IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

TRINITY INDUSTRIES, INC., et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No: 1:11cv937-CMH-TRJ
SPIG INDUSTRY, LLC, et al.,	)	
Defendants.	)	

NOTICE OF SUPPLEMENTAL AUTHORITY FOR PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs Trinity Industries, Inc. and The Texas A&M University System hereby notify the Court of the denial of the SPIG Defendants' request for acceptance of the "SGET" end terminal product by the Federal Highway Administration ("FHWA") pursuant to letter dated October 12, 2012 (copy attached hereto as Exhibit 1, "Supplemental Authority"). This Supplemental Authority, provided to the parties on October 12, 2012, is filed with regard to Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Partial Summary Judgment [D.N. 386]. In particular, the Supplemental Authority is proffered to the Court as further response to Defendants' contention that SPIG has a valid "offer of sale" of the SGET product to Selco without any crash-testing or FHWA acceptance. *See* D.N. 369 at 5 (Statement of Fact ¶ 18) & D.N. 403 at 4 (offer of sale contingent on acceptance).

Dated: October 15, 2012

Respectfully submitted,
TRINITY INDUSTRIES, INC. and
THE TEXAS A&M UNIVERSITY SYSTEM

By: /s/ Matthew B. Kirsner

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Counsel for Plaintiffs Trinity Industries, Inc. and The Texas A&M University System

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2012, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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Attorneys for Defendants Selco Construction, Inc., SPIG Industries, LLC, SPIG Industries, Inc.

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Counsel for Plaintiff

EXHIBIT 1

From:	Artimovich, Nick (FHWA)
To:	"Keith Cota"; kplatte@aashto.org
Cc:	Joseph.Jones@modot.mo.gov; Ronald K. Faller (rfaller1@unl.edu); dsicking@unl.edu; Julian, Frank (FHWA)
Subject:	RE: AASHTO-TCRS ---- Complaint on failing heads for terminal unit
Date:	Thursday, October 11, 2012 3:32:15 PM
Attachments:	CC_0094_Acceptance_Letter_09-02-2005.pdf

Keith,

Here is our response to your inquiry regarding the ET-Plus terminal:

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

FHWA Letter CC-94 is attached.

Regards,

Nicholas Artimovich, II
Highway Engineer, Office of Safety Technologies
Federal Highway Administration HSST
1200 New Jersey Avenue SE, Room E71-322
Washington, DC 20590
email: nick.artimovich@dot.gov
phone: 202-366-1331
fax: 202-366-3222
web: http://safety.fhwa.dot.gov

From: Keith Cota [mailto:KCota@dot.state.nh.us]
Sent: Monday, October 01, 2012 3:39 PM
To: Artimovich, Nick (FHWA); kplatte@aashto.org
Cc: Joseph.Jones@modot.mo.gov; Ronald K. Faller (rfaller1@unl.edu); dsicking@unl.edu; Julian, Frank (FHWA)
Subject: AASHTO-TCRS ---- Complaint on failing heads for termainal unit

Nick and Keith,

It seems I need to send along a big thanks to Frank Julian for offering up my contact information to a Mr. Josha Harman (304-888-4261). Late last Friday just before closing and as I was getting prepared for a great colorful weekend here in NH (mapping my route out as to where to drive for beautiful pictures), I received a phone call

from Mr. Harman as to his imminent concerns for the crash worthiness of the ET-Plus and ET-2000 terminal units due to the head and the extruder channel.

Mr. Harman advised that he has documented crash history across this county as to what he claims to be the failure of the head interaction with the extruder channel for the, SKT350, ET-2000 and ET-Plus. He alleges that the ET-2000 and ET-Plus terminal units are being sold with a modification to the extruder channel that may not have been crash tested to verify if it is crashworthy. He explained that the original accepted terminal used a 5 inch feed channel to control the movement of the head into the rail system allowing for the intruder head to coil the rail system and decelerate the vehicle. He seems to feel the use of a modified 4 inch feed channel being manufactured for the ET-Plus is too narrow and results in internal snagging with failure of the extruder head to complete the recoiling of the W-Beam. He feels the 4 inch feed channel modification made during device manufacturing was never crash tested for the change and, therefore, has resulted in documented, poor performance and safety from the data he has collected. He stated that he has documented serveral instances where the systems have failed in almost every State across this country and he has posted the information on his web site – www.failingheads.com

Mr. Harman noted that he has had past conversations with Doctor Sicking, Doctor Faller, Nick Artimovich, Keith Platte and Frank Julian as to his concerns for this system change and the need for immediacy to address this deficiency. He seems to be alluding to a position that the manufacturer may have modified the extruder plate and feed channel from what was accepted under the crash test for NHCRP 350 (Acceptance Letter CC-12G) and are providing non-crashworthy terminals. He did indicate that certain manufacturers of these terminal units have brought legal action against him due to his public outcry and he noted that these manufacturer(s) are trying to shut down his web page.

He expressed the need to get the information out to the users and buyers of these devices and felt that TCRS role should be to do that. I explained that this is the first time I am being aware of his alleged concern for the safety performance of these terminal units. I advised that the role of the TCRS is to document accepted road safety hardware as accepted under NCHRP 350 and any newer hardware systems under MASH into the Roadside Design Guide for its toll box application by the designers. I advised that it is not the role of the TCRS to police whether the hardware devices being manufactured meet the acceptance testing and to verify the device being delivered is the same as the crash tested hardware. This role falls to each State through their own Quality Assessment and Quality Controls programs. As in NH, if we find a contractor, supplier and/or manufacturer providing a substitute product that is not representative of the accepted device per our qualified products listing, then it would be referred to our Chief Engineer and, ultimately, to our Attorney General's Office for legal action. It is not the role of the TCRS to do this.

This issues appear to have some long history behind it and has resulted in several legal claims that are currently going through the legal process (according to Mr. Harman). I firmly believe that it is not the role of the TCRS to decide right from wrong in this case, as the court will decide that fate. Mr. Harman does bring up some interesting questions, such as: 1) what was the particular dimension of the original sliding channel used during the accepted crash tests, 2) has certain parts of the hardware system have been changed through the manufacturing process of the hardware and 3) should the changes require a revalidation test to ensure that its functionality has not diminished? Who polices this or should it be? Is it left up to the QC/QA policy of the individual States? (all rhetorical questions!)

The question I do have is ,"for the terminal units we are installing in NH, should it be providing a 5 inch feed channel or not?" We have many, many of these terminal units on our high speed facilities and this certainly causes me some strong concern for crash worthiness of the ET-Plus and ET-2000 that we have and are installing each year. I am not sure if I want to wait until the court case is decided and all the appeals have been completed to take action (20 years from now) or be ready to answer the next set of bigger questions as to 1) the

need to retrofit the devices installed along our highway system and 2) who pays?

I understand this has been going around for some time and I am just now becoming aware of the issues through the complainant in the lawsuit. I will be looking toward Nick to give some guidance as to how NH and other States should proceed. Should I be worried? Should I send this out to the full slot of TCRS State members? Or worst yet, should I brief my Chief Engineer? I don't like the box this puts me in!

Keith A. Cota, Chairman
AASHTO Technical Committee on Roadside Safety
NH Department of Transportation
Bureau of Highway Design
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Phone: (603) 271-1615
Fax: (603) 271-7025
Email: kcota@dot.state.nh.us

EXHIBIT 2

From: Artimovich, Nick (FHWA)
To: "Piper, Dave L"
Subject: RE: ET Plus
Date: Thursday, October 11, 2012 3:33:31 PM
Attachments: CC 0094 Acceptance Letter 09-02-2005.pdf

Dave,
Here is our reply to your inquiry regarding the ET-Plus terminals.

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

FHWA Letter CC-94 is attached.

Regards,

Nicholas Artimovich, II
Highway Engineer, Office of Safety Technologies
Federal Highway Administration HSST
1200 New Jersey Avenue SE, Room E71-322
Washington, DC 20590
email: nick.artimovich@dot.gov
phone: 202-366-1331
fax: 202-366-3222
web: http://safety.fhwa.dot.gov

From: Piper, Dave L [mailto:Dave.Piper@illinois.gov]
Sent: Friday, October 05, 2012 5:47 PM
To: Artimovich, Nick (FHWA)
Cc: Ho, Alan (FHWA); Tobias, Priscilla A
Subject: ET Plus

We have heard of changes to the ET Plus terminal that reduce the opening in the extruder head. Attached are photos from Illinois showing differing construction where the horizontal channels are welded to the inlet of the extruder. In one case, the older one on wood posts, the channels are butt welded. The other photo, showing an impact head that has been hit, the channels extend into the extruder head.

Our specifications require that guardrail terminals be accepted by FHWA, on the Department's list of approved devices and be according to manufacturer's specifications. We have been unable to confirm that this change to the insertion of the channels into the extruder head and apparent reduction of the opening was accepted by FHWA. Has FHWA accepted this modification?

EXHIBIT 3

From: Artimovich, Nick (FHWA)
To: Hinton, Daniel (FHWA)
Cc: Fouch, Brian (FHWA); Winne, William (FHWA)
Subject: RE: Guardrail endtreatment ET-Plus
Date: Thursday, October 11, 2012 3:30:18 PM
Attachments: CC_0094_Acceptance_Letter_09-02-2005.pdf

Dan,

Here is our response to your inquiry regarding the ET-Plus terminal.

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

FHWA Letter CC-94 is attached.

Regards,

Nicholas Artimovich, II
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Federal Highway Administration HSST
1200 New Jersey Avenue SE, Room E71-322
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fax: 202-366-3222
web: http://safety.fhwa.dot.gov

From: Hinton, Daniel (FHWA)
Sent: Wednesday, July 18, 2012 2:03 PM
To: Artimovich, Nick (FHWA)
Subject: Guardrail endtreatment ET-Plus

Nick,

The SCDOT asked a question regarding the ET-Plus terminal for use on the NHS. Their question concerns the channel chute. In FHWA's January 18, 2000 letter the detail for the terminal show a 5" width for the channel chute (attached with the detail shown in red). However FHWA's

September 2, 2005 (attached) letter does not provide any details showing the width of the channel chute.

This end terminal is being installed on a oversight project on the NHS, however the system has a 4" width channel chute. SCDOT would like to verify that the change from 5" to 4" has been crash tested under MASH TL-3 conditions and is eligible for reimbursement under the Federal-aid highway program.

Thanks

Dan Hinton
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