

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

UNITED STATES OF AMERICA ex rel.)	
JOSHUA HARMAN,)	
)	Civil Action No. 2:12-CV-89
Plaintiff,)	
)	
v.)	
)	
TRINITY INDUSTRIES, INC, and)	
TRINITY HIGHWAY PROTDUCTS, LLC,)	
)	
Defendants.)	

**BRIEF IN SUPPORT OF MOTION TO INTERVENE OF
THE CENTER FOR AUTO SAFETY AND THE SAFETY INSTITUTE**

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Attorneys for Intervenors

INTRODUCTION

The Center for Auto Safety and The Safety Institute (“Movants”) have moved to intervene under Federal Rule of Civil Procedure 24(b)(1) for the limited purpose of seeking public access to sealed court records in *United States ex rel. Harman v. Trinity Industries*, Civil Docket No. 2:12-CV-89.

As this Court is well aware, the underlying case involves allegations that Trinity Industries’ modified ET-Plus guardrail end terminal does not meet acceptable levels of safety and performance. Doc. 1, Compl. ¶ 11 (Mar. 6, 2012). More particularly, the Relator alleges that, instead of operating to slow and contain a vehicle as earlier versions of the end terminal did, the newer, modified version not only has not been adequately tested but, in the field, causes the guardrail to turn into a dangerous spear that can pierce a vehicle and maim or kill its occupants. *Id.* ¶¶ 10-11. Trinity’s modified ET-Plus end terminals appear on roadsides all over the country. *Id.* ¶ 12.

Numerous documents filed in the case—including dispositive motions and their exhibits—have been sealed at the parties’ requests. *E.g.*, Doc. 247, Defs.’ Mot. for Summ. J. (June 13, 2014); Doc. 260, Pl.’s Mot. for Partial Summ. J. (June 14, 2014). As Movants explain in their Motion to Unseal, filed contemporaneously with this motion, no party has made the difficult showing that is required to overcome the strong presumption in favor of public access to court records. Further, given that the case involves an issue of public safety and possible fraud on the government, public access to the court record is especially important.

The Center for Auto Safety and The Safety Institute seek to intervene to unseal the records because they have particular interest in advocating for the safety of our nation’s

highways. As explained in more detail below, access to the sealed records could be instrumental to the organizations' efforts in the name of public safety.

INTEREST OF MOVANTS

Movants' interest in this litigation is set forth more fully in the attached declarations of Clarence Ditlow and Jamie Schaefer-Wilson, Executive Directors of the Center for Auto Safety and The Safety Institute, respectively. In brief:

A. The Center for Auto Safety

The Center for Auto Safety is a national nonprofit organization that advocates for safer vehicles and highways. Exh. A, Ditlow Decl. ¶ 2. The Center has a long history of working to get safety regulations implemented. *Id.* ¶¶ 4-5. The Center has come to understand that there may be a serious safety problem with the highway guardrail end terminal in this case, the ET-Plus, but there is a need for additional empirical evidence regarding the end terminal's safety. *Id.* ¶¶ 6-7. If the sealed documents in this case support existing evidence of a serious safety issue with the modified ET-Plus, the Center will use that data to urge the federal government to undertake further testing of the device and to educate the public and the federal and state governments about the public safety hazard posed by the ET-Plus. *Id.* ¶ 7.

B. The Safety Institute

The Safety Institute is a 501(c)(3) organization that focuses on injury prevention, product safety, and public awareness. Exh. B, Schaefer-Wilson Decl. ¶¶ 1, 7. The Institute and its Board Members are currently involved in investigating safety issues related to highway guardrail end terminals, including the ET-Plus. *Id.* ¶ 11, 17. Among other things, the Institute is currently partnering with a university to study severe and fatal injury crashes that occurred as a result of impacts with the end and/or face of guardrail terminals. *Id.* ¶ 17. A principal goal of the study is

to analyze the safety performance of guardrail end terminals, including the ET-Plus, which is one of the key issues in this litigation. *Id.* ¶ 17. The Institute is seeking access to the sealed court records in this case because they are directly relevant to this study and could shed important light on this important issue of public health and safety. *Id.* at ¶ 18.

ARGUMENT

INTERVENTION IS WARRANTED BECAUSE MOVANTS MEET THE REQUIREMENTS FOR PERMISSIVE INTERVENTION UNDER RULE 24(B).

Intervention is proper here because Movants seek to unseal court records, and intervention is the appropriate vehicle for parties seeking to do just that. “It is well established that nonparties to a case seeking access to documents and records under a protective order or under seal in a civil case may do so by a motion for permissive intervention under [Federal] Rule [of Civil Procedure] 24(b)[].” *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 229 F.R.D. 126, 130 (S.D. Tex. 2005) (citing *San Jose Mercury News, Inc. v. U.S. Dist. Ct. N. Dist. (San Jose)*, 187 F.3d 1096, 1100 (9th Cir. 1999) and *EEOC v. Nat’l Children’s Ctr.*, 146 F.3d 1042, 41045 (D.C. Cir. 1998)); *Weiss v. Allstate Ins. Co.*, Civ. Action No. 06-3774, 2007 WL 2377116, at *2 (E.D. La. Aug. 16, 2007); *Gulf State Utils. Code v. Associated Elec. & Gas Ind. Servs., Ltd.*, No. Civ. A. 89-4086, 1992 WL 300781, at *1-*2 (E.D. La. Oct. 7, 1992).

In affirming the grant of a nonparty’s motion to intervene to access protected documents, the Fifth Circuit explained that “[n]onparties to a case routinely access documents and records under a protective order or under seal through motions for permissive intervention under rule 24(b)[].” *Newby v. Enron Corp.*, 443 F.3d 416 (5th Cir. 2006); see *In re Beef Indus. Antitrust Litig.*, 589 F.2d 786, 789 (5th Cir. 1979) (holding that there is “no question that the procedurally

correct course” for nonparties seeking access to sealed documents is through motion to intervene).¹

In other contexts, permissive intervention under Rule 24(b) requires intervening parties to demonstrate that it has an independent ground for subject matter jurisdiction, the motion is timely, and the claim or defense has a question or fact in common with the main action. Fed. R. Civ. Pro. 24(b); *In re Enron*, 229 F.R.D. at 130 (citing *EEOC*, 146 F.3d at 1046). Where a party is intervening solely for the limited purpose of unsealing records, however, courts make an exception to the requirement that there be an independent ground for subject matter jurisdiction because the court already has the power to determine whether the documents in the case should be protected or sealed. *See In re Enron*, 229 F.R.D. at 130 (citing *EEOC*, 146 F.3d at 1046). And, of course, the question raised by Movants—whether the court documents are appropriately sealed—is a question already in this case.

Instead, the key question when considering a motion to intervene for the purpose of unsealing court records is “whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” Fed. R. Civ. P. 24(b)(3); *see Newby*, 443 F.3d at 424 (limiting inquiry to whether intervention would prejudice the parties); *In re Enron*, 229

¹ In addition to those already cited, every circuit to have considered the question has recognized that nonparties may intervene under Rule 24(b) to seek access to protected or sealed documents: *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3d Cir. 1994); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 896 (7th Cir. 1994); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990); *Public Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 783-84 (1st Cir. 1988); *In re Agent Orange Litig.*, 821 F.2d 139, 144-45 (2d Cir. 1987); *Meyer Goldberg of Lorain v. Fisher Foods*, 823 F.2d 159, 162 (6th Cir. 1987).

F.R.D. at 130-31; *Gulf States*, 1992 WL 300781, at *1. The Fifth Circuit concurs. *See Newby*, 443 F.3d at 424.²

In this case, this motion will not delay or prejudice the parties in any respect. To begin, parties are not prejudiced by intervention when the intervention is done only to unseal court records and the intervenors, like Movants here, do not seek to intervene on the merits. *See, e.g., United Nuclear*, 905 F.2d at 1427 (“The most important circumstance in this case is that intervention was not on the merits, but for the sole purpose of challenging a protective order.”); *Public Citizen*, 858 F.2d at 786 (intervention timely and did not prejudice the parties because it sought to unseal records, not reopen the merits); *State Farm Fire & Cas. Co. v. Hood*, 266 F.R.D. 135, 140 (S.D. Miss. 2010) (motion to intervene timely because it sought the release of confidential documents only and did not seek to litigate the merits); *Gulf States*, 1992 WL 300781 at *1 (when nonparties do not seek to intervene on the merits, the original parties are not prejudiced).

And the timing of this motion is particularly apt. As this Court is well aware, less than a month has passed since this Court declared a mistrial, and the new trial will likely not occur until November. *See* Doc. 397, Joint Status Report (Aug. 11, 2014). Meanwhile, a status conference has been set for August 18, 2014, and this motion is being filed in advance of that date.

Permitting Movants to intervene at this juncture for the limited purpose of unsealing court

² In one early decision, the Fifth Circuit denied intervention to entities that had jointly moved to unseal court records on the ground that one of the two parties could obtain access to the documents in separate litigation. *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 525 (5th Cir. 1994). That, of course, is not true of Movants here. Since *Deus* was decided, the Fifth Circuit has affirmed a district court’s decision to permit a nonparty to intervene solely for the purpose of accessing protected records. *Newby*, 443 F.3d at 425; *see also Weiss*, 2007 WL 2377116, at *3 (finding *Deus* inapplicable and granting nonprofit’s motion to intervene to oppose motion to seal).

records will not interfere with the timing or the substance of the trial itself, nor the ultimate resolution of the claims on the merits.

CONCLUSION

Because a motion to intervene is the proper procedure for nonparties to seek to unseal court records and because the motion to intervene is timely and will not prejudice the parties, this motion should be granted.

Respectfully submitted,

/s/ David T. Bright

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CERTIFICATE OF SERVICE

I certify that a true copy of the above and foregoing document was served on each attorney of record or party in accordance with the Federal Rules of Civil Procedure on the 14th day of August, 2014, as indicated below to:

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/s/ David T. Bright
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EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA ex rel.)	
JOSHUA HARMAN,)	
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TRINITY INDUSTRIES, INC, and)	
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Defendants.)	

**DECLARATION OF CLARENCE DITLOW IN SUPPORT OF MOTION TO
INTERVENE OF THE CENTER FOR AUTO SAFETY**

I, CLARENCE DITLOW, hereby certify as follows:

1. I am the Executive Director of the Center for Auto Safety (“the Center”) and have been since 1976. I have a B.S. degree in Chemical Engineering from Lehigh University (1965), a J.D. degree from the Georgetown University Law Center (1970), and an LL.M. degree from the Harvard Law School (1971). I am the author of numerous consumer publications including the “Lemon Book” (1980 and 1990 editions), which I co-authored with Ralph Nader, and “Little Secrets of the Auto Industry” (1994). I am the chief editor of “Automobile Design Liability,” a six-volume work published by West, and supplemented annually, on state and federal regulation of the automobile, including all actions by the National Highway Traffic Safety Administration (NHTSA) and the Federal Trade Commission that affect motor vehicles.
2. The Center is a non-profit public interest organization founded by consumer advocate Ralph Nader and Consumers Union in 1970. The Center has over 15,000 members

nationwide. The Center is dedicated, among other matters, to promoting automobile and highway safety, to ensuring that defective and unsafe automobiles and automobile equipment are removed from the road, and that roads are safer for motor vehicles through safer designs and traffic controls. The Center provides information on safety hazards to alert the public, testifies before Congress and petitions federal agencies for remedial action on safety issues.

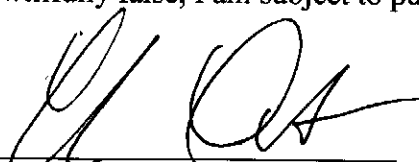
3. One of the means the Center uses to reduce the public's risk of injury on the highways is to educate the public about safety issues, and to serve as a clearinghouse for consumers and the media who want to obtain or report information on vehicle and highway safety issues. Each year, the Center receives more than 40,000 letters, telephone calls, and posts on its website from consumers and the media relating to these issues.
4. In 1974, the Center published "The Yellow Book Road: The Failure of America's Roadside Safety Program," a detailed analysis of the failure of the Federal Highway Administration (FHWA) and state highway departments to implement an effective roadside safety program. The Center followed up that report by working over the years since to improve roadside safety and design. Among its many accomplishments, the Center reached an agreement with the FHWA to cease the use of hazardous timber barriers in construction zones and to substitute concrete New Jersey barriers. Other Center highway safety activities have focused on bridge inspection, certification acceptance of state highway programs, speed limits and traffic control devices.
5. The Center has extensive experience with the American Association of State Highway and Transportation Officials (AASHTO) and FHWA. For example, a Center lawsuit established that AASHTO was an advisory committee to the FHWA under the Federal

Advisory Committee Act when utilized by FHWA. *Center for Auto Safety v. Cox*, 580 F.2d 689 (D.C. Cir. 1978). AASHTO publishes a comprehensive Highway Safety Manual (<http://safety.fhwa.dot.gov/hsm/>) which is utilized by FHWA in highway design.

6. The Center learned about the issue of the safety of the ET-Plus guard rail through www.failingheads.com. The issue is discussed by FHWA in a June 17, 2014 memo "ET-Plus W-Beam Guardrail Terminal" published at http://safety.fhwa.dot.gov/roadway_dept/policy_guide/road_hardware/memo_etplus_wbeam.cfm. The ET-Plus endcap was modified in 2005 but not disclosed to FHWA. The issue is whether the change from a 5" wide guide channel to a 4" wide guide channel made the ET-Plus a safety hazard.

7. The Center seeks to intervene in this matter because access to documents sealed in this proceeding would help determine whether the modified ET-Plus is safe or unsafe. Access to those documents would enable the Center to evaluate the issue and bring the facts to the public and FHWA as well as the Congress should there be hearings on the matter.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.


CLARENCE DITLOW

Dated: Aug 13, 2014

EXHIBIT B

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

UNITED STATES OF AMERICA ex rel.)	
JOSHUA HARMAN,)	
)	Civil Action No. 2:12-CV-89
Plaintiff,)	
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v.)	
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TRINITY INDUSTRIES, INC, and)	
TRINITY HIGHWAY PRODUCTS, LLC,)	
)	
Defendants.)	

**DECLARATION OF JAMIE SCHAEFER-WILSON IN SUPPORT OF THE SAFETY
INSTITUTE’S MOTION TO INTERVENE**

I, Jamie Schaefer-Wilson, declare as follows:

1. I am the Executive Director of The Safety Institute (the “Institute”), a 501(c)(3) non-profit organization with headquarters in Rehoboth, Massachusetts. I am submitting this declaration in support of the Institute’s Motions to Intervene and Unseal the records in this litigation.

2. As explained below, The Safety Institute is currently partnering with a university to study severe and fatal injury crashes that occurred as a result of impacts with the end and/or face of guardrail terminals. A principal goal of the study is to analyze the safety performance of all guardrail end terminal types, including the ET-Plus, which is one of the key issues in this litigation. The Institute is seeking access to the sealed court records in this case because they are directly relevant to this study and could shed significant light on this important issue of public health and safety.

My Background

3. Prior to my tenure at The Safety Institute, I was the Associate Director of Multimedia Outreach at Consumers Union, the policy and action division of Consumer Reports, where I wrote “The Consumer Reports Guide to Childproofing and Safety.” In my role at Consumers Union, I launched several consumer safety programs including The School Safety Alert Program, which brought together educators, teachers, government, school boards, parent-teacher groups, principals, and school administrators to communicate vital safety and recall information. As a result I launched “The National School Safety Coalition” consisting of more than 30 non-profit partners including three government agencies—the CPSC, FTC and FDA.
4. During my employment with Consumers Union, I also worked as a registered lobbyist and safety advocate. In that capacity, I worked to improve legislation involving vehicle safety, consumer products, and food, including The Cameron Gulbransen Kids Transportation Safety Act, The Consumer Product Safety Improvement Act, and The Food Safety Modernization Act.
5. I am a member of ASTM and serve on several juvenile product subcommittees and task-groups. I received an award in the 2007 ASTM International Advantage Award paper competition regarding the effectiveness of voluntary safety standards towards reducing injuries and fatalities.
6. In addition to writing “The Consumer Reports Guide to Childproofing and Safety,” I’ve written safety articles for several parenting magazines and websites. I was previously a certified Child Passenger Safety Technician and have spent the past ten years volunteering with the non-profit KidsAndCars.org.

The Safety Institute's Overall Mission

7. The overall focus of The Safety Institute is on injury prevention, product safety, and public awareness. The Safety Institute examines areas of injury prevention and product safety across a broad spectrum. The Institute bases its plans and priorities on issues that require greater study and emphasis, as well as those which may be underserved by other organizations and advocates. The Institute gives special attention to those areas of emerging importance to injury and product safety, including the effects of new and changing technologies.
8. A key mission of The Safety Institute is to support evidence-based research and interventions aimed at reducing injuries and improving product safety and to provide a strong, independent voice for safety professionals and survivors seeking to influence and advance prevention policies and strategies.
9. The Safety Institute is currently involved in, or has led efforts in a variety of issues regarding product safety and injury prevention. These include: water safety, preventing window falls, all-terrain vehicle safety, motor vehicle safety, restaurant and occupational safety, motor vehicle electronics, prevention of traumatic brain injury, regulating off-road vehicles, preventing falls among older adults, injuries from new technologies products and practices, recall effectiveness and outreach program (upcoming launch), effectiveness of guardrail end terminals, and residential elevator safety.
10. The Safety Institute recently launched and released the first of their quarterly Vehicle Safety Watch List of potential safety-related defects. The list is a product of the Institute's Vehicle Safety Watch List Analytics and the National Highway Traffic Safety Administration's Enforcement Monitoring Program. These reports will help the public

recognize the early signs of emerging, potential problems in the U.S. fleet. The reports will also help to identify continuing potential failures to effectively fix issues that are already known.

The Institute's Interest in This Litigation and the ET-Plus

11. One of the issues currently being studied by the Institute is the safety of highway guardrails. Throughout the course of its investigation into highway safety issues, the Institute has become aware of the increasing controversy regarding the guardrail end terminal ET-Plus, which is manufactured by the defendants in this case. Of particular concern is the lack of sufficient data regarding the safety performance of this device. Among other things, the Institute has learned the following:
 12. In 2012, Joshua Harman, the Relator in this case, informed the Federal Highway Administration (FHWA) that the ET-Plus had been modified in a way that was not reflected in the record on which its federal acceptance was based. This information touched off a controversy involving the manufacturer, the FHWA, and state departments of transportation.
 13. In October 2012, the American Association of State Highway and Transportation Officials (AASHTO) sent its membership a questionnaire concerning the field performance of the ET-Plus. Three of the 21-member agencies that responded stated that guardrail end terminals were involved in three severe crashes that caused serious injuries and deaths. Two members specifically referenced the ET-Plus. AASHTO requested that the FHWA review the crash acceptance of the ET-Plus end terminal and document that the modified barrier system was sufficiently crashworthy.
 14. In response, the FHWA assured AASHTO that there was no "reliable data indicating that

the ET-Plus end terminals are not performing as they were intended to perform,” and affirmed that the device was still eligible for reimbursement.

15. Under its own guidelines and criteria, the FHWA has the authority and discretion to evaluate the performance of guardrail terminals in service. To date, however, the agency has not voluntarily evaluated the ET-Plus’s in-service performance, despite the FHWA’s recognition in 2012 that the product performance is not satisfactory. Specifically, Nicholas Artimovich, a highway engineer from the FHWA’s Office of Safety Technologies, conceded to other agency engineers that there were “valid” questions about the ET-Plus’s field performance compared to that of earlier versions.
16. In short, despite serious questions about the safety of the modified ET-Plus end terminal, the FHWA has failed to take any action to evaluate its performance. This, in turn, poses a serious threat to public health and safety.
17. In 2014, The Safety Institute decided to take action to address the lack of “reliable” field performance data related to the ET-Plus. Earlier this year, The Safety Institute formed a partnership with a university to study severe and fatal injury crashes that occurred as a result of impacts with the end and/or face of guardrail terminals. The objective of the research is to investigate the in-service performance of guardrail end terminals between 2005 and 2014, including the ET-Plus. This study will incorporate a statistical estimate of the relative risks of fatal and/or serious injury crashes involving each of the widely used guardrail end terminals in two states, initially. This research study will be an objective analysis of crashes involving all guardrail end terminal types in the marketplace. The research study is ongoing and in its research phase.
18. In light of its involvement in this study, The Safety Institute has a strong interest in

obtaining access to the sealed court records in this case. As stated above, the purpose of this study is to address the lack of sufficient reliable data regarding the safety record of highway guardrail end terminals, including the ET-Plus. To the extent the court records in this case include information bearing on this topic, they are directly relevant to the Institute's study and could provide valuable information regarding the performance of the ET-Plus and Defendants' actions with regard to the federal government and state DOTs.

19. The Safety Institute's interest in access to the sealed court records in this case is further demonstrated by advocacy undertaken by the President of The Safety Institute's Board of Directors, Sean Kane. In addition to this role, Mr. Kane is the Editor of *The Safety Record*. Established in 2005, *The Safety Record* is a publication on motor vehicle, highway, and consumer product safety. *The Safety Record's* objective is to educate the press, policymakers, and the general public about motor vehicle, highway, and product safety issues.
20. *The Safety Record's* frequently visited website, <http://www.safetyresearch.net/the-safety-record-blog/>, reports the latest developments and provides in-depth information, commentary and analysis about a wide variety of motor vehicle, highway, and product safety issues. *The Safety Record's* website also posts documents received in response to various Freedom of Information requests, along with accompanying analysis and commentary, and provides the public with context around government rulemaking, investigations, and legislation in the areas of safety.
21. As Editor of *The Safety Record*, Mr. Kane has published articles specific to the lack of government transparency as it relates to documents surrounding alleged defects associated with the Trinity ET-Plus end terminal. [Http://www.safetyresearch.net/blog/](http://www.safetyresearch.net/blog/)

articles/safety-research-strategies-sues-fhwa-guardrail-documents;

[Http://www.safetyresearch.net/blog/articles/srs-sues-florida-dot-guardrail-docs](http://www.safetyresearch.net/blog/articles/srs-sues-florida-dot-guardrail-docs). In

addition, Mr. Kane and his company, Safety Research & Strategies, has sued the U.S. Department of Transportation and the Florida Department of Transportation related to unwarranted records withholding pertinent to the design, development, acceptance, testing and related communications surrounding the safety and efficacy of the Trinity ET-Plus end terminals.

22. In short, The Safety Institute and its Board Members feel strongly that documents filed under seal in this action are of immediate importance to the motoring public. Motorists operate their vehicles on roadways nationwide upon which these terminals are equipped. We have an opportunity and an obligation in support of our organization's mission and on behalf of the motoring public and their passengers to protect them from undue harm. If these records shed any light on the safety record of the ET-Plus, the public has a right to know, and the Institute is committed to ensuring that any such information is used to shed light on this important public safety issue.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: August 14, 2014



Jamie Schaefer-Wilson,
Executive Director, The Safety Institute