

# **Exhibit 3**

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

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

**DECLARATION OF BRIAN E. SMITH**

I, Brian E. Smith, declare as follows:

1. My name is Brian E. Smith, and I am the Vice President, International Sales for Trinity Highway Products, LLC (“Trinity”), the Plaintiff in this matter. My business address is 2525 Stemmons Freeway, Dallas, Texas 75207. I have personal knowledge of the matters set forth in this Affidavit.

2. My job duties include overseeing international sales and marketing for Trinity Highway Products, LLC. Prior to 2011, I also was responsible for new product development. The ET-Plus product at issue in this litigation is sold by Trinity Highway Products, LLC.

3. I have direct knowledge of the modifications and improvements made to the ET-Plus end terminal product since its introduction in 2000.

4. The ET-Plus has been accepted for use on the National Highway System by the Federal Highway Administration (“FHWA”) since January 18, 2000.

5. Throughout its product life cycle, the ET-Plus has been designed and manufactured with an exit gap having a manufacturing variance of 1 to 1.15 inches.

6. During the manufacturing process, the fabrication plants make use of a special part and manufacturing technique. A part is inserted into the ET-PLUS during manufacturing, and fabrication is done around this part. Therefore, because of manufacturing techniques, the exit gap can never measure less than 1”.

7. Under NCHRP Report 350 crash test conditions (as mandated by the FHWA), a guardrail splice using 1-1/2 inch bolts will fit through an ET-Plus exit gap having a manufacturing dimension of 1” with a variance/tolerance of -0”, +0.15”. When impacted “end on” at the end terminal, the vehicle pushes the ET-Plus head down the W-beam guardrail.

8. In 2005, Trinity suggested a manufacturing improvement of the ET-Plus to include an end terminal with a 4” top and bottom channel on the feeder chute (versus a 5” rail feeder chute in prior versions of the ET-Plus). One of the reasons for doing this was to strengthen the weld where the channel joins the head. Further, Trinity, in consultation with the ET-PLUS designers at Texas A&M, believed that the change in channel size to a 4” width would reduce the occurrence of “wobble” as the rail travels down the chute following impact.

9. On May 27, 2005, Texas A&M design engineers conducted a crash test pursuant to NCHRP Report 350 using an ET-Plus with 31” w-beam guardrail height. This was test 3-30. The ET-Plus in this crash test had a 4” rail feeder chute.

10. On August 10, 2005, Trinity provided a copy of this NCHRP Report 350 test 3-30 to the FHWA. On that date, Trinity requested FHWA’s acceptance of the ET-31, a modified version of its ET-Plus.

11. Copies of Plaintiffs’ testing and FHWA acceptance documents are attached to the Memorandum in Support of Motion to Disqualify as **Exhibit K**.

- through his lawyers at Roetzel & Andress (by filing Counterclaims in November and December 2011 against Trinity and The Texas A&M University System, based on the erroneous 4" rail feeder and 1-1/2" exit gap failure theories), and
- to the FHWA (by sending them an email with the PowerPoint Presentation titled "Failure Assessment of Guardrail Extruder Terminals" in January 2011).

19. On January 24, 2012, while attending the Transportation Research Board meeting in Washington, D.C., I was contacted by Nick Artimovich with the Federal Highway Administration. He later forwarded to me a PowerPoint presentation, regarding the ET-PLUS which he said that he had received from SPIG via email. I read the presentation and then provided it to Trinity's attorneys.

20. From speaking with Trinity's attorneys, I understand that the Presentation that SPIG sent to the FHWA was created by SPIG's attorneys at Roetzel & Andress.

21. Mr. Harman's unfounded statements in general, and the spurious nature of the Presentation created by his attorneys in particular, have done harm to the reputations of Trinity and Texas A&M. If Mr. Harman continues to distribute the Presentation containing these misleading statements and misrepresentations about Trinity's ET-Plus, these actions could negatively impact Trinity's customer relationships and business prospects.

22. I understand that attorneys representing Trinity will be filing this Affidavit with this Court with a Motion to Disqualify Counsel for Defendants SPIG and Selco.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on February 23, 2012, in DALLAS, TX.

A handwritten signature in cursive script, appearing to read "B. E. Smith", written in black ink.

BRIAN E. SMITH