



IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

ALABAMA POWER COMPANY,

Plaintiff,

v.

PINPOINT LOCATING, INC.,

Defendant.

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)
) **CASE NO.: CV-2012-001381.00**
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) **In accord with the Court's previously**
) **entered Scheduling Order, this Motion for**
) **Partial Summary Judgment is being filed in**
) **time to entertain a corresponding hearing on**
) **Monday, January 13. A definitive hearing**
) **date and time has not yet been set.**
)
)
)

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Alabama Rule of Civil Procedure 56(c)(3), plaintiff Alabama Power Company ("Alabama Power") respectfully moves this Court to enter a partial summary judgment in its favor regarding liability on its claim for negligence against defendant Pinpoint Locating, Inc. ("Pinpoint").¹ As grounds for this motion, Alabama Power states as follows:

INTRODUCTION

This case is about Pinpoint's destruction of Alabama Power's underground concrete ductbank—which is a combination of assembled conduits² and spacers used to encase, consolidate, and protect the electrical cables running inside it—at the intersection of Morris Avenue and 20th Street North in Birmingham, Alabama. In or around August 2010, Ervin Cable Construction ("Ervin"), a company that, among other things, installs underground fiber optic cable, hired Pinpoint to perform directional boring work to make way for the installation of underground fiber optic cable underneath the south side of Morris Avenue. Prior to the

¹ In filing this motion, Alabama Power does not waive or abandon its claims for wantonness and trespass, and Alabama Power does not waive or abandon its claim for negligence should this motion be denied. Further, Alabama Power reserves the right to supplement this motion.

² A conduit is a tube or duct used for the protection and routing of electrical wiring.

commencement of the directional boring work, USIC Locating Services, Inc. (“USIC”) located and marked with paint the general locations of the facilities that were buried underground in line with Pinpoint’s boring route—including Alabama Power’s ductbank. On the night of August 11, 2010, while performing the work that Ervin hired it to do, Pinpoint bored directly into and completely through Alabama Power’s underground ductbank—rendering it inoperative and in need of replacement. This incident occurred because Pinpoint negligently failed to determine the location and depth of the ductbank as it was situated within the path of its bore. As a result, Pinpoint is liable for the resulting damage to Alabama Power’s property.

NARRATIVE STATEMENT OF UNDISPUTED FACTS

I. Pinpoint Performed the Directional Boring Work At Issue.

In or around August 2010, Ervin hired Pinpoint to perform underground directional boring work in downtown Birmingham. *See* Steve Martin Dep. 22-26 (Oct. 24, 2013).³ Specifically, Ervin retained Pinpoint to bore an underground tunnel along the south side of Morris Avenue (stretching from at least 18th Street North through 20th Street North) in which Ervin thereafter was to lay roughly two thousand (2,000) feet of fiber optic conduit measuring 1¼ inches thick. *Id.*; *see also id.* at 47:17-23; 95-112; Ex. 12 to Martin Dep. (a hand-drawn diagram that depicts in green ink the underground route bored by Pinpoint).⁴

Regarding the work at issue, Pinpoint entered into a contract with Ervin that established that Pinpoint had a duty, among others, to avoid damaging any underground utility facilities, to pay for any damaged caused to underground utility facilities, and to locate and mark such underground utility facilities:

³ Relevant portions of the transcript of the deposition of Mr. Steve Martin, Pinpoint’s designated corporate representative, is attached to the motion as Exhibit A.

⁴ A true and correct copy of Exhibit 12 to Steve Martin’s deposition is attached to this motion as Exhibit B.

(ii) Subcontractor shall exercise its best efforts to prevent damage to property in the course of the performance of its obligations under this Agreement. Subcontractor shall, at its sole expense, replace, restore or pay replacement costs of any property damaged by its operations. Such replacement or restoration shall be completed when judged satisfactory by the Contractor and/or any governing agency or property owner.

(iii) Daily during construction and upon completion of the work, Subcontractor shall remove from the premises all debris and rubbish created in the performance of the Work, to the satisfaction of Contractor. Immediately following any construction, Subcontractor shall provide clean up per industry standards and to the reasonable satisfaction of Contractor and/or Project Owner or property owner.

(iv) Subcontractor represents and warrants to Contractor that all equipment and materials provided by Subcontractor and used in the performance of the Work and made a part of the project will be new, of good quality, free of defects and in conformity with the requirements of this Agreement.

(v) Subcontractor shall provide for and oversee all safety orders, precautions, and programs necessary for the reasonable safety for it and of its employees, agents or subcontractors and the general public while performing the Work, as well as, all materials to be incorporated into the project; all property and improvements on and adjacent to the construction site; and, compliance with all applicable laws, ordinances, rules, regulations and orders of all public authorities relating to the performance of the Work.

(vi) Subcontractor shall, prior to the beginning of any Work, locate and mark, or cause the appropriate authority to locate and mark, all existing utilities and/or other facilities, underground, aerial or otherwise, in the area. Subcontractor shall be solely and completely responsible for locating and marking or contacting the local locating service to locate and mark, such underground utilities and/or facilities, and as such shall be liable for any and all damages, either consequential or actual, direct or indirect, caused by Subcontractor's actions or failure to act with respect to any underground utilities and/or other facilities within or without the construction right-of-way.

Ex. C (Pinpoint's contract with Ervin regarding the Morris Avenue work at issue in this case);⁵ *see also id.* at Section 6(a) (providing that Pinpoint had a duty to adhere to all applicable state laws, rules, and regulations relating to its underground boring work).

⁵ Relevant portions of Pinpoint's contract with Ervin governing the underground boring work at issue in this action, which was included in Exhibit 16 to Steve Martin's deposition, is attached to this motion as Exhibit C. *Cf.* Martin Dep. 184-89 (testifying that Pinpoint entered into this contract with Ervin and that such contract's terms and conditions governed the at issue work that Pinpoint performed underneath Morris Avenue in August 2010).

Over the course of the nights of August 10 and 11, 2010, Pinpoint completed the work that it was hired by Ervin to do, as it bored the underground fiber optic cable tunnel along Morris Avenue from 18th Street North through 20th Street North. *See* Martin Dep. 22-26; *see also id.* at 29; 47:17-23; 95-112; Ex. 12 to Martin Dep. 29.

II. Alabama Power’s Ductbank Was Marked Properly with Red Paint Prior to the Start of and Throughout the Course of Pinpoint’s Work.

Prior to the commencement of the directional boring work, USIC located and marked with paint the general locations of the facilities that were buried underground and in line with Pinpoint’s boring path. *See* Tim Belue Aff. (Dec. 27, 2013), ¶ 5.⁶ Specifically in regards to this lawsuit, on or about August 2, 2010—and before Pinpoint commenced its work—USIC marked with red paint the location of Alabama Power’s ductbank at the intersection of Morris Avenue and 20th Street North.⁷ *See* Belue Aff., ¶¶ 5-6; *id.* at ¶ 12. Pinpoint does not dispute that the ductbank was marked properly with red paint during the time period of the work at issue:

Q: Now, does Pinpoint contend that Alabama Power’s underground duct bank and underground facilities at that area of issue [were] not marked appropriately?

A: I don’t know that.

Q: Do you have any reason to believe that the power lines were not marked approximately?

A: Why would—no, I do not.

Q: No reason? Okay.

A: No reason.

Q: And what does red paint signify?

A: Power.

⁶ Tim Belue’s Affidavit is attached to this motion as Exhibit D.

⁷ *See* ALA. CODE § 37-15-6(b) (providing that underground “Electric Power Distribution and Transmission” facilities are to marked with the “Group Identifying Color” of “Safety Red”).

Q: Power. Okay. Other than the one Alagasco line, did Pinpoint encounter any other unmarked facilities?

A: Not that we damaged, no.

Q: But did you encounter any unmarked facilities at all?

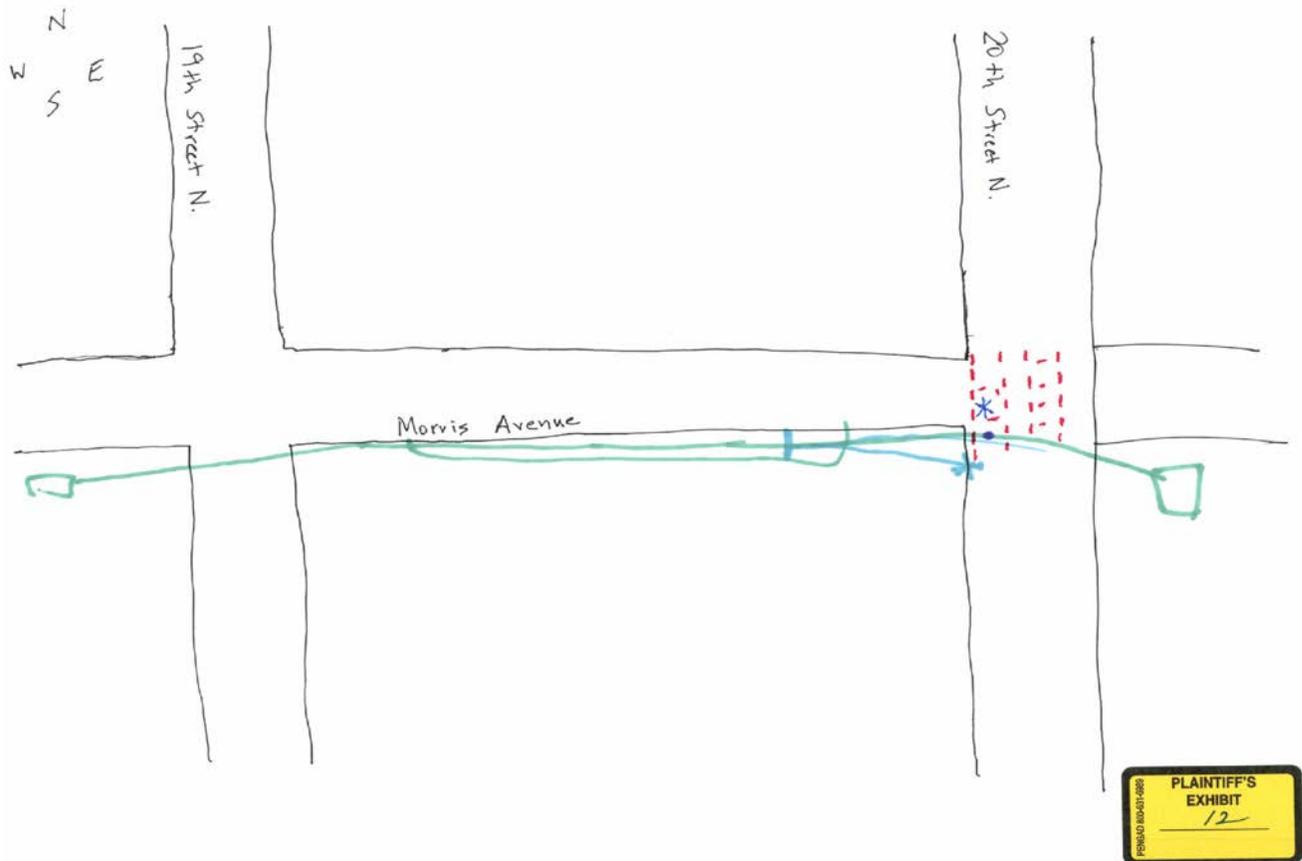
A: Not that I remember.

Martin Dep. 59:3-23; *see id.* at Martin Dep. 59:17-23 (testifying that, other than one Alagasco gas line that Pinpoint damaged on the night of August 10,⁸ Pinpoint did not encounter any other unmarked underground facilities); 184:7-15 (acknowledging that Pinpoint does not have any reason to believe that the underground ductbank was marked incorrectly and that Pinpoint does not possess any documents tending to show that the ductbank was marked incorrectly).

III. Pinpoint's Bore Path Ran Perpendicular to Alabama Power's Ductbank.

At his deposition, Pinpoint's corporate representative supplemented a hand-drawn diagram to illustrate the path taken by Pinpoint's bore on the night at issue:

⁸ *See* Martin Dep. 48:12-20.



Ex. 12 to Def.’s Dep. To clarify, the green ink (as drawn by Martin) represents the west-to-east path of Pinpoint’s bore.⁹ The red dotted lines represent the red paint applied by USIC prior to Pinpoint’s work to denote the location of Alabama Power’s buried facilities—including the damaged ductbank at issue.¹⁰ Pinpoint’s corporate representative applied the purple dot (located just below the blue asterisk) to mark the spot where he believed Alabama Power had determined the location of the incident at issue to have occurred, *i.e.* the spot where Pinpoint bored into the

⁹ See Martin Dep. 107:5-7 (“Okay. So, this green, that represents the path of your bore? A: That’s correct.”); see also 105-06 (Mr. Martin noting that Pinpoint’s work started from the west).

¹⁰ See Martin Dep. 105:12-21 (“Q: Okay. Now, I’ve also—as you can see on Plaintiff’s Exhibit 12, Mr. Martin, I’ve also very crudely, just in red ink, marked the red paint markings, signifying the location of the power lines. A: Yes. Q: Does that look roughly accurate to you? A: Yes.”).

underground ductbank.¹¹ As evident from relevant testimony and the above diagram, Alabama Power's underground ductbank ran north-to-south down 20th Street North (and through the intersection with Morris Avenue). *See* Brian Lett Dep. 145-46 (Dec. 6, 2013);¹² Ex. 12 to Martin Dep.; Martin Dep. 105:12-21.

Thus, the path of Pinpoint's bore ran perpendicular to Alabama Power's ductbank, meaning that Pinpoint had to tunnel either below or over-the-top-of the ductbank to avoid drilling into it. *See* Martin Dep. 92:22-93:3 ("And just to be clear, you were drilling across, or perpendicular, with the underground electrical lines, is that right? A: That's right."); 76:22-77:4 ("When you come across red paint marks like—well, first of all, was Pinpoint going to bore across the location of the power lines, as depicted in Plaintiff's Exhibit 8?¹³ A: We were."); *cf. id.* at 114:14-21 ("Q: Is the depth of your bore—is knowing the depth of your bore important when you're crossing underground utility lines? A: It is. Q: And why is that? A: **To make sure you don't hit them.**") (emphasis added).

¹¹ *See* Martin Dep. 105:1-11 ("Q: Okay. So, you've placed a dot, a purple dot, on Plaintiff's Exhibit 12, where you think that the white star, that is on Plaintiff's Exhibit 7, is located? A: That's correct. Q: And again for the record, the white star is what was marked as the location of the—what we're saying is the damage to the underground duct bank? A: That's right.").

¹² Relevant portions of the transcript of the deposition of Mr. Brian Lett, Alabama Power's designated corporate representative, are attached to the motion as Exhibit E.

¹³ Exhibit 8 to Martin's deposition is a photograph depicting the intersection of Morris Avenue and 20th Street North as it appeared on the date that the photograph was taken (*i.e.*, September 2, 2010—thus after Pinpoint performed the work at issue and drilled into Alabama Power's ductbank). More specifically, Exhibit 8 to Martin's deposition depicts the red paint marks identifying the general location of Alabama Power's ductbank buried underneath the intersection of Morris Avenue and 20th Street North, as well as depicting a white-painted star (or asterisk) that identifies the spot on the street directly above the point where Pinpoint bored into the ductbank. Exhibit 8 to Martin's deposition is attached to this motion as Attachment 1 to Exhibit D. *See* Belue Aff. ¶¶ 9-11 (testimony authenticating and discussing the photograph that was attached as Exhibit 8 to Martin's deposition).

IV. Pinpoint Bored Directly Into and Completely Through Alabama Power's Ductbank.

On the night of August 11, 2010, Pinpoint bored directly into and completely through Alabama Power's ductbank at the intersection of Morris Avenue and 20th Street North:

Pinpoint was performing excavation work at or near the intersection of Morris Avenue and 20th Street in Birmingham, Alabama on or about August 11, 2010. To perform the excavation work, Pinpoint was operating boring equipment. During or otherwise in connection with such excavation work, Pinpoint bored into Alabama Power's ductbank and related equipment located at or near the intersection of Morris Avenue and 20th Street in Birmingham, Alabama. Pinpoint's contact with Alabama Power's ductbank and related equipment occurred despite the fact that the locations of Alabama Power's underground facilities, including the damaged ductbank and related equipment, were visibly and appropriately marked prior to and at the time of the contact. By boring into the ductbank, Pinpoint caused substantial damage to Alabama Power's ductbank and related utility equipment.

Pl.'s Verified Resp. to Def.'s Interrog. No. 3 (Jan. 23, 2013);¹⁴ *see also* Lett Dep. 34:22-35:3 (“Q: What did my client’s boring machine actually hit, according to Alabama Power? A: The ductbank at the corner of 20th Street and Morris Avenue.”); *id.* at 34-38 (Brian Lett testifying that, among other things, Pinpoint’s bore “went all the way through the duct[bank]”); *id.* at 43.

Further, Pinpoint does not dispute that it bored into and caused the damage at issue to Alabama Power's ductbank:

Q: Did you tell [Ervin] that you didn't cause any damage?

A: I did not.

Q: And why not?

A: **Well, it was obvious we had caused the damage**, if they were having to go out and lower the cable for y'all to put it in.

Martin Dep. 138:7-17 (emphasis added); *see id.* at 30:6-10 (“Q: Do you have reason to dispute that Pinpoint bored into the underground duct bank? A: From the photos that I've seen, no, I

¹⁴ A true and correct copy of Alabama Power's Verified Response to Pinpoint's Interrogatory No. 3 is attached to this motion as Exhibit F.

don't object to that at all.") (emphasis added); 30:15-23 ("Q: Okay. So, it appears to you from the photos that Pinpoint bored into the duct bank? A: From the photos that y'all sent us and with me going out and looking at it and from what John Veejay told me from Ervin Communications, we drilled into a conduit—into a single conduit from—for Alabama Power."); 30-31; 135-38.

V. Pinpoint Did Not Determine the Precise Location of Alabama Power's Ductbank Prior to Boring Across It.

Pinpoint did not first determine the ductbank's precise location in order to prevent drilling into it:

Q: So, for—and we're talking about Plaintiff's Exhibit 8, but for the path of your bore, and when it crossed the underground facility—underground power lines, as marked by these red paint strips, you did not know how deep or the exact location of the power lines, in relation to the path of your bore, is that correct?

A: We pulled that hand hole, **which is about 30 feet away** [from Pinpoint's boring path and thus the spot where it drilled into the ductbank], and it was 106 to 108 inches.

Q: **But you didn't know for sure that it was 106 or 108 inches—**

A: **That's correct.**

Q: That's correct. Okay. **Because underground facility lines, they can fluctuate in depth, can't they?**

A: **They do.**

Martin Dep. 99:4-22 (emphasis added); *see also id.* at 82-83.

Instead of precisely locating the ductbank, Pinpoint peered into a manhole (or "hand hole") **located approximately thirty (30) feet away from the path of its bore** to observe the location of the ductbank as it lied at the manhole—*i.e.*, thirty feet away from Pinpoint's boring path—but not as to where it actually lied in the boring path. *See id.*; *see also id.* at 77:5-10 ("Q: Okay. So, what—what did you do—did you do anything special, as far as locating the lines,

because you were going to bore across them? A: We pulled that manhole and looked inside.”); 81:13-16 (“Q: Okay. Did you do anything else, other than measuring the conduit depth from the manhole? A: Did not.”); *see also id.* at 79:20-80:11 (testifying that Pinpoint did not measure the width of the Alabama Power conduit observed in the manhole).

Pinpoint did not employ any detection equipment or non-invasive methods to determine the precise location of Alabama Power’s ductbank:

Q: Did you employ—did Pinpoint employ any detection equipment to try to find out the depths and the location [of the ductbank]?

A: **Did not.**

Q: Or use any noninvasive measures to determine the precise location and depth?

A: Besides opening that hand hole, **no.**

Q: Use any hand tools of any kind?

A: **Did not.**

Q: Any vacuum excavation techniques?

A: **Did not.**

Martin Dep. 81:17-82:8 (emphasis added); *see id.* at 82:9-83:14 (testifying that Pinpoint did not do anything to determine whether the location of the ductbank as it existed in Pinpoint’s drilling path was the same as the location of the ductbank as it existed in the manhole).

Further, Pinpoint did not “pothole”¹⁵ the Alabama Power ductbank to determine its precise location as situated within Pinpoint’s boring path:

¹⁵ “Potholing” is an industry term that means digging a hole in the street or land directly over the underground drilling path in order to determine the precise location and depth of any underground facility that runs perpendicular to the drilling path (*e.g.*, Alabama Power’s ductbank). *See, e.g.*, Martin Dep. 91:13-92:2 (“Q: Did—are you aware of the term, ‘pothole’ as— A: I am. Q: —in terms of excavation? A: I am. Q: Could you, in kind of layman’s terms,

Q: And you were not able to—or you did not measure and determine exactly the depth of the power line, as situated at Morris and 20th Street, where your bore was going to run?

A: **I can save us a ton of time and the time of questions. I did not pothole that line.** I went to that hand hole, and pulled a hand hole, pulled a measurement on it and got a measurement on that conduit. **I did not pothole it.** The questions you’re asking are—you’re just—we’re going in circles. **I did not pole it—I did not pothole it.**

Martin Dep. 97:21-98:11 (emphasis added); *see id.* at 99:1-3 (“Q: You’re right, you’ve established that you didn’t pothole? A: That’s correct.”); 131:5-6 (“A: . . . I didn’t pothole it.”).

Further still, Pinpoint did not pothole the ductbank because it did not want to spend the extra time—and incur the additional expense—that would result from potholing:

Q: Okay. And why did you not want to replace the concrete [portion of the street that would have to be replaced if Pinpoint had potholed the ductbank]?¹⁶

A: I didn’t want to replace it for anything, for no reason.

Q: Just because it would—

A: **I mean, if you’re going for an expense deal, I didn’t want to replace it. I didn’t want to pothole it. I didn’t pothole it.** I took a depth in that hand hole. We keep going back, did I pothole that line? **I did not pothole that line.**

Martin Dep. 130:12-22 (emphasis added); 95:5-96:15 (testifying that it would have taken Pinpoint “ten or 12 hours” and cost Pinpoint a “[c]ouple of thousand dollars” to pothole Alabama

tell me what potholing means? A: That means taking the posthole digger or vac system and potholing a line. Q: Now, when you say ‘potholing a line,’ does that mean digging out— A: Around that line to find out the depth of it or something like that.”); *see also id.* at 97:12-15 (“Q: And when you pothole, do you pothole in an area directly in line with where your bore is going to be? A: Yes.”); 92:17-21 (testifying that Pinpoint’s potholing of underground lines allows it to determine the exact location of those underground lines).

¹⁶ The street portion at issue in this case—*i.e.*, the intersection of Morris Avenue and 20th Street North—is comprised of concrete (instead of, for example, asphalt). *See* Martin Dep. 94-95 (testifying that the intersection of Morris Avenue and 20th Street North is made of “thick” concrete); *see also* Attach. 1 to Ex. D.

Power's ductbank at the intersection of Morris Avenue and 20th Street North); *compare id.* at 128:1-21 (testifying that it took Pinpoint a total of four hours to pothole two separate lines in asphalt at the intersection of Morris Avenue and 18th Street North during an earlier portion of the work performed on August 11, 2010); 128:22-129:6 (testifying that it is less expensive to pothole in asphalt than in concrete).

VI. By Boring Directly Into and Completely Through the Ductbank, Pinpoint Damaged Alabama Power's Property.

By drilling directly into and completely through Alabama Power's ductbank, Pinpoint rendered the ductbank inoperable and in need of costly replacement:

By boring into Alabama Power's ductbank, Pinpoint rendered the ductbank and the utility conduits therein functionally useless and in need of significant repair. Pinpoint completely damaged Alabama Power's ductbank and related equipment. Moreover, Pinpoint damaged Alabama Power's underground cable, type No. 35-3 conductor paper insulated lead primary. The damaged conduit was believed to be "Orangeburg" pipe with a four-inch diameter, which was the standard size used by Alabama Power at that time. Alabama Power's entire duct line and pipe was encased in concrete, and due to the inability to repair "Orangeburg" pipe, the entire section of duct line from Alabama Power's manhole at Morris Avenue to its manhole at Powell Avenue had to be replaced. In replacing the duct line, Alabama Power used the current standard material, five-inch EB/DB PVC conduit, and temporarily had to replace the conductor with 15kV #1/0 CU primary. . . .

Pl.'s Verified Suppl. Resp. to Def.'s Interrog. No. 5 (Mar. 1, 2013);¹⁷ *see also id.* at Nos. 8, 9, 16; Brian Lett Dep. 34-38.

APPLICABLE LEGAL STANDARD

Summary judgment is appropriate where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *See* ALA. R. CIV. P. 56(c)(3); *Warehouse Home Furnishing Distribs., Inc. v. Whitson*, 709 So. 2d 1144, 1151 (Ala. 1997).

¹⁷ A true and correct copy of Alabama Power's Verified Supplemental Responses to Pinpoint's Interrogatory Nos. 5, 8, 9, and 16 is attached to this motion as Exhibit G.

Once a moving party makes the showing that it is entitled to judgment as a matter of law, the non-moving party bears the burden of producing “substantial evidence” creating a genuine issue of material fact. *See Ex parte Lumpkin*, 702 So. 2d 462, 465 (Ala. 1997). ““Substantial evidence”” is ““evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.”” *Ex parte Lumpkin*, 702 So. 2d at 465 (quoting *West v. Founders Life Assurance Co. of Fla.*, 547 So. 2d 870, 871 (Ala. 1989)). *See also Bruner v. Geneva County Forestry Dept.*, 865 So. 2d 1167, 1174 (Ala. 2003) (“[Movant] satisfied its burden of production and the burden then shifted to the [nonmovants] to present sufficient evidence They did not carry that burden. On that basis alone, we would uphold the summary judgment.”).

Alabama Rule of Civil Procedure 56 provides:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, **may be rendered on the issue of liability alone** although there is a genuine issue as to the amount of damages.

ALA. R. CIV. P. 56(c)(3) (emphasis added).

Argument

I. **Pinpoint Is Liable to Alabama Power for Negligence.**

Alabama Power is entitled to summary judgment regarding the issue of liability on its negligence claim against Pinpoint, because Pinpoint failed to determine the precise location of Alabama Power’s ductbank prior to boring across it. “To prove negligence, a plaintiff must establish four elements: 1) a duty to a foreseeable plaintiff; 2) a breach of that duty; 3) proximate causation; and 4) damage or injury.” *Farr Metal, Inc. v. Hines*, 738 So. 2d 863, 863 (Ala. 1999).

Here, the undisputed evidence establishes that Pinpoint is liable for negligently drilling into Alabama Power's ductbank as a matter of law.

A. Pinpoint owed a duty to Alabama Power to act reasonably in order to prevent damaging the ductbank.

It is axiomatic under Alabama law that Pinpoint owed a duty to Alabama Power to act reasonably in order to prevent damaging Alabama Power's property—which Pinpoint knew it was boring across—when performing its underground excavation work. The Alabama Supreme Court has noted:

Applicable here is the well-established rule that “every person owes every other person a duty imposed by law to be careful not to hurt him.” *Southeastern Greyhound Lines v. Callahan*, 13 So. 2d 660, 663 (Ala. 1943). In a variety of circumstances, this Court has recognized a duty to foreseeable third parties,^[18] based on a general “obligation imposed in tort to act reasonably.” *Berkel & Co. Contractors, Inc. v. Providence Hosp.*, 454 So. 2d 496, 502 (Ala. 1984) (citing cases). *See, e.g., Havard v. Palmer & Baker Eng'rs, Inc.*, 302 So. 2d 228, 231 (Ala. 1974) (engineering firm under a contract with the City of Mobile to inspect a tunnel owed a duty to third-party “member[s] of the public using” the tunnel to reasonably apprise the City of Mobile of the “condition of the fire-fighting equipment located in the [t]unnel”), *overruled on other grounds, Ex parte Insurance Co. of North America*, 523 So. 2d 1064 (Ala. 1988)[.]

Taylor v. Swift, 892 So. 2d 887, 893 (Ala. 2004); *see Smitherman v. McCafferty*, 622 So. 2d 322, 324 (Ala. 1993) (noting that ““every person owes every other person a duty imposed by law to be careful not to hurt him””) (quoting *Southeastern Greyhound Lines*, 13 So. 2d at 663).

¹⁸ Here, it is undisputed that Alabama Power was a “foreseeable third part[y],” as Pinpoint knew that its bore path was to cross over and thus potentially encounter Alabama Power's ductbank (*see, e.g.,* Martin Dep. 59:3-23; 76:22-77:4; 92:22-93:3; 184:7-15), and that it was important to know the depth of underground facilities to “**make sure you don't hit them.**” Martin Dep. 114:14-21 (emphasis added). *See also id.* at 100:8-101:5 (testifying that the failure to determine the precise location of an underground line prior to boring across it can result in damage to such an underground facility); *id.* at 101:6-11 (testifying that the chance of boring into an underground facility is substantially reduced if its exact location and depth are determined before boring across its path).

Further, the Alabama Supreme Court has “held that ‘where one party to a contract assumes a duty to another party to that contract, and it is foreseeable that injury to a third party—not a party to the contract—may occur upon a breach of that duty, the promissor owes that duty to all those within the foreseeable area of risk.’ A breach of such a duty that results in injury to a third party who is ‘within the foreseeable area of risk’ is actionable negligence.” *QORE, Inc. v. Brandford Bldg. Co., Inc.*, 25 So. 3d 1116, 1124 (Ala. 2009) (quoting *Harris v. Board of Water & Sewer Commissioners of Mobile*, 320 So. 2d 624, 630 (Ala. 1975)). As noted above in footnote 18, it was foreseeable that Pinpoint would bore into Alabama Power’s ductbank if Pinpoint did not determine beforehand the precise location and depth of the ductbank. *See, e.g.*, Martin Dep. 59:3-23; 76:22-77:4; 92:22-93:3; 114:14-21; 184:7-15. Pinpoint’s contract with Ervin **expressly** provides that Pinpoint was required to perform its boring work in a manner so as to prevent damage to any underground utility facilities, as well as to pay for any damaged sustained by such facilities. *See* Ex. C.

Further still, the “Alabama One-Call” statute, codified at Alabama Code §§ 37-15-1, *et seq.*, mandates that excavators like Pinpoint:¹⁹

- (a) **Conduct excavation or demolition activities so as to avoid damage to or minimize interference with existing underground facilities** in and near the excavation or demolition area;
- (b) **Employ detection equipment or non-invasive methods to determine the precise location of an operator’s underground facilities** when excavation is to be done within the area marked as the approximate location of the operator’s underground facilities and maintain a clearance between any underground facility and the cutting edge or point of any mechanized equipment, taking into account

¹⁹ The Alabama One-Call statute defines an “Excavator” as “any person who engages in excavation.” ALA. CODE § 37-15-2(f). The term “Excavate” or “Excavation” is defined as “any operation for the purpose of the movement or removal of earth, rock, or other material by mechanized equipment or explosive device and includes, but is not limited to, augering, backfilling, blasting, boring, digging, ditching, drilling, grading, plowing-in, pulling-in, ripping, scraping, sub-soiling, trenching, and tunneling.” *Id.* at § 37-15-2(e).

the known limit of control of such cutting edge or point, **as may be reasonably necessary to avoid damage to such facility;**

...

ALA. CODE § 37-15-8 (emphasis added).

At his deposition, Pinpoint’s corporate representative testified that Pinpoint has a duty to follow the Alabama One-Call Excavation Guide.²⁰ See Martin Dep. 44: 10-15 (“Q: Does Pinpoint try to follow the procedures and guidelines set forth in the Alabama 1 Call Excavation Guide? A: Sure, we do. Q: And why is that. A: **It’s a state law.**”) (emphasis added). The Alabama One-Call Excavation Guide, which is based on Alabama Act 94-487 (the Act’s accompanying statutory authority is the Alabama One-Call statute), “is intended as a resource to aid in the prevention of damage to underground utility facilities in the State of Alabama” and provides that excavators—for example, Pinpoint—“are responsible for finding and avoiding all facilities down to the depth they are working.” See Ex. H. It cannot be undisputed that Pinpoint owed a legal duty to Alabama Power, and this motion is due to be granted.

B. Pinpoint breached its duty to Alabama Power by, among other things, failing to determine the precise location and depth of the ductbank.

The Code of Alabama makes clear that when performing the kind of work at issue in this action, an excavator like Pinpoint is required to “conduct [its] excavation or demolition activities so as to avoid damage to or minimize interference with existing underground facilities in and near the excavation or demolition area” and to “employ detection equipment or non-invasive methods to determine the precise location of an operator’s underground facilities.” ALA. CODE § 37-15-8. The Alabama One-Call statute also mandates that an excavator such as Pinpoint must “maintain a clearance between any underground facility and the cutting edge or point” of its

²⁰ Relevant portions of the Alabama One-Call Excavation Guide, the entirety of which was attached to Steve Martin’s deposition as Exhibit 5, is attached to this motion as Exhibit H.

boring equipment. ALA. CODE § 37-15-8(b). Additionally, the Alabama One-Call Excavation Guide provides that Pinpoint should use hand tools or other non-invasive equipment—including via potholing the area—to determine the exact location of underground lines when boring perpendicular to them:

SAFE DIGGING TIPS FOR EXCAVATORS

When crossing underground utilities within the tolerance zone, the excavation should be performed with hand tools or non-invasive equipment until the marked facility is exposed. See Figures 1 through 4 pages 15 and 16, for examples of conduit and small cable tolerance zones.

- Dig by hand, pothole, vacuum or other soft digging methods.
- If excavating to a certain depth, use hand tools to expose a window in the earth down to that depth and then open the window 18 inches on either side of the marked facility to determine the exact location of the buried facility.

Ex. H;

- When digging in hard compacted soils, pothole to the side of the locate marks and collapse the soil into the pothole while digging toward the marks. (Figure 7, page 18).
- Beware of the possibility of abandoned facilities. Find, expose and protect all facilities within the tolerance zone. Do not damage any of these facilities as they may be used by the utility at a later date.

Id.

However, as noted above in Section V of the “Narrative Statement of Undisputed Facts,” Pinpoint did not employ any detection equipment or other non-invasive methods to determine the

precise location of Alabama Power's ductbank. *See* Martin Dep. 81:17-82:8; *see id.* at 82:9-83:14. At his deposition, Pinpoint's corporate representative testified repeatedly that Pinpoint did not pothole the area at issue to determine the location of Alabama Power's ductbank as situated within Pinpoint's boring path:

Q: And you were not able to—or you did not measure and determine exactly the depth of the power line, as situated at Morris and 20th Street, where your bore was going to run?

A: **I can save us a ton of time and the time of questions. I did not pothole that line.** I went to that hand hole, and pulled a hand hole, pulled a measurement on it and got a measurement on that conduit. **I did not pothole it.** The questions you're asking are—you're just—we're going in circles. **I did not pole it—I did not pothole it.**

Martin Dep. 97:21-98:11 (emphasis added); *see id.* at 99:1-3; 130:17-22 (“A: I mean, if you're going for an expense deal, I didn't want to replace it. I didn't want to pothole it. I didn't pothole it. I took a depth in that hand hole. We keep going back, did I pothole that line? I did not pothole that line.”); 131:5-6. Despite the plain text of Alabama Code § 37-15-8(b), Pinpoint's corporate representative testified that Pinpoint did not have to maintain a clearance between Alabama Power's ductbank and its bore. *See* Martin Dep. 83:15-84:7.

Although required by law to do so, Pinpoint did not first determine the precise location of Alabama Power's ductbank prior to boring across (and ultimately into) it. *See, e.g.,* Martin Dep. 99:4-22; *see also id.* at 77:5-10; 79:20-80:11; 81:13-83:14; 97:21-98:11; 99:1-3. Therefore, the undisputed evidence establishes that Pinpoint failed to use reasonable care to determine the precise location of Alabama Power's ductbank (and thus to prevent damaging it), and as a result Pinpoint breached its duty of care owed to Alabama Power.

C. Pinpoint’s breach caused the damage to Alabama Power’s ductbank.

By not first determining the precise location of Alabama Power’s ductbank, Pinpoint caused the damage to Alabama Power’s ductbank, as Pinpoint blindly continued with its work and ultimately drilled into—and completely through—Alabama Power’s underground property. *See, e.g.*, Pl.’s Verified Resp. to Def.’s Interrog. No. 3; *see also* Brian Lett Dep. 34-38. Pinpoint does not dispute that it caused the damage at issue:

Q: Did you tell [Ervin] that you didn’t cause any damage?

A: I did not.

Q: And why not?

A: **Well, it was obvious we had caused the damage**, if they were having to go out and lower the cable for y’all to put it in.

Martin Dep. 138:7-17 (emphasis added); *see id.* at 30-31; 135-38.

Pinpoint even admitted that a failure to determine the precise location of an underground facility can cause the exact type of damage at issue here. *See* Martin Dep. 114:14-21 (“Q: Is the depth of your bore—is knowing the depth of your bore important when you’re crossing underground utility lines? A: It is. Q: And why is that? A: **To make sure you don’t hit them.**”) (emphasis added); *see also id.* at 101:6-11 (“Q: Okay. And is that—is the chance [of causing damage] obviously reduced, if you know the exact location and depth of the lines? [Defense Counsel]: Object to the form. A: It is.”). Further, there is no evidence that any entity—other than Pinpoint—did anything to cause or help bring about the damage to the ductbank. *See* Martin Dep. 167:2-9 (“Q: Did Alabama Power do anything wrong, in terms of the incident? A: No, not that I know of. Q: What about any other company? A: No. Q: Or any other person? A: (Shaking head negatively.) Not that I know of.”).

There is no dispute that, if Pinpoint had determined the precise location and depth of the Alabama Power's ductbank, Pinpoint then would have been able to guide its bore either above or below the ductbank—instead of into and completely through it. “The proximate cause of an injury is that cause which, in the natural and probable sequence of events, and without the intervention or coming in of some new or independent cause, produces the injury, and without which the injury would not have occurred.” *Mobile Gas Serv. Corp. v. Robinson*, 20 So. 3d 770 (Ala. 2009). Although proximate cause is generally a question for the jury, “[w]hen the facts are such that reasonable men must draw the same conclusion, the question of proximate cause is one for the courts.” *Morgan v. City of Tuscaloosa*, 108 So. 2d 342, 345 (Ala. 1959). There is no question that Pinpoint caused the damage to Alabama Power's ductbank, and this motion is due to be granted as a matter of law.

D. Alabama Power has been damaged by Pinpoint.

As noted above, Alabama Power has been damaged by Pinpoint, in that Pinpoint's negligent boring work destroyed Alabama Power's property, rendering the need of costly replacement. *See, e.g.*, Pl.'s Verified Suppl. Resp. to Def.'s Interrog. Nos. 5, 8, 9, 16; *see also* Lett Dep. 34-38; 122. Further, Pinpoint has acknowledged that damage was sustained by Alabama Power's property. *See, e.g.*, Martin Dep. 30:15-23 (testifying that Pinpoint drilled into an Alabama Power conduit); *see also id.* 30-31; 135-38. There is no dispute that Alabama Power has been damaged by Pinpoint, and “[a] summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the **amount of damages.**” ALA. R. CIV. P. 56(c)(3) (emphasis added).

The undisputed evidence shows that Pinpoint is liable to Alabama Power for negligently boring into Alabama Power's underground ductbank. There is no genuine issue of material fact as to Pinpoint's liability for negligence, and this motion is due to be granted as a matter of law.

CONCLUSION

Pinpoint negligently breached its duty owed to Alabama Power, and Alabama Power was damaged as a result. For purposes of this motion, as to negligence liability alone, there is no genuine issue of material fact upon which relief can be granted, and Alabama Power is entitled to partial summary judgment as a matter of law. Pursuant to Alabama Rule of Civil Procedure 56(c)(3), Alabama Power Company requests that this Court enter an Order granting this Motion for Partial Summary Judgment.

Respectfully submitted this 29th day of December, 2013.

/s/ Thomas R. DeBray, Jr.

One of the Attorneys for Plaintiff,
Alabama Power Company

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CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed the foregoing with the Clerk of the Court using the AlaFile system, which will send notification of such filing on this the 29th day of December, 2013:

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/s/ Thomas R. DeBray, Jr. _____

Of Counsel

EXHIBIT A

TYLER EATON MORGAN NICHOLS & PRITCHETT INC.

1 IN THE CIRCUIT COURT OF JEFFERSON COUNTY,

2 ALABAMA

3

4 CIVIL ACTION NO.: CV-2012-001381

ORIGINAL

5

6 ALABAMA POWER COMPANY,

7 Plaintiff,

8 vs.

9 PINPOINT LOCATION, INC.,

10 Defendant.

11

12

13 DEPOSITION

14 OF

15 STEVE MARTIN

16 24TH DAY OF OCTOBER, 2013

17 TAKEN AT: 2011 FOURTH AVENUE NORTH

18 BIRMINGHAM, ALABAMA

19

20

21 TAKEN BEFORE: Gary N. Morgan

22 Registered Professional

23 Reporter and Notary Public

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1 or add or supplement in any way about your
2 answers?

3 A. (Shaking head negatively.)
4 Not at the time -- not at this time.

5 Q. Then you'll let me know, if
6 that changes, correct?

7 A. I will.

8 Q. Now, Mr. Martin, I'd like to
9 talk to you now a little bit more about
10 the specific incident, while we're here,
11 and, as you know, that concerns what
12 happened on or about August 11th, 2010
13 when Pinpoint bored into Alabama Power's
14 underground duct bank in Birmingham. Are
15 you aware of that?

16 A. I am.

17 Q. It happened at the
18 intersection of Morris Avenue and 20th
19 Street North, is that correct?

20 A. That's correct.

21 Q. Okay. Who -- who hired
22 Pinpoint to do that boring job?

23 A. Ervin Construction out of

TYLER EATON MORGAN NICHOLS & PRITCHETT INC.

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1 Bessemer.

2 Q. And why did Ervin Construction
3 hire Pinpoint?

4 MR. LUKE: Object to the form.

5 A. I had a contract with them.

6 Q. Well, what work was Ervin --
7 what work was Pinpoint supposed to do for
8 Ervin?

9 A. Install a inch and a quarter
10 conduit.

11 Q. Inch and a quarter conduit?

12 A. That's correct.

13 Q. What kind of conduit?

14 A. A fiber optic line.

15 Q. And what was this fiber optic
16 line going to be used for?

17 A. I don't know.

18 Q. So, was -- Ervin Cable
19 Construction, was that the general
20 contractor?

21 A. It was.

22 Q. And Pinpoint was the
23 subcontractor?

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1 A. No, General -- Ervin
2 Communication is the contractor who hires
3 me. I would be the prime in that case to
4 go out and do it.

5 Q. Okay.

6 A. Well, maybe they are the
7 prime, and I'm the sub, however, you want
8 to look at it, but they're a -- they have
9 a contract with many different
10 construction comp -- with many different
11 utility companies, and I go out and do the
12 utilities for them.

13 Q. When you say you "do the
14 utilities," did you -- was it Pinpoint's
15 job to dig the tunnel underground in which
16 to lay the conduit?

17 A. We don't dig tunnels.

18 Q. Well, I'm sorry. How would
19 you describe it?

20 A. Directional bore underground.

21 Q. So, bore underground?

22 A. That's right.

23 Q. To lay the conduit?

TYLER EATON MORGAN NICHOLS & PRITCHETT INC.

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1 A. That's right.

2 Q. Okay. And Ervin hired

3 Pinpoint?

4 A. That's correct.

5 Q. Was -- who owned the conduit,

6 or who was the utility?

7 A. I don't know that.

8 Q. You don't know that?

9 A. No, I do not.

10 Q. Okay. So, this directional

11 boring work that was supposed to be

12 performed, what was the scope of that

13 work, where was it supposed to start, and

14 where was it supposed to end?

15 A. Started at the bus barn. Is

16 that on 18th? At 18th Street, I believe,

17 and come down to Morris Avenue.

18 Q. So, it started at 18th Street

19 North in Birmingham?

20 A. Started at the bus barn. I

21 don't know what street that's on.

22 Q. Okay.

23 A. But it went two blocks to the

TYLER EATON MORGAN NICHOLS & PRITCHETT INC.

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1 bank right here on the corner.

2 Q. And did it -- did the boring
3 work run down parallel with Morris Avenue?

4 A. It did.

5 Q. Okay.

6 A. Would have been on the south
7 side of Morris Avenue.

8 Q. How much was Pinpoint paid to
9 do this job?

10 A. \$12 a foot, I believe.

11 Q. And do you know the length in
12 feet?

13 A. Maybe 2,000 feet.

14 Q. Maybe 2,000 feet?

15 A. (Nodding head affirmatively.)

16 Q. And do you know a Delana
17 Dunnaway?

18 A. Delana Dunnaway works for
19 Ervin Communications, yes.

20 Q. Have you ever had any
21 communications with her about this job, in
22 particular?

23 A. Other than probably picking

TYLER EATON MORGAN NICHOLS & PRITCHETT INC.

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1 MR. LUKE: Object to the form.

2 A. I don't know that. I -- we
3 don't know that we drilled into it. I was
4 not notified that I drilled into it until
5 sometime in October.

6 Q. Do you have any reason to
7 dispute that Pinpoint bored into the
8 underground duct bank?

9 A. From the photos that I've
10 seen, no, I don't object to that at all.

11 Q. Okay. What photos have you
12 seen?

13 A. The ones y'all sent over to
14 us.

15 Q. Okay. So, it appears to you
16 from the photos that Pinpoint bored into
17 the duct bank?

18 A. From the photos that y'all
19 sent us and with me going out and looking
20 at it and from what John Veejay told me
21 from Ervin Communications, we drilled into
22 a conduit -- into a single conduit from --
23 for Alabama Power.

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1 Exhibit 5 was marked for
2 identification.)

3 MR. DEBRAY: And, Gary, so you
4 know, I've marked the pamphlet itself, but
5 I've also made copies of the pamphlet,
6 just for ease of reference.

7 Q. (BY MR. DEBRAY:) So, you are
8 somewhat familiar with this guide?

9 A. I am.

10 Q. Does Pinpoint try to follow
11 the procedures and guidelines set forth in
12 the Alabama 1 Call Excavation Guide?

13 A. Sure, we do.

14 Q. And why is that?

15 A. It's a state law.

16 Q. So, it's -- Pinpoint has the
17 legal obligation to follow this excavation
18 guide?

19 MR. LUKE: Object to the form.

20 A. That's correct.

21 Q. Okay. Do all excavation and
22 boring companies in Alabama have to file
23 this -- have to follow this guide?

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1 incident on August 11th again?

2 A. You're --

3 MR. LUKE: Object to the form.

4 A. Okay. You're going back to
5 the incident on August the 11th. You're
6 acting like I know that we damaged a
7 cable. We did not know we damaged a
8 cable.

9 Q. Okay. And we'll get to that.

10 MR. LUKE: That was on
11 August 11th.

12 A. Okay. Well, you keep going
13 back to the incident. We've got to go
14 there now. If we don't go there now, you
15 keep calling it an incident that I can't
16 answer.

17 Q. Well, here's what we'll talk
18 about. We'll talk about the Ervin Cable
19 job that occurred on or about August 11th,
20 2012, from along Morris Avenue in downtown
21 Birmingham around 19th Street and 20th
22 Street, is that fair?

23 A. That's fair.

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1 Q. Okay. And we'll get to the --
2 to the encounter with Alabama Power's
3 underground duct bank later.

4 A. Okay.

5 Q. But after the initial
6 notification call to the Alabama 1 Call --

7 A. Okay.

8 Q. -- did Pinpoint, and that
9 means you or anybody on behalf of
10 Pinpoint, call Alabama 1 Call again,
11 relating to the Ervin job?

12 A. We damaged a gas line the
13 first night we were there. Now, I can't
14 tell you if I called the 1 Call center
15 because they don't have after hour -- they
16 do have after-hour calls, but they give
17 you numbers to call. I can't remember if
18 I called them or just notified Alagasco
19 that we'd damaged a gas line. I can't
20 remember that for sure.

21 Q. And where did the damaged gas
22 line -- where is it located?

23 A. One block down.

TYLER EATON MORGAN NICHOLS & PRITCHETT INC.

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1 correct?

2 A. That's right.

3 Q. Now, does Pinpoint contend
4 that Alabama Power's underground duct bank
5 and underground facilities at that area of
6 issue was not marked appropriately?

7 A. I don't know that.

8 Q. Do you have any reason to
9 believe that the power lines were not
10 marked approximately?

11 A. Why would -- no, I do not.

12 Q. No reason? Okay.

13 A. No reason.

14 Q. And what does red paint
15 signify?

16 A. Power.

17 Q. Power. Okay. Other than the
18 one Alagasco line, did Pinpoint encounter
19 any other unmarked facilities?

20 A. Not that we damaged, no.

21 Q. But did you encounter any
22 unmarked facilities at all?

23 A. Not that I remember.

TYLER EATON MORGAN NICHOLS & PRITCHETT INC.

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1 Q. Would that mean digging up the
2 ground?

3 A. Depends on if I was going to
4 have to cross it or not.

5 Q. Okay. So, if you're going to
6 have to cross it, you would have to dig up
7 the ground?

8 A. Not necessarily.

9 Q. What else could you do?

10 A. If you were going -- what I
11 mean is, if you didn't have to cross it or
12 if it was going the opposite direction,
13 you'd just be looking for it. If I had to
14 cross it, yeah, I try to spot that line;
15 it was not in a bunch of concrete or
16 something like that.

17 Q. Okay. Now, as far as the
18 Alabama Power duct bank that's located at
19 the intersection of Morris and 20th Street
20 North, the general location is depicted by
21 the red marks, for example, in Plaintiff's
22 Exhibit 8. When you come across red paint
23 marks like -- well, first of all, was

TYLER EATON MORGAN NICHOLS & PRITCHETT INC.

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1 Pinpoint going to bore across the location
2 of the power lines, as depicted in
3 Plaintiff's Exhibit 8?

4 A. We were.

5 Q. Okay. So, what -- what did
6 you do -- did you do anything special, as
7 far as locating the lines, because you
8 were going to bore across them?

9 A. We pulled that manhole and
10 looked inside.

11 Q. Now, when you say "that
12 manhole," you're talking about Plaintiff's
13 Exhibit 8. It looks like -- and correct
14 me if I'm wrong, Mr. Martin, but it looks
15 like -- I count a total of five manhole
16 covers, is that right?

17 A. That's right.

18 Q. And the one that you pulled is
19 the one that is closest to us --

20 A. Those two manholes right
21 there.

22 Q. Okay. So, the two closest --

23 A. I don't know what that manhole

TYLER EATON MORGAN NICHOLS & PRITCHETT INC.

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1 tape measure down?

2 A. I did not.

3 Q. Who did?

4 A. I want to say Jimmy Cook did
5 on that one.

6 Q. On the one to the left?

7 A. On both of them.

8 Q. Okay. Is Jimmy Cook a
9 Pinpoint employee?

10 A. He is.

11 Q. And what did he measure as the
12 depth of the conduit?

13 A. 106 inches.

14 Q. Would that be the top of the
15 conduit or the bottom?

16 A. I don't remember that. But
17 106 is what we come up with.

18 Q. Did he measure both the top
19 and the bottom depths?

20 A. The conduit didn't look like
21 to me -- or if -- it didn't look like it
22 was more than a four-inch when we pulled
23 those hand holes. So, I mean, if you

TYLER EATON MORGAN NICHOLS & PRITCHETT INC.

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1 pulled a hundred and whatever, it --
2 there's not much of a difference from the
3 top and the bottom.

4 Q. So, did you look in the
5 manhole yourself?

6 A. I did.

7 Q. And you said it didn't look to
8 be more than four inches?

9 A. That's right.

10 Q. Did you measure it?

11 A. No, I did not.

12 Q. And you don't know if that 106
13 measurement was from the top or the
14 bottom?

15 A. I do not.

16 Q. What about when he pulled the
17 second manhole cover, this one on the
18 right? Did he measure it with a tape
19 measure there?

20 A. He did.

21 Q. And what did he find the depth
22 to be?

23 A. It was a little more shallow

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1 than this one. We wasn't really worried
2 about that one because we were going to be
3 deeper than that. I can't remember what
4 this was. I don't remember what that was.
5 I asked Jimmy, after all this damage came
6 up, and he said, I believe it was 106, 108
7 inches.

8 Q. 106, 108 inches. And you
9 think this one on the right was a little
10 more shallow?

11 A. It was shallow. It was in the
12 80 range.

13 Q. Okay. Did you do anything
14 else, other than measuring the conduit
15 depth from the manhole?

16 A. Did not.

17 Q. Did you employ -- did Pinpoint
18 employ any detection equipment to try to
19 find out the depths and the location?

20 A. Did not.

21 Q. Or use any noninvasive
22 measures to determine the precise location
23 and depth?

TYLER EATON MORGAN NICHOLS & PRITCHETT INC.

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1 A. Besides opening that hand
2 hole, no.

3 Q. Use any hand tools of any
4 kind?

5 A. Did not.

6 Q. Any vacuum excavation
7 techniques?

8 A. Did not.

9 Q. Did Pinpoint do anything to
10 try to determine whether or not the
11 location and depth of the conduit in the
12 general area, depicted in the asterisk on
13 Plaintiff's Exhibit 8, was the exact same,
14 as what was measured from the manhole
15 cover?

16 A. Okay. Ask that one more time,
17 now.

18 Q. Sure. You measured from this
19 left manhole cover either 106 or 108 --

20 A. That's right.

21 Q. -- in inches?

22 A. That's correct.

23 Q. In depth?

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1 A. That's correct.

2 Q. You don't know if that's from
3 the top of the conduit or the bottom of
4 the conduit?

5 A. Do not know.

6 Q. Okay. Did Pinpoint do
7 anything to determine that the conduit was
8 in the same exact location and depth as
9 under the ground -- underneath the
10 asterisk here?

11 A. I did not.

12 Q. Okay. On Plaintiff's
13 Exhibit 8?

14 A. No.

15 Q. Okay. Now, when -- when
16 boring underground and crossing over
17 underground facilities, like you were
18 going to do here, as depicted in
19 Plaintiff's Exhibit 8, is Pinpoint
20 supposed to maintain a clearance between
21 its -- the cutting edge of its bore and
22 any underground facilities?

23 A. You're asking, are we supposed

TYLER EATON MORGAN NICHOLS & PRITCHETT INC.

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1 to maintain a clearance under that or
2 above it?

3 Q. Well, either -- well,
4 either/or.

5 A. No, you don't have to maintain
6 a clearance, as long as you don't damage
7 it.

8 Q. Okay.

9 A. There -- that's not in this
10 book here (indicating).

11 Q. What is the known limit of
12 control for the 3020 bore that you were
13 using?

14 A. I'm not understanding that
15 question.

16 Q. Well, fair enough. The rod
17 that shoots -- and you bore underground.
18 Is there -- is there a maximum amount of
19 feet that you can bore underground before
20 that drill starts to lose control -- tight
21 control of where it's actually drilling?

22 A. Still not understanding --

23 Q. Sure. Sure.

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1 Q. Okay. Did Pinpoint provide
2 any kind of support for any of the
3 underground facilities that it
4 encountered?

5 A. What are you asking?

6 Q. Provide any kind of
7 stabilization support or any support of
8 any kind?

9 A. I'm not sure what you're
10 asking.

11 Q. Okay. We can come back to
12 that.

13 Did -- are you aware of the
14 term, "pothole" as --

15 A. I am.

16 Q. -- in terms of excavation?

17 A. I am.

18 Q. Could you, in kind of layman's
19 terms, tell me what potholing means?

20 A. That means taking the posthole
21 digger or vac system and potholing a line.

22 Q. Now, when you say "potholing a
23 line," does that mean digging out --

TYLER EATON MORGAN NICHOLS & PRITCHETT INC.

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1 A. Around that line to find out
2 the depth of it or something like that.

3 Q. So, let's look at Plaintiff's
4 Exhibit 8, and we'll take this asterisk as
5 the general area. How would you go about
6 potholing that area to determine the depth
7 of the underground power line?

8 A. You'd have to cut the concrete
9 in that area and pothole down on it.

10 Q. Have you ever done that?

11 A. We have.

12 Q. Did you do that here?

13 A. Did not.

14 Q. Why not?

15 A. Because we pulled that manhole
16 cover right there and saw it at 106 to
17 108 inches.

18 Q. And, so, you thought that that
19 was basically good enough to keep
20 drilling?

21 A. I did.

22 Q. And just to be clear, you were
23 drilling across, or perpendicular, with

TYLER EATON MORGAN NICHOLS & PRITCHETT INC.

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1 the underground electrical lines, is that
2 right?

3 A. That's right.

4 Q. Okay. Did you pothole
5 anywhere during this job?

6 A. We did.

7 Q. Where did you do that?

8 A. Be west. We would be west on
9 Morris. We potholed some lines down
10 there, crossing.

11 Q. Like back toward 19th Street?

12 A. That's correct.

13 Q. What lines did you pothole?

14 A. I want to say we potholed some
15 power lines and some cable TV -- or some
16 phone lines back further west, telephone
17 and cable.

18 Q. Do you remember how many?

19 A. Two, I believe.

20 Q. Okay. And you think one may
21 have been a power line?

22 A. I think one was a power line,
23 and one was a phone line.

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1 Q. Okay. And did you pothole in
2 concrete?

3 A. In pavement.

4 Q. In pavement?

5 A. We did.

6 Q. But when you say "pavement,"
7 that's different than concrete, right?

8 A. It is.

9 Q. So, what's depicted in
10 Plaintiff's Exhibit 8 is concrete?

11 A. That's correct.

12 Q. And what you potholed was
13 pavement?

14 A. That's right.

15 Q. Is it easier to pothole in
16 pavement than it is concrete?

17 A. It is.

18 Q. Why is that?

19 A. This concrete down here is
20 about eight inches thick.

21 Q. You're talking about the
22 concrete depicted in Plaintiff's
23 Exhibit 8?

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1 A. That's correct.

2 Q. That sounds like some thick
3 concrete.

4 A. It is.

5 Q. What kind of -- how much time
6 would it take to pothole through concrete,
7 like the one in Plaintiff's Exhibit 8?

8 A. It'd take a long time.

9 Q. About an hour?

10 A. No.

11 Q. How long?

12 A. About ten or 12 hours.

13 Q. Ten or 12 hours?

14 A. That's right. For you to
15 pothole that line right there at
16 130 inches, whatever y'all are saying it
17 is, would have taken ten or 12 hours to do
18 that.

19 Q. Is it expensive?

20 A. Yeah, it is.

21 Q. About -- how much would it
22 cost to do that?

23 A. I don't know. Can't tell you

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1 that.

2 Q. You don't have any kind of
3 estimate? Just your best guess.

4 MR. LUKE: We don't guess.

5 MR. DEBRAY: Well, he knows
6 it's expensive.

7 MR. LUKE: Still not guessing.

8 A. You got --

9 Q. (BY MR. DEBRAY:) Well, I just
10 want to know what expensive is, in your
11 mind.

12 A. Couple of thousand dollars to
13 do that.

14 Q. Okay. A couple of thousand
15 dollars and about ten to 12 hours?

16 A. That's right.

17 Q. Okay. When you potholed the
18 two in the asphalt, were you able to
19 determine the exact location of those
20 lines?

21 A. We were.

22 Q. Were you able to determine the
23 exact depth of those lines?

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1 A. No, I don't think we -- the
2 one line, we didn't get down to the depth.
3 We just got down to our depth and came on
4 through the hole.

5 Q. Was that because you knew that
6 you were -- you had seen the location and
7 knew that --

8 A. That's right.

9 Q. -- your path of travel was not
10 going to encounter it?

11 A. That's correct.

12 Q. And when you pothole, do you
13 pothole in an area directly in line with
14 where your bore is going to be?

15 A. Yes.

16 Q. Okay. Now, in Plaintiff's
17 Exhibit 8, your bore was not traveling in
18 the same line as the manhole covers that
19 you pulled, correct?

20 A. That's correct.

21 Q. And you were not able to -- or
22 you did not measure and determine exactly
23 the depth of the power line, as situated

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1 at Morris and 20th Street, where your bore
2 was going to run?

3 A. I can save us a ton of time
4 and the time of questions. I did not
5 pothole that line. I went to that hand
6 hole, and pulled a hand hole, pulled a
7 measurement on it and got a measurement on
8 that conduit. I did not pothole it. The
9 questions you're asking are -- you're
10 just -- we're going in circles. I did not
11 pole it -- I did not pothole it.

12 Q. And I'm just trying to just --
13 I don't know much about all this stuff
14 like you.

15 A. That's obvious.

16 Q. It's not my business.

17 MR. LUKE: Just answer the
18 question.

19 A. Okay.

20 Q. More than anything, Mr.
21 Martin, I'm just trying to get an
22 understanding.

23 A. Okay.

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1 Q. You're right, you've
2 established that you didn't pothole?

3 A. That's correct.

4 Q. So, for -- and we're talking
5 about Plaintiff's Exhibit 8, but for the
6 path of your bore, and when it crossed the
7 underground facility -- underground power
8 lines, as marked by these red paint
9 strips, you did not know how deep or the
10 exact location of the power lines, in
11 relation to the path of your bore, is that
12 correct?

13 A. We pulled that hand hole,
14 which is about 30 feet away, and it was
15 106 to 108 inches.

16 Q. But you didn't know for sure
17 that it was 106 or 108 inches --

18 A. That's correct.

19 Q. That's correct. Okay.
20 Because underground facility lines, they
21 can fluctuate in depth, can't they?

22 A. They do.

23 Q. Is that an uncommon thing that

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1 you see, or is it a common thing?

2 A. When they're dug in -- if they
3 were dug in, and I can't tell you if that
4 line was dug in or not, they should remain
5 at about the same depth.

6 Q. But they can fluctuate?

7 A. They can fluctuate.

8 Q. Okay. Now, what can happen
9 if -- if a boring company, like Pinpoint,
10 bores down a line where it doesn't know
11 for sure the exact depth and location of
12 the underground facilities?

13 MR. LUKE: Object to the form.

14 A. Now, ask that again. What,
15 now?

16 Q. If Pinpoint --

17 A. Okay.

18 Q. -- bores in a line where it
19 doesn't know the exact location and depths
20 of the underground facilities it's going
21 to cross over in that line of directional
22 boring, is it possible to -- to run into
23 those underground lines?

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1 MR. LUKE: Object to the form.

2 A. Sure, it is.

3 Q. And has this happened to
4 Pinpoint before?

5 A. It has.

6 Q. Okay. And is that -- is the
7 chance obviously substantially reduced, if
8 you know the exact location and depth of
9 the lines?

10 MR. LUKE: Object to the form.

11 A. It is.

12 Q. The fact that you didn't
13 pothole the area depicted in Plaintiff's
14 Exhibit 8, did that give you any concern
15 about continuing with the boring?

16 A. It did not.

17 Q. And why not?

18 A. Because we pulled that hand
19 hole cover right there, and it was 106 to
20 108 inches.

21 MR. DEBRAY: Okay. Would
22 y'all let us go off the record real quick?

23 (Said deposition was in recess

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1 at 10:31 a.m. until 10:43 a.m.
2 after which the following
3 occurred:)

4 Q. (BY MR. DEBRAY:) And Mr.
5 Martin, we're now back on the record.
6 Looking at Plaintiff's Exhibit 8 -- and
7 I'm referring again to the two manhole
8 covers that we discussed earlier, the ones
9 that Pinpoint pulled. Do you know about
10 how far apart they are?

11 A. Probably ten feet.

12 Q. About ten feet?

13 A. (Nodding head affirmatively.)

14 Q. And I think you said the one
15 on the left, the power line underneath it,
16 was about 106 to 108 in depth, and the one
17 on the right was about 80 in depth?

18 A. That's right.

19 Q. Is it unusual at all to be --
20 that kind of difference between two lines
21 ten feet apart?

22 A. I don't install power, so I
23 can't answer that.

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1 Q. But in your work when you run
2 across power lines underground, is it
3 unusual for neighboring facilities to be
4 different -- different depths?

5 A. Not at all.

6 (Whereupon, Plaintiff's
7 Exhibit 12 was marked for
8 identification.)

9 Q. Okay. And I'm just -- I
10 apologize, Mr. Martin. I'm still a little
11 confused as to the path. So, I'm going to
12 mark this as Plaintiff's Exhibit 12. And
13 I'm sorry, I don't have a copy. This is a
14 hand-drawn diagram that I've done. And
15 I'm no artist, as you can tell, but we've
16 got the compass here in the upper left,
17 north, west, south, east, and here's 19th
18 Street. You see that?

19 A. That's right.

20 Q. Morris Avenue. You see
21 Morris?

22 A. I do.

23 Q. And 20th Street North. Do you

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1 see that?

2 A. I do.

3 Q. Does that generally depict --

4 A. It is.

5 Q. -- how the street is set up?

6 Okay. And do you see this blue asterisk
7 that I've written in blue ink?

8 A. I do.

9 Q. Okay. That is -- signifies
10 that same white asterisk that's on
11 Plaintiff's Exhibit 8 and Plaintiff's
12 Exhibit 7, and based on the photographs,
13 I've -- that's -- I've labeled it with a
14 blue star on Plaintiff's Exhibit 12, as
15 the approximate location. Does that look
16 approximately right to you?

17 A. No.

18 Q. And why not?

19 A. You're too far to the north.

20 Q. Too far to the north. Okay.

21 If you will take this purple Sharpie and
22 if you'll label where you think it was.

23 A. (Deponent complies.)

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1 Q. Okay. So, you've placed a
2 dot, a purple dot, on Plaintiff's
3 Exhibit 12, where you think that the white
4 star, that is on Plaintiff's Exhibit 7, is
5 located?

6 A. That's correct.

7 Q. And again for the record, the
8 white star is what was marked as the
9 location of the -- what we're saying is
10 the damage to the underground duct bank?

11 A. That's right.

12 Q. Okay. Now, I've also -- as
13 you can see on Plaintiff's Exhibit 12, Mr.
14 Martin, I've also very crudely, just in
15 red ink, marked the red paint markings,
16 signifying the location of the power
17 lines.

18 A. Yes.

19 Q. Does that look roughly
20 accurate to you?

21 A. Yes.

22 Q. Okay. Now, if you would, with
23 this green Sharpie -- and I realize that

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1 your work started further west than 19th
2 Street, correct?

3 A. Yes.

4 Q. But will you just take this
5 green Sharpie and show me the path -- from
6 what you -- from what you can remember --

7 A. Okay.

8 Q. -- of your bore and where it
9 was to travel along Morris Avenue?

10 A. Can I fix your drawing?

11 Q. Sure.

12 A. The road goes in here for
13 parking there.

14 Q. Okay.

15 A. Comes out. The drill was set
16 up here. We came down through here like
17 this and through there just like that and
18 crossed and came up in a hand hole right
19 there.

20 Q. In a what?

21 A. In a hand hole.

22 Q. What's a hand hole?

23 A. It's what you pull cable into.

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1 It's a hand hole, the same as that manhole
2 right there in that exhibit --

3 Q. Exhibit 8?

4 A. Yes.

5 Q. Okay. So, this green, that
6 represents the path of your bore?

7 A. That's correct.

8 Q. Before you begin a job, do you
9 have a -- a plan in your head, as to
10 exactly where you're going to bore?

11 A. You -- somewhat, yes.

12 Q. Do you map it out on anything?

13 A. Do I map it out?

14 Q. Do you draw it out on a --

15 A. No.

16 Q. Okay. This work, and
17 specifically the portion of the work
18 depicted on Plaintiff's Exhibit 12, did
19 you -- let me ask you this, first: Did
20 you have in your mind a plan for where you
21 were going to bore for the Ervin job?

22 A. We did.

23 Q. Okay. So, as depicted by you

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1 on Plaintiff's Exhibit 12, did -- what you
2 ended up boring, which is represented in
3 green, did that deviate at all from what
4 your initial plan was?

5 A. It did some.

6 Q. Can you tell me how?

7 A. In Exhibit 7 -- you can't see,
8 but there's a -- old fire hydrant sat
9 right here.

10 Q. And when you say "right here,"
11 you're talking about just a few feet from
12 this sandwich shop sign?

13 A. That's correct. There's an
14 old fire -- or there was something in the
15 ground here.

16 Q. Okay.

17 A. We originally --

18 Q. Immediately to the right of
19 that sign?

20 A. That's correct. We originally
21 came down through here and stopped here
22 and backed up.

23 Q. And when you say you "came

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1 down" here, you came down to the curb?

2 A. That's right. We got into --
3 there was something extremely hard
4 underground here. We backed up, started
5 again and came down through here. You can
6 see the white dots we've got on the road.
7 We came -- we got to right here and hit
8 something real, real hard.

9 Q. All right. This may help us.
10 Do you know the direction?

11 A. I know the direction of what?

12 Q. Like, is this north, or is
13 this --

14 A. This would be west. This
15 would be east. This would be south, and
16 that would be north.

17 Q. Okay. Well, then, I'll take
18 this green pen, and I'm going to mark the
19 top of Plaintiff's Exhibit 7 with a one,
20 the right with a two, the bottom with a
21 three and the left with a four. That way
22 when we read it -- and you talk about, we
23 came down here, we'll know exactly where

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1 you're talking about. So, let's start
2 over, Mr. Martin. Tell me about why you
3 had to deviate.

4 A. We were coming from number
5 one.

6 Q. Right.

7 A. Going towards number three.

8 Q. Yes.

9 A. And in the middle, not the
10 middle of the road, but close to the edge
11 of the road, we got into something
12 extremely hard right here.

13 Q. Okay. Where that white --

14 A. At the corner. That's
15 correct.

16 Q. -- paint is?

17 A. As you see, we came down
18 through here.

19 Q. From one toward three?

20 A. You can see my curve right
21 here.

22 Q. Yes.

23 A. We originally had the bore

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1 coming like this, going straight, and we
2 hit something -- do you want me to use
3 this marker?

4 Q. If you would, use this blue
5 marker. And, now, you're back on
6 Plaintiff's Exhibit 12.

7 A. We originally came -- if
8 you're -- this didn't change at all --
9 came down through here and got into
10 something real hard right there, backed up
11 to right here, about that point there and
12 started again.

13 Q. Okay. So, the blue mark
14 represents what you originally did, and
15 you got into something real hard where you
16 kind of put that blue X?

17 A. That's right.

18 Q. And you backtracked, and then,
19 you finished on the path that's depicted
20 in the green?

21 A. That's correct.

22 Q. And this is Plaintiff's
23 Exhibit 12. Okay. And -- do you know

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1 what was so hard about this area?

2 A. I do not.

3 Q. Okay. You mentioned some
4 white paint, Mr. Martin. Did you mark any
5 of this area, or the road, with white
6 flags or white paint?

7 A. We did.

8 Q. What did you do here in the
9 Ervin job?

10 A. We used white paint to mark
11 our -- depth of our line.

12 Q. And do you do that with every
13 job?

14 A. We do.

15 Q. How do you determine the
16 depth -- your depth?

17 A. With the locator.

18 Q. Okay. And I apologize if you
19 explained this to me before, but what is
20 the locator?

21 A. What locates the beacon out of
22 that housing.

23 Q. I see. And it relays it back

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1 depth, but why is it important to know
2 your depth?

3 A. Well, you really -- it's not
4 important to know your depth. It's just
5 making sure you're on your path.

6 Q. So, the depth of your bore is
7 not important when excavating underground?

8 A. It's not important to put it
9 on the ground like we do, no. We do it
10 just -- if you go back and look and say,
11 hey, we're 102 inches here for an
12 as-built, for later on -- for your
13 customer.

14 Q. Is the depth of your bore --
15 is knowing the depth of your bore
16 important when you're crossing underground
17 utility lines?

18 A. It is.

19 Q. And why is that?

20 A. To make sure you don't hit
21 them.

22 Q. Are you familiar with Alabama
23 Act 94-487?

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1 Q. The -- are you talking
2 about -- where you potholed back on the
3 asphalt you were talking about earlier?

4 A. Yes.

5 Q. How long does it take you to
6 pothole in asphalt?

7 A. Depends on how deep you're
8 having to go.

9 Q. How about here at Morris
10 Avenue, what you did that night?

11 A. It took a couple of hours to
12 do that.

13 Q. For each one?

14 A. My guys started these before
15 we even started the bore.

16 Q. Right. But you did two
17 potholes, right?

18 A. That's right.

19 Q. Did it take two hours for each
20 one?

21 A. Approximately, yeah.

22 Q. Is it less expensive to
23 pothole in asphalt than it is concrete?

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1 A. I thought we'd already been
2 over that same question.

3 Q. Would you answer it again,
4 please?

5 A. Yes, it's less expensive to
6 cut asphalt than it is concrete.

7 Q. How much less expensive?

8 A. I can't tell you that, but
9 it's less expensive.

10 Q. Okay.

11 A. But the City of Birmingham
12 didn't want us cutting that asphalt or
13 that concrete, either.

14 Q. Who, from the City of
15 Birmingham, didn't want you cutting that?

16 A. The engineers.

17 Q. Do you remember their names?

18 A. I do not.

19 Q. When did you talk to them?

20 A. I didn't talk to them.

21 Q. Well, who, from Pinpoint, did?

22 A. Ervin, representative from
23 Ervin did.

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1 Q. Do you know who it was?

2 A. A John Veejay told us not to
3 cut that concrete, that the engineers did
4 not want that concrete cut. If we did, we
5 had to replace the entire street because
6 the concrete wouldn't match.

7 Q. So, they would have let you
8 cut the street, but you were just going to
9 have to replace the concrete, is that
10 correct?

11 A. That's correct.

12 Q. Okay. And why did you not
13 want to replace the concrete?

14 A. I didn't want to replace it
15 for anything, for no reason.

16 Q. Just because it would --

17 A. I mean, if you're going for an
18 expense deal, I didn't want to replace it.
19 I didn't want to pothole it. I didn't
20 pothole it. I took a depth in that hand
21 hole. We keep going back, did I pothole
22 that line? I did not pothole that line.

23 Q. Right.

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1 A. We keep going back to that
2 same thing. I've answered it.

3 MR. LUKE: Answer the
4 question.

5 A. I've answered it. I didn't
6 pothole it.

7 MR. LUKE: You've answered the
8 question.

9 Q. Right. I was just
10 wondering -- this last one, I wasn't
11 necessarily asking about the pothole. I
12 was just asking why you didn't want to
13 replace all that concrete.

14 MR. LUKE: He said he was told
15 not to cut it.

16 MR. DEBRAY: Well, he said
17 that --

18 Q. (BY MR. DEBRAY:) They said
19 you -- they didn't say you couldn't cut
20 it. They said if you did cut it, you'd
21 have to replace it, isn't that right?

22 A. That's right.

23 Q. Okay. And, then, I think you

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1 y'all allege we damaged, I could tell.

2 Q. How long did you stay out
3 there?

4 A. Ten minutes.

5 Q. Was anybody from the Power
6 Company there?

7 A. I don't know. There was a
8 whole bunch of people here.

9 Q. Did you know any of them?

10 A. I did not.

11 Q. What did you do for those ten
12 minutes?

13 A. I looked around at the -- the
14 damaged area, what they were doing.

15 Q. Did you ask anybody any
16 questions?

17 A. Nope.

18 Q. Did you call Ervin?

19 A. Ervin already knew about it
20 because they had to come out and repair a
21 line -- they had to take that line that we
22 put in and move it for the Power Company
23 to come in and put their cable in.

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1 Q. And when did Ervin have to do
2 that?

3 A. I'm assuming after that or
4 before it. I don't know. When I got
5 here, the intersection was about like what
6 you see it here. All of this was gone,
7 and it looks like to me, they had started
8 from the south, coming north.

9 Q. You say "All of this," you're
10 talking about the bottom portion of
11 Plaintiff's Exhibit 10?

12 A. All of this concrete was gone.

13 Q. Which is the bottom portion of
14 Plaintiff's Exhibit 10?

15 A. That's correct.

16 Q. How did you know about Ervin's
17 work that they had to do?

18 A. They sent me a bill.

19 Q. Do you know when they sent it
20 to you?

21 A. I do not.

22 Q. Did they call you about it
23 beforehand?

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1 A. They did not.

2 Q. Did they call anybody at
3 Pinpoint about it beforehand?

4 A. They told me they were -- they
5 called me when -- I want to say Delana
6 called me and said that she was taking it
7 off my retainage because I was not doing
8 any work for them at that time.

9 Q. Do you do any work for them
10 now?

11 A. If they call, I do.

12 Q. Do they call?

13 A. Yeah, they call.

14 Q. When Delana said she was
15 taking it out of your retainage, did you
16 say anything in response?

17 A. No, I just asked, what's it
18 for, and she told me.

19 Q. And what did she say?

20 A. She said it was for them
21 removing the conduit -- lowering the
22 conduit and fiber at Morris Avenue for the
23 damage.

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1 Q. And what did you tell her in
2 response?

3 A. Okay.

4 Q. And you don't remember when
5 that call took place?

6 A. I do not.

7 Q. Okay. Did you ask her what
8 damage?

9 A. I did not.

10 Q. Did you tell her that you
11 didn't cause any damage?

12 A. I did not.

13 Q. And why not?

14 A. Well, it was obvious we had
15 caused the damage, if they were having to
16 go out and lower the cable for y'all to
17 put it in.

18 Q. Right, I mean, because it's a
19 pretty extensive deal, as depicted in
20 Plaintiff's Exhibit 10. What about the
21 night of --

22 MR. LUKE: Object to the
23 comment.

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1 A. What are you asking, now?

2 Q. Did Alabama Power do anything
3 wrong, in terms of the incident?

4 A. No, not that I know of.

5 Q. What about any other company?

6 A. No.

7 Q. Or any other person?

8 A. (Shaking head negatively.)
9 Not that I know of.

10 Q. Okay. Now, in your
11 interrogatory responses, Mr. Martin, I
12 believe we asked you to identify all those
13 individuals that have personal knowledge
14 about this work and what we're calling the
15 incident, the encounter.

16 A. Okay.

17 Q. And you've identified your
18 five employees, who we've already talked
19 about. You told me that night there was
20 another company there, but you can't
21 remember the name of that company?

22 A. I can't remember who -- I can
23 tell you later. I mean, are we coming

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1 A. No.

2 Q. Okay. Did Pinpoint have any
3 kind of internal notes or documents about
4 the Ervin job or the encounter with the
5 duct bank?

6 A. No.

7 Q. And I believe you said earlier
8 that you don't have any reason to believe
9 that the underground duct bank was marked
10 incorrectly, is that correct?

11 A. Not at all.

12 Q. So, you don't have any
13 documents to show -- tending to show that
14 they were marked incorrectly?

15 A. No.

16 Q. Okay. And on your documents,
17 just kind of -- I just want to go through
18 and make sure I know what this is. This
19 first one, which is Plaintiff's
20 Exhibit 16, are the documents that you
21 produced to Alabama Power. It's the
22 Contractors Information Sheet. Is this
23 what you're saying that Ervin would fill

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1 out?

2 A. No, this is a contract with
3 Ervin, is all this is.

4 Q. Okay. And the next looks like
5 a Checklist, Subcontractor Insurance.
6 What is this?

7 A. This is a contract with Ervin,
8 and that's their checklist to make sure
9 that they've got everything -- or I've got
10 everything sent to them before we do
11 anything.

12 Q. Okay. And how many pages is
13 it?

14 A. I have no clue. Looks like
15 about 15 or 20. 25 or 30. I don't know.

16 Q. Well, if you go to the -- see,
17 this is what I'm trying to figure out.
18 I've got -- if you'll go to the Checklist
19 Subcontractor Insurance page, which would
20 be the second page in Exhibit 16. Okay.
21 That looks like the first page. The
22 second page has got a number two on it,
23 and then, I can't tell if that's a -- if

TYLER EATON MORGAN NICHOLS & PRITCHETT INC.

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1 we're missing the third page because it
2 looks like it jumps ahead. And then the
3 fourth page, is that your signature?

4 A. It is.

5 Q. Okay. And do you know if it's
6 missing any pages?

7 A. Nope. Don't know that. Looks
8 like none of them is numbered after that
9 first one.

10 Q. Yes. But now in-between
11 there, you've got your W-9. Is that what
12 that is?

13 A. It is.

14 Q. The fifth page in 16. Now, on
15 the sixth page, it looks like it's a
16 Subcontractor Agreement between Pinpoint
17 and Ervin, is that right?

18 A. It is.

19 Q. And if you go to the end, is
20 that your signature?

21 A. It is.

22 Q. So, did you agree to -- or did
23 Pinpoint agree to all the provisions

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1 that's in this Subcontractor Agreement?

2 A. I did.

3 Q. And this is for the Ervin job
4 that we've been talking about?

5 A. No.

6 Q. I'm sorry. What is this for?

7 A. A blanket contract with Ervin.

8 Q. Okay. Did you enter into a
9 separate one for the Ervin job?

10 A. No.

11 Q. But did this apply to the
12 Ervin job?

13 A. It does.

14 Q. Okay. I see Addendum A says
15 Insurance Requirements and then Exhibit A,
16 Payment Terms. Exhibit B, Fee Schedule.
17 And then we jump to Exhibit F. Do you
18 know where Exhibits C, D and E are?

19 A. Do not.

20 Q. Do you know what they say?

21 A. Do not.

22 Q. Okay. And these exhibits,
23 though, apply to the Ervin job as well,

TYLER EATON MORGAN NICHOLS & PRITCHETT INC.

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1 right?

2 A. This is a blanket contract
3 with Ervin. So, it would apply with every
4 job I do for Ervin.

5 Q. Okay. And that's your
6 signature there?

7 A. It is.

8 Q. On -- on Exhibit G, as well as
9 on Exhibit H?

10 A. That's my signature on all of
11 them.

12 Q. Okay. Now, the last two
13 documents -- the last two pages of
14 documents produced in Exhibit 16, is this
15 the locate ticket for the Ervin job?

16 A. It is.

17 Q. Is there anything incorrect on
18 it, that you can tell?

19 A. Not that I can tell.

20 Q. Who is Pete Wilson?

21 A. I guess that would be the
22 operator who took the call.

23 Q. Okay.

EXHIBIT B



20th Street N.

Morris Avenue

19th Street N.

W
 N
 E
 S

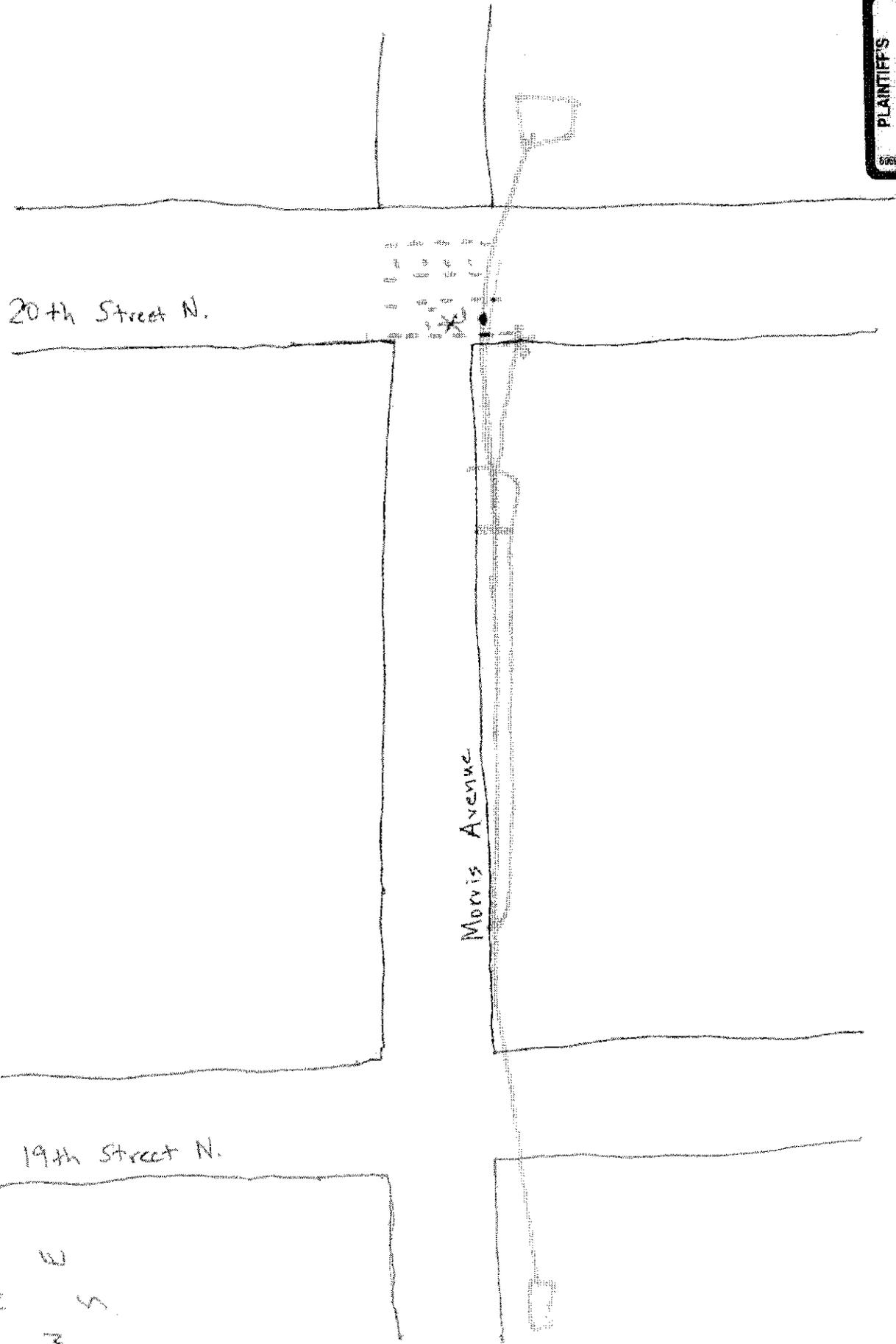


EXHIBIT C

SUBCONTRACTOR AGREEMENT

This Subcontractor Agreement ("Agreement") is effective as of the date an authorized representative from Ervin Cable Construction, LLC has executed said contract. This contract is by and between Ervin Cable Construction, LLC, a Delaware limited liability company, 450 Pryor Blvd., P. O. Box 10, Stangl, Kentucky 42459 ("Contractor") and Pinpoint Locating, Inc. ("Subcontractor") for the purpose of performing certain subcontract work under Contractor's primary contract (the "Primary Contract") with _____ ("Project Owner"). The subcontract work includes, but is not limited to, the following services: _____

(the "Work").

Section 1. Contract Documents. (a) The Contract Documents include this Agreement, any exhibits or attachments to this Agreement and the Primary Contract, including all the conditions, covenants, drawings, specifications and other documents forming or by reference made a part of the Primary Contract (the "Contract Documents").

(b) The Contract Documents, other than this Agreement, are a part of this Agreement the same as if attached to or repeated in this Agreement. Subcontractor is bound to Contractor by all of the provisions in the Contract Documents that apply to the Work in the same manner that Contractor is bound to Project Owner under the Contract Documents. In the event of any conflict in terms as between this Agreement and its exhibits or attachments, the provisions in this Agreement shall in all events govern and prevail. In the event of any conflict in terms as between this Agreement and the Primary Contract, the provisions in the Primary Contract shall in all events govern and prevail.

(c) Copies of the Contract Documents applicable to the Work will be furnished by Contractor to Subcontractor upon Subcontractor's request.

Section 2. Time is of the Essence. In the performance of Subcontractor's obligations under this Agreement, time is of the essence. Contractor may, from time to time, establish and change scheduling requirements for the completion of a part or all of the Work. Subcontractor shall comply with Contractor's requirements as to timely performance and, if necessary, employ additional crews and work overtime without additional compensation due Subcontractor by Contractor.

Section 3. Extensions of Time. If Subcontractor is delayed in the performance of the Work by conditions that could not reasonably be foreseen by Subcontractor and that are beyond the reasonable control of Subcontractor, then Contractor may grant Subcontractor an extension of time of performance, provided that Subcontractor, within ten (10) days after the commencement of the delay, applies in writing to Contractor requesting an extension of time for performance and stating the reason for the delay. Subcontractor shall not be entitled to damages or other monetary compensation for delay even if such delay is caused, or partly caused by Contractor.

Section 4. Independent Contractor. Subcontractor shall at all times be deemed a non-exclusive independent contractor and is not an employee, partner, agent, or engaged in a joint venture with Contractor. As such, the parties to this Agreement understand that Subcontractor is not subject to the control or direction of Contractor in the performance of the Work, nor is Subcontractor dependent upon Contractor for a major portion of its business. It is further understood that Subcontractor is free to contract for similar

services to be performed for other companies, subject to the provisions of Section 22, while it is operating under this Agreement; however, neither Subcontractor, its subcontractors, employees, agents or affiliates, shall install any other company's plant in or on the same trenches, poles or facilities of Contractor at the time of performance of the Work covered by this Agreement.

Section 5. Vehicles, Equipment and Tools. Subcontractor shall furnish the vehicles, equipment and tools necessary to perform the Work required for full performance of this Agreement.

Section 6. Subcontractor Requirements. (a) Subcontractor shall comply with all federal, state, county, local and city laws, ordinances, rules and regulations that are now or may in the future become applicable to Subcontractor or Subcontractor's business, equipment or personnel engaged in Work under this Agreement or accruing out of performance of such operations, including, but not limited to, federal, state or local wage and hour laws, including the Fair Labor Standards Act, as amended; the National Labor Relations Act, as amended; Title VII of the Civil Rights Act of 1964, as amended; the Age Discrimination in Employment Act of 1967, as amended; the Americans with Disabilities Act of 1990, as amended; the Rehabilitation Act of 1973, as amended; the Occupational Safety and Health Act of 1970, as amended; rules, regulations and requirements of the Federal Communications Commission, any and all state and federal environmental protection agencies, departments of transportation, or any federal or state aviation administrations governing any aspect of the Work; state workers' compensation laws, state unemployment compensation laws, and all applicable licensing regulations; requirements of any applicable utility company pole attachment or joint user agreements; and, requirements of all franchises which may encompass the Work.

(b) Subcontractor represents and warrants that it has complied and will continue to comply during the term of the Agreement, and any extensions thereof, with the Immigration Reform and Control Act of 1986 (the "Immigration Act"). Without limiting the scope of such representation and warranty, Subcontractor specifically represents and warrants that: (i) it has not hired since November 6, 1986, and will not hire at any time in the future, "unauthorized aliens," as defined in 8 C.F.R. §274a.1(a), to perform any portion of the Work; and (ii) it will comply with the verification requirements of 8 C.F.R. §274a.2 with respect to each of its employees hired after November 6, 1986 who perform any portion of the Work. Subcontractor agrees to indemnify Contractor, its parent company and Project Owner for any penalties imposed on and any legal expenses incurred by the Contractor, its parent company or Project Owner arising out of the violation of the Immigration Act or of regulations issued pursuant thereto by Subcontractor or any of its subcontractors, or arising out of any finding that one or more of Subcontractor's employees or agents are found to be unauthorized to work as assigned.

(c) In addition, Subcontractor shall comply with requirements specified in all applicable right-of-way agreements, approval procedures and operational procedures as they pertain to the Work, including but not limited to the following:

(i) All records of Subcontractor relating to this Agreement shall be retained for five (5) years following the date of final payment under this Agreement. Subcontractor agrees that the auditor of the state in which the work is performed or any authorized representative of the state, and, where applicable, the Comptroller General of the United States or any other representatives of the United States Government, shall have access to and the right to examine, audit, excerpt and transcribe any directly pertinent books, documents, papers and records of Subcontractor relating to orders, invoices, payments or Subcontractor's performance pursuant to this Agreement. Subcontractor shall not impose any charges for

access to its books and records regarding its performance under this Agreement, and shall fully cooperate with authorized representatives in the examination or audit of books and records.

(ii) Subcontractor shall exercise its best efforts to prevent damage to property in the course of the performance of its obligations under this Agreement. Subcontractor shall, at its sole expense, replace, restore or pay replacement costs of any property damaged by its operations. Such replacement or restoration shall be completed when judged satisfactory by the Contractor and/or any governing agency or property owner.

(iii) Daily during construction and upon completion of the work, Subcontractor shall remove from the premises all debris and rubbish created in the performance of the Work, to the satisfaction of Contractor. Immediately following any construction, Subcontractor shall provide clean up per industry standards and to the reasonable satisfaction of Contractor and/or Project Owner or property owner.

(iv) Subcontractor represents and warrants to Contractor that all equipment and materials provided by Subcontractor and used in the performance of the Work and made a part of the project will be new, of good quality, free of defects and in conformity with the requirements of this Agreement.

(v) Subcontractor shall provide for and oversee all safety orders, precautions, and programs necessary for the reasonable safety for it and of its employees, agents or subcontractors and the general public while performing the Work, as well as, all materials to be incorporated into the project; all property and improvements on and adjacent to the construction site; and, compliance with all applicable laws, ordinances, rules, regulations and orders of all public authorities relating to the performance of the Work.

(vi) Subcontractor shall, prior to the beginning of any Work, locate and mark, or cause the appropriate authority to locate and mark, all existing utilities and/or other facilities, underground, aerial or otherwise, in the area. Subcontractor shall be solely and completely responsible for locating and marking or contacting the local locating service to locate and mark, such underground utilities and/or facilities, and as such shall be liable for any and all damages, either consequential or actual, direct or indirect, caused by Subcontractor's actions or failure to act with respect to any underground utilities and/or other facilities within or without the construction right-of-way.

(vii) Subcontractor shall commence the Work for any project as of the date Contractor delivers notice to proceed. Notwithstanding anything to the contrary herein, if in Contractor's reasonable opinion, Subcontractor's progress is such that it is unlikely that the Work can be completed on or before the scheduled date, Contractor has the right to terminate this Agreement.

Section 7. Taxes. Subcontractor shall pay all withholding, social security, disability, unemployment, excise, sales, use, or other taxes or insurance as required or that may become due under federal, state or local law, regulation or ordinance, except such sales and use taxes applicable to material and other items furnished by Contractor or Project Owner. Subcontractor shall indemnify Contractor and Project Owner and hold them harmless from any and all liability in connection with Subcontractor's failure to pay pursuant to this Section.

Section 8. Indemnify. Subcontractor shall indemnify Contractor, its parent company and Project Owner, and hold them harmless against any and all claims, liability, litigation, loss, and expense, including attorneys' fees suffered by Contractor, its parent company or Project Owner as a result of

Section 32. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same agreement.

CONTRACTOR:
Ervin Cable Construction, LLC

By: _____
Signature

Print Name

Title

Date

SUBCONTRACTOR:
Pinpoint Locating, INC.
(Print name of your company)

By: Steve Menden
Signature
Steve Menden
Print Name
11/18/10
Time

Subcontractor's Taxpayer Identification Number:
63-125719

EXHIBIT D

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

ALABAMA POWER COMPANY,)	
)	
Plaintiff,)	
)	
v.)	
)	
PINPOINT LOCATING, INC.,)	CASE NO.: CV-2012-001381.00
)	
Defendant.)	
)	

AFFIDAVIT OF TIM BELUE

Before me, the undersigned, a notary public in and for said state and said county, personally appeared Tim Belue who, after being by me first duly sworn, deposes and states as follows:

1. My name is Tim Belue. I am employed by USIC Locating Services, Inc. ("USIC") as the Claims Manager, Alabama.

2. I am an Alabama resident, I am over the age of twenty-one (21) years, and I have personal knowledge of the facts set forth in this affidavit.

3. I am aware of the claims and incidents made the basis of the above-captioned lawsuit.

4. USIC is a provider of underground utility locating services and is in the business of, among other things, marking the locations of facilities buried underground (*e.g.*, underground electrical power lines) with paint or other markings prior to the performance of excavation, digging, boring, or other types of underground work that is to take place in the same approximate area as such underground facilities.

5. On or about August 2, 2010, and prior to August 10, 2010, USIC marked with paint the locations of the underground facilities situated along the underground boring route to be followed by Pinpoint Locating, Inc. ("Pinpoint") during its underground boring work to be performed on or around August 10 and 11, 2010. USIC marked with paint the locations of the

utility facilities buried underneath the at issue portion of Morris Avenue in Birmingham, Alabama (*i.e.*, the portion of Morris Avenue that stretched from as far as 18th Street North and through the intersection of Morris Avenue and 20th Street North) (the “Morris Avenue Locating Job”).

6. As part of the Morris Avenue Locating Job, on or about August 2, 2010 (and prior to August 10, 2010), USIC marked with red paint the locations of Alabama Power Company’s (“Alabama Power”) underground utility facilities located underneath the at issue stretch of Morris Avenue, including but not limited to the location of Alabama Power’s underground ductbank that is at issue in this lawsuit, which was located underground at the intersection of Morris Avenue and 20th Street North in Birmingham.

7. On September 2, 2010, and after learning about the damage caused to Alabama Power’s underground ductbank that is at issue in this lawsuit, I inspected the area where the damage occurred, *i.e.*, the intersection of Morris Avenue and 20th Street North in Birmingham, Alabama, on behalf of USIC.

8. During my inspection on September 2, 2010, and in the normal and usual course and scope of USIC business, I took photographs depicting the underground utility location paint markings at the intersection of Morris Avenue and 20th Street North in Birmingham, which were applied previously by USIC on or about August 2, 2010.

9. Attached to this Affidavit as Attachment 1 is a true and correct photograph that I personally took on September 2, 2010, and this photograph truly and accurately depicts the intersection of Morris Avenue and 20th Street North in Birmingham as it appeared on September 2, 2010 (including but not limited to truly and accurately depicting the red paint marks applied previously by USIC that denoted the locations of underground electric utility facilities as such red paint markings appeared on September 2, 2010). I took the photograph attached to this Affidavit as Attachment 1 in my ordinary and usual course of business as the USIC Claims Manager, Alabama.

10. The photograph attached as Attachment 1 to this Affidavit truly and accurately depicts the white painted star (or asterisk) as it appeared at the intersection of Morris Avenue and 20th Street North in Birmingham on September 2, 2010, and this white painted star marked the exact location of where Alabama Power's underground ductbank was bored into, as was determined by Alabama Power after August 11, 2010 but before I took the photograph on September 2, 2010.

11. In November 2010, and on behalf of USIC, I again returned to intersection of Morris Avenue and 20th Street North in Birmingham to observe work being performed to observe the damage incurred by Alabama Power's ductbank that is at issue in this lawsuit. During such time, I observed the excavation of the intersection of Morris Avenue and 20th Street North, and I observed the exact location where Alabama Power's ductbank had been bored into previously (*i.e.*, the exact point of damage). During such time, I also observed that the red paint markings (which are depicted in Attachment 1 to this Affidavit) previously applied by USIC on or about August 2, 2010 had appropriately marked the location of Alabama Power's underground ductbank (including but not limited to the exact point of damage), and I also observed that the white painted star (which is depicted in Attachment 1 to this Affidavit) previously applied by Alabama Power had appropriately identified the exact point of damage to the ductbank.

12. USIC marked with red paint the exact location of Alabama Power's underground ductbank at the intersection of Morris Avenue and 20th Street North in Birmingham, Alabama (*i.e.*, the ductbank that is at issue in this lawsuit) prior to August 11, 2010.

FURTHER AFFIANT SAYETH NOT.


Tim Belue

STATE OF ALABAMA)

SHELBY COUNTY)

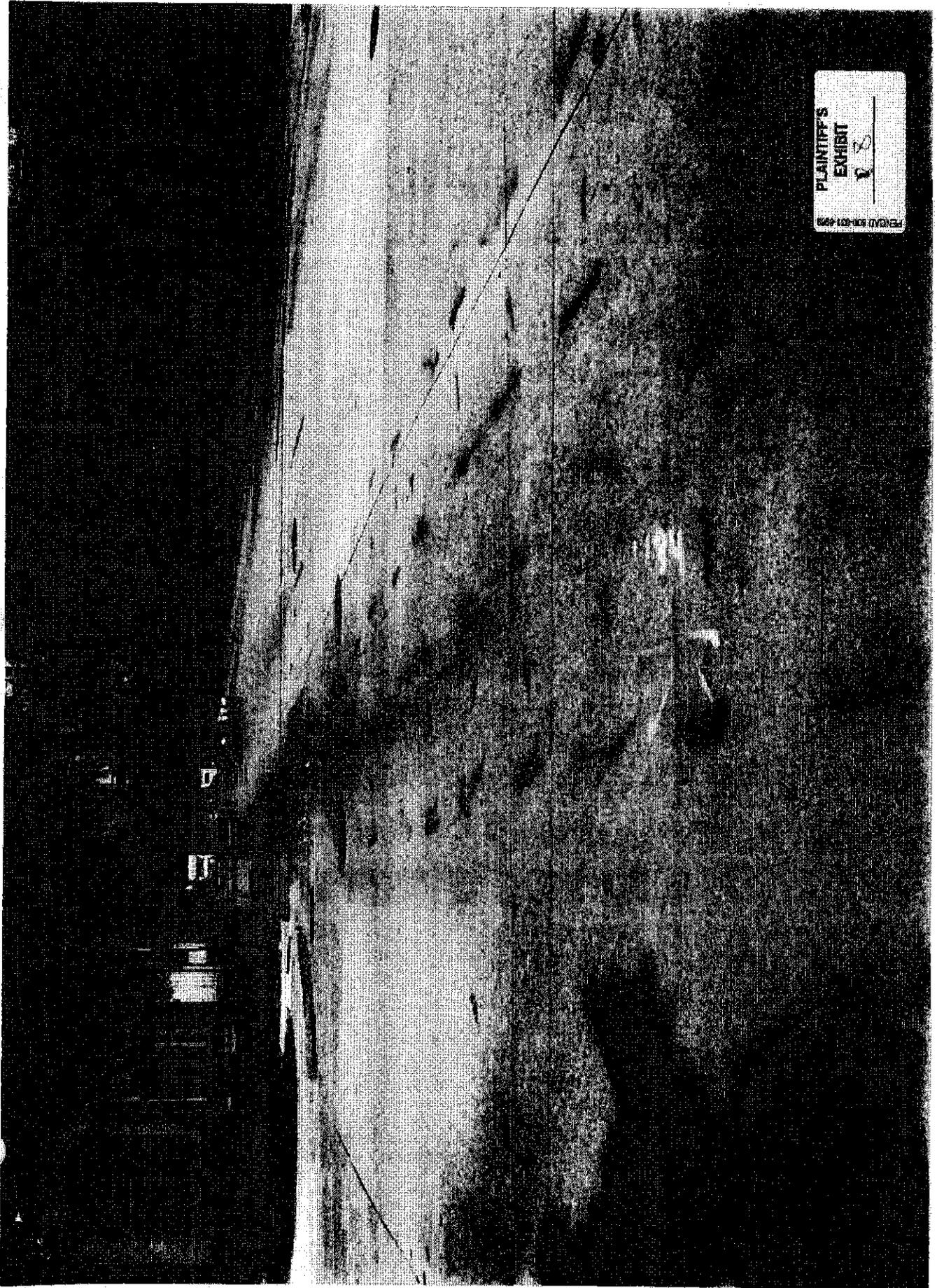
Sworn and subscribed to me on this 27 day of December, 2013.

Marrant L. Jeffery
Notary Public

NOTARY PUBLIC STATE OF ALABAMA AT LARGE
MY COMMISSION EXPIRES: Sept 11, 2016
~~BOUNDED THROUGH NOTARY PUBLIC UNDERWRITERS~~
Date of Commission

[Notary Seal]

ATTACHMENT 1 TO AFFIDAVIT OF TIM BELUE



PLAINTIFF'S
EXHIBIT
28
PERIOD 80-81-82

EXHIBIT E

COPY

1

Brian Lett

1 IN THE CIRCUIT COURT OF
2 JEFFERSON COUNTY, ALABAMA
3
4 CIVIL ACTION NO.: CV-2012-1381
5
6 ALABAMA POWER COMPANY,
7 an Alabama Corporation,
8 Plaintiff,
9 vs.
10 PINPOINT LOCATING, a
11 corporation,
12 Defendant.

13
14
15 DEPOSITION TESTIMONY OF
16 BRIAN A. LETT

17
18 December 6, 2013
19 10:30 a.m.

20
21 COURT REPORTER:
22 MELANIE L. PETIX, CCR

23 S T I P U L A T I O N S

Brian Lett

1 A. Yes.

2 Q. If you would, if you will look at
3 those and turn to what I believe is the
4 third page of them where the actual
5 responses begin, and I have a few questions
6 about some specific things.

7 MR. RAY: Phillip, do you have a
8 copy of these?

9 MR. LUKE: Just the two that I
10 brought. I'm sorry. Well, I take that
11 back. It's that stuff that we pulled off
12 the top, I think they are in here.

13 MR. RAY: Okay.

14 THE WITNESS: I know this is early
15 on, but do you mind if I take a break?

16

17

(Short recess.)

18

19 Q. (BY MR. LUKE:) Looking at
20 interrogatory number three in the response
21 there, I'm going to ask you some specific
22 questions. What did my client's boring
23 machine actually hit, according to Alabama

Brian Lett

1 Power?

2 A. The ductbank at the corner of 20th
3 Street and Morris Avenue.

4 Q. Okay. Which, if any, of the
5 cables in the ductbank were damaged?

6 A. One of the 350 size cables was hit
7 and damaged.

8 Q. Okay. Was it at one spot that
9 that cable was strung? Did it bore through
10 the cable I guess is what I'm asking?

11 A. It went perpendicular to the
12 cable.

13 Q. I guess this is what I'm trying to
14 understand: In some of just the generic
15 photographs I have seen of ductbanks, they
16 would be down in a trench before they are
17 filled in and they would be laying flat and
18 there would be a conduit, a conduit, a
19 conduit with these spacers you were talking
20 about separating them by several inches. It
21 didn't go through multiple different cables,
22 it went through one cable?

23 MR. RAY: Object to the form.

Brian Lett

1 A. It went through one cable,
2 multiple ducts.

3 Q. Okay. Explain that to me.

4 A. The way you explained it with a
5 duct, a duct, a duct, you've got a row of
6 let's say four ducts, above it a row of four
7 ducts, above it a row of four ducts, all
8 running this way. You run perpendicular
9 into that. You can't just really hit one
10 duct without taking out multiple ducts when
11 you go through, because they are all spaced
12 and staggered in there together.

13 Q. So it's kind of like -- I hate to
14 use a child's analogy, but since we were
15 talking about kids off the record, if we had
16 a -- do you know what Connect Four is?

17 A. I do.

18 Q. It's got the holes in it?

19 A. Yes.

20 Q. Are the ducts similar to the holes
21 that we see in the children's game Contact
22 Four, so they are kind of stacked on top of
23 each other?

1 A. That's right.

2 Q. Is that fair?

3 A. That's fair.

4 Q. And I know there may not be that
5 many, but however many there are.

6 How many are stacked in this
7 instance, do you know?

8 A. I don't know.

9 Q. Was there more than one stack?

10 A. There would have just been one
11 stack there, multiples high and wide. But
12 I'm not sure what the size was.

13 Q. You don't know how high or high
14 wide?

15 A. No, I don't.

16 Q. Do you know how many -- you said
17 the conduit was Orangeburg pipe, you
18 believe?

19 A. That's right.

20 Q. Do you know how many pieces of
21 Orangeburg pipe were damaged?

22 A. I don't know how many there was.

23 Q. And I guess my question is, if you

Brian Lett

1 don't know how many pieces of Orangeburg
2 pipe were damaged, how can you tell me that
3 there were multiple ducts damaged?

4 MR. RAY: Object to form. You can
5 answer.

6 A. Because it went through one side
7 and came out the other. So it had to go
8 through multiple ones to get -- if it went
9 through one, it went through multiples,
10 because it went all the way through the
11 duct.

12 Q. Have you seen any photographs
13 showing that damage?

14 A. I have seen a photograph showing
15 the fiber-optic cable coming out of the
16 ductbank.

17 Q. We will get to the photographs
18 later.

19 Have you seen any photographs that
20 show the damage to the multiple ducts, as
21 you say occurred?

22 A. No.

23 Q. Are you aware of any photographs

Brian Lett

1 Q. Yes.

2 A. Yes, I have.

3 Q. In your complaint or Alabama Power
4 Company's complaint it says, Pinpoint has
5 failed or refused Alabama Power's repeated
6 requests that they pay for the damage to the
7 ductbank.

8 Are you aware of any other
9 requests being made for payment other than
10 that letter?

11 A. No, I'm not.

12 Q. What is the date of the letter?

13 A. March 16th, 2012.

14 Q. And what was the date that Alabama
15 Power Company contends this damage occurred?

16 A. I think it was August 11th, 2010.

17 Q. Did you authorize this letter to
18 be sent?

19 A. I did not.

20 Q. Who is the person who sent the
21 letter? It doesn't seem to have a signature
22 on it.

23 A. Yeah. I don't know the answer.

1 Q. (BY MR. LUKE:) The next group of
2 photographs, I think I know what they are
3 but I don't want to assume since to do so
4 might make me something I may already be.
5 Can you tell me what this next section from
6 211 to 223 is?

7 A. They are all pictures of the
8 damaged PILC cable.

9 Q. I think you told me earlier in
10 your deposition, but just so it's clear,
11 this is the cable that was removed from the
12 ground by Alabama Power Company employees,
13 correct?

14 A. That's correct.

15 Q. And the area we see just
16 specifically like in 211 that's photographed
17 in different angles and from different
18 positions in this 12 or 13 photographs here
19 is the point at which it was struck by the
20 boring bits. Is my understanding correct?

21 A. Yes.

22 Q. And the only thing that I didn't
23 really understand, if you will look at

1 you? I'm not trying to be confusing. I'm
2 just trying to picture it in my head.

3 A. You have three feeders running
4 through the ductbank system that manhole
5 number two is a part of that run from one
6 through two to three, and then those splices
7 are on either end to tie that new temporary
8 cable back into the existing cable that has
9 been out there.

10 Q. And I think probably what I need
11 to ask you to do is, at manhole number one
12 on Morris Avenue on 20th Street, okay?

13 A. Uh-huh.

14 Q. There are three PILC cables coming
15 into that manhole that's part of this
16 ductbank that was damaged, correct?

17 A. Correct.

18 Q. How are those three then spliced
19 into the second ductbank that's adjacent to
20 it is what I guess I'm not understanding?

21 A. Okay. When you come into the
22 ductbank, let's say at Morris Avenue and
23 20th Street going north with the cable that

1 was damaged --

2 Q. Yes, sir.

3 A. -- when it gets into the ductbank,
4 it's connecting with another cable there
5 that's going to let's say go on further
6 north, and there's going to be a splice that
7 connects that PILC to that PILC in that
8 manhole.

9 Well, when you take this part out
10 going back south and you have rerouted from
11 a different direction and brought in the
12 cross length polyethylene tree retardant
13 that we talked about a minute ago, well,
14 that's three individual cables coming into
15 that same manhole at Morris and 20th Street
16 and now you have cut the splice out that was
17 tied to the damaged cable, but you still got
18 the PILC, the end of it right here that's
19 got the three conductors in it.

20 Q. All right.

21 A. And you are going to use that
22 trifurcating splice to connect these three
23 to these three individual cables that are

EXHIBIT F

interrogatory to the extent they seek documents or information not in its possession, custody or control.

6. The foregoing General Objections are incorporated by reference into each response as though fully set forth regardless of whether any or all of said objections are repeated in response to any specific interrogatory.

VERIFIED RESPONSES TO INTERROGATORIES

1. Please state the full and correct name and job title of the person answering these interrogatories.

RESPONSE: Brian A. Lett
Engineering Supervisor

2. Please state the name and job title of each persons involved in the decision to make upgrades to and/or to actually repair the ductbank described in your complaint as a result of the alleged damage caused by the defendant.

RESPONSE: Alabama Power objects to this interrogatory as vague and ambiguous and to the extent it is uncertain as to what Pinpoint means by use of the term "make upgrades to." Subject to and without waiving the foregoing and General Objections, Brian Lett approved the repairs to the damaged ductbank and related equipment to be completed. Mr. Lett is an Engineering Supervisor with Alabama Power.

3. Please state the facts which are known to you which support your contention that the defendant damaged the ductbank described in your complaint.

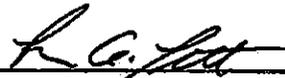
RESPONSE: Pinpoint was performing excavation work at or near a portion of Morris Avenue situated near 20th Street North in Birmingham, Alabama on or about August 11, 2010. To perform the excavation work, Pinpoint was operating boring equipment. During or otherwise in connection with such excavation work, Pinpoint bored into Alabama Power's ductbank and related equipment located at or near a portion of Morris Avenue situated near 20th Street North in Birmingham, Alabama. Pinpoint's contact with Alabama Power's ductbank and related equipment occurred despite the fact that the locations of Alabama Power's underground facilities, including the damaged ductbank and related equipment, were visibly and appropriately marked prior to and at the time of the contact. By boring into the ductbank, Pinpoint caused substantial damage to Alabama Power's ductbank and related utility equipment.

VERIFICATION

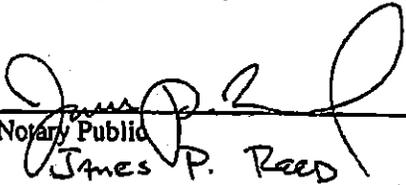
STATE OF ALABAMA)
)
JEFFERSON COUNTY)

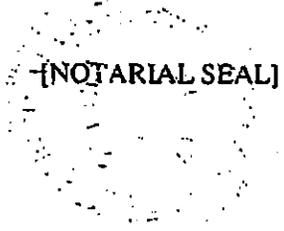
I, Brian A. Lett, as an Engineering Supervisor with Alabama Power Company, hereby certify that I have reviewed the foregoing responses to interrogatories and know the contents thereof; that these responses were prepared with the assistance and advice of counsel, upon which I have relied; that the responses set forth herein, subject to inadvertent or undiscovered errors, are based on, and therefore necessarily limited by, the records and information still in existence, presently recollected and thus far discovered in the course of preparation of these responses; that consequently, Alabama Power Company reserves the right to make any changes in these responses if it appears at any time that omissions or errors have been made therein, or that more accurate information is available; and that, subject to the limitations set forth herein, the said responses are true to the best of my knowledge, information and belief.

ALABAMA POWER COMPANY

By: 
Brian A. Lett

Sworn to and subscribed before me on this the 23rd day of January, 2013.


Notary Public
James P. Reed



[NOTARIAL SEAL]

My Commission expires: 8-30-2014

Respectfully submitted this 23rd day of January, 2013.

/s/ Thomas R. DeBray, Jr.
One of the Attorneys for Plaintiff,
Alabama Power Company

OF COUNSEL:

Eric T. Ray
Thomas R. DeBray, Jr.
BALCH & BINGHAM LLP
1901 Sixth Avenue North, Suite 1500
Birmingham, Alabama 35203
Telephone: (205) 251-8100

Counsel for Alabama Power Company

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing on the following via electronic mail and U.S. Mail, postage prepaid, on this the 23rd day of January, 2013:

K. Phillip Luke
William A. Mudd
WHITAKER, MUDD, LUKE & WELLS, LLC
2011 4th Avenue North
Birmingham, Alabama 35203
Telephone: (205) 639-5300

/s/ Thomas R. DeBray, Jr.
Of Counsel

EXHIBIT G

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

ALABAMA POWER COMPANY,)	
)	
Plaintiff,)	
)	
v.)	
)	CASE NO.: CV-2012-001381.00
PINPOINT LOCATING, INC.,)	
)	
Defendant.)	
)	
)	

PLAINTIFF ALABAMA POWER COMPANY'S VERIFIED SUPPLEMENTAL RESPONSES TO DEFENDANT PINPOINT LOCATING, INC.'S INTERROGATORIES

Plaintiff Alabama Power Company ("Alabama Power") supplements its responses to Defendant Pinpoint Locating, Inc.'s ("Pinpoint") Interrogatories as follows:

GENERAL OBJECTIONS

1. Alabama Power's supplemental responses are made solely for the purposes of this action. Each is made subject to all objections as to competency, relevancy, materiality, propriety, and admissibility, and any and all other objections and grounds that would require the exclusion of any statement made herein, if such a statement were made by or were asked of a witness present and testifying in court, all of which objections and grounds are reserved and may be interposed at the time of trial, should there be a trial in this matter.

2. No incidental or implied admissions are intended by the supplemental responses made. The fact that Alabama Power answers, responds or objects to any particular request is not an admission that Alabama Power accepts or admits the existence of any fact set forth in, or assumed by, each such request or that such responses or objections constitutes admissible evidence. The fact that Alabama Power answers part or all of any particular request is not

intended to be, and should not be construed as, a waiver by Alabama Power of all or any part of any objection to such requests.

3. The supplemental answers and responses are based on Alabama Power's present knowledge of the facts potentially relevant to this action. Alabama Power has not completed its investigation of the facts, discovery proceedings in this case or its preparation for trial. Alabama Power accordingly reserves its right to make appropriate changes in its supplemental responses and/or answers or to supplement those responses and/or answers should it appear at any time that an omission or error has been made or that additional or more accurate information should be included. Alabama Power further reserves its right to rely upon any and all information at trial, whether or not disclosed at this time.

4. To the extent that any or all of Pinpoint's requests seek legal opinions, legal conclusions or call for information prepared or obtained in anticipation of litigation or for trial, or otherwise protected from disclosure by the work-product doctrine, the attorney-client privilege, or any other privilege, Alabama Power objects to such requests on such grounds. Alabama Power is not obligated to and will not disclose information protected from discovery by virtue of said privileges or doctrines.

5. Alabama Power objects to each and every request to the extent it is overly broad, vague, ambiguous, unspecific, not reasonably calculated to lead to the discovery of admissible evidence, and beyond the scope of permissible discovery. Alabama Power further objects to each and every request where no date limitations are given on the grounds that those requests are not properly limited in time or scope. Alabama Power also objects to each and every request to the extent it seeks information or documents containing confidential or proprietary information, the production of which would constitute a damaging and unwarranted disclosure of trade

secrets. Finally, Alabama Power objects to each and every request to the extent it seeks documents or information not in the possession, custody or control of Alabama Power.

6. The foregoing general objections are incorporated by reference into each supplemental response as though fully set forth regardless of whether any or all of said objections are repeated in response to any specific request.

SUPPLEMENTAL RESPONSES TO DEFENDANT'S INTERROGATORIES

5. Please state in complete and precise detail the damages which you allege that Pinpoint Locating caused to the ductbank described in your complaint.

SUPPLEMENTAL RESPONSE: By boring into Alabama Power's ductbank, Pinpoint rendered the ductbank and the utility conduits therein functionally useless and in need of significant repair. Pinpoint completely damaged Alabama Power's ductbank and related equipment. Moreover, Pinpoint damaged Alabama Power's underground cable, type #350-3 conductor paper insulated lead primary. The damaged conduit was believed to be "Orangeburg" pipe with a four-inch diameter, which was the standard size used by Alabama Power at that time. Alabama Power's entire duct line and pipe was encased in concrete, and due to the inability to repair "Orangeburg" pipe, the entire section of duct line from Alabama Power's manhole at Morris Avenue to its manhole at Powell Avenue had to be replaced. In replacing the duct line, Alabama Power used the current standard material, five-inch EB/DB PVC conduit, and temporarily had to replace the conductor with 15kV #1/0 AL primary. Alabama Power's construction contractor, Southeastern Sealcoating, Inc., performed all construction, removal, and installation work, and all conductor work was performed by Alabama Power personnel. The required fiber re-route work was performed jointly by the fiber owners and Alabama Power. See also documents produced previously and contemporaneously by Alabama Power in this action.

7. Please itemize each and every repair made by Alabama Power Company as a result of the damage alleged in your complaint as it relates to the ductbank situated on, near or adjacent to Morris Avenue and 20th Street North in Birmingham, Alabama.

SUPPLEMENTAL RESPONSE: Alabama Power objects to this interrogatory as vague and ambiguous and to the extent it is uncertain as to what Pinpoint means by use of the term "each and every repair made by Alabama Power Company." Subject to and without waiving the foregoing or General Objections, see Supplemental Response to Interrogatory No. 5 and documents produced previously and contemporaneously by Alabama Power in this action.

8. Please provide an itemization of any monies spent or expenses incurred by Alabama Power Company and which you contend total \$432,324.47.

SUPPLEMENTAL RESPONSE: Subject to and without waiving the General Objections, see documents produced previously and contemporaneously by Alabama Power in this action. Further, Alabama Power responds that it claims monetary damages incurred as a result of Pinpoint's boring into the ductbank at issue, in the amounts set forth as follows: Material Costs: \$19,340.55; Labor Costs: \$96,500.65; Transportation Costs: \$5,918.15; Contractor Costs: \$305,807.25; Miscellaneous Costs: \$3,837.35. TOTAL COSTS: \$431,403.95, plus costs of collection, including without limitation, attorneys' fees.

9. Please provide a list of all persons and entities who worked or performed services in connection with the repairs made to the ductbank described in your complaint.

SUPPLEMENTAL RESPONSE: Alabama Power objects to this interrogatory to the extent it is vague, ambiguous, overly broad, and unduly burdensome. Subject to and without waiving the foregoing or General Objections, Alabama Power responds that various persons and/or entities performed services in connection with repairing the ductbank and related equipment damaged by Pinpoint, including but not necessarily limited to: Jeffery Brasfield, Jimmy Battle, Curtis Brown, Gregory Bush, Joshua Bush, Kevin Naramore, Marcus Powell, Edward Stell, Jr., Ardelbert Terrell, Jr., Bradley Thompson, Mitch Thompson, Brian Lett, Jack Page, Jeff Heckman, Michael Hill, Antonio Huntley, Dwight Jackson, Clinton Jones, Dejuan Minor, Ronald Morris, Dennis Collar, Martin Corley, Tracy Culver, Southeastern Sealcoating, Inc., Mark Johnson, Metz Davis, Jason Marlin, Scott Hastings, Preston Cockrell, Daryl Wilhite, Rebecca Herrera, Abdo Amer, Brian Nalley, John Finké, Charlie Newfield, Daniel Tate, Video Industrial Services, Wallace Smith, Jr., Leslie Wilson, John Burton, John Rouse, Stones & Sons Electrical Cont., Inc., Deltacom, and Kimball Karmondi. See also documents produced previously and contemporaneously by Alabama Power in this action.

11. Please state whether Alabama Power Company gave any representative from Pinpoint Locating an opportunity to review or inspect the damages allegedly caused by it prior to any repairs being made.

SUPPLEMENTAL RESPONSE: As Pinpoint caused the damage at issue, Pinpoint knew of its occurrence before any other person or entity, and thus had every opportunity to observe and inspect the damage that it caused immediately thereafter. Moreover, Alabama Power personnel, in responding to the signal indicating the loss of voltage in the area at issue, informed the on-site Pinpoint crew members regarding the indication of a potential issue at the site where Pinpoint was performing the boring work. Before Alabama Power could finish coordinating its initial response to the issue, the Pinpoint personnel had left the scene. Pinpoint

was notified formally in October 2010 of the damage it caused to Alabama Power's ductbank, and Alabama Power is not aware of any other formal invitation extended to Pinpoint in regards to further inspecting the damages that it caused. Moreover, Pinpoint was called to the scene to repair the duct and fiber line for which it was responsible, which was damaged during the replacement work as a result of their running through Alabama Power's duct line. Thus, Pinpoint was able to see at that time that its fiber duct ran through several of Alabama Power's ducts. Moreover, Alabama Power never refused to permit Pinpoint the opportunity to review or inspect the damages to Alabama Power's ductbank and related equipment, and Pinpoint never requested Alabama Power that Pinpoint be allowed to review or inspect the damages to Alabama Power's ductbank and related equipment.

12. Please state whether Alabama Power Company has internal policies, procedures or guidelines it follows with regard to damage to its utilities or properties by contractors or other entities such as the damage you allege you incurred in connection with this matter. If so, please produce a copy of said policies and procedures.

SUPPLEMENTAL RESPONSE: Alabama Power objects to this interrogatory as vague, ambiguous, overly broad, unduly burdensome, not limited in time or scope, and not reasonably calculated to lead to the discovery of admissible evidence. Alabama Power further objects to this interrogatory to the extent it is uncertain as to what Pinpoint means by use of the phrase "internal policies, procedures or guidelines it follows with regard to damage to its utilities or properties by contractors or other entities." Subject to and without waiving the foregoing or General Objections, when power outages or other abnormalities occur, the Alabama Power Distribution Operations Center ("DOC") typically receives an indication of said outage or abnormality. At such time, Alabama Power personnel are dispatched, dependent upon the type of issue and the responsible department, to investigate and work on a responsive plan. In regards to the incident at issue, the DOC received an indication that the network feeder had lost voltage, and thus the DOC signaled the Alabama Power network engineer, who in turn contacted an Alabama Power network crew working in the area. The Alabama Power network crew went to the scene at issue to investigate and assess any damages incurred. In investigating the incident, it was determined that Alabama Power's ductbank had been damaged and rendered functionally unusable. As such, repair work via replacement of the duct line was the only viable option. Upon coming to this conclusion, the process of repair was instituted.

16. Please describe in complete and precise detail any upgrades, repairs, retrofits or other work which was performed on the underground utilities in the area of the ductbank described in the plaintiff's complaint and which were done at the time the ductbank was being repaired.

SUPPLEMENTAL RESPONSE: Alabama Power objects to this interrogatory as vague, ambiguous, and otherwise confusing. Subject to and without waiving the foregoing or General Objections, all work performed by Alabama Power's contractor, Southeastern Sealcoating, Inc., from the beginning of this project until it was finished, was undertaken to complete this replacement job necessitated by the damage caused by Pinpoint. The only other "contractors" involved in the work at issue were the Birmingham City police officers used for traffic control, which was required of Alabama Power by the City of Birmingham, Stones & Sons Electrical Cont., Inc., which had to perform work to replace the damaged electrical panel and feed to lights situated under the nearby railroad crossing, and Deltacom, which provided the materials needed, including the fiber optic cable, and their personnel, working in conjunction with Alabama Power's crews and traffic control, to re-route the Deltacom fiber (which ran through Alabama Power's damaged duct line) as a result of Pinpoint's damaging the Alabama Power duct line. No "upgrades," as this term is understood to mean by Alabama Power, were performed during the replacement repair work at issue, as Alabama Power simply used the standard materials currently in use at the time of the repair work. Alabama Power removed the completely damaged ductbank, along the same affected path and in the same affected location, in accordance with applicable standards and materials.

18. Please describe in complete detail the damage allegedly caused by the defendant.

SUPPLEMENTAL RESPONSE: Alabama Power objects to this interrogatory as duplicative. Subject to and without waiving the foregoing or General Objections, see Supplemental Response to Interrogatory No. 5.

19. Please describe in complete and precise detail all repair necessitated solely by the damage allegedly caused by the defendant.

SUPPLEMENTAL RESPONSE: Alabama Power objects to this interrogatory as duplicative, vague, and ambiguous, and to the extent it is uncertain as to what Pinpoint means by use of the term "necessitated solely by the damage allegedly caused by [Pinpoint]." Subject to and without waiving the foregoing or General Objections, all repair work described herein was necessitated solely by the damage caused by Pinpoint. Further, see documents produced previously and contemporaneously by Alabama Power in this action.

Objections tendered by counsel.

VERIFICATION

STATE OF ALABAMA)
)
JEFFERSON COUNTY)

I, Brian A. Lett, as an Engineering Supervisor with Alabama Power Company, hereby certify that I have reviewed the foregoing supplemental responses to interrogatories and know the contents thereof; that these supplemental responses were prepared with the assistance and advice of counsel, upon which I have relied; that the supplemental responses set forth herein, subject to inadvertent or undiscovered errors, are based on, and therefore necessarily limited by, the records and information still in existence, presently recollected and thus far discovered in the course of preparation of these supplemental responses; that consequently, Alabama Power Company reserves the right to make any changes in these supplemental responses if it appears at any time that omissions or errors have been made therein, or that more accurate information is available; and that, subject to the limitations set forth herein, the said supplemental responses are true to the best of my knowledge, information and belief.

ALABAMA POWER COMPANY

By: *Brian A. Lett*
Brian A. Lett

Sworn to and subscribed before me on this the 1st day of March, 2013.

James Patterson
Notary Public



[NOTARIAL SEAL]

My Commission expires: 8-30-2014

Respectfully submitted this 1st day of March, 2013.

/s/ Thomas R. DeBray, Jr.
One of the Attorneys for Plaintiff,
Alabama Power Company

OF COUNSEL:

Eric T. Ray
Thomas R. DeBray, Jr.
BALCH & BINGHAM LLP
1901 Sixth Avenue North, Suite 1500
Birmingham, Alabama 35203
Telephone: (205) 251-8100

Counsel for Alabama Power Company

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing on the following via electronic mail and U.S. Mail, postage prepaid, on this the 1st day of March, 2013:

K. Phillip Luke
William A. Mudd
WHITAKER, MUDD, LUKE & WELLS, LLC
2011 4th Avenue North
Birmingham, Alabama 35203
Telephone: (205) 639-5300

/s/ Thomas R. DeBray, Jr.
Of Counsel

EXHIBIT H

Alabama **Call**

Excavation Guide



**Know what's below.
Call 811 before you dig.**

www.al1call.com

**800.292.8525 Nationwide
205.252.4444 Bham Area**

PLAINTIFF'S
EXHIBIT
5

INTRODUCTION

This manual is intended as a resource to aid in the prevention of damage to underground utility facilities in the State of Alabama. Alabama One Call developed this guide to enhance public safety, protect the environment, minimize risks to excavators and to prevent disruption of vital public services.

PURPOSE

Alabama One Call (AOC) is a non-profit organization established to provide a centralized one call notification system as a means to safeguard against injury and loss of life, to protect public services and to prevent damage to underground facilities by providing for prior notification of excavation and demolition activities.

Major Functions:

1. To receive reports from the public, contractors, utilities and other parties of their proposed excavation activity. These parties are encouraged to obey Alabama Act 94-487 and call Alabama One Call at least two working days in advance of all planned excavation. The reports or calls received for this purpose are referred to as location requests.
2. To transmit, via communications network, any information pertinent to the excavation location and the nature of the excavation to all AOC members who have underground facilities at that location.
3. To promote the use of AOC by all excavators.
4. To promote membership in the AOC by underground facility owners.

Alabama One Call does not perform locates, it is the communication network between excavators and member underground facility owners.

SECTION 6

6. When directional boring or drilling, the excavator should properly expose and support each utility crossing in or near the excavation area, this includes backfilling, as may be reasonably required by the utility owner for the protection of the underground utilities

- **NOTE:** It is a good idea to look for the following as indicators of existing underground facilities near the area of the excavation site; Power Transformers, Utility Pole Drops (Cables attached to the side of the utility pole and entering the ground. Galvanized "U" Guards sometimes protect these cables.), Telephone or Cable Television Pedestals, Water Valves or Hydrants, Gas Meters, Valves or Test Stations, Warning Signs or Markers, Manhole Rings and Covers.

SECTION 7

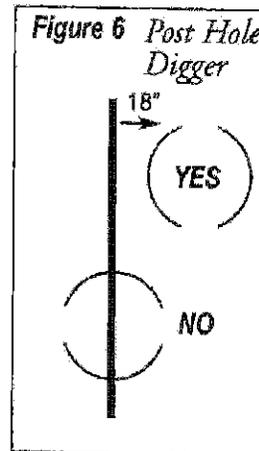
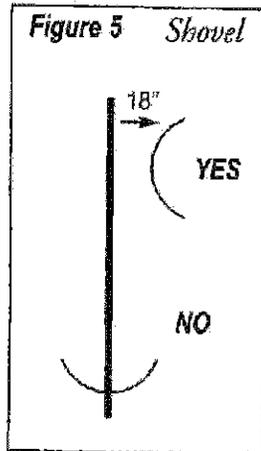
SAFE DIGGING TIPS FOR EXCAVATORS

When crossing underground utilities within the tolerance zone, the excavation should be performed with hand tools or non-invasive equipment until the marked facility is exposed. See Figures 1 through 4 pages 15 and 16, for examples of conduit and small cable tolerance zones.

- Dig by hand, pothole, vacuum or other soft digging methods.
- If excavating to a certain depth, use hand tools to expose a window in the earth down to that depth and then open the window 18 inches on either side of the marked facility to determine the exact location of the buried facility.

SECTION 7

- When using a shovel, keep the face of the blade toward the side of the facility. (Figure 5 and 6)
- When using post hole diggers, keep the opening between the blades pointing the same direction as the facility is running. (Figure 6).



- Avoid the use of picks and mattocks.
- When digging in hard compacted soils, pothole to the side of the locate marks and collapse the soil into the pothole while digging toward the marks. (Figure 7, page 18).
- Beware of the possibility of abandoned facilities. Find, expose and protect all facilities within the tolerance zone. Do not damage any of these facilities as they may be used by the utility at a later date.

WHEN PARALLELING UNDERGROUND FACILITIES:

At intervals find and expose, by hand digging, all facilities in the area to be disturbed by the excavation and adjust to the path of the excavation accordingly. Beware of the possibility of abandoned facilities. Do not damage.

Note: The depth of underground facilities is not guaranteed. Never assume that a utility facility is the same depth throughout its route as where it was exposed. Also be aware that there are lines found just a few inches under the surface. Most likely they were buried at a prescribed depth but, over the years through grading operations or other actions, they are now just beneath the surface. Excavators are responsible for finding and avoiding all facilities down to the depth they are working.