

Kurt D. Holzer; ISB #4557
HEPWORTH HOLZER, LLP
537 West Bannock Street, Suite 200
Boise, Idaho 83702
Telephone: (208) 314-9115
Facsimile: (208) 342-2927
Email: kholzer@hepwortholzer.com

Ronald L.M. Goldman; CA SBN 3422
Clay Robbins III; CA SBN 101275
BAUM, HEDLUND, ARISTEI, GOLDMAN, PC
10940 Wilshire Boulevard, Suite 1600
Los Angeles, California 90024
Telephone: (310) 207-3233
Facsimile: (310) 820-7444
Email: crobbins@baumhedlundlaw.com

Attorneys for Plaintiff Lawrence P. Manlapit, Jr.,
Individually and as Co-Administrator of the
Estate of Lawrence P. Manlapit, III

Raymond D. Powers; ISB #2737
Mark J. Orlor; ISB #7476
Cody J. Witko; ISB #10427
POWERS FARLEY, P.C.
702 West Idaho Street, Suite 700
Boise, Idaho 83702
Telephone: (208) 577-5100
Email: contact@powersfarley.com
rdp@powersfarley.com
mjo@powersfarley.com
cjw@powersfarley.com

Attorneys for Plaintiff Dorine E. Noriko,
Individually and as Co-Administrator of the
Estate of Lawrence P. Manlapit, III

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

LAWRENCE P. MANLAPIT, JR.,
individually as father of LAWRENCE P.
MANLAPIT, III, DECEASED,

Plaintiff,

vs.

KRUJEX FREIGHT TRANSPORT CORP.;
KRUJEX TRANSPORTATION CORP.;

Lead Case No. CV01-19-06625
(Consolidated with Case Nos.
CV01-19-23246, CV01-20-00653,
CV01-20-02624, CV01-20-07803 and
CV01-20-08172)

**MEMORANDUM IN SUPPORT OF
MANLAPIT/JOHNSON/WESTALL**

KRUJEX TRANSPORTATION SYSTEMS, LLC; KRUJEX LOGISTICS, INC.; ALBERTSON'S COMPANIES; CORNELIEU VISAN; DANIEL VISAN; LIGRA VISAN; STATE OF IDAHO; STATE OF IDAHO DEPARTMENT OF TRANSPORTATION; IDAHO STATE POLICE; PENHALL COMPANY; PARAMETRIX, INC.; SPECIALTY CONSTRUCTION SUPPLY LLC; and DOES 1 through 150, inclusive,

Defendants.

AND ALL CONSOLIDATED ACTIONS.

PLAINTIFFS' JOINT MOTION FOR LEAVE TO AMEND COMPLAINTS TO ADD A CLAIM FOR PUNITIVE DAMAGES AGAINST DEFENDANTS PENHALL COMPANY AND SPECIALTY CONSTRUCTION SUPPLY, LLC

COME NOW Plaintiffs Lawrence P. Manlapit, Jr. and Dorine E. Norko, individually and in their capacity as Co-Administrators of the Estate of Lawrence P. Manlapit, III¹ ("Manlapit Plaintiffs"), Plaintiff Daisy Johnson, and C.J., a minor, and Plaintiffs Kimberly and Michael Westall, by and through their undersigned counsel, and respectfully submit this *Memorandum in Support of Manlapit/Johnson/Westall Plaintiffs' Joint Motion for Leave to Amend Complaints to Add a Claim for Punitive Damages Against Defendants Penhall Company and Specialty Construction Supply, LLC*.

¹ As far as the conflicts of law issue regarding the Estate of Lawrence P. Manlapit, III is concerned, although Connecticut has the predominant interest in having its compensatory damages law applied to the Estate's wrongful death claim, the same cannot be said on the issue as it relates to punitive damages. On that front, Idaho, rather than Connecticut, possesses the predominant interest in having its punitive damages law applied because such an award is not intended to compensate a plaintiff, but rather to punish and deter a defendant. This concept is articulated in *Weinstein v. Prudential Property and Cas. Ins. Co.*, 149 Idaho 299, 233 P.3d 1221 (2010), when the Idaho Supreme Court commented on the purpose of punitive damages: "to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition" and "detering the defendant and others within the state from engaging in similar wrongful conduct in the future." *Id.* at 333, 233 P.3d at 1255 (emphasis added). Thus, when it comes to punitive damages, Idaho law applies because it has the predominant interest. This conclusion also reinforces why Connecticut law applies to the Estate's compensatory damages—because that state has the "most significant relationship" on the issue in order to further Connecticut's policy of allowing full compensation for its decedents' estates in death cases. *See Toyota Motor Co. v. Cook*, 581 S.W.3d 278, 289-92 (Tx. Ct. App. 2019) (performing conflict of law analysis and applying different law on the issue of compensatory damages (Texas) and punitive damages (Mexico)).

I. INTRODUCTION

The Manlapit/Johnson/Westall Plaintiffs are entitled to an order granting their joint motion for leave to amend their complaints to assert claims for punitive damages against Defendants Penhall Company (“Penhall”) and Specialty Construction Supply LLC (“Specialty”). Both defendants acted in a manner constituting an extreme deviation from reasonable standards of conduct and showed a complete disregard or indifference towards well-established standards of conduct applicable to them, and they each flagrantly and grossly violated basic and straightforward requirements governing the construction Project specifically designed to preserve the safety of the general motoring public.

Penhall and Specialty, in an intentional and purposeful manner, deviated from the traffic control plan and special provisions prepared by a professional licensed engineer specifically for the I-84 construction Project at issue. The professional licensed engineer, Ken Colson/Parametrix, determined at least two lanes on a four-lane section of I-84 needed to remain open to traffic during construction activities. This requirement was based, at least in part, on a traffic capacity analysis performed based on traffic volume data provided by the ITD. The requirement that two lanes remain open was not a complex or intricate engineering detail to implement; rather, it was simple and straight-forward.

If Penhall or Specialty wished to use an alternate traffic control plan, Mr. Colson outlined a process to allow that to happen, which included submitting the request for consideration by the ITD in writing, with alternate plans being prepared and sealed by an Idaho professional engineer. The amended plan had to be presented for approval to the ITD engineer at least 14 days in advance of any proposed change to the original TCP. Moreover, the existing TCP had to remain in place until the ITD engineer approved any proposed changes to the existing TCP.

Penhall and Specialty intentionally and purposefully deviated from the TCP and Special Provisions by closing three of the four lanes on I-84 in the fall of 2017 and again in June 2018. This was in direct violation of the contract requirements and the approved TCP. These deviations were not supported by an engineer's approval or a traffic capacity analysis. Predictably, when Penhall and Specialty implemented this unapproved change to the TCP, traffic backed up into and well beyond the advance warning area of the TCP at a minimum on the evenings of June 14, 15, and 16, 2018. In fact, for days prior to the fatal crash on June 16, 2018, both Penhall and Specialty knew, or should have known, that their decision to flagrantly violate the explicit TCP and Special Provisions by closing three of four lanes on I-84 eastbound would, and did, cause severe traffic backups creating a dangerous and unnecessary hazard for motorists traveling that section of I-84 East those evenings. Before the fatal collision that is the subject of this motion, Penhall and Specialty were notified that motorists were calling to complain and/or express concern about the lengthy traffic backups which extended in some points at least three miles upstream of the start of the first lane closure, well beyond the advance warning zone. Both Penhall and Specialty were aware that traffic backups on a highspeed interstate highway, late at night, created a dangerous condition and exposed motorists to the risk of rear-end collisions, yet neither entity did anything to rectify their self-created dangerous condition.

On June 16, 2018, at about 11:30 p.m., a Jeep Wrangler containing three members of the U.S. Air Force—Carlos Johnson, Karlie Westall, and Lawrence Manlapit, III—found itself in the unfortunate position of being at the end of a lengthy traffic queue that had formed due to Penhall and Specialty's intentional deviation from the TCP and Special Provisions. The traffic queue never would have formed that night had Penhall and Specialty adhered to the simple and straightforward requirement of keeping two lanes of traffic open. But Penhall was behind schedule on the Project

and desperate to avoid being assessed financial penalties under the contract. Closing an extra lane allowed the work to progress on a more expedited basis and the Project to finish on time.

As the Jeep Wrangler was either stopped or almost at a stop at the end of the traffic queue, a tractor-trailer operated by Illya Tsar slammed into the back of it, forcing it forward into the rear end of another tractor-trailer. The vehicles were consumed by fire. Mr. Johnson, Ms. Westall, and Mr. Manlapit, III all suffered horrific deaths (as did Mr. Tsar). Plaintiffs will establish at trial that Penhall and Specialty's extreme deviations from reasonable standards of conduct were a proximate cause of this senseless and horrific fatal crash and that Mr. Johnson, Ms. Westall, and Mr. Manlapit paid the ultimate price as a result.

II. APPLICABLE LEGAL STANDARD

Under Idaho law, a complaint as originally filed cannot contain a prayer for punitive damages; instead, a party seeking punitive damages may move to amend the pleadings to assert a prayer for punitive damages, which shall be allowed if the plaintiff establishes "a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages." Idaho Code § 6-1604(2).

To support an award of punitive damages, "the claimant must prove, by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted." Idaho Code § 6-1604(1). For purposes of the motion for leave to amend, the party seeking to add a claim for punitive damages does not need to meet the burden of clear and convincing evidence at the motion stage; rather, the party need only show "a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages." *Bryant v. Colonial Sur. Co.*, 2016 WL 707339, at *3 (D. Idaho Feb. 22, 2016); *see* Idaho Code § 6-1604(2). Once the plaintiff has established a reasonable likelihood of proving

facts at trial sufficient to support an award of punitive damages, “[t]he court shall allow the motion to amend the pleadings.” Idaho Code § 6-1604(2) (emphasis added). The trial court is to use its discretion, after weighing the evidence, in determining whether the plaintiff has established a reasonable likelihood of proving a claim for punitive damages. *Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 423, 95 P.3d 34, 41 (2004).

In *Cheney v. Palos Verdes Inv. Corp.*, the Idaho Supreme Court described the circumstances necessary to justify punitive damages:

An award of punitive damages will be sustained on appeal only when it is shown that the defendant acted in a manner that was “an extreme deviation from reasonable standards of conduct, and that the act was performed by the defendant with an understanding of or disregard for its likely consequences.”

104 Idaho 897, 905, 665 P.2d 661, 669 (1983) (internal citations omitted).

Punitive damages may properly be imposed to further a State’s legitimate interest in punishing unlawful conduct and deterring its repetition within its borders. *Weinstein v. Prudential Property and Cas. Ins. Co.*, 149 Idaho 299, 335-36, 233 P.3d 1221, 1256-58 (2010). “Deterrence” refers to discouraging the defendant and others within the state from engaging in similar wrongful conduct in the future. *Id.* The purpose of punitive damages is to punish the defendant and for the added purpose of protecting the public in the state by deterring the defendant and others from doing such wrong in the future. *Id.*

III. STATEMENT OF FACTS

The Plaintiffs will be able to establish the following facts at trial:

Preparing for the I-84 Project

1. In December 2016, the ITD hired Parametrix, Inc. (“Parametrix”), a professional civil engineering firm that performs traffic engineering services, to prepare a construction staging and temporary traffic control plan, including special provisions, for designated Federal Aid Project

No. A 019(289), the I-84 Five Mile Road to Orchard Roads and Ramps (the “Project”).² The Project was located along I-84, between Five Mile and Orchard, beginning at milepost 48.1 and ending at milepost 51.3.³ It consisted of grinding of concrete pavement, resealing concrete pavement joints, repairing concrete cracks, and repairing pavement spalls in an effort to improve the interstate’s driving surface.⁴

2. ITD determined the Project was a “significant project” requiring the development of a Transportation Management Plan, also known as a Temporary Traffic Control Plan (“TTCP”).⁵ A “Significant Project” involves a large volume of traffic relative to Idaho Highways, complex staging and phasing through system interchange, and the general nature of the work primarily related to the impact of traffic and roadways.⁶

3. The average daily traffic count for I-84 in 2017 was “substantially higher” than 85,270 vehicles per day and “probably over double that amount.”⁷ ITD provided Parametrix with the average daily traffic numbers, commercial truck volume, and average speed for I-84 so they could prepare the TTCP for this project.⁸

4. On January 18, 2017, Parametrix met with ITD personnel for the Project’s “Kickoff Meeting,” where it was first discussed and agreed that in the 4-lane sections the Project would

² See Declaration of Clay Robbins, III, in Support of Manlapit/Johnson/Westall Plaintiffs’ Joint Motion for Leave to Amend Complaints to Add a Claim for Punitive Damages Against Defendants Penhall Company and Specialty Construction Supply LLC (Robbins Dec.) at Ex. 24 (Declaration of Ken Colson, P.E. filed on or about December 8, 2020, in support of Parametrix’s Motion for Summary Judgment) at p. 2; Tab 7, pp. 196-200; see also Robbins Dec., Ex. 27 at 22:25-23:20.

³ See Robbins Dec. at Ex. 3.

⁴ *Id.*

⁵ *Id.* at Ex. 27 at 13:5-13:17; 15:8-16:7.

⁶ *Id.* at 13:18-14:9; 15:10-15:17; see Robbins Dec. at Ex. 2.

⁷ *Id.* at 82:15-84:1.

⁸ *Id.* at 84:7-86:9.

show a two (2) lane work zone with two (2) lanes open to traffic.⁹ The meeting's discussions were memorialized in a written memorandum.¹⁰

5. On March 2, 2017, Parametrix and ITD again met for a "Preliminary Design Review Meeting," wherein Parametrix's preliminary TTCP was reviewed and revised.¹¹ During this meeting, ITD suggested a review of hourly traffic volume data to determine whether weekend work times could be extended.¹² Parametrix agreed to review the traffic volume data and report its finding in an email.¹³

6. Parametrix used the Highway Capacity Manual 2010 for capacity evaluations and determined that the capacity of I-84 in this area was 1,450 vehicles per lane per hour and, required that two lanes be maintained open at all times in the eastbound and westbound directions on sections that had four existing through lanes, such as at the crash location.¹⁴

7. On March 22, 2017, ITD and Parametrix met for a "Final Design Review Meeting."¹⁵ The purpose of this meeting was to discuss final edits to the traffic control plan, as well as review and approve content to be placed in the special provisions associated with implementation of the traffic control plan.¹⁶ By this time, the plans and specifications for the Project were largely complete.¹⁷ However, Bryon Breen, ITD's Resident Engineer for the Project, discussed that the requirements for the Traffic Control Manager ("TCM") should be "tightened up

⁹ See Robbins Dec., Ex. 24 at Ex. A.

¹⁰ See Robbins Dec., Ex. 27 at 101:12-; 102:16; see also Robbins Dec., Ex. 24 at Ex. A.

¹¹ See Robbins Dec., Ex. 24 at Ex. B; see also Robbins Dec. at Ex. 13 at 39:24-40:4.

¹² See Robbins Dec., Ex. 24 at Ex. B.

¹³ *Id.*

¹⁴ See Robbins Dec. at Ex. 4.

¹⁵ See Robbins Dec., Ex. 24 at Ex. C.

¹⁶ *Id.*

¹⁷ See Robbins Dec. at Ex. 15 at 39:24-40:4; 48:8-48:21.

so that we get a higher caliber more qualified person for this critical job.”¹⁸ Mr. Breen, as the Resident Engineer, was concerned about the volume of traffic through the Project, as it is one of the highest volume areas in the State of Idaho,¹⁹ and he wanted to ensure that the TTCP was properly carried out on the Project.²⁰ This recommendation for a “higher caliber” TCM was ultimately incorporated in the final plans and specifications for the Project.²¹

8. On March 28, 2017 and March 30, 2017, ITD and Parametrix stamped the design plans (“Plan and Profile” for the Project), signifying they were complete.²²

The TTCP and the Special Provisions for the Project

9. The Project’s plans included substantial direction regarding implementing, monitoring, and, if needed, adjusting the approved temporary traffic control plan (“TTCP”).²³ At the outset of the TTCP, the “Temporary Traffic Control General Notes” provided, in relevant part, as follows:

- 3. If the Temporary Traffic Control Plan Shown Does Not Form To The Contractor’s Method of Operation. **The Contractor Will Submit a Temporary Traffic Control Plan For Approval. Fourteen (14) Calendar Days of Review Time Is Required For The Temporary Traffic Control Plan Or Changes Made To The Plan.**²⁴
- 4. Work Conditions Will Be Monitored By The Contractor Under Varying Conditions Of Traffic Volume, Light, And Weather To Ensure Traffic Control Measures Are Operating Effectively And That All Devices Used Are Clearly Visible At All Times And In Good Repair.²⁵

¹⁸ See Robbins Dec., Ex. 24 at Ex. C; see also Robbins Dec. at Ex. 15 at 48:22-49:5.

¹⁹ See Robbins Dec. at Ex. 15 at 49:6-49:17.

²⁰ *Id.* at 49:20-50:6.

²¹ See Robbins Dec. at Ex. 13 at 45:8-46:4.

²² See Robbins Dec. at Ex. 5; see also Robbins Dec., Ex. 24 at pp. 3-4 and Ex. D.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

- 5. The Distances Shown Between Temporary Traffic Control Devices Are Approximate Minimums And Some Adjustments May Be Necessary In The Field Depending On Conditions Encountered. Supplemental Devices May Be Required By Actual Traffic Or Construction Situations.²⁶
- 12. Additional Signing May Be Required As Directed.²⁷
- 14. ... Two Truck Mounted Attenuators Are Required, One Adjacent To Each Live Traffic Lane.²⁸

NIGHT WORK IS REQUIRED FOR THIS PROJECT

Weekday Nights Sunday Night Through Friday Morning	10:00 pm to 5:00 am (7 Hours Max.)
Weekend Nights Friday Night Through Saturday Morning	10:00 pm to 7:00 am (9 Hours Max.)
Weekend Nights Saturday Night Through Sunday Morning	10:00 pm to 9:00 am (11 Hours Max.)

The TTCP also sets forth with specificity the traffic control sign types and quantities to be used on the Project, detailed schematics on the allowed lane closures, the location and distance of all temporary traffic signs, and even the required sizes for the temporary traffic signs to be used.²⁹

For instance, the TTCP³⁰ showed details for the double lane drop that the contractor was to follow, including the following signs:

- Portable Changeable Message Sign
- W20-1 ROAD WORK AHEAD
- INCREASED FINES FOR WORK ZONE SPEED VIOLATIONS
- W3-5 SPEED LIMIT 55 AHEAD
- R2-1 SPEED LIMIT 55
- W20-5 2 LEFT LANES CLOSED AHEAD
- W4-2L left lane ends symbol sign

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ See Robbins Dec. at Ex. 5; see also Robbins Dec., Ex. 24 at pp. 3-4 and Ex. D; see also Robbins Dec. at Ex. 14 at 109:5-109:13; see also Robbins Dec. at Ex. 21 at 57:12-57:17.

³⁰ *Id.*

The TTCP³¹ also detail the following tapers and tangents:

- shoulder taper
- Lane 4 merge (660')
- 1320' tangent
- Lane 3 merge (660')

10. To further aid in ensuring the proper implementation of the TTCP, Parametrix prepared certain special provisions which further detail how to implement, monitor, and, if needed, adjust the TTCP (the "Special Provisions").³² The Special Provisions specified that nighttime work and lane closures were required for the Project, defining the "hours for night work and the restrictions for construction activities involving lane closures on I-84 and I-184" as follows:³³

TIME	RESTRICTION
<p style="text-align: center;">Weekday Nights Sunday Night Through Friday Morning 10:00 p.m. to 5:00 a.m.</p>	<p>For existing 3-lane sections, a minimum of 1-lane shall be maintained in each the Eastbound and Westbound direction.</p> <p>For existing 4-lane sections and greater, a minimum of 2-lanes shall be maintained in each the Eastbound and Westbound direction or as shown in the temporary traffic control plans.</p> <p>For existing 1-lane sections at on-ramps and off-ramps, temporary closures are allowed as shown in the temporary traffic control plans and detour plans or as directed.</p>
<p style="text-align: center;">Weekend Nights Friday Night Through Saturday Morning 10:00 p.m. to 7:00 a.m.</p>	<p>Same restrictions as listed above for Weekday Nights.</p>
<p style="text-align: center;">Weekend Nights Saturday Night Through Sunday Morning 10:00 p.m. to 9:00 a.m.</p>	<p>Same restrictions as listed above for Weekday Nights.</p>
<p style="text-align: center;">All remaining times not listed.</p>	<p>No lane restrictions or construction activities allowed.</p>

³¹ *Id.*

³² See Robbins Dec., Ex. 24 at pp. 2-4 and Ex. E.

³³ See Robbins Dec., Ex. 3 (at p. 6 of 23 - ITD 000061).

11. The Special Provisions also provided a penalty/charge of \$3,500 every 15-minutes the Contractor failed to keep the requisite number of traffic lanes open.³⁴

12. Ken Colson, a professional licensed engineer employed by Parametrix, testified as follows regarding the TCP and Special Provisions: “Parametrix’s temporary traffic control plan and special provisions required that at least two lanes remain open to traffic in either direction on four-lane sections of the highway during all phases of the work, including in the work zone. The special provisions also detailed the process by which contractors could request changes to the construction staging and/or traffic control plan. Proposed changes required a written amended plan to be completed by an engineer licensed in Idaho. The amended plan had to be submitted for approval to ITD at least 14 days in advance of any intended changes. Moreover, the special provisions provided that the existing traffic control plan must remain in place until ITD approved any proposed changes to the plan.”³⁵

13. Given the importance of traffic control management on the Project, the Special Provisions required that the Project have an “**experienced** Traffic Control Manager (TCM)” for resolution of traffic control conflicts, continuous monitoring of the traffic flow through a work zone setup and determine and potential improvements to the traffic control operations and phasing in accordance with the approved traffic control plans.”³⁶

14. The TCM was required to be certified by the American Traffic Safety Services Association (“ATSSA”), with a minimum of five (5) years of Work Zone Traffic Control

³⁴ *Id.*

³⁵ See Robbins Dec. at Ex. 24 at ¶ 8.

³⁶ See Robbins Dec., Ex. 3 at p. 34 (emphasis added); see also Robbins Dec. at Ex. 8.

experience to maintain, monitor, and manage traffic control.³⁷ Evidence of the required certification, qualifications, and experience were required to be submitted to ITD for approval.³⁸

15. The TCM was required to maintain a daily diary, documenting the design and approval of all work zones and any changes in configuration to an established work zone, and direction from coordinating with the Prime Contractor.³⁹ The TCM was required to make daily entries in the diary of “all traffic control pay items, personnel used in traffic control operations and unusual occurrences involving the traveling public.”⁴⁰ A copy of the daily diary entries were required to be submitted to ITD by 10:00 a.m. the following work day for review, approval, and payment.⁴¹

16. Should issues arise with the TTCP, the Special Provisions allowed a Contractor to request a modified or amended TTCP, if it submitted, in writing, an alternate TTCP which was signed and sealed by an Idaho licensed engineer.⁴² After submitting the alternate plan, ITD was allowed 14 days for its Project Engineer to review the proposed plans.⁴³ The Special Provisions warn: “There is no guarantee, real or implied, that an alternate plan will be approved. **Changes in traffic will not be allowed until alternate plans are approved in writing.** Once alternate plans are approved, the approved plans must be followed unless new plans are submitted and approved.”⁴⁴

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See Robbins Dec., Ex. 3 at p. 34; see also Robbins Dec. at Ex. 24 at Ex. E.

⁴³ *Id.*

⁴⁴ *Id.* (emphasis added).

17. The Special Provisions further provided that work was to be completed on the Project “within 75 Working Days” and that failure to complete the work on time would subject the Contractor to Liquidated Damages in the amount of \$3,500 per day.⁴⁵

18. The TTCP for the Project was designed to “inform motorists of conditions ahead so that they could safely and orderly transverse the [Project’s] construction zone.”⁴⁶ It was also designed to “make every assurance” that ITD would minimize traffic queues.⁴⁷ The purposes of a TTCP are to:

- a. Facilitate the smooth flow of traffic through a work zone;⁴⁸
- b. Reduce unexpected changes in traffic flow;⁴⁹
- c. Preserve the safety of the workers in the construction zone, as well as the safety of the motorists traveling through the work zone;⁵⁰
- d. Reduce, as much as possible, the development of traffic queues through a work zone;⁵¹
- e. Reduce the occurrence of rear-end collisions;⁵²

19. One purpose of the advanced warning area of a TTCP is to warn drivers about a potential upcoming hazard.⁵³

20. The existence of a traffic queue within a work zone, extending into the advanced warning zone, is a potential hazard to the travelling public, especially at night.⁵⁴ The hazard of a

⁴⁵ See Robbins Dec. at Ex. 3 at page 6 of 23.

⁴⁶ *Id.* at Ex. 27 at 66:1-66:7.

⁴⁷ *Id.* at Ex. 15 at 44:11-45:5.

⁴⁸ *Id.* at Ex. 21 at 62:19-62:24; *Id.* at Ex. 28 at 29:15- 30:1; *Id.* at Ex. 14 at 36:21-37:1; *Id.* at Ex. 22 at 33:23-34:2; *Id.* at Ex. 27 at 65:2-65:5.

⁴⁹ *Id.* at Ex. 21 at 62:25-63:8; *Id.* at Ex. 17 at 47:10-47:14; *Id.* at Ex. 14 at 37:2-37:7.

⁵⁰ *Id.* at Ex. 21 at 64:4-64:11; *Id.* at Ex. 17 at 46:24-27:2.

⁵¹ *Id.* at Ex. 21 at 64:12-64:18; *Id.* at Ex. 28 at 29:15- 30:1.

⁵² See Robbins Dec. at Ex. 13 at 18:22-20:19.

⁵³ *Id.* at Ex. 17 at 48:6-48:11; *Id.* at Ex. 17 at 66:16-68:8; see also Lee Declaration at ¶¶ 20-21 wherein the purpose of advance warning area is discussed which is an area critical to safety because it is the area where alerts, notifications and warnings are given to motorists about roadway conditions leading up to the construction zone, including the presence of slowing or stopped traffic.

⁵⁴ See Robbins Dec. at Ex. 22 at 35:10-35:19; see also Robbins Dec. at Ex. 20 at 63:3-63:7; see Lee Declaration beginning at ¶ 34.

traffic queue within a work zone, extending into the advanced warning zone, is a risk of rear-end collisions.⁵⁵

Submitting the Project for Bid

21. On April 27, 2017, ITD published a “Notice of Letting,” inviting the public to submit bids for the Project through May 23, 2017. As part of this notice, the Project’s plans, including the TTCP and the Special Provisions, were available on ITD’s website.⁵⁶

22. Following ITD’s request for bids, Ken Colson/Parametrix, contacted Eric Blackburn, of Penhall, to inform him of the Project.⁵⁷

23. On May 23, 2017, Daniel Kircher/Specialty sent an email to all contractors who were bidding on the Project, noting that Specialty was “anticipating using the traffic control plans provided in the bid; if the Prime Contractor would like to revise the staging & phasing plans, an Engineers [sic] services would need to be retained.”⁵⁸ Consequently, Mr. Kircher understood that any revision to the Project’s TTCP would require an engineer to undertake the same evaluation that was originally completed by Parametrix.⁵⁹

24. On June 20, 2017, Penhall was awarded the contract for the Project.⁶⁰ Penhall is the largest provider of concrete cutting, concrete breaking, excavation, and concrete highway grinding services in the United States.⁶¹

25. On July 13, 2017, Penhall employee, Mr. Blackburn, sent an email to his colleagues, suggesting that they invite Specialty to the preconstruction meeting because they

⁵⁵ *Id.* at Ex. 22 at 35:20-35:24; *Id.* at Ex. 13 at 91:15-92:20.

⁵⁶ *Id.* at Ex. 5; *see also* Robbins Dec. at Ex. 20 at 65:21-66:6.

⁵⁷ *See* Robbins Dec. at Ex. 20 at 57:11-58:11.

⁵⁸ *See* Robbins Dec. at Ex. 14 at 122:7-123:9; *see also* Robbins Dec. at Ex. 32.

⁵⁹ *See* Robbins Dec. at Ex. 14 at 123:25-124:3.

⁶⁰ *See* Robbins Dec. at Ex. 3.

⁶¹ *See* <https://www.penhall.com/our-story/>, last visited July 5, 2021.

wanted Specialty's input regarding the issues of having traffic on both sides of the project.⁶² In this email, Mr. Blackburn acknowledged that if they wanted to change the TTCP "beyond what is in the project drawings," Penhall had to submit a new TTCP to ITD or they were "obligated to follow what the state has provided."⁶³

Pre-Construction Activities

26. On July 26, 2017, a "Pre-Construction Meeting" was held, wherein individuals from ITD,⁶⁴ Penhall,⁶⁵ and Specialty⁶⁶ were present.⁶⁷ The meeting was audio recorded and had an agenda with a sign-in sheet.⁶⁸ Among other things, the Special Provisions limiting lane closures to two lanes in a four-lane stretch was addressed during the meeting.⁶⁹

27. During the Pre-Construction Meeting, specific information regarding the TTCP and the Special Provisions were discussed. Specifically, Penhall asked about what to do if traffic were backed up and if there were any provisions similar to the East Coast, where contractors would be required to terminate a lane closure if the traffic backed up.⁷⁰ ITD responded that traffic had been calculated into the plan and the ITD did **not** expect that to occur.⁷¹ ITD continued that if severe congestion did in fact occur, they would probably be notified by Idaho State Police.⁷²

28. The meeting's agenda again reiterated the Contract was to be completed within 75 calendar days once construction had begun and Penhall must: "**Submit any changes to the traffic**

⁶² See Robbins Dec. at Ex. 32.

⁶³ See Robbins Dec. at Ex. 20 at 117:14-117:20; 119:1-119:6.

⁶⁴ See Robbins Dec. at Ex. 13 at 64:16-65:5.

⁶⁵ See Robbins Dec. at Ex. 20 at 84:23-85:14.

⁶⁶ See Robbins Dec. at Ex. 14 at 50:16-50:21; 124:25-125:2.

⁶⁷ See Robbins Dec. at Ex. 34 (at p. 640); see also Robbins Dec. at Ex. 27 at 171:18-172:11.

⁶⁸ See Robbins Dec. at Ex. 20 at 84:23-85:14.

⁶⁹ See Robbins Dec. at Ex. 13 at 69:21-69:25.

⁷⁰ See Robbins Dec. at Ex. 27 at 180:13-181:25.

⁷¹ *Id.*

⁷² *Id.* at pp. 181-182.

control plan in writing. Changes require a new TCP with an Engineer's stamp. Approval must be received prior to implementation.⁷³

29. With regard to Change Orders, the agenda noted.⁷⁴

CHANGE ORDERS

Subsection 104.02 – Contract Revisions

- There will be no changes to the contract without the approval of ITD.
- Contractor shall submit form ITD-2884 "Request for Change" for each change order requested.
- Written authorization is required prior to any additional work or change order work being performed.

30. On August 8, 2017, Penhall hired Specialty as the TCM for the Project.⁷⁵ Specialty was chosen solely because they were the low bid on the project.⁷⁶ Before the Project, Penhall had worked with Specialty on only one prior occasion.⁷⁷ Prior to retaining Specialty, Penhall did not verify that Specialty's Traffic Control Manager was ATSSA certified or that it had at least five (5) years work experience, as required by the Special Provisions.⁷⁸

31. Prior to signing the Subcontract Agreement, Specialty was provided copies of the Project's TTCP and Special Provisions.⁷⁹

32. On August 11, 2017, Kircher/Specialty emailed Coletta/Penhall the name and phone number of Specialty's expected TCM for the Project – Joshua Roper.⁸⁰

33. On August 17, 2017, Kircher submitted a formal written request for a change to the TTCP.⁸¹ By this request, Kircher requested a change in the spacing between the tubular markers

⁷³ See Robbins Dec. at Ex. 34 (at p. 641) (emphasis added).

⁷⁴ *Id.* (emphasis in original).

⁷⁵ See Robbins Dec. at Ex. 20 at 86:15-87:2; see also Robbins Dec. at Ex. 14 at 124:20-124:24.

⁷⁶ See Robbins Dec. at Ex. 20 at 72:25-73:6.

⁷⁷ *Id.* at 39:21-39:25.

⁷⁸ See Robbins Dec. at Ex. 20 at 126:8-133:10; see also Robbins Dec. at Ex. 19 at 67:1-67:23.

⁷⁹ See Robbins Dec. at Ex. 14 at 85:25-86:3; see also Robbins Dec. at Ex. 20 at 82:12-83:11; see also Robbins Dec. at Ex. 19 at 28:10-28:18 and 82:21-82:24.

⁸⁰ See Robbins Dec. at Ex. 35; see also Robbins Dec. at Ex. 14 at 126:18-127:8.

⁸¹ See Robbins Dec. at Ex. 36; see also Robbins Dec. at Ex. 14 at 137:13-138:8.

used for lane closures, from 55' to 110'.⁸² In response, ITD denied the request.⁸³ On September 5, 2017, Specialty again formally requested a change in the TTCP with regard to the spacing between the tubular markers used for lane closures, from 55' to 110'.⁸⁴ In response, ITD stated that it would “continue to use the 55' spacing for the tubular markers, as per the plans.”⁸⁵

34. On August 21, 2017, the Resident Engineer signed off on Specialty as the TCM company for the Project, although neither ITD (nor Penhall) verified the qualifications of Specialty or the TCM to ensure they met the requirements set forth in the Special Provisions.⁸⁶

The I-84 Project

35. On August 14, 2017, work on the Project officially began. For the start of 2017, Penhall's project manager was Vincent Coletta.⁸⁷ Coletta left the project in late September 2017.⁸⁸ During his time as project manager, Coletta only came to Idaho on two occasions and was never on the work site during work hours.⁸⁹ Coletta did not have any phone conversation or face-to-face conversations with Kircher regarding how to amend the TTCP.⁹⁰ Coletta was not directly involved in the implementation of the TTCP.⁹¹ Coletta was told by ITD's Resident Engineer and Inspector that any changes to the TTCP must be submitted in writing, with the proposed plans being drafted and stamped by a licensed engineer.⁹² According to Coletta, Penhall understood that if there was

⁸² *Id.*

⁸³ *See* Robbins Dec. at Ex. 34 (at pp. 684-685); *see also* Robbins Dec. at Ex. 14 at 138:19-139:14.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *See* Robbins Dec. at Ex. 15 at 83:8-84:13.

⁸⁷ *See* Robbins Dec. at Ex. 19 at 25:11-25:25.

⁸⁸ *Id.* at 30:7-30:12.

⁸⁹ *Id.* at 32:7-32:12 and 32:19-33:18.

⁹⁰ *Id.* at 29:16-30:3.

⁹¹ *Id.* at 24:25-25:5.

⁹² *Id.* at 40:15-42:1.

going to be a change to the TCP and special provisions there would have to be a written change stamped by an engineer approved by the State of Idaho.⁹³

36. For 2017, ITD's inspectors for the Project were David Van Lydegraf ("Van Lydegraf") and Steve Erichson ("Erichson").⁹⁴

37. Bruce Kidd was a project superintendent for Penhall on the Project and had been employed by Penhall only from June 2017 to December 2018.⁹⁵ Prior to his employment with Penhall, Mr. Kidd had *never* been involved in any highway construction project.⁹⁶ That notwithstanding, Mr. Kidd was involved in the changes made to the TCP in the Spring of 2018.⁹⁷

38. He never reviewed the Penhall/State contract; he never asked to receive, nor did he review, the TCP or Special Provisions for the I-84 Project.⁹⁸ That said, he was expected to review, the TTCP and Special Provisions.⁹⁹ He does not know whether Specialty was ever given the TCP and its Special Provisions.¹⁰⁰ When he began on the Project in 2017, Kidd was not aware that there were occasions when four lanes of open highway had been reduced to a single open lane during the Project.¹⁰¹ He understood that the original TCP only allowed for a four-lane stretch of Highway to be reduced to two open lanes.¹⁰² He believes the revision of the TCP to allow for a single open lane in a four-lane stretch of highway did not occur until 2018.¹⁰³ During the Spring of 2018, he interacted with the TCM on a nightly basis, telling him what lanes needed to be closed.¹⁰⁴

⁹³ *Id.* at 52-53.

⁹⁴ *See* Robbins Dec. at Ex. 27 at 355:20-355:23.

⁹⁵ *See* Robbins Dec. at Ex. 16 pp. 19-20, 29; *see also* Robbins Dec. at Ex. 19 at 53:15-54:5.

⁹⁶ *See* Robbins Dec. at Ex. 16 pp. 20-21.

⁹⁷ *See* Robbins Dec. at Ex. 16 at p. 26.

⁹⁸ *Id.* at p. 28.

⁹⁹ *See* Robbins Dec. at Ex. 19 at 55:18-57:9.

¹⁰⁰ *See* Robbins Dec. at Ex. 16 at p. 29.

¹⁰¹ *See* Robbins Dec. at Ex. 16 at p. 30.

¹⁰² *See* Robbins Dec. at Ex. 16 at pp. 31-32.

¹⁰³ *See* Robbins Dec. at Ex. 16 at pp. 30, 33.

¹⁰⁴ *See* Robbins Dec. at Ex. 16 at pp. 32-33.

39. The change in the TCP to reduce four open lanes to a single open lane was made upon an oral direction; Kidd was given that instruction a few days before the Project started in the Spring of 2018, during a meeting attended by Scott Reed and Bob Bleeker, as well as a handful of unidentified ITD employees.¹⁰⁵ No one from Specialty was present.¹⁰⁶ Scott Reed/Penhall was the individual who raised the issue of restricting lanes down to a single lane in an otherwise four-lane stretch of highway.¹⁰⁷ Mr. Kidd did not know then what needed to be done to revise the TCP for the project.¹⁰⁸ He did not become aware of those requirements until the day before his deposition.¹⁰⁹

40. Kidd did not know what evaluations went into the creation of a TCP in terms of lane capacity and traffic volume.¹¹⁰ He did not discuss that issue with the TCM regarding the decision to restrict four lanes of highway down to a single open lane.¹¹¹ He does not believe that anyone from Penhall had such a discussion with Specialty.¹¹² He does not know who advised Specialty in the Spring of 2018 to reduce four open lanes down to a single open lane, but it was not him; he is not aware of any time when any representative of Specialty raised any concern with him about the decision to restrict four open lanes of highway down to a single open lane.¹¹³

41. It is Kidd's understanding that a TCP provides for the safety of both workers and the motoring public through a highway construction zone.¹¹⁴ It is also his understanding that the

¹⁰⁵ See Robbins Dec. at Ex. 16 at pp. 34-38.

¹⁰⁶ *Id.* at pp. 37-38.

¹⁰⁷ *Id.* at p. 38.

¹⁰⁸ *Id.* at p. 39.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at p. 41.

¹¹¹ *Id.*

¹¹² *Id.* at pp. 44-48.

¹¹³ *Id.*

¹¹⁴ *Id.* at p. 48.

purpose of the TCP is to reduce the occurrence of unexpected traffic stoppages and the development of traffic queues.¹¹⁵ He recognizes that the existence of a traffic back-up in the area of highway construction zones presents the risk that traffic will back up, causing a rear-end collision and further that such a risk is particularly acute at night.¹¹⁶ Kidd also recognized that the purpose of the advanced warning area of the TCP is to provide adequate notice to drivers about an upcoming potential hazard, for example a traffic back-up.¹¹⁷

42. It is Kidd's impression that the decision to go from four open lanes of highway to a single open lane was between Penhall and the State.¹¹⁸ He is aware that during the Spring of 2018, Scott Reed was the Penhall representative who would go to the eastbound lanes to see how work was progressing.¹¹⁹ He recalls receiving a telephone call from the State Communications operator on June 15, 2018; during that conversation, the operator told him of public complaints about the traffic congestion in the eastbound section of the I-84 Project that was being worked on that night.¹²⁰ Kidd told the operator that he would call "his people."¹²¹ There were no Penhall workers on the eastbound side of I-84 on June 15.¹²² By "his people," he meant that he would contact a Diamond Drilling representative, probably Gerald Johnson.¹²³ Kidd testified that he did not call the TCM because "I saw no reason to."¹²⁴ *He did not expect Diamond to do anything*, he just informed Diamond of the communication from the State operator so that Diamond could tell

¹¹⁵ See Robbins Dec. at Ex. 16 at pp. 48-49.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at p. 49.

¹¹⁸ *Id.* at pp. 56-57.

¹¹⁹ *Id.* at p. 56.

¹²⁰ *Id.* at pp. 57-58.

¹²¹ *Id.* at p. 58.

¹²² *Id.*

¹²³ *Id.* at p. 60.

¹²⁴ *Id.* at p. 61.

his personnel, “Y’all be on the lookout.”¹²⁵ He never saw a written proposal to change four open lanes of highway to a single open lane before Penhall’s decision was implemented.¹²⁶

43. Should issues arise on-site, ITD’s inspectors would contact Kidd first.¹²⁷

44. Prior to work starting each day, Penhall would gather its employees and hold a “Safety Pre-Task Plan Meeting.”¹²⁸ Subcontractors were not part of the meeting.¹²⁹ During the discussion, the lanes that were being set for closures were discussed.¹³⁰

45. Scott Reed was another project superintendent for Penhall on the I-84 Project, along with Bruce Kidd and Bob Bleeker.¹³¹ Mr. Reed was the Penhall representative in Idaho (boots on the ground) with the highest authority,¹³² but he was not in any way familiar with the Penhall/State construction contract or, more particularly, the TCP or Special Provisions with respect thereto.¹³³ Mr. Reed never looked at the Special Provisions for the TCP.¹³⁴ He was never told that there were explicit procedures that had to be followed in order to amend the TCP.¹³⁵ He never reviewed the State/Penhall contract because he says he didn’t need to, there was no need for him to be involved in the TCP.¹³⁶

46. Reed understood that the purpose of the TCP was to facilitate the safe passage of motorists through a highway construction zone and reduce the occurrence of unexpected stoppages

¹²⁵ Deposition of Bruce Kidd, page 61.

¹²⁶ Deposition of Bruce Kidd, page 32.

¹²⁷ See Robbins Dec. at Ex. 29 at 36:9-36:17.

¹²⁸ See Robbins Dec. at Ex. 20 at 123:3-124:5; See Robbins Dec. at Ex. 16 at 80:12-84:6.

¹²⁹ See Robbins Dec. at Ex. 17 at 61:15-61:18.

¹³⁰ See Robbins Dec. at Ex. 17 at 56:16-56:21; 57:13-57:24; and 61:3-61:7.

¹³¹ See Robbins Dec. at Ex. 17 at pp. 49-50.

¹³² *Id.* at p. 139.

¹³³ *Id.* at pp. 91, 94-95.

¹³⁴ *Id.* at p. 95.

¹³⁵ *Id.* at p. 94.

¹³⁶ *Id.* at p. 95.

or queues.¹³⁷ He realized that it is particularly important during night construction to avoid sudden traffic stoppages or the development of a traffic back up.¹³⁸ He also understood that an advance warning area serves the purpose of giving warning to drivers of upcoming traffic hazards.¹³⁹ When he was on site, he would not interact with the TCM.¹⁴⁰ He testified Penhall's project manager was responsible for overseeing Specialty's work as TCM on the project.¹⁴¹ After the accident, he contacted the TCM, who informed Mr. Reed that the TCP had been set according to plan that evening.¹⁴² On June 16, 2018, there was a Penhall work zone on the eastbound lanes, but a subcontractor was working those lanes.¹⁴³

47. Reed recalls a meeting with ITD representatives a few days before the restart of the Project in the Spring of 2018. During that meeting, he had discussions with ITD about reducing four open lanes of highway to a single open lane and to leave the shoulder open as an emergency "escape route."¹⁴⁴ His proposed change to the TCP was not accompanied by a traffic volume or traffic capacity evaluation to support the request.¹⁴⁵ He does not recall ITD telling Penhall to submit their request in writing.¹⁴⁶ He has no idea how the TCM was advised of the revision to the TCP.¹⁴⁷ He does not know how Penhall determined that a single lane of traffic during working hours on eastbound I-84 could accommodate the anticipated traffic volume.¹⁴⁸ He assumes that

¹³⁷ *Id.* at pp. 46-47.

¹³⁸ *Id.* at pp. 47-48.

¹³⁹ *Id.*

¹⁴⁰ *See* Robbins Dec. at Ex. 17 at p. 29.

¹⁴¹ *Id.* at p. 172.

¹⁴² *Id.* at pp. 83-84.

¹⁴³ *Id.* at p. 85.

¹⁴⁴ *Id.* at pp. 102-103.

¹⁴⁵ *See* Robbins Dec. at Ex. 17 at p. 104.

¹⁴⁶ *Id.* at p. 85.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at p. 106.

that if such a determination was made, it would have been made by ITD.¹⁴⁹ That determination was not done.

48. Reed became aware during May 2018 for the first time that the plans and specifications prohibited the reduction of four open lanes of highway to a single open lane.¹⁵⁰ After he made the proposal to ITD about reducing four open lanes to a single open lane on eastbound I-84, he did nothing to inform himself about the requirements of the TCP.¹⁵¹ He denies all knowledge about Specialty ever raising any concerns about revising the TCP.¹⁵²

49. Before his involvement in the Project in 2018, he never spoke with any Penhall representative regarding the operation of the Project in 2017.¹⁵³ He was not involved in any way in monitoring the TCP because he never reviewed the plan and would have no way of evaluating whether the TCP was being properly implemented.¹⁵⁴ Even if he had known anything about traffic backups as a result of the reduction of four open lanes down to a single open lane, he would not have done anything. “It’s not my responsibility as to what needs to happen.”¹⁵⁵

50. In a post-accident email, Reed acknowledges that he was not authorized to deviate from the approved TCP. He bemoans the fact that after the accident, they were being forced to comply with the contract as written. Tellingly, he warns his fellow Penhall employees that the requirement to comply with the TCP means they will not complete the Project on time.¹⁵⁶

¹⁴⁹ *Id.* at pp. 106-107.

¹⁵⁰ *Id.* at pp. 107-108.

¹⁵¹ *See* Robbins Dec. at Ex. 17 at p. 108.

¹⁵² *Id.* at pp. 110-112.

¹⁵³ *Id.* at p. 114.

¹⁵⁴ *Id.* at p. 116.

¹⁵⁵ *Id.* at p. 132.

¹⁵⁶ *See* Robbins Dec. at Ex. 26 (PENHALL007519, produced after deposition of Scott Reed).

51. Jeromy Magill was the Project Manager for Penhall on this Project.¹⁵⁷ There had been three to four Project Managers for the Project, because there was a high rate of turnover at Penhall. He was the only one left available to act as Project Manager for this job.¹⁵⁸ He never received any instruction or training from Penhall regarding the TCP.¹⁵⁹ Prior to going to the job, he had no discussions with either Vince Coletta or Henry “Shields” Sullivan regarding what the job requirements were.¹⁶⁰ When Magill took over the Project from Pat Nordberg (the first Project Manager), he only skimmed the State/Penhall contract and never really read its requirements.¹⁶¹ Neither did he ever review or form an understanding of the Project’s TCP or its Special Provisions.¹⁶²

52. Magill never had any discussions with either Bryon Breen or any other representative of ITD regarding the TCP.¹⁶³ Although he never reviewed the contract, his “impression” from discussing operations with either Penhall personnel on site was that two lanes were to remain open in a four-lane stretch.¹⁶⁴ His only discussions with the TCM had to do with invoicing; he never had any discussions with him about the TCP.¹⁶⁵

53. Magill knew that a purpose served by the TCP was to facilitate the smooth transition of traffic through a construction zone and to provide for the safety of workers and

¹⁵⁷ See Robbins Dec. at Ex. 18 at p. 16.

¹⁵⁸ *Id.* at p. 18.

¹⁵⁹ *Id.* at pp. 20-22.

¹⁶⁰ *Id.* at pp. 19-20.

¹⁶¹ *Id.* at p. 21.

¹⁶² *Id.*

¹⁶³ *Id.* at p. 27.

¹⁶⁴ See Robbins Dec. at Ex. 18 at p. 28.

¹⁶⁵ *Id.* at p. 30.

motorists, as well as to avoid the development of traffic queues.¹⁶⁶ He understood that a traffic queue in a construction zone presents a safety hazard to both motorists and to workers.¹⁶⁷

54. When the Project restarted in the spring of 2018, he understood Penhall had only a limited number of days to finish the Project.¹⁶⁸ Time was tight for Penhall to do the job required under the contract, so Penhall had to bring in another contractor (Diamond Drilling) to do part of the job that Penhall had originally contracted to perform.¹⁶⁹ This was done in order for Penhall to avoid being assessed liquidated damages under the terms of the contract (if it fell behind schedule).¹⁷⁰

55. When the Project restarted in the Spring of 2018, there was an urgency to get the Project done on an expedited basis.¹⁷¹ It was Penhall's intent to finish the Project on time and on an expedited basis in order to avoid penalties.¹⁷² Magill developed a schedule for the restart that was presented to and approved by ITD. It was developed by him to show the shortest period practicable to get the job done. Penhall wanted the Project done as soon as possible.¹⁷³

56. Neither Kidd nor Reed ever advised him that there were any alterations to the TCP.¹⁷⁴ As the incoming Project Manager, Magill acknowledged he would want to know about any prior deviations to the TCP, but again he was never advised of the deviations to the TCP in the fall of 2017.¹⁷⁵ Magill would expect that his superintendents (Kidd and Reed) would know the

¹⁶⁶ *Id.* at pp. 33-35.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at pp. 41, 44.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 43.

¹⁷² *Id.* at 44.

¹⁷³ *Id.* at pp. 43-44.

¹⁷⁴ *See* Robbins Dec. at Ex. 18 at p. 92.

¹⁷⁵ *Id.* at p. 93.

contract documents and the TCP and would follow the requirements of the TCP.¹⁷⁶ Magill's take from the handoff of this Project to him was the import of avoiding liquidated damages.¹⁷⁷ Magill acknowledged that one way to speed up work on this Project was to close more lanes than was called for in the contract, thus affording the ability to do more work, faster.¹⁷⁸

57. A "winter break" was taken on the Project starting late October/early November 2017, due to weather restrictions.¹⁷⁹

58. On April 23, 2018, a "Meet and Greet Meeting" was held with ITD and Penhall representatives.¹⁸⁰ No minutes were kept of this meeting.¹⁸¹ Specialty was not present for this meeting.¹⁸² During the meeting, Penhall expressed that they were worried about completing the Project on time.¹⁸³ Near the end of the meeting, a Penhall representative asked Bryon Breen to be allowed to close a third lane during joint sealing operations.¹⁸⁴ Breen told the Penhall representative to submit the request in writing so it could be analyzed and determined whether it was acceptable or not.¹⁸⁵

59. On May 30, 2018, a "Re-startup Meeting" was held at ITD's District 3 Regional office.¹⁸⁶ This meeting was held to coordinate construction after work had been suspended due to weather.¹⁸⁷ No meeting minutes were kept.¹⁸⁸ There were "five or six people from ITD" at the

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at p. 94.

¹⁷⁸ *Id.*

¹⁷⁹ *See* Robbins Dec. at Ex. 16 at 98:20-98:22; 36:3-36:7.

¹⁸⁰ *See* Robbins Dec. at Ex. 29 at 38:3-38:6.

¹⁸¹ *Id.* at Ex. 15 at 90:17-90:19.

¹⁸² *Id.*

¹⁸³ *Id.* at Ex. 15 at 44:19-44:24.

¹⁸⁴ *Id.* at Ex. 29 at 40:25-41:14; *Id.* at Ex. 15 at 92:1-92:15.

¹⁸⁵ *Id.* at Ex. 29 at 41:15-17; *Id.* at Ex. 15 at 92:1-92:15.

¹⁸⁶ *Id.* at Ex. 17 at 155:3-155:7.

¹⁸⁷ *Id.* at Ex. 27 at 193:4-195:9.

¹⁸⁸ *Id.*

meeting, including a project engineer and project manager.¹⁸⁹ Penhall, again, requested the closure of three open lanes in a four-lane stretch.¹⁹⁰ Penhall claims the ITD representatives approved the closure of three open lanes in a four-lane stretch, leaving only the “slow lane” open for travel.¹⁹¹

60. Construction restarted on the Project on May 31, 2018.¹⁹² Sometime in May/June 2018, an informal meeting involving ITD, Penhall, and Specialty occurred at the “stockyard” (the “Stockyard Meeting”).¹⁹³ Present at the Stockyard Meeting was Bruce Kidd, Scott Reed, ITD’s inspectors, Garling, and Roper.¹⁹⁴ It took place in the staging area, against the north wall of the pit, next to the pickup trucks.¹⁹⁵ Initially, Bruce Kidd approached Garling and asked whether Specialty was ready to pull on the triple-lane closure. Garling responded that they had staged a double-lane closure, per the TTCP, and that he would need to speak with Josh Roper. At that point, Jon Mensinger showed up and Garling asked Jon if they were allowed to set the triple-lane closure, because he knew it was not in the Contract. Bruce responded “yes,” and then continued speaking with Jon Mensinger. Garling then walked away to call Josh Roper to tell them they had requested a triple lane closure and Josh needed to come discuss. Then, Garling left.¹⁹⁶

61. During the Stockyard Meeting, the ITD inspector participated in the conversation regarding the reduction of four open lanes of highway down to a single open lane and did not

¹⁸⁹ See Robbins Dec. at Ex. 17 at 99:2-99:14.

¹⁹⁰ *Id.* at Ex. 29 at 98:8-99:3; *Id.* at Ex. 17 at 97:6-97:15

¹⁹¹ *Id.* at Ex. 17 at 102:3-103:25.

¹⁹² *Id.* at Ex. 17 at 149:5-149:10; *Id.* at Ex. 27 at 194:6-194:7.

¹⁹³ *Id.* at Ex. 22 at 89:22-90:5.

¹⁹⁴ See Robbins Dec. at Ex. 22 at 91:4-91:12.

¹⁹⁵ *Id.* at 190:18-190:23.

¹⁹⁶ *Id.* at 191:6-197:18; *Id.* at Ex. 14 at 207:10-208:24.

object to its implementation.¹⁹⁷ No request was made at the Stockyard meeting made for a written amendment to the TTCP.¹⁹⁸

62. Roper called Garling approximately 15-20 minutes after Garling left the stockyard and told him that there was an agreement between Jon Mensinger, Blaine Schwendiman, Scott Reed, and Bruce Kidd and they were moving forward with the three lane closures but not until Penhall was done with the left lanes.¹⁹⁹ Roper and Garling met up in person shortly after and Roper expressed frustration regarding the triple lane closure.²⁰⁰

63. Garling expressed concern at the “Stockyard Meeting” that the triple lane closure exceeded the contract specifications.²⁰¹ Immediately after the “Stockyard Meeting,” Josh Roper called Mason Garling and told him that they would be setting a triple lane closures “but not until Penhall was done with the left lanes.”²⁰² Despite increasing the number of lane closures, there was no evaluation completed concerning the capacity of a single lane to accommodate the volume of traffic through I-84 in the construction area.²⁰³ After the “Stockyard Meeting,” the triple-lane closure issue wasn’t discussed again and rather than decline to set up the triple because it was in violation of the contract, Specialty conceded because they “needed to move forward.”²⁰⁴

64. When Specialty began the final stage of the construction to replace the pavement seals in the I-84 eastbound lanes on Thursday, June 14, 2018, Garling was told by Penhall to use

¹⁹⁷ *Id.* at Ex. 21 at 104:7-105:6.

¹⁹⁸ *Id.* at 107:14-107:20.

¹⁹⁹ *Id.* at Ex. 22 at 206:18-208:6.

²⁰⁰ *Id.* at 208:12-208:19.

²⁰¹ *See* Robbins Dec. at Ex. 22 at 117:15-117:22.

²⁰² *Id.* at 103:8-103:24.

²⁰³ *Id.* at 103:25-104:6.

²⁰⁴ *Id.* at 118:14-118:21.

the same three-lane closure that he had previously used in the westbound lanes in September and October of 2017.²⁰⁵

65. On June 15, 2018, Garling spoke with Blaine Schwendiman and “asked him if he had any concerns with the same exact setup that was the Friday before,” to which Schwendiman responded that he had no concerns and that he was confident in Specialty’s ability to set the traffic control. This conversation took place during a “significant traffic queue” and Schwendiman and Garling both watched the queue.²⁰⁶

ITD’s Work Zone Inspectors

66. During the entire Project, ITD had employees, known as “inspectors,” on-site of the Project on a daily basis. ITD’s inspectors were provided a copy of, and expected to be aware of, the TTCP and the Special Provisions.²⁰⁷ They were also on-site to ensure the TCM was properly doing their job.²⁰⁸ While on-site, the inspectors were typically working alongside the contractor’s workers.²⁰⁹

67. ITD’s inspectors were expected to prepare a daily diary, known as a Standard Construction Diary.²¹⁰ They were also expected to document the quality and quantity of the work that was being performed on the Project.²¹¹ It was expected that ITD’s inspectors would also note deviations from the TTCP, potential hazards to workers, and potential hazards to motorists driving through the construction zone.²¹² The ITD inspector would either handwrite or type the Standard

²⁰⁵ *Id.* at 122:15-123:22.

²⁰⁶ *Id.* at 126:3-126:15.

²⁰⁷ *See* Robbins Dec. at Ex. 27 at 135:1-136:14; *Id.* at Ex. 15 at 39:11-39:24; *Id.* at Ex. 13 at 40:25-41:2.

²⁰⁸ *Id.* at Ex. 13 at 25:18-25:22.

²⁰⁹ *Id.* at Ex. 27 at 132:17-132:25.

²¹⁰ *Id.* at 130:10-130:16.

²¹¹ *Id.* at 130:16-130:25.

²¹² *Id.* at 131:5-133:11.

Construction Diary and then either submit the item directly into the Project's file or provide them to a supervisor, who was supposed to submit them into the Project's file.²¹³

68. ITD's inspectors would routinely have meetings with the project engineer to apprise them of what was happening on-site of the Project.²¹⁴ These meetings occurred approximately two-to-three times a week.²¹⁵

69. Upon witnessing something that constituted a hazard to workers or the travelling public, ITD's inspectors had the authority to correct the issue or stop work.²¹⁶

70. ITD's inspectors do not have authority to deviate from the TTCP.²¹⁷

71. Blaine Schwendiman ("Schwendiman") was ITD's "Lead Inspector" for the Project starting in 2018.²¹⁸ Schwendiman had worked as an inspector on two prior projects "many years prior."²¹⁹ But, Schwendiman did not review the TTCP and Special Provisions before working on the Project.²²⁰ He also did not review any of the prior Standard Construction Diaries or Traffic Control Maintenance Diaries and he did not ask anyone at Penhall or Specialty regarding the TTCP and Special Provisions.²²¹

72. When he was working on the Project, Schwendiman filled out a "Standard Construction Diary."²²² He, however, did not submit them to anyone directly but submitted them to the "project file."²²³ Despite testifying that he was unaware of the TTCP for the Project,

²¹³ See Robbins Dec. at Ex. 27 at 387:10-388:6; *Id.* at Ex. 13 at 62:11-62:21.

²¹⁴ See Robbins Dec. at Ex. 27 at 130:5-130:9.

²¹⁵ See Robbins Dec. at Ex. 13 at 154:18-155:4.

²¹⁶ See Robbins Dec. at Ex. 27 at 133:12-134:6.

²¹⁷ See Robbins Dec. at Ex. 27 at 134:13-134:20.

²¹⁸ See Robbins Dec. at Ex. 30 at 18:10-18:15; 23:15-24:9; See Robbins Dec. at Ex. 29 at 101:10-101:13.

²¹⁹ See Robbins Dec. at Ex. 30 at 24:22-25:3.

²²⁰ *Id.* at 34:16-36:2; 42:7-45:25.

²²¹ *Id.* at 35:19-36:2.

²²² *Id.* at 36:14-36:19.

²²³ *Id.* at 36:20-38:3.

Schwendiman repeatedly noted in his Standard Construction Diaries that he had driven through the project to verify the TTCP was correct and appeared to be set properly.²²⁴ Specifically, he noted the following with regard to his observations of the TTCP and its effect on traffic conditions:

- May 31st: “TTC was in place at 10PM... Drove through the project to verify the TTC was correct and appeared to be set properly.”
- June 1st: ““TTC was in place at 10PM... Drove through the project to verify the TTC was correct and appeared to be set properly.”
- June 2nd: “TTC was in place at 10PM... Drove through the project to verify the TTC was correct and appeared to be set properly. At the initial TTC lane merges the traffic slowed...”
- June 3rd: “TTC was in place at 10PM... Drove through the project to verify the TTC was correct and appeared to be set properly.”
- June 4th: “TTC as in place at 10PM...Drove through the project to verify the TTC was correct and appeared to be set properly. Again with the initial TTC lane merges the traffic slowed and bunched up... Traffic merge hesitation appears to be an issue.”
- June 8th: “TTC as in place at 10PM...Drove through the project to verify the TTC was correct and appeared to be set properly.”
- June 10th: “TTC was in place at 10PM...Drove through the project to verify the TTC was correct and appeared to be set properly.”
- June 11th: “TTC was in place at 10PM.”
- June 14th: “Traffic was in place at 10PM. Drove through the EB TTC and verified it appeared to be in place correctly. 3 lanes closed for the nights [sic] operation... Traffic had issues the first few hours of the lane closures. Appears to be a merge hesitation.”
- June 15th: “TTC was in place at 10PM. Drove through the TTC and verified it appeared to be in place correctly.”
- June 16th: “TTC was in place at 10PM. Drove through the TTC and it appeared to be setup correctly. 3 arrowboards used for lane closure. Traffic had issues with the lane closure merges, backing traffic up moving slow with a lot of stop and go happening.”

73. Jon Mensinger (“Mensinger”) was another of ITD’s inspectors on-site of the Project in 2018.²²⁵ Prior to Mensinger’s work on the Project in 2018, Mensinger reviewed the TTCP and

²²⁴ See Robbins Dec. at Ex. 37.

²²⁵ See Robbins Dec. at Ex. 29 at 35:15-35:20.

Special Provisions and was aware of the restrictions regarding lane closures.²²⁶ In fact, he had a copy of them with him.²²⁷

74. Mensinger also completed a Standard Construction Diary for the days he was on the Project, as well as a personal notebook that he would write down project specific items.²²⁸ Based upon his review of his diaries and his notebook, Mensinger was aware that on, at least, June 11th, 12th, and 13th, a four-lane stretch of I-84 had been reduced to a single lane, in violation of the TTCP and Special Provisions.²²⁹

75. Mensinger and Schwendiman were both on-site of the Project many times when three lanes were closed in a four-lane stretch.²³⁰

76. During 2018, Schwendiman was Specialty's "essential point of contact with ITD" but he never told Specialty that they did not have approval to reduce four open lanes of highway down to a single open lane.²³¹

77. Kidd claims he was never told by any representative of ITD that a written request to change the TTCP would have to be submitted before approval of an additional lane closure was allowed.²³² Kidd was not aware of any written request for a change to the TTCP being made.²³³

²²⁶ *Id.* at 148:20-149:4; 144:18-144:23.

²²⁷ *Id.* at 145:1-145:7.

²²⁸ *Id.* at 33:15-34:4.

²²⁹ *See* Robbins Dec. at Ex. 29 at 72:4-73:9; 127:22-129:23.

²³⁰ *See* Robbins Dec. at Ex. 22 at 228:21-229:17.

²³¹ *Id.* at 229:21-229:25.

²³² *See* Robbins Dec. at Ex. 16 at 72:17-72:21.

²³³ *Id.* at 72:22-72:25.

Traffic Control Managers - Specialty

78. The TCM would monitor traffic's response to the TTCP by frequently driving through the work zone and through the advanced warning area.²³⁴ As its custom and practice, Specialty expected the TCM to constantly monitor the Project by driving through and inspecting.²³⁵

79. Josh Roper was the TCM for the Project for all of 2017 and part of 2018.²³⁶ At the time he was TCM, Josh Roper was ATSSA certified as a "Traffic Control Supervisor" but he did not have the requisite five (5) years of prior experience.²³⁷ This Project was the first time that Roper had acted as a TCM on a highway construction project.²³⁸ Roper was not the "original choice" for the TCM for the Project; however, the original TCM let Specialty and the job fell to him.²³⁹ Roper said he wanted extra help on the Project because of his lack of experience.²⁴⁰

80. Daniel Kircher was Roper's immediate supervisor and involved with all traffic control operations for Specialty.²⁴¹

81. Prior to appearing on-site at the Project, Roper was provided a copy of the TTCP and Special Provisions, which he reviewed and spoke about with Dan Kircher.²⁴² He did not discuss how the TTCP could be revised.²⁴³

²³⁴ See Robbins Dec. at Ex. 14 at 104:2-104:24.

²³⁵ *Id.* at 105:23-106:7.

²³⁶ See Robbins Dec. at Ex. 14 at 60:1-60:7.

²³⁷ *Id.* at Ex. 14 at 93:22-93:24.

²³⁸ See Robbins Dec. at Ex. 21 at 21:25-22:19.

²³⁹ *Id.* at 25:17-25:24; p. 26.

²⁴⁰ *Id.* at pp. 25-28.

²⁴¹ *Id.* at 25:9-25:11.

²⁴² *Id.* at 26:20-27:14.

²⁴³ *Id.* at 31:21-32:1.

82. In accordance with the Special Provisions, Roper was instructed to have detailed diaries submitted to Dan Kircher by 6:00-7:00 a.m. the following day so Kircher could review and give to ITD.²⁴⁴

83. When changes were made to the TTCP, Roper would tell Kircher either the next morning or on the way to the job-site the next day.²⁴⁵ Roper understood that if the TCP was to be revised, it would have to be in writing and approved by the ITD engineer on the Project before any change could be implemented.²⁴⁶ During the course of the Project, the TCP was changed.²⁴⁷ Roper talked about those changes with Penhall in 2017 regarding reducing four open lanes of traffic down to a single open lane.²⁴⁸ There was never a formal proposal submitted to or approved by ITD.²⁴⁹ He never saw an ITD-approved plan to revise the TCP.²⁵⁰ If there had been an approved revised plan, as TCM, he would have received such a document.²⁵¹ Roper never asked for a change to be approved in writing by ITD before he implemented changes in the TCP even though he knew it was required by the TCP and Special Provisions.²⁵² He allowed reductions of four open lanes to a single open lane in 2017.²⁵³

84. Roper understood that it was his job as TCM to implement, as approved, the written TCP plans.²⁵⁴ Roper never spoke with the ITD engineer for the Project (Breen), or with the ITD Project manager (Statkus) about any proposed change to the TCP.²⁵⁵

²⁴⁴ *Id.* at 30:15-31:15.

²⁴⁵ *Id.* at 33:6-33:23.

²⁴⁶ *See* Robbins Dec. at Ex. 21 at p. 32.

²⁴⁷ *Id.* at pp. 33-34.

²⁴⁸ *Id.* at pp. 34-37.

²⁴⁹ *Id.* at pp. 35.

²⁵⁰ *Id.*

²⁵¹ *Id.* at p. 41.

²⁵² *Id.* at pp. 41-42.

²⁵³ *Id.* at p. 42.

²⁵⁴ *Id.* at pp. 41-42.

²⁵⁵ *Id.* at pp. 46-47.

85. Roper understood that one purpose of the TCP was to facilitate traffic flow and reduce unexpected changes in traffic in the speed of traffic flow.²⁵⁶ Another purpose of the TCP was to preserve the safety of workers and motorists traveling in the area of the construction zone and to reduce, as much as possible, the development of traffic queues.²⁵⁷ He understood that traffic queues in construction areas on highways are a hazard to motorists, including the risk of rear-end collisions.²⁵⁸

86. In the fall of 2017, Roper met with Penhall and the ITD inspector to discuss closing three lanes of travel in a four-lane stretch because Penhall was worried about having traffic on both sides of them because of the grinder's seat extending into an additional lane.²⁵⁹ At that time, Roper received instructions from Penhall and/or ITD to reduce the number of lanes of a four-lane stretch of highway from four open lanes down to one open lane during construction activities.²⁶⁰ These instructions were passed along to his supervisor, Kircher, who told Roper to proceed with the additional lane closure because the State approved it.²⁶¹ There was no formal written proposal to amend the TTCP.²⁶² "Bruce" and "Kenny" from Penhall, as well as Steve Erichson and David Van Lydegraf from ITD, were present during these discussions.²⁶³ None of the individuals present brought up the contractual requirement that any deviation from the approved TTCP required a written proposal prepared by a licensed engineer and approved by ITD before any implementation.²⁶⁴

²⁵⁶ *Id.* at p. 62.

²⁵⁷ *See* Robbins Dec. at Ex. 21 at p. 64.

²⁵⁸ *Id.* at p. 65.

²⁵⁹ *Id.* at 36:2-40:23

²⁶⁰ *See* Robbins Dec. at Ex. 14 at 57:24-60:3.

²⁶¹ *Id.* at 68:11-68:22.

²⁶² *See* Robbins Dec. at Ex. 22 at 40:24-41:19.

²⁶³ *Id.* at 42:15-44:3.

²⁶⁴ *Id.* at 46:17-46:24.

87. In 2017, Kircher reviewed the TCM's diaries on a daily basis prior to them being turned into ITD.²⁶⁵ When reviewing the Traffic Control Maintenance Diaries in 2017, Kircher noticed that there were occasions where four lanes of highway were being reduced down to a single open lane.²⁶⁶ The day after Kircher first noticed that there were four-lane section of the highway being reduced down to only one open lanes, he asked Roper why that was occurring, who responded that the State had approved it and Penhall had directed.²⁶⁷ Kircher did not contact ITD's resident engineer to confirm that they had approved the additional lane closure.²⁶⁸ He also did not contact anyone at Penhall to find out if they had authority to request the additional lane closure.²⁶⁹

88. At no time did Specialty request to see the written provisions that allowed for the change of the TTCP.²⁷⁰

89. In 2017, despite Roper not having seen written approval, he created signs indicating "Three Right Lanes Closed" and "Three Left Lanes Closed" for the Project.²⁷¹ Specialty charged the costs for these signs to ITD, who paid for them.²⁷²

90. Roper received the approval to create the "Three Lanes Closed Ahead" signs from the ITD on-site inspector, Steve Erichson.²⁷³ Otherwise, he would not have made the signs.²⁷⁴

91. When traffic was reduced to a single lane in a four-lane section, traffic slowed down.²⁷⁵ Traffic responded better to double lane closures than triple lane closures.²⁷⁶

²⁶⁵ See Robbins Dec. at Ex. 14 at 95:10-95:19.

²⁶⁶ *Id.* at 95:20-95:25.

²⁶⁷ *Id.* at 96:2-96:17.

²⁶⁸ *Id.* at 96:23-97:2.

²⁶⁹ *Id.* at 97:2-97:7.

²⁷⁰ *Id.* at 99:15-99:18.

²⁷¹ See Robbins Dec. at Ex. 21 at 58:19-59:5.

²⁷² *Id.* at 59:16-59:20.

²⁷³ See Robbins Dec. at Ex. 14 at 231:3-232:6; *Id.* at Ex. 21 at 61:13-61:18.

²⁷⁴ See Robbins Dec. at Ex. 21 at 60:14-60:20.

²⁷⁵ *Id.* at 69:26-70:4.

²⁷⁶ *Id.* at 118:11-118:16.

92. After review of his 2017 Traffic Control Maintenance Diaries, Roper confirmed that Specialty had reduced four-open lanes of traffic to a single open lane on October 17, 2018, October 18, 2017, October 18, 2017, October 18, 2017, October 20, 2017, October 22, 2017, October 23, 2017, and October 25, 2017.²⁷⁷

93. After review of his 2018 Traffic Control Maintenance Diaries, Roper confirmed that Specialty had reduced four-open lanes of traffic to a single open lane on June 2, 2018 and June 3, 2018.²⁷⁸

94. On October 25, 2017, Roper was asked by Penhall to extend the triple lane closure longer than 2.5 miles, another violation of the TTCP and Special Provisions.²⁷⁹ Roper did not ask for and was not provided with any written document showing the deviation from the TTCP was approved by ITD.²⁸⁰

95. In the Fall of 2017, Specialty's reductions in travel lanes from four lanes to a single open lane were at the direction of Penhall and the ITD inspectors.²⁸¹ Roper directly asked ITD, "Are we allowed to do triples?" To which, the answer was "yes."²⁸²

96. The very first day upon returning to the Project in the Spring of 2018, Roper discussed with a Penhall representative the reduction of three lanes in a four-lane stretch of highway.²⁸³

²⁷⁷ *Id.* at 70:5-80:15; *Id.* at Ex. 6.

²⁷⁸ *See* Robbins Dec. at Ex. 21 at 108:4-118:9.

²⁷⁹ *Id.* at 78:3-80:15.

²⁸⁰ *See* Robbins Dec. at Ex. 21 at 80:16-80:24.

²⁸¹ *Id.* at 91:11-92:19.

²⁸² *Id.* at 120:25-121:7.

²⁸³ *Id.* at 96:25-97:10.

97. Upon his return to the Project in the Spring of 2018, Roper was under the impression that a triple lane closure was not going to be necessary in 2018.²⁸⁴ He also did not review the specifications or the TCP itself, but met with Mason Garling/Specialty who was new to the Project and was to be trained in traffic control management.²⁸⁵

98. Roper saw ITD inspectors inspecting the implementation of the temporary traffic control devices.²⁸⁶

99. Roper discussed the development of a traffic queue into the advanced warning area after the implementation of the TTCP with ITD's inspectors on multiple occasions.²⁸⁷ Roper had telephone conversations with ITD's inspector and Penhall's superintendent on a nightly basis.²⁸⁸

100. Roper understood that the TCM had the authority to open up a closed lane of travel if he saw a traffic queue form into the advance warning area.²⁸⁹ If he had seen traffic back up to such an extent, he would have brought out a moveable sign to advise of triple-lane enclosures ahead of the traffic back up, or he would have instituted what is known as a "cattle chute," where traffic is allowed to proceed on each side of construction activities (thus allowing two open lanes).²⁹⁰ If he had seen a traffic backup form as a result of an unauthorized lane closure, he would have gone straight to the ITD inspector and advised him that changes had been made and that was the result.²⁹¹

²⁸⁴ *Id.* at 102:5-103:18.

²⁸⁵ *See* Robbins Dec. at Ex. 21 at pp. 95, 99-100.

²⁸⁶ *Id.* at 130:2-130:7.

²⁸⁷ *See* Robbins Dec. at Ex. 21 at 130:17-131:5.

²⁸⁸ *Id.* at 160:5-161:9.

²⁸⁹ *See* Robbins Dec. at Ex. 21 at pp. 162-163.

²⁹⁰ *Id.* at 164.

²⁹¹ *Id.* at 164-165.

101. The inexperienced Mason Garling took over as TCM in June 2018 because Roper had training obligations with the National Guard.²⁹² Garling was ATSSA certified as a “Traffic Control Supervisor”, but he had only worked for Specialty since 2014.²⁹³ As of June 2018, Garling did **not** have a minimum of five years of work zone traffic control experience and therefore he did not have the requisite five years of traffic control experience.²⁹⁴ Prior to his work on the Project, he had only worked as a TCM on two other ITD projects.²⁹⁵

102. Garling had access and personally reviewed the TTCP and Special Provisions for the I-84 Project.²⁹⁶ He acknowledged the purpose of the Special Provisions is to understand how to properly implement the TTCP.²⁹⁷ He reviewed the Temporary Traffic Control General Notes.²⁹⁸

103. Prior to the re-startup of the Project, Roper and Garling “got together” and went over the Project before they started staging material “multiple days” before May 31, 2018; during this conversation, Josh Roper discussed Penhall’s request for a three-lane closure in 2017 and that ITD “was okay with it.”²⁹⁹

104. Shortly before beginning his work on the I-84 Project in June 2018, Garling spoke with Roper regarding his experience with the Project in 2017.³⁰⁰ Roper informed him that Bruce Kidd was Penhall’s foreman and that there had been changes to the TTCP in 2017, i.e., Penhall had requested a three-lane closure in a four-lane stretch of I-84.³⁰¹ Garling did not ask whether

²⁹² See Robbins Dec. at Ex. 14 at 60:8-60:13; *Id.* at Ex. 22 at 37:9-37:17 and 37:18-38:8.

²⁹³ See Robbins Dec. at Ex. 14 at 93:25-94:2; *Id.* at Ex. 22 at 20:9-20:14.

²⁹⁴ See Robbins Dec. at Ex. 22 at 60:14-60:21.

²⁹⁵ *Id.* at Garling 22:15-23:7.

²⁹⁶ *Id.* at 38:14-38:24.

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 63:12-63:22.

²⁹⁹ *Id.* at 184:2-185:16.

³⁰⁰ *Id.* at 40:12-40:18.

³⁰¹ See Robbins Dec. at Ex. 22 at 42:7-42:9 and 43:8-43:17.

Penhall's request for a three-lane closure had been approved by ITD and did not ask to see written confirmation that the amendment to the TTCP had been presented and approved by ITD.³⁰² Yet, Garling understood that ITD written approval was required for any modification of the TCP.³⁰³ Garling asked Roper if ITD knew of the three lanes closures, which Roper stated that "he had spoken with the inspectors and there was an agreement between Penhall and ITD."³⁰⁴

105. Garling never saw any written changes to the TTCP approved by the State of Idaho and was never told that the resident engineer had approved the deviation from the TTCP.³⁰⁵ He understood that Bryon Breen was the person at ITD who would have to review and approve a change to the TCP.³⁰⁶

106. Garling believed that Penhall had responsibilities in the proper implementation of the TTCP in addition to those delegated to Specialty.³⁰⁷ He also believed Penhall had a responsibility to ensure that Specialty was adhering to the TTCP.³⁰⁸

107. Specialty received nightly instructions from Penhall on the implementation of the TTCP.³⁰⁹ The ITD inspectors did not instruct Specialty regarding its implementation.³¹⁰

108. Three to four times a week, Garling would discuss the traffic control setup and traffic flow with Blaine Schwendiman/ITD, to ensure he was "content with what was going on."³¹¹ Garling was under the impression that the ITD inspectors had reviewed the TTCP.³¹²

³⁰² *Id.* at 43:22-43:25 and 44:7-44:16.

³⁰³ *Id.* at p. 39.

³⁰⁴ *See* Robbins Dec. at Ex. 22 at 45:14-45:22.

³⁰⁵ *Id.* at 57:10-58:14.

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 64:14-64:20.

³⁰⁸ *Id.* at 64:14-65:7.

³⁰⁹ *Id.* at 67:8-67:17.

³¹⁰ *Id.* at 67:24-68:4.

³¹¹ *See* Robbins Dec. at Ex. 22 at 69:11-71:18.

³¹² *Id.* at 72:12-73:4.

109. Despite the TTCP not providing for any “Three Left Lanes Closed Ahead” or “Three Right Lanes Closed Ahead” traffic control signs, Garling personally placed “Three Left Lanes Closed Ahead” or “Three Right Lanes Closed Ahead” traffic control signs on the Project.³¹³

110. In 2018, Kircher reviewed the TCM’s diaries on a daily basis and again saw that there had been a reduction of four open lanes to a single open lane.³¹⁴ When Kircher saw the additional lane reductions in 2018, he asked Garling why they were occurring, who told him that Specialty was “required to do that for the safety of Penhall’s operations.”³¹⁵ Again, Kircher did not contact ITD’s Resident Engineer to confirm he, on behalf of Specialty, had approved the deviation from the TTCP.³¹⁶

111. One of Specialty’s general laborers noticed traffic queues that extended to Cloverdale Rd.³¹⁷

112. Both Roper and Garling were provided hard copies of the TTCP and Special Provisions for the Project and they were expected to be familiar with them.³¹⁸

113. Jake Loux (“Loux”) was a Specialty employee and was the Traffic Control Supervisor who was assigned to assist the inexperienced Roper and Garling. In October 2017, he was involved placing traffic control devices on I-84 which reduced the number of open lanes from four lanes to one lane on more than one night.³¹⁹

³¹³ See Robbins Dec. at Ex. 22 at 73:11-74:13.

³¹⁴ See Robbins Dec. at Ex. 22 at 99:19-100:2.

³¹⁵ *Id.* at 100:3-100:12.

³¹⁶ *Id.* at 68:23-69:2.

³¹⁷ See Robbins Dec. at Ex. 31 at 25:8-25:10.

³¹⁸ See Robbins Dec. at Ex. 14 at 86:11-87:9 and 199:15-199:23.

³¹⁹ See Robbins Dec. at Ex. 23 at pp. 41-42.

114. On June 14, 2018, he participated in setting up the traffic control to reduce eastbound I-84 from four open lanes to one open lane.³²⁰ He testified that Mason Garling had been instructed by “Somebody at Penhall” to do that.³²¹ Loux only worked the June 14, 2018 shift and didn’t return to work until the Monday after the fatal crash.³²² After the crash Specialty employees were instructed to be sure any changes in the TCP were documented in writing.³²³

115. When Loux returned after the June 16, 2018 crash, he reviewed the TCP to “see what we were setting up east of the incident . . .” to make sure Specialty was complying with the traffic control plan.³²⁴ He expressed concern to Garling that the traffic control setup requested by Penhall was in violation of the approved plans. Loux testified that Mr. Garling’s response was “what are our options of doing what is requested from Penhall?”³²⁵

116. After the Collision, Penhall continued to request the closure of three lanes in a four-lane stretch, despite Specialty’s objections.³²⁶

117. If a traffic queue was forming in the Project, the TCM was expected to have noted, logged, and corrected the issue.³²⁷ The TCM was also expected to inform ITD’s inspector on-site or a Penhall representative.³²⁸

³²⁰ See Robbins Dec. at Ex. 23 at pp. 41-42.

³²¹ *Id.* at pp. 64-66.

³²² *Id.* at pp. 65-66.

³²³ *Id.* at p. 66..

³²⁴ *Id.* at pp. 80-81.

³²⁵ *Id.* at p. 82.

³²⁶ *Id.* at 79:3-82:15.

³²⁷ *Id.* at 117:8-117:11.

³²⁸ *Id.* at 117:12-117-21.

118. Kircher was under the impression that ITD’s inspectors were inspecting the “entire project” from the beginning of Specialty’s signs to the end of the project, including the implementation of the TTCP, and everything that Penhall was doing.³²⁹

119. On June 10th, 11th, 12th, 14th, 15th, and 16th, Specialty continued to set up triple lane closures in four-lane stretches of the Project.³³⁰

120. On June 14, 2018, due to the closure of three lanes, traffic was backed up “past the Locust Grove overpass,” which was approximately two miles, from 10:00 p.m. to 11:30 p.m.³³¹ Despite this, Garling did not discuss the traffic conditions with Blaine Schwendiman/ITD and he did not consider placing a changeable message board further westbound on eastbound I-84 to advise approaching traffic that there was traffic congestion ahead.³³² When asked if he had considered placing a changeable message board further west to advise eastbound traffic before they reached the congestion, he responded that he didn’t; he explained that they “don’t typically move our devices per congestion. We keep them at their certain distance that they’re called out on the plans”.³³³ Garling recognized that the “only way [traffic] would have been notified [of congestion]... would be the brake lights.”³³⁴

121. On July 15, 2018, Specialty closed three lanes on eastbound I-84 and traffic was again backed up “**passed [sic] Locust Grove and was at a standstill,**” due to the lane closures. This was “about two miles.”³³⁵ That evening, Garling had a discussion with Schwendiman/ITD

³²⁹ *Id.* at 143:18-143:25.

³³⁰ *See* Robbins Dec. at Ex. 22 at 146:4-146:10; 146:15-146:20; 148:9-148:13; 149:1-149:4; 151:17-152:10; 157:2-157:10; and 161:18-161:22.

³³¹ *Id.* at 152:11-153:14.

³³² *Id.* at 153:25-154:13; 154:15-154:23.

³³³ *Id.* at pp. 154-155.

³³⁴ *Id.* at 155:4-155:18; *See* Robbins Dec. at Ex. 6.

³³⁵ *Id.* at 158:20-159:5.

regarding his thoughts on the setup of the TTCP and the traffic queue because “he was concerned that traffic wasn’t moving at all.”³³⁶

122. Garling knew that traffic backing up to the Locust Grove overpass “was excessive” and “extreme.”³³⁷ Yet, Garling did nothing to remedy this known dangerous condition.

Public Complaints of Traffic Congestion Leading Up to the June 16, 2018, Fatal Crash³³⁸

123. On the night before the subject crash, June 15, 2018, the Idaho State Police (ISP) received numerous calls from motorists complaining about traffic congestion, long queues, and frustrated motorists driving unsafely trying to get around the queue approaching the work zone on eastbound I-84.

124. That evening, a motorist called Justin at the ISP at approximately 11:30 p.m. asking, “what’s the deal with I-84 eastbound”. The caller said all four lanes were “pretty much stopped” for a couple of miles from Meridian to the Flying Wye. The caller said, “it’s pretty bad” and suggested they “make signs farther down the road.” Justin said he would let ITD know and see “if they can activate the reader boards.” The caller said they have been “stop and go for a couple miles” and are “just now starting to hit construction signs.”³³⁹ Meridian Road is about 3 miles upstream of the subject crash and about 3.5 miles upstream of the start of the first lane closure.

125. Justin/ISP, in turn, called Trooper Kenneth Beckner with ISP to alert him that they had received several calls that there was not proper signage to alert motorists. Trooper Beckner

³³⁶ *Id.* at 159:12-160:11.

³³⁷ *Id.* at 176:23-177:22.

³³⁸ *See* Lee Dec. at ¶¶ 27-32.

³³⁹ *See* Robbins Dec. at Ex. 11.

drove through the Project's work zone, including the advanced warning area, as part of his normal patrol duties.³⁴⁰ He noticed that traffic was backed up but said there was "plenty of signage."³⁴¹

126. On July 15, 2018, at approximately 12:34 a.m., Trooper Beckner was contacted by dispatch to provide help to a Tow Truck driver who had called and requested help slowing down traffic so he doesn't get hit because traffic was not providing any room due to construction shutting down all but one lane.³⁴²

127. On July 15, 2018, at approximately 10:01 p.m., Trooper Beckner responded to an ISP's dispatch call for an abandoned vehicle. At 10:12 p.m., Trooper Beckner advised dispatch to have the tow company come down right shoulder due to bumper-to-bumper traffic due to the construction activities of the Project.³⁴³

128. On July 15, 2018, at approximately 11:26 p.m., Trooper Beckner was contacted by ISP's dispatch, who had been contacted by "multiple callers requesting the ITD readerboards by activated farther west on I-84 Alerting to the traffic being converged." For instance, Kevin Beringer called ISP (Justin) and said that ISP needs to direct traffic on EB 84 because "damn Department of Transportation" won't do anything. People were driving down the closed left lane ignoring lane closed signs, and even driving on the shoulder. The callers said, "they need to remark it."³⁴⁴ Trooper Beckner told dispatch that "there is plenty of signage with flashing lights and cones // no need for the boards."³⁴⁵

³⁴⁰ See Robbins Dec. at Ex. 38 at 22:2-23:15.

³⁴¹ See Robbins Dec. at Ex. 11; *Id.* at Ex. 38 at 23:20-24:11.

³⁴² See Robbins Dec. at Ex. 38 at 31:10-34:22; *see also* Robbins Dec. at Ex. 10.

³⁴³ See Robbins Dec. at Ex. 38 at 34:23-37:1; *see also* Robbins Dec. at Ex. 10 (ISP 33).

³⁴⁴ See Robbins Dec. at Ex. 11.

³⁴⁵ See Robbins Dec. at Ex. 38 at 37:2-41:23; *see also* Robbins Dec. at Ex. 10 (ISP 35).

129. On July 15, 2018, at approximately 11:35 p.m., Officer Beckner was again contacted by ISP's dispatch, who had received a 911 call transfer, complaining that "Right Side-Cars are driving on the median to pass stopped traffic in the construction zone." Officer Beckner was at his office and told dispatch the "area is well lit and signs are placed accordingly."³⁴⁶

130. On July 15, 2018, at approximately 11:55 p.m., Trooper Beckner was again contacted by ISP's dispatch, who had received a call, stating: "Everyone flying down the left lane and no one is reacting to the lane ending // People using the shoulder to pass and get around things." Trooper Beckner again told dispatch the 'area is well lit and signs are placed accordingly.'³⁴⁷

131. On July 15, 2018, Bryant Cauthers, with the Idaho State Communications Center called Bruce Kidd/Penhall to advise him of the multiple complaints that had been received regarding traffic issues related to the work zone and advanced warning area of the Project.³⁴⁸ Kidd did not inform Garling about the June 15, 2018 ISP phone call regarding traffic issues.³⁴⁹ Kidd "saw no reason to" to inform Specialty of the complaints requesting additional signage.³⁵⁰

132. On June 16, 2018, the night of the fatal crash, Specialty placed another triple left closure on the four-lane freeway. For the third night in a row, eastbound I-84 traffic was backed up past Locust Grove Road.³⁵¹ Garling testified that he did not have any discussions with Penhall or the ITD inspector before the crash; however, he did have a conversation with Bruce Kidd of Penhall after the crash. Kidd inquired if the traffic control was set up the same as before and what

³⁴⁶ See Robbins Dec. at Ex. 38 at 41:24-46:2; see also Robbins Dec. at Ex. 10 (ISP 38).

³⁴⁷ See Robbins Dec. at Ex. 38 at 46:3-50:5; see also Robbins Dec. at Ex. 10 (ISP 38).

³⁴⁸ See Robbins Dec. at Ex. 16 at 59:3-59:14; See Robbins Dec. at Ex. 12.

³⁴⁹ See Robbins Dec. at Ex. 22 at 134:11-134:24.

³⁵⁰ See Robbins Dec. at Ex. 16 at 60:17-61:1.

³⁵¹ See Robbins Dec. at Ex. 22 at pp. 160-162.

the traffic was like to which Garling replied that the set-up was the same and traffic was backed up the same as the previous two or three nights.³⁵²

133. Garling testified that, after the crash, Kircher had contacted Penhall “trying to get them to agree to not setting another triple. . . because we didn’t want to risk it . . . We were instructed to set the triples in the first place, and after an incident like this, we did not want to continue to go against the plans.”³⁵³

134. On the evening of the fatal crash, Diamond Drilling was working on the eastbound lanes of I-84.³⁵⁴ Diamond did not request that three eastbound lanes be closed on June 16, 2018.³⁵⁵

135. There were two ITD Inspectors on-site on June 16, 2018 prior to the Collision, one with Penhall on the westbound side and one with Diamond on the eastbound side.³⁵⁶

136. The following Figure shows the placement and locations of the traffic control devices located in the advanced warning area of the Project on June 16, 2018.³⁵⁷

³⁵² *Id.* at p. 163.

³⁵³ *See* Robbins Dec. at Ex. 22 at pp. 168-169.

³⁵⁴ *See* Robbins Dec. at Ex. 14 at 225:22-226:3.

³⁵⁵ *See* Robbins Dec. at Ex. 20 at 63:8-63:12.

³⁵⁶ *See* Robbins Dec. at Ex. 22 at 131:2-131:22.

³⁵⁷ *See* Robbins Dec., Ex. 1 at p. 5 of 24.

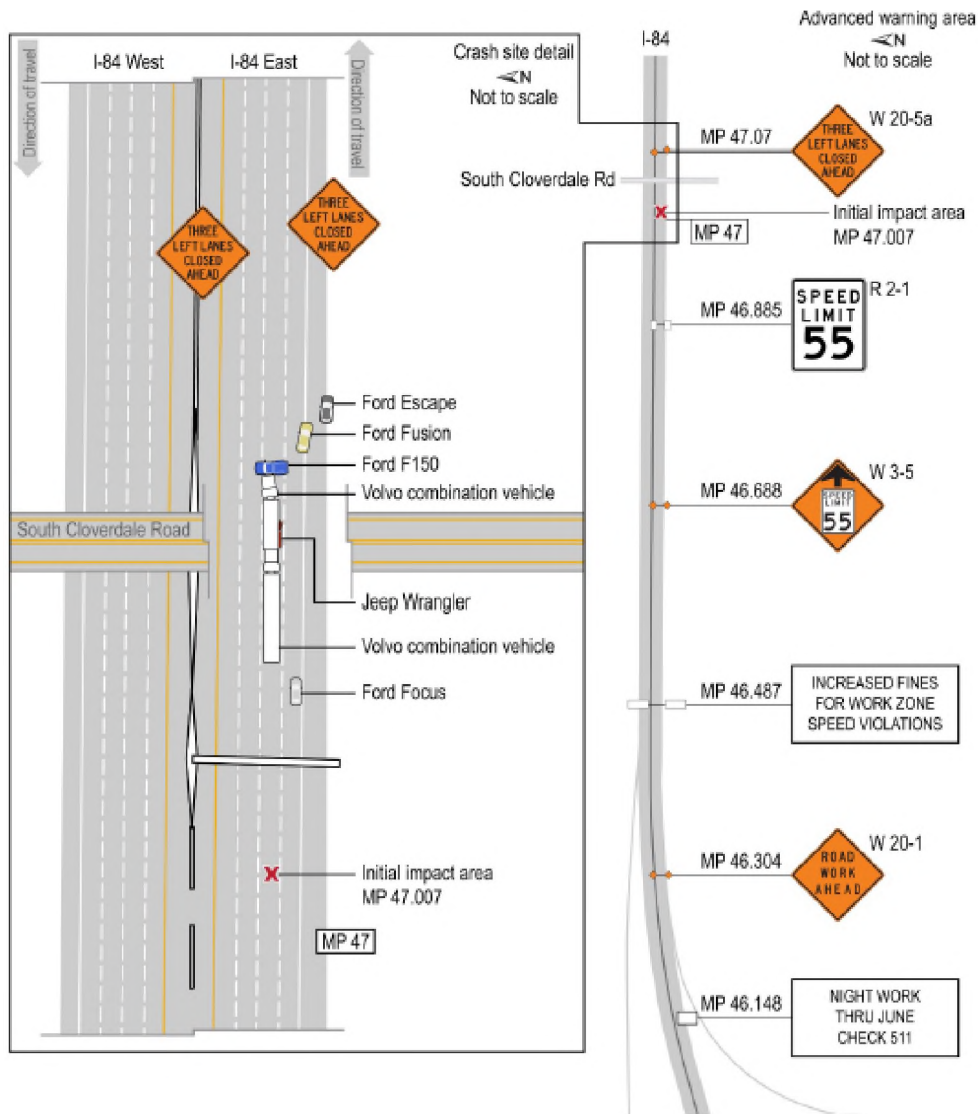


Figure 2 – Advance Warning Area of Work Zone with Crash Site Detail

137. No portion of the TTCP allowed for three lanes of travel to be closed in a four-lane stretch of highway.³⁵⁸

³⁵⁸ See Robbins Dec. at Ex. 14 at 108:23-109:4; see also Robbins Dec. at Ex. 24 at Exs. D and E; see also Robbins Dec. at Ex. 5.

138. ITD's project engineer, Dave Statkus, agreed that "inadequate traffic control and queue management procedures employed by Penhall Company and its subcontractor Specialty Construction Supply Company, Inc." contributed to the crash.³⁵⁹

139. According to Statkus, ITD strives for free-flowing traffic and to avoid the development of lengthy queues in work zones "[a]s much as one can do."³⁶⁰ Statkus testified that ". . . with the traffic control set up in such a way that there was four lanes and they went down to one lane, it would be inadequate."³⁶¹ Statkus testified that, to his knowledge, ITD never allowed any of its inspectors to make a change to the TCP throughout this project.³⁶²

140. Statkus was also asked if it is possible that Penhall made a verbal or written request to him to permit one open lane in a four-lane section, to which Statkus responded, "No." He said that a written proposal along with "a set of stamped plans" was required for ITD consideration of such a request and that along with the set of stamped plans there would have to be an evaluation of lane capacity.³⁶³

141. Breen, the ITD Resident Engineer, testified that if he had found out the contractors had reduced a four-lane section to one lane, he would have stopped it.³⁶⁴

IV. OPINIONS OF JIM C. LEE, PH.D., P.E., P.T.O.E.

The Manlapit/Johnson/Westall Plaintiffs have retained Jim C. Lee, Ph.D., P.E., P.T.O.E. to offer opinions in his field of expertise—traffic engineering. Specifically, as it pertains to this motion, he has been retained to offer opinions on the standard of care applicable to Penhall and

³⁵⁹ See Robbins Dec. at Ex. 13 at 96:6-99:6; 105:19-107:19.

³⁶⁰ See Robbins Dec. at Ex. 13 at p. 20.

³⁶¹ *Id.* at p. 123.

³⁶² *Id.* at p. 148.

³⁶³ *Id.* at pp. 119-120.

³⁶⁴ See Robbins Dec. at Ex. 15 at p. 78.

Specialty, and to evaluate the actual levels of care exhibited by each with respect to the creation, approval and implementation of the original TCP and Special Provisions for the Project, the deviations therefrom, as well as to evaluate and discuss other operational considerations of those two companies with respect to the Project.

Dr. Lee is a traffic engineer with over 50 years of experience in the industry. He has a Bachelor of Science in Civil Engineering from the University of New Mexico, a Master of Engineering in Civil Engineering from the Pennsylvania State University, and a Ph.D. in Civil Engineering from the University of Oklahoma. He has held several positions in his 50 years in the industry, including working: as a District Traffic Engineer and Traffic Planning Engineer for the Oklahoma Highway Department (now the Oklahoma Department of Transportation); as City Traffic Engineer for the City of Amarillo, Texas, and Director of Transportation for the City of Beaumont, Texas; and for two consulting engineering firms for a total of seven years before starting Lee Engineering, where he worked for 32 years before retiring in April 2020. Consequently, he is well-qualified to opine on the relevant and appropriate standards of care applicable to Penhall and Specialty. The full scope of his opinions is set forth in his Declaration filed concurrently herewith.³⁶⁵

The following provides a factual summary for his opinions:

- (1) ITD retained Parametrix to develop the traffic control plans and Special Provisions for the I-84 Project. After evaluating traffic volume and capacity, Parametrix required at least two lanes on a four-lane section of I-84 to be open to traffic at all times during this Project.
- (2) If Penhall wanted to deviate from the approved traffic control plan, the TCP and Special Provisions (ITD00060) required that an alternate plan be submitted in writing, prepared and sealed by an Idaho professional engineer for consideration by ITD engineers. The

³⁶⁵ See generally Declaration of Jim C. Lee, Ph.D., P.E., P.T.O.E. in Support of Manlapit/Johnson Plaintiffs' Joint Motion for Leave to Amend Complaints to Add Prayer for Punitive Damages Against Defendants Penhall Company and Specialty Construction Supply LLC ("Lee Declaration") filed concurrently herewith.

amended plan had to be submitted to the ITD for approval at least 14 days in advance of the implementation of any intended change. Moreover, the special provisions stated provided that the existing traffic control plan must remain in place until the ITD engineers approved a proposed change to the existing plan.

- (3) The contract provided for a Traffic Control Manager (“TCM”) to ensure that the TCP was correctly implemented. The TCM position required specific minimum qualifications and was to be provided by the contractor. The two Specialty TCMs assigned to the Project did not have the minimum qualifications. Penhall did nothing to determine whether either Specialty TCM possessed the minimum qualifications.
- (4) In flagrant violation of the contract requirements, Penhall and Specialty knowingly and intentionally closed three of the four lanes on I-84 in October 2017 and June 2018. The deviation was not supported by an engineer’s approval and/or a traffic volume/capacity evaluation Penhall claimed to have ITD “verbal approval” but did not have written (or indeed any) approval from an ITD *engineer* as required by the Special Provisions.
- (5) Because Penhall’s improper deviation could not accommodate expanded capacity with only a single open lane, traffic backed up into and past the advance warning area during the June 14 to June 16, 2018, timeframe.
- (6) For days prior to the fatal crash, both Penhall and Specialty were aware that their decision to violate the TCP and close three of four lanes on I-84 East was causing severe traffic backups. Both Penhall and Specialty were aware that such traffic backups on a highspeed interstate highway, late at night, created a dangerous condition and exposed motorists to the risk of rear-end collisions. Such collisions are particularly dangerous to motorists when they involve large commercial tractor/trailer combinations. The presence of such tractor trailer combinations on I-84 East during the nighttime hours was foreseeable to both Penhall and Specialty, given past historical usage of that highway segment.
- (7) On the nights before this tragic fatal crash, the Idaho State Police notified Penhall and Specialty of callers complaining about long queues, which extended about three miles upstream of the start of the first lane closure, although the traffic control plan’s advance warning area was only 1.3 miles long. Callers also complained about traffic driving around the closed lane in the median and the lack of advance warning of the hazard. Neither Penhall nor Specialty did anything to remedy the extreme traffic hazard caused by their improper lane reduction on June 16, 2018.
- (8) ITD relied on the TCP which Parametrix developed. The approved TCP required two open lanes and if the plan as approved had been implemented traffic would not have backed up on the night of the fatal crash. The plan in use on June 16, 2018 also did not conform to the MUTCD, because the longer queues extended beyond the advance warning devices.³⁶⁶

³⁶⁶ *Id.* at pp. 87-89.

Based upon the foregoing factual summary, the following conclusions are held by

Dr. Lee to a reasonable degree of engineering probability:

- (1) Penhall knowingly and intentionally violated the TCP and Special Provisions by instructing Specialty to close three lanes of the four-lane section. The evidence shows that its upper management did not assure that the on-site managing employees (Project Superintendent and Project Manager) were adequately trained in and/or informed about the importance of compliance with the Project's approved TCP unless and until a properly designed and approved alternative had been prepared and presented to the State's Project Engineer for review and approval. This amounted to an extreme deviation from industry practice. These upper- and on-site managerial lapses directly caused an inherently dangerous, unapproved alteration to the TCP to be implemented on this Project without adequate evaluation, oversight and/or approval. This resulted in the creation of an extremely hazardous condition in the traffic lanes of eastbound I-84 for two nights before June 16, 2018, as well as on the night of the fatal crash itself. Defendants' on-site management (Project Superintendent and Project Manager) were aware of the traffic backups caused by their outrageous and reckless decision to alter the TCP, and yet did absolutely nothing to warn motorists of its existence, and/or remedy the condition that contributed to the deaths of three young airmen.
- (2) Specialty did not take its TCM responsibilities seriously. It knowingly and intentionally violated the TCP and Special Provisions by closing three of four lanes. The evidence shows that its upper management did not assure that the managing employees (TCM, Traffic Control Supervisor and Traffic Control Administrator) were adequately trained in and/or informed about the importance compliance with the Project's TCP unless and until a properly designed and approved alternative had been prepared and presented to the State's Project Engineer for review and approval. This also amounted to an extreme deviation from industry practice. Upper management also utterly failed to train the on-site managing employees concerning how to recognize and respond to lengthy traffic queues through construction work zones, a well-known hazard as discussed above, and thereby protect the motoring public, another extreme deviation from industry practice. These upper- and on-site managerial lapses directly caused an inherently dangerous, unapproved alteration to the TCP to be implemented without adequate evaluation, oversight and/or approval. This resulted in the creation of an extremely hazardous condition in the traffic lanes of eastbound I-84 for two nights before June 16, 2018, as well as on the night of the fatal crash itself. Defendants' management (TCM, Traffic Control Supervisor and Traffic Control Administrator) were aware of the traffic backups caused by this outrageous and reckless decision to alter the TCP, and yet did absolutely nothing to warn motorists of its existence, and/or remedy the condition that contributed to the deaths of three young airmen.
- (3) The actions of Penhall and Specialty's on-site managers in closing three of four lanes, rather than providing the contract-required two open lanes, and in failing to provide adequate warning of the lane closures and resultant traffic queue were in flagrant and egregious disregard for the safety of I-84 motorists. They knew and/or should have known (with adequate training) that providing only half of the contract-required capacity would

and did result in long queues and the described dangerous condition on I-84 East with its associated hazards.

- (4) Because of the intentional violations of the Project's TCP and Special Provisions by the Penhall and Specialty on-site management, a dangerous lengthy traffic queue was created late at night in the eastbound lanes of I-84 in Boise on the night of this crash, and at least two nights prior thereto. This hazardous condition was caused by and known to both Penhall and Specialty prior to the crash. Although timely steps could and should have been taken to remedy this hazard that would have avoided the crash, nothing was done by either Penhall or Specialty and this horrendous fatal crash resulted.

- (5) It is the opinion of Dr. Lee, based upon the facts as described, that the flagrant, egregious, outrageous and conscious failure of Penhall and Specialty to use reasonable care in training the on-site management on, and the actual implementation of, the TCP and Special Provisions, amounted to an extreme deviation from reasonable standards of conduct under the circumstances and evinces a complete disregard or indifference on the part of both Penhall and Specialty for the well-established safety principles and practices in the construction industry designed to ensure the life and/or safety of the general motoring public. Based on his review of the evidence, neither Penhall nor Specialty came even close to meeting the applicable industry standard of care. They each flagrantly and grossly violated the contract they each agreed to honor. These deviations, under the circumstances presented and outlined above, are considered by Dr. Lee to be so dangerous in nature, as to be fairly characterized as egregious and outrageous. Based upon the facts he reviewed, it is the opinion of Dr. Lee, that the conscious decision of Penhall and Specialty to violate the TCP and Special Provisions created a known dangerous condition that they then each allowed to persist for days. This misconduct amounted to an extreme deviation from reasonable standards of conduct and is evidence of a complete disregard for or indifference on the part of both Penhall and Specialty for well-established safety principles and practices in the industry designed to ensure the life and/or safety of the general motoring public. As noted by Dr. Lee, if Penhall and Specialty had merely exercised reasonable care in discharging their responsibilities under the contract and had trained their on-site management personnel in traffic control administration, the traffic backup of June 16, 2018, (and the nights prior thereto) would not have been created. This horrific fatal crash would not have occurred, and three young airmen would not have died in the traffic lanes of I-84 East in the late-night hours of June 16, 2018.³⁶⁷

³⁶⁷ *Id.* at pp. 89-92.

V. ARGUMENT AND ANALYSIS

A. The Actions, or Lack Thereof, By Defendants Penhall and Specialty Constitute an Extreme Deviation From Reasonable Standards of Conduct, With an Understanding of or Disregard for the Likely Consequences.

Based on the factual record, there is a reasonable likelihood of establishing facts at trial to support a claim of punitive damages against Penhall and Specialty based on their actions, or lack thereof, which reflect an extreme departure from reasonable standards of conduct in choosing to intentionally deviate from the TCP and Special Provisions specifically prepared for the Project. Further, Penhall and Specialty's actions, or lack thereof, were done with a clear understanding, and disregard of, the likely consequences of the unapproved deviation from the TCP. The significant factual record developed through discovery up to this point and discussed in the Declaration of Dr. Lee show that both Penhall and Specialty demonstrated a deliberate and flagrant disregard for the safety of the motoring public.

A wealth of admissible expert opinion has been presented that would amply support a finding that Penhall and Specialty each exhibited an extreme departure from applicable industry standards and that they both knowingly placed the motoring public in great danger when they intentionally chose to deviate from the TCP and Special Provisions. (*See Lee Dec.*) The full scope of Dr. Lee's opinions is set forth in his accompanying Declaration have been summarized above.

In *Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 95 P.3d 34 (2004), the plaintiff filed a motion to add a claim for punitive damages under Idaho Code § 6-1604. Plaintiff supported her motion with an expert opinion that "Costco's failure to train its employees in proper display techniques constituted an extreme deviation from industry practice." *Id.* at 424, 95 P.3d at 42. When granting the motion, the district court stated:

Vendelin has established a "reasonable likelihood" of proving facts at trial sufficient to support a punitive damages award. Vendelin's expert believes that

Costco's lack of adequate training programs constituted an extreme deviation from the industry standard of care. That evidence is sufficient to demonstrate a reasonable likelihood of proving at least a disregard for likely consequences.

Id. Ultimately, the jury found an award of punitive damages against Costco was appropriate and, as a result, the Idaho Supreme Court determined the district court did not abuse its discretion allowing plaintiff to amend her complaint. *Id.* at 423-24, 95 P.3d at 41-42.

Similarly, this joint motion to amend is convincingly supported with the well-founded expert opinions of Dr. Lee detailing multiple extreme deviations on the part of Penhall and Specialty in implementing and monitoring the efficacy of traffic control measures, as well as his opinion (based upon the evidence), that both Penhall and Specialty had failed to train their employees on the process for altering or changing temporary traffic control plans governing a highway construction project, as well as how to recognize and respond to a lengthy traffic back-up. Each independently constituted an extreme deviation from industry practice.

Similar to *Vendelin*, there is substantial evidence that Penhall and Specialty employees were improperly trained, or not trained at all, in proper procedures for altering or changing temporary traffic control plans (particularly the one for this Project), the importance of adhering to such plans, how to recognize and respond to the development of a lengthy traffic back-up on a highway construction project, and/or how to correct such a well-recognized hazard. *See id.* at 431, 95 P.3d at 49. Just like in *Vendelin*, there is also substantial evidence from which the jury could infer that these deviations were a cause of this horrific fatal collision that took the lives of three innocent young people. *Id.* These extreme deviations on the lack of training are in addition to other extreme deviations identified by Dr. Lee in his declaration.

The *Vendelin* court also stated “[t]he establishment of adequate employee training procedures is ultimately the responsibility of Costco’s corporate management. Under the

circumstances, Costco, as a corporation, was either aware or should have been aware that it lacked adequate training procedures and that this deficiency increased the likelihood that Costco customers would be injured by falling merchandise.” *Id.* The same analysis applies here. Penhall and Specialty were either aware, or should have been aware, that their on-site managers were not adequately trained for this Project and that this deficiency increased the likelihood of the devastating fatal crash that occurred on June 16, 2018. Overall, the facts demonstrate that on a number of levels, both Penhall and Specialty exhibited a deliberate and flagrant disregard for the safety of the motoring public. These facts, outlined in this motion, highlight the need to hold them each accountable and hopefully deter future misconduct and thereby prevent a repeat of another similar horrific event on the highways of Idaho.

The record is uncontroverted. The TCP and Special Provisions required two open lanes be maintained in a four-lane stretch of I-84 during construction. Penhall and Specialty each knew of this requirement. Yet, on the evening of the fatal collision, and on the nights leading up to it, only one lane was available to traffic on I-84 eastbound. This remained the case despite Penhall and Specialty each knowing that a traffic queue would and did develop, and also knowing of the dangers this condition presented of a completely avoidable rear-end collision. Here, on the nights before the crash, and on June 16, 2018, both Penhall and Specialty knew this decision to alter the TCP caused a lengthy traffic queue to extend well beyond the advance warning zone.

1. **Penhall and Specialty knew a traffic queue in a construction zone presented a safety hazard to motorists yet ignored the one they created by deviating from the TCP and Special Provisions.**

As discussed in the Statement of Facts, employees from both Penhall and Specialty testified they understood a traffic queue in a highway construction zone presented a safety hazard to the motoring public. Penhall and Specialty employees also testified they understood the purpose of a

TCP was to help facilitate the smooth flow of traffic through the construction zone. Dr. Lee refers to the considerable research over the past thirty years discussing the well-recognized danger of rear-end collisions among vehicles slowed or stopped by a traffic queue.³⁶⁸

Yet, the undisputed facts demonstrate Penhall and Specialty deliberately chose to ignore the long traffic queues they created by their intentional decision to deviate from the TCP and Special Provisions. The traffic hazard caused by these intentional decisions is clearly documented in the traffic maintenance diaries on the night of the fatal collision and the nights leading up to it. The back-ups extended at least to Locust Grove, or roughly two miles before the location of the fatal crash on the evening of June 16, 2018. These hazardous back-ups extended well beyond the advance warning zone, which is an area critical to safety because it is the area where alerts, notifications and warnings are given to motorists about roadway conditions leading up to the construction zone, including the presence of slowing or stopped traffic.³⁶⁹ The advance warning area contemplated by the approved TCP was adequate **for the required two moving lanes of traffic**. It did not contemplate and therefore was entirely inadequate for the single open lane made available by Penhall and Specialty prior to and at the time of the fatal crash.³⁷⁰

Equally problematic is the undisputed fact that Penhall and Specialty each ignored the complaints received from concerned motorists who were having to deal with the effects of the traffic congestion that had been created leading up to the fatal crash. This was all the natural and foreseeable results of the intentional decision by Penhall and Specialty to cavalierly deviate from the TCP and Special Provisions. Calls from concerned motorists about the long queues and lack

³⁶⁸ See Lee Dec. at ¶ 34.

³⁶⁹ See Lee Dec. at ¶¶ 20-21.

³⁷⁰ See Lee Dec. at ¶ 21.

of adequate signage were relayed to the Idaho State Police, and in turn, from the State Police through the State Communications Center to Specialty and Penhall. Even with the many serious concerns reported by Boise motorists, neither Penhall nor Specialty responded to alleviate or correct the situation on or before the night of June 16, 2018. The same three-lane closure with only a single open lane was repeated on the night of the fatal collision (June 16, 2018). Predictably, a long traffic queue resulted just like it had on the nights preceding. Three young people were needlessly killed in the resultant rear-end collision.

Simply put, Penhall and Specialty each ignored the risk presented by lengthy traffic queues that they caused to extend well beyond the advance warning zone. They chose to ignore the pleas from concerned motorists. They had knowledge of these issues on the nights preceding the fiery fatal crash. Instead of doing something quite simple to remedy the hazardous condition, they each decided to continue their course of outrageous conduct despite their knowledge of the likely consequences, and in so doing, caused and/or contributed to this senseless and horrific fatal crash.

2. Penhall and Specialty knew the process required to deviate from the TCP and Special Provisions and yet intentionally ignored it.

Although the process by which changes could be made to the TCP and Special Provisions were clearly explained in the contract documents, it was reinforced when Penhall sought a potential change to the TCP prior to the Project beginning. In August 2017, discussions were held between Penhall, Specialty and the ITD regarding altering the TCP. The ITD clearly explained to Penhall that a revised TCP needed to be submitted, in writing. Thereafter, Penhall and Specialty discussed the issue separately and Specialty let it be known it did not have a licensed engineer on staff to prepare a revised TCP. That proposed change was then dropped.

Despite the revision process being discussed, and both Penhall and Specialty understanding it, as well as understanding neither entity had a licensed engineer on staff capable of preparing a

revised TCP for what the ITD considered a “significant project,” Penhall and Specialty nonetheless chose to deviate from the TCP and Special Provisions. This was an intentional decision done with full knowledge of the likely horrific consequences on a highspeed highway late at night. Indeed, the facts show these two defendants ignored the requirements of the TCP and Special Provisions multiple times in the fall of 2017 without going through the required written submittal to the ITD engineer of a request and obtaining alternate plans prepared and sealed by an Idaho professional engineer to support such a request. Penhall and Specialty flat out ignored the revision process they knew existed. They decided to ignore the TCP and Special Provisions in the fall of 2017 and decided to continue this course of outrageous and hazardous conduct in June 2018, despite their knowledge of the likely consequences.

What makes Penhall and Specialty’s conduct even more egregious under the circumstances is the fact that each of these two defendants had approximately seven months prior to the fatal crash to develop an alternate TCP and obtain the required approval from the ITD given the break in construction activities between November 2017 and the project restart in May 2018. They also could have utilized that time to implement one of the other alternatives discussed by Dr. Lee.³⁷¹ Instead, Penhall and Specialty wasted this time and cavalierly decided to make and implement their own TCP without State approval. Upon the Project restart, they again decided to simply repeat their outrageous misconduct from the fall of 2017. In essence, they decided to roll the dice and gamble with the safety and lives of the motoring public, all so Penhall could finish the Project on time and avoid financial penalty.

³⁷¹ See Lee Dec. at ¶¶ 35-50.

3. **Penhall was under pressure to complete the Project on an expedited basis to avoid a substantial financial penalty, fueling its outrageous conduct.**

It is not surprising that Penhall was unwilling to expend resources to develop an alternate TCP and obtain approval from the ITD given it was already staring down the barrel of a potential hefty fine over not delivering the Project on time. Not to mention the fact that neither it (nor Specialty) had budgeted for engineering analysis. This evidence comes from the admissions of Penhall's Project Manager at the time of the fatal collision, Jeromy Magill. His testimony is summarized in the Statement of Facts and in the Lee Declaration (¶¶ 78-80 at pp. 50-52). Pursuant to Mr. Magill (the third or fourth Project Manager in the ever-revolving Penhall door), there was an urgency to get the Project done on an expedited basis so as to avoid liquidated damages being assessed. In fact, his impression from the prior Project Manager, before assuming the position at the time of the fatal crash, was the importance of avoiding liquidated damages and he developed an expedited work schedule to assist the process. He acknowledged that one way to accelerate completion of the Project was to close more lanes than called for in the contract, thus affording the ability to do more work, faster. Getting the job done in a manner to avoid financial penalties trumped highway safety for Penhall on this Project.

4. **Specialty's decision to deviate from the TCP and Special Provisions was outrageous and showed a flagrant disregard for the safety of the motoring public with knowledge of likely consequences.**

Specialty's role on the Project was plain and simple: it held itself out as being an expert in traffic control. It agreed to serve as the traffic control manager which involved, among other things, making sure the TCP and Special Provisions were implemented properly, continuously monitor the traffic flow through the construction zone and determine if any improvements to traffic control operations needed to be made. Specialty's miserable and outrageous failure to safeguard

the motoring public in Boise justifies a decision by this Court to allow amendment of the Plaintiffs' complaints so as to assert claims for punitive damages against Specialty.

Specialty's egregious misconduct started before it placed the first traffic control device on the highway. For this "significant project," Specialty agreed to only utilize Traffic Control Managers who possessed a minimum of five years of Work Zone Traffic Control experience. Neither Traffic Control Manager selected by Specialty to serve in that capacity, Josh Roper or Mason Garling, possessed such experience, and each lacked the required experience as manifested in several significant facets bearing on the proximate cause of this fatal crash. Specialty management knowingly allowed deviations from the approved TCP and Special Provisions without first securing alternate approved plans per the required process. Specialty's on-site managers were not skilled at and so did not respond to the development of the dangerous and lengthy traffic queues that had become a common sight to the Specialty TCM on the nights leading up to the fatal crash on June 16, 2018.

In fact, Specialty's first TCM, Josh Roper, was so inexperienced that he requested extra help. But Specialty had limited options, and Mr. Roper was next in line even though it was the first time he had ever served as a TCM. Similar to Mr. Roper, Mr. Garling did not have the requisite experience to serve as TCM on this Project. But Specialty moved him into that position in June 2018 despite his lack of experience. Both knew what was required to change the TCP and Special Provisions, but each allowed an unauthorized deviation to happen on their watches. They allowed the extra lane to be closed without the required engineer's seal on an alternate plan and without an ITD engineer's review and approval in advance of implementation. Moreover, Specialty's on-site managers stood by and did nothing as lengthy, hazardous traffic queues predictably began to form. Mr. Garling testified he was concerned "about the fact that traffic

wasn't moving at all" on June 15, 2018—the night before of the fatal collision. But despite this concern, he allowed the TCP and Special Provisions to be violated by closing the third lane, leading to the creation of a lengthy traffic queue that ultimately resulted in the fatal crash.

Specialty obviously simply did not take the significance of its traffic control responsibilities at all seriously. Mr. Roper and Mr. Garling were clearly “in over their heads.” Compounding their glaring lack of experience was Specialty’s utter failure to adequately inform and/or train them on issues bearing directly on their responsibilities on the Project and, in particular, on the fundamental issues that resulted in this fatal crash: how to respond to lengthy traffic queues through construction work zones (a well-known hazard), and the importance of strict compliance with the approved TCP and Special Provisions unless and until a properly designed alternative had been prepared and approved by qualified engineers. Pursuant to Dr. Lee, these training failures amounted to an extreme deviation from industry practice and led directly to this fatal crash.

5. The fatal collision would not have occurred had Penhall and Specialty kept two lanes open as required by the TCP and Special Provisions.

It is beyond reasonable dispute that the Plaintiffs will be able to establish at trial that the fatal collision would not have occurred had Penhall and Specialty implemented the TCP and Special Provisions as designed for their Project. This conclusion is supported by the traffic capacity engineering analysis undertaken by and discussed in Dr. Lee’s Declaration.³⁷² This analysis demonstrates that if a second lane had remained open on the night of June 16, 2018, **as required**, a persistent traffic queue would not have formed. More probable than not, that queue would not have formed, traffic would have flowed unimpeded at 55 miles per hour, and this

³⁷² See Lee Dec. at ¶¶ 123-166.

senseless fatal crash would have been avoided. The Plaintiffs' Jeep would have been traveling at a constant speed through the work zone rather than being at the end of a lengthy, stopped traffic queue. Stated otherwise, had Penhall and Specialty followed the TCP and Special Provisions—rather than intentionally deviating from them—Carlos Johnson, Karlie Westall and Lawrence Manlapit, III, would not have been killed in this senseless and horrific fatal collision.

VI. CONCLUSION

Based on the foregoing, the Manlapit/Johnson/Westall Plaintiffs respectfully request that the Court allow them to amend their respective Complaints to add a claim for punitive damages against Defendants Penhall and Specialty. Allowing punitive damages to be claimed against these two defendants is an appropriate legal avenue to punish, and hopefully deter, a repeat of the events that led to this senseless crash that took the lives of three innocent young people and devastated each of their families.

DATED this 6th day of July, 2021.

BAUM HEDLUND ARISTEI & GOLDMAN PC

By: /s/ Clay Robbins, III
Clay Robbins, III
-and-
Kurt D. Holzer
HEPWORTH HOLZER, LLP
Attorneys for Plaintiff, Lawrence P. Manlapit,
Jr., Individually and as Co-Administrator of the
Estate of Lawrence P. Manlapit, III

POWERS FARLEY, P.C.

By /s/ Mark J. Orlor
Raymond D. Powers – Of the Firm
Mark J. Orlor – Of the Firm
Cody J. Witko – Of the Firm
Attorneys for Plaintiff Dorine E. Norko,
Individually and as Co-Administrator of the
Estate of Lawrence P. Manlapit, III

LITSTER FROST INJURY LAWYERS

By /s/ Evan S. Mortimer
Evan S. Mortimer – Of the Firm
Attorneys for Plaintiff Daisy Johnson and C.J., a
minor

JOHNSON & MONTELEONE, LLP

By /s/ Jason R.N. Monteleone
Jason R.N. Monteleone – Of the Firm
Attorneys for Plaintiffs Kimberly and Michael
Westall