artimovich that they had also shrunk the ET-PLUS's exit gate from 1.5 inches to 1.0 inches (a 33% decrease). (*Id.*) Finally, they failed to tell Mr. Artimovich that they had shrunk the length of the feeder chute by 3/4 inch. (*Id.*) Neither Trinity nor TAMUS gave Mr. Artimovich scaled drawings of the secretly changed ET-PLUS. (*Id.*; *see also* Ex. W.) The drawings would have shown the extensive, additional changes that seem to have slipped Plaintiffs' minds.

In the February 14, 2012 meeting with Mr. Artimovich, Plaintiffs represented that the secretly changed ET-PLUS was tested successfully on May 27, 2005. (Ex. I at 40-50.)<sup>5</sup> Roger Bligh of Texas A&M repeated this representation in a February 28th e-mail to Mr. Artimovich. (Ex. Y.)<sup>6</sup> However, the discovery in this case has revealed that these representations were false.

As discussed above, Trinity did not even begin to design the secretly modified ET-PLUS until *after* the May 27 test. The prototype, which allegedly was tested on that date, was slapped together by welders (not engineers) who made no drawings of what they built. Moreover, Plaintiffs made substantial changes to the design of the modified ET-PLUS *after* the May 27, 2005 test. (*See generally supra*, at 7-8.) As a result, the version of the ET-PLUS that Trinity

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<sup>5</sup> Notably, the May 27, 2005 test was not Test 3-31, *i.e.*, "the most critical impact scenario" (Ex. G. at 2), but rather Test 3-30. And the test failed safety criteria K. (Ex. X at 36.)

<sup>6</sup> In March 2012, FHWA drafted a letter to Trinity in which it demanded drawings of the end terminal used in the May 27 test and further demanded an in service review of the ET-PLUS's performance. (Ex. Z.) However, the letter was never sent. If Trinity had responded to these inquiries truthfully, FHWA would have learned of the multiple additional changes that TAMUS and Trinity never disclosed.



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began selling in the fourth quarter of 2005 necessarily had different geometry than whatever was crash tested May 27.

In addition, it appears that TAMUS submitted a bogus photo to FHWA in an effort to bolster its contention that the prototype tested on May 27, 2005, had the same geometry as the secretly modified ET-PLUS placed on the highways. In another February 28, 2012 e-mail to Mr. Artimovich, Dr. Bligh claimed that the dimensions of the prototype tested on May 27th were “confirmed by TTI proving ground personnel through analysis of photographs.” (Ex. X.) Plaintiffs represented to both the Court and Defendants (Dkt. No. 299) that the “analysis” to which Dr. Bligh referred was an algebraic equation written on a post-it note affixed to a photograph marked with the Bates No. TRINITY012683. (Ex. AA.)

Defendants’ expert, Dr. William Howard, reviewed the document marked TRINITY012683. As he explained in his declaration, (Ex. BB), the photographed end terminal was really an original ET-PLUS with 5 inch feeder channels rather than the prototype which had 4 inch feeder channels. TTI had fed bogus measurements into the algebraic equation in an effort to produce a predetermined result. When the correct measurements were used, the width of the feeder channels was actually 4.7-4.95 inches. (*Id.* at 4-5.)

Dr. Howard also uncovered an additional deception that was even more disturbing. He conclusively shows that the photograph at issue was not even taken on the date when the prototype was tested, *i.e.*, May 27, 2005. The photograph was instead taken several weeks earlier on May 5<sup>th</sup>, which is the date that TTI conducted a lateral crash test on the ET-31 system. (*Id.* at 5-20.) All parties agree that the end terminal used in that test had 5 inch wide feeder channels. In sum Dr. Howard’s report demonstrates on every level Plaintiffs’ calculated deception of FHWA.

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Worse yet, TTI should not have even conducted tests of the ET-PLUS in the first place. FHWA regulations require that the testing facility be “independent.” *E.g.*, 23 C.F.R. § 637.205(c). TTI was anything but independent. Its employees had invented the ET 2000 and the ET-PLUS in addition to their first cousin, the ET EURO. Trinity was contractually obligated to pay TTI, TAMUS, and the inventors a royalty of 6.85 to 8% of gross sales. (Ex. CC; *see* Ex. M at 235-36.) As of mid-June 2011, Trinity had paid more than \$31 million in royalties for the ET line of products to TAMUS-related persons. Dr. Bligh, whose misconduct is discussed above, personally received more than \$1.5 million. (*See* Ex. DD.)

Plaintiffs’ calculated fraud on the FHWA has been partially successful, at least thus far. Based on the selective disclosures and outright false information fed to it by TAMUS and Trinity, FHWA issued the following e-mail on October 13, 2012:

On February 14, 2012, Barry Stephens and Brian Smith of Trinity Highway Products (Trinity) stated the company’s ET end terminal with the 4-inch wide guide channels was crash tested at the Texas Transportation Institute (TTI) in May 2005. Roger Bligh of TTI confirmed this information on February 14, 2012. Trinity submitted documentation on various dates of changes made to its ET end terminals, which included changes from the ET-2000 to the ET-Plus. On February 14, 2012, the company reported the reduction in the width of the guide channels from 5 inches (in the year 2000) to 4 inches (in 2005) was a design detail omitted from the documentation submitted to the Agency on August 10, 2005. On March 15, 2012, Trinity submitted a letter to FHWA dated March 14, 2011 (sic), which stated its ET-Plus with the 4-inch guide channels was crash tested at TTI in May 2005. The Trinity ET-Plus end terminal with the 4-inch guide channels is eligible for reimbursement under the Federal-Aid Highway Program under FHWA letter CC-94 of September 2, 2005.

(Ex. EE.) Letter CC-94 referenced in the e-mail is limited to those few states which employ the Midwest Guardrail System. (*See* Ex. FF (“[T]he ET PLUS-31 . . . can be used on the National Highway System (NHS) *when connected to the MGS barrier.*” (emphasis added)).) The FHWA has not retroactively blessed use of the ET-PLUS in the majority of states (such as Virginia) that do not use 31 inch high guardrails.

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**E. Plaintiffs' Fraud On This Court**

Consistent with its effort to defraud FHWA, Plaintiffs also attempted to defraud this Court regarding the approval status of its products. Specifically, even though Plaintiffs started investigating Defendants' alleged infringement in November 2010, sent a cease-and-desist letter in February 2011, and actually filed suit in March 2011, Plaintiffs did not issue a written litigation hold or turn off Trinity's aggressive 30-day automatic document destruction program *until at least January 2012*. (Dkt. No. 412 at 1.)

Plaintiffs thus spoliated extensive evidence concerning their fraud on the regulatory agencies. *See E.I. du Pont de Nemours & Co. v. Kolon Indus.*, 803 F. Supp. 2d 469, 499 (E.D. Va. 2011) ("Upon anticipation of litigation, parties must suspend [their] routine document retention/destruction polic[ies] and put in place a 'litigation hold' to ensure the preservation of relevant documents."). Indeed, Defendants received numerous documents from third parties, *but not from Plaintiffs*, regarding Trinity's 2012 fraud on the FHWA, including its request that the meeting take place in private, not public. (*See* Dkt. No. 412-2 at 7.) Plaintiffs failed to produce these documents despite several Orders to produce approval-related documents.

At a hearing on one of Defendants' motions to compel approval-related documents, Plaintiffs represented to the Court that "there's no one file drawer or one box" where approval correspondence is kept. (Dkt. No. 230 at 7.) But Trinity's own executive testified that "we have an area where we store information that would involve state approval letters . . ." (Ex. V at 130.) Examples of similar misrepresentations are legion, and were catalogued in Attachment 2 to Defendants' Motion for Sanctions. (*See* Dkt. No. 383-2.)

Plaintiffs' fraud on this court was not limited to misrepresenting photographic evidence (*supra* at 12-13), destroying other evidence, and counsels' affirmative misrepresentations at hearings and in pleadings. Plaintiffs also submitted false affidavits from witnesses. On

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February 24, 2012, as part of an effort to disqualify the law firm of Roetzel & Andress from representing Defendants, Brian Smith and Gregory Mitchell swore under oath that the secretly modified ET-PLUS was “tested, certified and accepted for use.” (Dkt. No. 92-1 at 15, 44.) These sworn statements were false, and Plaintiffs knew them to be false, because only ten days earlier they had confessed to FHWA that Trinity had secretly modified the ET-PLUS in 2005 by reducing the feeder channels from 5 inches to 4 inches. (*Supra* at 11.) Plaintiffs asked FHWA to approve retroactively the redesigned ET-PLUS—a request that would not have been necessary if, as the witnesses swore, it was already approved.

Defendants filed a Motion for Sanctions in the underlying patent case based on Plaintiffs’ spoliation and misrepresentations. (Dkt. No. 383-84.) Magistrate Judge Jones denied Defendants’ request for sanctions, relying on “Mr. Kirsner’s representations about what was done.” (Dkt. No. 423 at 19.) Mr. Kirsner had represented to the Court that Plaintiffs had produced the documents Defendants claimed were spoiled. (*Id.* at 14 (“I found all the Trinity Bates numbers in ten minutes.”).) That representation was, at best, affirmatively misleading. Plaintiffs placed their own Bates numbers on productions that came from third parties.

As Defendants’ appeal of Judge Jones’s ruling made plain, Plaintiffs themselves had not produced these clearly relevant documents. (Dkt. Nos. 424-1 to 424-30.) On the day before this Court was scheduled to hear Defendants’ appeal, Plaintiffs capitulated and entered [REDACTED] settlement. That settlement is what Plaintiffs are trying to hide from public view.

**F. The Settlement Of This Case**

The parties met with Judge Jones for a settlement conference on Thursday, October 18, 2012. After twice filing this patent infringement action [REDACTED]

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[REDACTED]

The parties' oral settlement was memorialized [REDACTED] The parties envisioned signing a subsequent, more formal document. In order to avoid the issue of a non-binding "agreement to agree," [REDACTED]

[REDACTED]

[REDACTED] This Settlement Agreement was never filed with the Court or even shown to Judge Jones.

**G. The Alleged Breaches Of The Settlement And Plaintiffs' Multiplicity Of Litigation**

The dispute now before the Court began with a January 11, 2013 letter sent to the parties by Wynne Kelly, an Assistant United States Attorney for the District of Columbia who had represented Mr. Artimovich in his deposition. Mr. Kelly suggested, based on press inquiries, that the Protective Order entered in this case might have been violated by public disclosure of a

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deposition exhibit that was originally produced by FHWA in response to a FOIA request. (Ex. GG.) Mr. Kelly did not assert privilege. [REDACTED]

Defendants responded less than 24 hours later, explaining that the deposition and exhibit at issue were not Protected Information under the plain terms of the Stipulated Protective Order. (*See* Ex. HH.) Neither FHWA nor Plaintiffs have challenged Defendants' analysis of the Protective Order.

Nonetheless, Plaintiffs requested a same-day, off-the-record telephone conference with Judge Jones relating to alleged violations of the Settlement Agreement—specifically, two of the violations they allege here, relating to the Florida Subpoena and the Texas filing. (*See* Ex. II.) Plaintiffs, however, did not provide a copy of the Settlement Agreement to Judge Jones. (Thus, Defendants provided a courtesy copy to Judge Jones on January 14th.) Plaintiffs also requested an immediate production to them of Jones Day's response to the Florida Subpoena, a request Jones Day denied as improper and overly burdensome. (Ex. JJ.) The telephone conference took place at 4 pm on Monday, January 14, 2013. (*See* Ex. KK.)

Judge Jones informed Plaintiffs there was nothing the Court could do. He explained that, because the case was closed, the Court lacked jurisdiction to enforce the Settlement Agreement. Judge Jones further stated that Plaintiffs could obtain relief only by filing a new, and public, action for breach of contract.

There matters stood for a month, until the press reports concerning Plaintiffs' violations of roadway safety standards were published. (*See* Dkt. No. 454 at 1-2.) Once Plaintiffs learned that those stories were in the works, they multiplied their litigation, filing another defamation suit against Mr. Harman and SPIG in the Northern District of Georgia, where FOX was set to break the story (Ex. LL), and issuing subpoenas to the reporters themselves (Ex. MM) despite

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press-shield laws. Plaintiffs have also now ignored Magistrate Judge Jones’s ruling and filed the instant Motion to Enforce. Consistent with their pattern of misrepresentations to this Court, however, Plaintiffs’ motion does not mention Judge Jones’s January 14, 2013 ruling, nor their subsequent, month-long period of inaction before requesting a summary injunction.

**ARGUMENT**

The Fourth Circuit “has stated clearly that when a settlement agreement has been breached, two remedies are available—a *suit* to enforce the agreement or a Rule 60(b)(6) motion to vacate the prior dismissal.” *Harman v. Pauley*, 678 F.2d 478, 481 (4th Cir. 1986) (emphasis added). Here, Plaintiffs have not sought either remedy. Their motion is not a new complaint, and it nowhere mentions Fed. R. Civ. P. 60(b)(6). That omission is not surprising because Plaintiffs cannot satisfy *any* of Rule 60(b)(6)’s stringent requirements for relief from this Court’s final judgment of dismissal. Thus, Plaintiffs’ Motion to Enforce Settlement Agreement should be dismissed for lack of jurisdiction.

On the merits, Plaintiffs fail to provide *any* factual basis for alleging a violation of the Settlement Agreement’s confidentiality provision, and there has been none. Further, their requested relief—

—exposes the illegitimacy of their Motion. The Court should deny the motion and grant Defendants their attorneys’ fees.

**I. THE COURT LACKS JURISDICTION OVER PLAINTIFFS’ MOTION**

**A. The Court Did Not Retain Jurisdiction To Enforce The Agreement**

Plaintiffs’ Motion should be dismissed because this Court no longer has jurisdiction over this case, which was closed on December 5, 2012. (Dkt. No. 440.) Plaintiffs’ sole basis for contending

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██████████ There are several problems with Plaintiffs’ argument.

*First*, the Settlement Agreement, which was finalized on November 26, 2012,<sup>7</sup> was never filed with this Court. Until Plaintiffs included it with their Motion to Enforce, they never even provided a copy to the Court.<sup>8</sup> It is well settled that a party cannot “confer” jurisdiction on the Court without the Court’s own knowledge and agreement. *See Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701-702 (1982); *Harrison v. Edison Bros. Apparel Stores, Inc.*, 924 F.2d 530, 531 n.2 (4th Cir. 1991).

*Second*, given that the Court had never seen the Settlement Agreement, it never ██████████ otherwise ruled that it was retaining jurisdiction to enforce the Agreement. Instead, the Court entered the parties’ jointly filed Stipulation of Dismissal, which simply stated:

Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), the Plaintiffs/Counterclaim Defendants and Defendants/Counterclaim Plaintiffs hereby stipulate and agree that the above action, including (a) all claims, counterclaims and affirmative defenses actually asserted by the Parties in this action, (b) Counts II and III of the Amended Complaint previously dismissed *without prejudice*, and (c) Counts I, II-A, II-B, III-A and III-B, and the Count VIII of the Second Amended Counterclaim previously dismissed *without prejudice*, are dismissed *WITH PREJUDICE*, subject to the terms of the Settlement Agreement and Mutual release dated November 26, 2012, with each party to bear its own costs, expenses and attorneys’ fees.

(Dkt. No. 440.) Neither the parties’ Stipulation nor this Court’s Order recites any jurisdictional language. Moreover, it is well established that the mere reference to a “Settlement Agreement” does not establish jurisdiction to enforce the Agreement. *See Smyth v. Rivero*, 282 F.3d 268,

<sup>7</sup> Presumably unintentionally, ██████████  
██████████

<sup>8</sup> Elsewhere, but not in their Motion to Enforce, Plaintiffs concede that the Settlement Agreement had not been provided to the Court. (Dkt. No. 442 at 2 (“The parties did not file the settlement agreement previously with the Court to avoid public disclosure of their agreed terms of settlement.”).)



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283 (4th Cir. 2002) (“The rule that a court’s order must embody a settlement agreement to serve as a basis for jurisdiction to enforce the agreement is adhered to strictly. This rule is interpreted to require that the district court give a clear indication that it is incorporating the terms of the agreement into that order or retaining jurisdiction over the agreement.” (internal citations, quotation marks, and alterations omitted)). Long ago, the Fourth Circuit explained that a court “is not . . . empowered to enforce” a settlement agreement in a case that had been before it unless “the agreement had been approved and incorporated into an order of the court.” *Fairfax Countywide Citizens Ass’n v. County of Fairfax, Va.*, 571 F.2d 1299, 1302-03 (4th Cir. 1978); *Trustees of Painters Trust Fund of Wash. D.C. v. Clabbers*, No. 02-4063, 2010 BL 156432, at \*4-5 (D. Md. July 9, 2010). The Stipulation plainly does not establish any approval or incorporation of the Settlement Agreement. Thus, without this Court’s express retention of jurisdiction or incorporation of the Agreement into a Court Order, no jurisdiction remains. *See, e.g., Gambale v. Deutsche Bank AG*, 377 F.3d 133, 139 (2d Cir. 2004) (“Generally . . . a plaintiffs filing in the district court of a stipulation of dismissal signed by all parties pursuant to Rule 41(a)(1)(A)(ii) divests the court of its jurisdiction over a case, irrespective of whether the district court approves the stipulation.”).

*Third*, even if the private Settlement Agreement could somehow confer jurisdiction unbeknownst to the Court, Plaintiffs flatly mischaracterize its terms [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *See, e.g., Hovenssa, LLC v. Technip*

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*Italy S.p.A.*, No. 08-civ-1221, 2009 BL 61058, at \*5 (S.D.N.Y. Mar. 16, 2009) (“[A]lthough the parties purported to contract to jurisdiction in this court, their effort was unavailing”; they have “no basis for federal subject matter jurisdiction,” and [REDACTED]

[REDACTED]. The plain language makes this clear. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

A case from the Eleventh Circuit is instructive. In *Anago Franchising Inc. v. Shaz*, 677 F.3d 1272 (11th Cir. 2012), the court vacated a district court’s order enforcing a settlement agreement because the district court lacked jurisdiction. Unlike here, the parties’ stipulation of dismissal in *Anago* even expressly stated that “the Court shall reserve jurisdiction to enforce the settlement between the parties.” *Id.* at 1274. The Eleventh Circuit held that this self-executing nature of a Rule 41(a)(1)(a)(ii) stipulation precluded jurisdiction, notwithstanding the parties’ intent. *Id.* at 1277-78. Here, the facts precluding jurisdiction are even more compelling. This Court cannot have retained jurisdiction by a self-executing Stipulation’s enigmatic reference to a Settlement Agreement that the Court had never seen.

**B. Supreme Court And Fourth Circuit Precedent Require A New Action For The Relief Plaintiffs Seek**

Although the allegations in Plaintiffs’ Motion are without merit (*see* Part II, *infra*), the Court’s lack of jurisdiction does not preclude them from bringing a new case to enforce the Agreement (subject to their Rule 11 obligations). Consistent with longstanding Supreme Court and Fourth Circuit precedent making clear how Plaintiffs should have proceeded, Judge Jones conveyed this point during the conference that Plaintiffs requested. Plaintiffs wholly ignore this

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precedent and Judge Jones’s words in burdening the Court and Defendants with their Motion.

In *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375 (1994), the Supreme Court held that “[e]nforcement of the settlement agreement. . . whether through award of damages or decree of specific performance, is more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction.” *Id.* at 378. (emphasis added). Similarly, in *Harman*, the Fourth Circuit held that, when a settlement agreement has been allegedly breached, the complaining party should bring “a suit to enforce the agreement” (if does not file a Rule 60(b)(6) motion to vacate the dismissal). 678 F.2d at 481; *see also Guinness PLC v. Ward*, 955 F.2d 875, 895 n.17 (4th Cir. 1992) (citing *Harman* and other cases for the proposition that “attempts to enforce such settlements are normally separate causes of action and that the parties should more appropriately bring separate actions to so enforce”).<sup>9</sup>

*Hinsdale v. Farmers Nat’l Bank & Trust Co.*, 823 F.2d 993 (6th Cir. 1987), is directly on point. There, the Sixth Circuit vacated a district court’s order enforcing a settlement agreement for lack of jurisdiction. *Id.* at 996. *Hinsdale* reasoned that the stipulation of “dismissal with prejudice terminated the district court’s jurisdiction except for the limited purpose of reopening and setting aside the judgment of dismissal within the scope allowed by Rule 60(b) of the Federal Rules of Civil Procedure.” *Id.* at 995-96 (internal quotation marks omitted) (citing, *inter alia*, *McCall-Bey v. Franzen*, 777 F.2d 1178, 1190 (7th Cir. 1985)). Thus, the parties could “seek enforcement of the settlement agreement only by means of an

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<sup>9</sup> Plaintiffs cite *Silicon Image, Inc. v. Genesis Microchip, Inc.*, 271 F. Supp. 2d 840 (E.D. Va. 2003), and [REDACTED]

[REDACTED] ) But that case is distinguishable. *Silicon Image* did not arise after a stipulation of dismissal, so there was no need for Rule 60(b)(6) relief or a new case because there was no final judgment. Indeed, the Court was not being asked to adjudicate a breach of the settlement agreement, but rather determine whether “there was an agreement and, if so what the terms of the agreement were.” *See generally Trustees of Painters’ Trust Fund*, 2010 BL 156432, at \*5 (describing *Hensley v. Alcon Labs, Inc.*, 277 F.3d 535, 540-41 (4th Cir. 2002)); *see Silicon Image*, 271 F. Supp. 2d at 847.

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independent action for specific performance or by means of a Rule 60(b) motion *to vacate the prior order of dismissal* for the purpose of enforcing the agreement.” *Id.* at 996 (original emphasis) (citing *Harman* and *Stipelcovich v. Sand Dollar Marine, Inc.*, 805 F.2d 599, 605 (5th Cir. 1986)). Because Hinsdale’s motion, like Plaintiffs’ motion here, did not “specifically request[] relief under Rule 60(b),” the Sixth Circuit concluded that “the district court was without jurisdiction to enforce the settlement agreement.” *Id.* at 996 & n.3.

As in *Hinsdale*, Plaintiffs here filed their motion in a *closed* case, not a *new* one, and make no reference to Rule 60(b). Their motion should be dismissed for lack of jurisdiction.

**C. Plaintiffs Have No Grounds To Reopen The Case Under Rule 60(b)(6)**

Even if Plaintiffs had filed a motion to reopen this closed case pursuant to Rule 60(b)(6), they could not, as a matter of law, satisfy that Rule’s stringent requirements for relief. Rule 60(b)(6) states in pertinent part: “on motion and just terms, the court may relieve a party . . . from a final judgment, order, or proceeding for . . . any other reason that justifies relief.” “While this catchall reason includes few textual limitations, its context requires that it may be invoked in only ‘extraordinary circumstances’ . . . .” *Aikens v. Ingram*, 652 F.3d 496, 500 (4th Cir. 2011) (en banc); *see also, e.g., Ackermann v. United States*, 340 U.S. 193, 202 (1950).

To make this extraordinary showing, a Rule 60(b) movant must show (1) it has another viable avenue for relief, *see* 11 Charles Alan Wright et al., *Federal Practice & Procedure* § 2857 (3d ed. & supp. 2012); *Harman*, 678 F.2d at 481, (2) its motion is “timel[y],” *Dowell v. State Farm Fire & Cas. Auto. Ins. Co.*, 993 F.2d 42, 48 (4th Cir. 1993), and (3) its claim is “meritorious,” *Aikens*, 652 F.3d at 501. Plaintiffs cannot satisfy any of these requirements.

1. Plaintiffs have another option for relief—a new lawsuit

Plaintiffs cannot satisfy Rule 60(b)(6)’s requirement of demonstrating prejudice from the existing Stipulation of Dismissal. Reopening this case is unnecessary because the

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Settlement Agreement is at least equally enforceable in a separate action.

The Fourth Circuit’s decision in *Harman* is directly on point. There, the plaintiff sought to enforce a settlement agreement by Rule 60(b) motion in the underlying case, which had already been dismissed with prejudice. 678 F.2d at 480. The district court refused to reopen the case, observing that “Harman could obtain the same relief. . . . through a lawsuit against Pauley.” *Id.* at 481. The Fourth Circuit affirmed, concluding “that under these circumstances the interests of justice do not require vacation of the dismissal order” under Rule 60(b). *Id.* at 481-82; *see also, e.g., Sawka v. Healtheast, Inc.*, 989 F. 2d 138, 140-141 (3d Cir. 1993).

The District of Maryland recently applied *Harman* to reject a motion to enforce a settlement agreement. *Trustees of Painters Trust Fund*, 2010 BL 156432, at \*5-6. “Plaintiffs have failed to demonstrate extraordinary circumstances justifying vacatur of the prior order dismissing the case, particularly where they may seek relief *via* a new lawsuit.” *Id.* at \*6; *see also, e.g., Outside-the-Box, Inc. v. Global Inflight Prods.*, No. 04-455, 2007 BL 3741 (W.D.N.C. May 17, 2007) (relying on *Harman* to conclude that granting the motion to enforce “would not further justice”; “a better remedy would be for [movant] to file a separate action for enforcement of the settlement agreement”).

The result should be the same here. Vacatur of the parties’ joint Stipulation of Dismissal resolving this case is unnecessary because Plaintiffs may seek relief in a separate suit for breach of contract. Plaintiffs certainly have shown no hesitation to vexatiously multiply proceedings. As demonstrated in the Factual Background above, they have already filed two separate, yet substantively identical, defamation actions in two different venues.

2. Plaintiffs’ Motion Is Untimely

Any request for Rule 60(b) relief would also be untimely. The Fourth Circuit has repeatedly held that a months-long delay does not warrant the extraordinary relief of Rule

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60(b)(6). *See, e.g., McLawhorn v. John W. Daniel & Co.*, 924 F.2d 535, 538 (4th Cir. 1991) (upholding denial of Rule 60(b) motion as untimely where three and a half months passed between notice of judgment and 60(b) motion); *Central Operating Co. v. Util. Workers of Am.*, 491 F.2d 245, 253 (4th Cir. 1974) (same, “almost four months”); *see also Consol. Masonry & Fireproofing, Inc. v. Wagman Const. Corp.*, 383 F.2d 249, 251 (4th Cir. 1967) (same, two and one-half months). Likewise, in *Jones v. City of Richmond*, 106 F.R.D. 485 (E.D. Va. 1985), this Court refused to vacate a dismissal entered after a settlement because the movant “delayed for over three months in filing his motion under Rule 60(b) and has presented absolutely no circumstances to justify that delay.” *Id.* at 490.

Here, Plaintiffs have been aware of two of the alleged violations for several months. The Florida subpoena issued on November 20, 2012. [REDACTED] The Texas filing occurred on December 12, 2012. Trinity is a party in both of those cases and thus had immediate knowledge of the supposed violations. Plaintiffs even referenced them during their requested January 14th teleconference with Judge Jones. Yet Plaintiffs filed their Motion only now (when the press reports have begun in earnest). As in *Jones*, Plaintiffs cannot justify their delay. To the extent they seek Rule 60(b) relief, it should be denied as untimely.<sup>10</sup>

3. Plaintiffs’ Arguments Have No Merit

Finally, even if Plaintiffs could overcome the other hurdles to treating their Motion to Enforce as a Rule 60 motion (or if Plaintiffs were to later file a Rule 60 motion), the motion would have to be denied for lack of merit. As discussed in the following Section, Defendants have not breached the Settlement Agreement.

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<sup>10</sup> To the extent that Plaintiffs rely on the January 14th conference with Judge Jones to demonstrate timeliness, that merely highlights the substantive defects of Plaintiffs’ request. Judge Jones informed Plaintiffs that they would have to file a *new* complaint in order to enforce the Settlement Agreement.

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**II. PLAINTIFFS, NOT DEFENDANTS, HAVE BREACHED THE SETTLEMENT AGREEMENT**

If this Court were to reach the merits of Plaintiffs’ Motion notwithstanding its lack of jurisdiction, the Motion should be denied. Plaintiffs fail to offer substantive evidence of *any* violation of the Settlement Agreement, *except their own*. Instead, Plaintiffs appear to be reacting to their displeasure about the exercise of free speech by Mr. Harman and the press.

**A. The Florida Subpoena Does Not Reveal Any Settlement Terms**

In contending that the Florida subpoena shows a violation of the Agreement’s confidentiality, Plaintiffs merely invoke its “timing,” noting that it was issued on the same date that Defendants executed the Settlement Agreement. (Dkt. No. 444 (filed under seal) at 9.) The timing, however, leads to the opposite conclusion. Under the terms of Paragraph 20 of the parties’ *public* Stipulated Protective Order (Dkt. No. 141 at 20), [REDACTED] deleted sixty-days *after* termination of the case. The settlement terminated the case, thus initiating the 60-day countdown for document deletion. Accordingly [REDACTED] any individual seeking access to Protected Information produced in the underlying case would have to act quickly while Jones Day still had the documents [REDACTED] [REDACTED] In short, the very timing of the subpoena undercuts—rather than supports—any inference of a violation.<sup>11</sup>

**B. The Texas Filing Does Not Reveal Any Terms Of The Settlement Agreement**

Plaintiffs claim that the Texas filing violated the Agreement because it informed the

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<sup>11</sup> Plaintiffs’ arguments regarding [REDACTED] the subpoena are irrelevant. A subpoena is a court order. Moreover, in the District for the District of Columbia, compliance with a subpoena is required despite the pendency of an ungranted motion to quash. *Albert v. Starbucks Coffee Co.*, 213 F. App’x 1, 2 (D.C. Cir. 2007). Likewise, Plaintiffs improperly critique Jones Day for declining to claw back its production. Claw back is unnecessary where, as here, the challenge to the subpoena remains unresolved and the counsel issuing the subpoena has certified that he will not review the production until after that Court rules on his Motion to Reconsider. (*See* Ex. II.)

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Texas Court that Plaintiffs [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] does not publicly reveal the terms of the Settlement

Agreement, because it does not even refer to the Settlement Agreement.

Moreover, this sentence appeared in Mr. Harman’s Opposition to Trinity’s Motion to Voluntarily Dismiss the Texas Case. Trinity moved to dismiss the Texas case on the same day that the parties stipulated to dismiss this case. It is apparent that Plaintiffs were seeking to

[REDACTED] Yet, just one month earlier, Plaintiffs had threatened Mr. Harman with additional defamation suits (Ex. NN); a threat later realized by the filing of a defamation action in the Northern District of Georgia. (Ex. LL.) In light of this background [REDACTED] to protect

Mr. Harman’s ability to defend himself from Plaintiffs’ multiple suits.

**C. Mr. Harman’s Statement To Journalists Does Not Reveal Any Terms Of The Settlement Agreement**

Lastly, Plaintiffs allege that Mr. Harman disclosed [REDACTED] informing a reporter that Plaintiffs made “a *confidential* settlement that allowed both parties to walk away from the patent lawsuit.” (Ex. E at 7.) But [REDACTED]

[REDACTED]

[REDACTED] See, e.g.,



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*Con Ed. Co. of N.Y., Inc. v. Fyn Paint & Lacquer Co.*, No. CV-00-3764, 2008 BL 63560, at \*13 (E.D.N.Y. Mar. 28, 2008) (“Prior to reaching the May 2003 agreement, defendants even offered to transfer the Fyn Paint site to Con Edison at no cost as part of a proposed settlement, a generous offer that was made so that Feinstein could walk away from this litigation.”).<sup>12</sup> Here, Mr. Harman *preserved* the confidentiality of the agreement by telling reporters that the settlement was “confidential” and allowed both parties to end the litigation without the need for a trial. He did not reveal [REDACTED]. There is no violation.

**D. In Contrast, Plaintiffs’ Memorandum In Support Of The Motion To File Under Seal Violates The Settlement Agreement**

In contrast, Plaintiffs themselves affirmatively violated the Settlement Agreement by expressly disclosing that “it included a confidentiality clause as a material term.” (Dkt. No. 442 at 4.) Plaintiffs fail to note that the confidentiality clause covers all terms, including the confidentiality clause itself. Plaintiffs’ Memorandum in Support of the Motion to Enforce also violates Federal Rule of Evidence 408 by quoting statements made at the settlement conference in an effort to impugn Mr. Harman’s credibility. (*See, e.g.*, Dkt. No. 444 (filed under seal) at 5.)

Plaintiffs’ violations and unclean hands further support denial of equitable relief under Rule 60(b)(6). Plaintiffs conduct also demonstrates why a summary proceeding is improper—if Plaintiffs had proven a violation, Defendants would be entitled to discovery to further support affirmative defenses, such as the *in pari delicto* defense implicated by Plaintiffs’ misconduct.

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<sup>12</sup> *See also, e.g., Border Collie Rescue, Inc. v. Ryan*, No. 3:04-cv-568, 2006 BL 80360, at \*2 (M.D. Fla. July 21, 2006) (“The Court has reviewed and considered the parties’ various notices informing the Court of the status of settlement negotiations and the various conditions upon which the parties would walk away from each other, or this case, entirely.”); *Malek v. Verizon Commc’ns, Inc.*, No. 02-30164-MAP, 2004 BL 3189, at \*2 (D. Mass. Jan. 27, 2004) (“Plaintiff was willing to settle the case in exchange for \$10,000; that Plaintiff did not want to return to work for Verizon; and that if the ‘original offer’ was placed back on the table, and there were mutual releases, Plaintiff would ‘walk away from’ the case.”); *In re Allen*, NO. 11-37671, 2012 BL 215154, at \*20 (Bankr. D.N.J. Mar. 2, 2012) (“Debtor chose to settle . . . and walk away from ATN for a sum he presumably felt fair.”).

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**III. EVEN IF DEFENDANTS HAD VIOLATED THE SETTLEMENT AGREEMENT, PLAINTIFFS’ REMEDIES WOULD STILL BE IMPROPER**

Assuming, *arguendo*, that Plaintiffs had supplied any actual evidence that Defendants violated the Settlement Agreement, they still would not be entitled to the remedies they request. Those requests in fact reveal the true purpose of Plaintiffs’ Motion—to squelch the media and freedom of speech simply because Plaintiffs do not like what is being said. That is not the law.

Plaintiffs first request an order enjoining violation of the Settlement Agreement. Overlooking the First Amendment problems inherent in such a prior restraint, Plaintiffs’ Motion to File Under Seal demonstrates that an injunction is unavailable here. Pursuant to Federal Rule of Civil Procedure 65(d), “[e]very order granting an injunction . . . must describe in reasonable detail—and not by referring to . . . [an] other document—the act or acts restrained.” (Emphasis added). Any injunction requiring compliance with the terms of the Settlement Agreement would thus have to publicize the terms of that Agreement, contrary to Plaintiffs’ willingness and in violation of the Agreement’s confidentiality clause. Moreover, the existence of the confidentiality clause demonstrates that the parties did not intend the Agreement to be enforceable as a court order. If Plaintiffs had so desired, they should have bargained for such a benefit in the settlement negotiations. The Court should not permit Plaintiffs to unilaterally change the terms of settlement simply because they now desire a better bargain.

Next, Plaintiffs request that the Court require Jones Day—a non-party—to claw back a response to a subpoena issued out of the District for the District of Columbia for discovery in an action pending in the Middle District of Florida. This Court lacks jurisdiction over that subpoena and the subpoenaed party’s response (not to mention that party itself). Rule 45 “clearly provides that a motion to quash or modify a subpoena must be brought *in the court from which the subpoena was issued*, rather than the court where the underlying action is

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pending.” *First Time Videos LLC v. Doe*, No. 2:11-cv-690-MSD-FBS, 2012 WL 1134736 at \*1 (E.D. Va. April 4, 2012) (emphasis added) (dismissing a motion to quash a subpoena issued by the District of Minnesota because the motion had to be filed in that district); *see also McCook Metals LLC v. Alcoa, Inc.*, 249 F.3d 330, 334 (4th Cir. 2001) (Rule 45 assigns the issuing court “the responsibility of issuing and enforcing subpoenas in its district”).

Plaintiffs’ third and fourth requests—for sanctions and an unspecified amount of damages—are equally uncalled for. Moreover, they have no possible basis. Neither is [REDACTED], and Plaintiffs provide no statutory or other basis for sanctions. *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 301 (4th Cir. 2002) (vacating finding of civil contempt for publication of confidential settlement agreement in the absence of valid court order mandating confidentiality); *see Hester Indus., Inc. v. Tyson Foods, Inc.*, 160 F.3d 991 (2d Cir. 1998) (same, violation of settlement agreement). Likewise, Plaintiffs fail to offer any evidence of the amount of supposed damages, (Dkt. No. 444 at 11), and Plaintiffs have waived an evidentiary hearing. (Dkt. No. 451 at 3.) Their requests are histrionic, not well made.

The entities burdened by Plaintiffs’ motion are the Court and Defendants, not Plaintiffs. Plaintiffs have ignored Judge Jones’s directive that the Court has no jurisdiction over their allegations and have ignored the case law plainly establishing this fact. Instead, they have burdened this Court with an improper motion that seeks relief unavailable to them. Defendants should be reimbursed for their time and expenses responding to this motion.

### CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs’ Motion to Enforce the Settlement Agreement and grant Defendants their attorneys’ fees and costs.

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Dated: March 1, 2013

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on March 1, 2013, a copy of the foregoing was filed electronically with the Clerk of Court using the ECF system which will send notification to the following ECF participants:

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