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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X		
In re	:	Chapter 11
	:	
MOTORS LIQUIDATION COMPANY, et al.,	:	Case No.: 09-50026 (REG)
f/k/a General Motors Corp., et al.	:	
	:	(Jointly Administered)
Debtors.	:	
	:	
-----X		

**OBJECTION TO GENERAL MOTORS LLC’S MOTION TO ENFORCE,
PURSUANT TO 11 U.S.C. 105 & 363, THE COURT’S JULY 5, 2009
SALE ORDER AND INJUNCTION AGAINST PLAINTIFFS IN
PRE-CLOSING ACCIDENT LAWSUITS**

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TO THE HONORABLE COURT:

COME NOW Doris Powledge Phillips, f/k/a Doris Powledge, Plaintiff, Individually and as Representative of the Estate of Adam Powledge, deceased, the Estate of Rachel Powledge, deceased, the Estate of Isaac Powledge, deceased, the Estate of Christian Powledge, deceased, and the Estate of Jacob Powledge, deceased (collectively, “Plaintiffs”), complaining of General Motors Corporation n/k/a Motors Liquidation GUC Trust (“Old GM”), Respondent-Defendant, and Defendant General Motors LLC (“New GM”) (collectively, “GM”), filing Plaintiffs’ Objection to General Motors LLC’s Motion Pursuant to 11 U.S.C. 105 and 363 to Enforce the Court’s July 5, 2009 Sale Order and Injunction Against Pre-Closing Accident Lawsuits and respectfully show the following:

“...[I]t is better to be guilty of manslaughter than of fraud about what is fair and just.”

INTRODUCTION

The Crash—

1. On October 18, 2005 a father and his four children were killed in a fiery one-car accident. That morning Adam Powledge was taking his children to school. As they drove along I-45 in Houston, Texas Adam lost control of his vehicle, a 2004 Chevy Malibu, and drove onto a grassy median. Unable to control the vehicle, the Malibu drove in an almost perfectly straight line until it was cut into two parts, down the middle, by a metal pole located at the center of the median. The car erupted in fire with Adam and the little children inside. These lives were unnecessarily taken from us because of GM’s negligence and gross negligence.



The photographs taken just after the accident reveal that, while the airbags did not deploy, the airbag failure was not the cause of the crash.

Underlying Litigation—

2. On September 6, 2007 Dori Powledge filed suit, *Powledge, et al. v. General Motors Corp.*, Cause No. 07-CV-1040, alleging that an electrical malfunction caused a loss of control of the vehicle. During the litigation GM dismissed Plaintiffs' claims because "[her] theories require failures of both the cruise control and brake systems, as well as the inability to steer." Such a significant malfunction, according to GM, was implausible given that "[Plaintiffs] cannot demonstrate any defect **and any alleged 'recall'**" of the 2004 Malibu that would have contributed to the accident.

3. A cornerstone of GM's legal defense to the 2007 lawsuit was a particularly nefarious accusation—**that Adam Powledge was not the victim of a GM defect, but was a murderer and intended to kill himself and his children.**¹ This defense was used throughout the litigation as a means of undermining Plaintiffs' case. While Plaintiffs have no doubt that the vehicle was not intentionally crashed by Adam Powledge, GM's (both Old and New) concealment of the issues with the vehicle described below gave such a preposterous theory a shred of credibility that it never deserved. If only because, in the absence of knowledge about the defects in the vehicle that were known to GM at the time, it is hard to fathom why a vehicle would behave the way it did. Of course, knowing what Plaintiffs know about the defects today, it is certain that design defects, known to GM at the time, caused, or at a minimum significantly contributed to, this tragic event.

Recalls of 2014—

4. We now know that GM was aware that the power steering system on the 2004 Malibu—identical to the 2004-2007 Saturn Ion and part of the March 31, 2014 recall—could cause a loss of control. But GM put off a recall and never disclosed this information during the 2007 litigation. And now, in the days since Plaintiffs' Original Bill of Review and Original Petition were filed, we know of even more defects. Below is

¹ Exhibit A, correspondence from A. Zambrano dated July 27, 2010 at pp. 7; Exhibit B, *Expert Report of S. Syson* dated July 14, 2008, pp. 5 - 15; and Exhibit C, *Rebuttal Assessment Report of S. Syson*, pp. 2, 5, and 6; *See also* Exhibit D, *Report of B. Bowman* dated February 18, 2009, pp. 3.

a chart of all GM recalls affecting Plaintiffs' 2004 Malibu that were the subject of this crash:

Recall Date	Model	Reason(s)	Hazard	What is the recall
5/15/14	2004-2012 Malibu	Increased resistance in the Body Control Module (BCM). This condition can cause brake lamp failure, cruise control failure, traction control failure, braking assist failure, electronic stability control failure	Any of the failure conditions increase the risk of a crash	GM will notify owners and dealers, attach wiring harness to BCM with a spacer, apply dielectric lubricant to both the BCM and harness connector, and will relearn the brake pedal home position
3/31/14	2004-2006 Malibu	Possible loss of electric power steering (EPS) assist could occur at any time while driving	If power steering is lost, greater driver effort required to steer at low speeds, increasing the risk of a crash	At time of recall, parts to fix problem were not currently available. Around April 28, 2014, GM will send bulletin for owners.
6/30/14	1997-2004 Malibu	Unintended ignition key rotation	Undefined	

Given the recent trickle of recalls involving the 2004 Malibu, Plaintiffs would not be surprised to see additional recalls announced. Furthermore, given GM's past dishonesty, discovery may yield even more concealed defects.



The photo above shows the Malibu's tire track marks as it headed straight into the metal pole.

5. While the Cobalt/Ion/Saturn ignition switch recall in February has received greater media attention, the Malibu is now the most recalled GM vehicle for 2014.² According to GM, the 5/15/14 recall listed above is the result of a “problem with the wiring harness associated with the brake lamp.”³ This can cause “the vehicles’ brake lights to illuminate when the brakes aren’t being engaged, or, on the other hand, **prevent the lights from illuminating when the driver hits the brakes.**”⁴ Importantly for

² CNNMoney.com, “Chevy Malibu tops GM’s recall parade,” May 23, 2014, <http://features.blogs.fortune.cnn.com/2014/05/23/chevy-malibu-tops-gms-recall-parade/> (last visited 5-30-14).

³ Yahoo!News, “Huge GM Recall: Chevrolet Corvette, Malibu, Silverado, Tahoe, Cadillac CTS, GMC Sierra, More,” May 15, 2014, https://autos.yahoo.com/news/huge-gm-recall-chevrolet-corvette-141857653.html?soc_src=mediacontentsharebuttons (last visited 5-30-14).

⁴ *Id.*

Plaintiffs' claims, the problem can also "disable important systems like **electronic stability control, traction control, panic braking assist, and cruise control.**"⁵ These systems were the primary areas that we know Plaintiffs' Malibu demonstrated a lack of control prior to the crash.⁶

6. We also know that the reason why witnesses to the crash—whose testimony was heavily relied upon by GM to support GM's murder-suicide defense—testified that prior to the crash Plaintiffs' Malibu's "brake lights never came on..."⁷ But the reason why the brake lights never came on was because the problems with the "wiring harness associated with the brake lamp" can "**prevent the lights from illuminating when the driver hits the brakes.**" But rather than GM disclosing this known electrical issue in, at the latest, 2009 or 2010 as the litigation was ongoing, the lack of brake lights being observed *was used as the basis for accusing Adam Powledge of murdering his children.*

GM's Fraud—

7. When did GM know about this potentially fatal flaw concerning the wiring harness? In 2009, during the height of the 2007 litigation.⁸ From USA Today:

⁵ *Id.*

⁶ Ex. B, pp. 23. Plaintiffs' expert from the 2007 Lawsuit concluded a "mechanical/electrical or environmental failure in the design" was a contributing factor to the crash. Additionally, the expert concluded that the "brake system, throttle control, vehicle speed control and cruise control system is defectively designed..." These are the exact components that are impacted by GM's most recent Malibu recall and that effected Plaintiffs' 2004 Malibu.

⁷ Ex. A, pp.2 (*citing* L. Gilman's deposition, 19:4-20).

⁸ USA Today, "*Documents show another delayed GM recall,*" May 29, 2014, <http://www.usatoday.com/story/money/cars/2014/05/29/another-delayed-gm-recall/9740545/> (last visited 5-30-14).

The documents, filed Thursday, show that [in 2009] GM recalled about 8,000 Pontiacs from the 2005 and 2006 model years because the brake lights might not work when the driver stepped on the brake pedal. But the company didn't recall later-model G6s or the Chevrolet Malibu and Saturn Aura until three weeks ago. The cars are nearly identical.

USA Today, "*Documents show another delayed GM recall*," May 29, 2014.

8. As noted above, the problem not only impacts the brakes, but "can affect some of a car's other functions. If the cruise control is on, drivers may have to push harder on the brake pedal to get it to disengage.... Also, the cars' traction control, electronic stability control and panic braking assist features, all designed to prevent crashes or lessen their severity, could become disabled."⁹ None of this information was provided to Plaintiffs during the 2007 Litigation, but was withheld.

9. Then, on June 30, 2014, GM announced another recall related to the subject Malibu, an ignition switch recall similar to GM's February recall.¹⁰ In addition to hindering the braking and steering systems, the ignition switch defect will prohibit the airbags from deploying.¹¹ By all accounts, Plaintiffs' Malibu did not deploy airbags prior to impact.

10. Now, years later, after bankruptcy forced Plaintiffs and other tort plaintiffs to accept penny-on-the-dollar settlements, GM finally disclosed this information—as it continues to trickle out—that supports Plaintiffs' theory of the case. Rather than a lack of

⁹ *Id.*

¹⁰ Wall Street Journal, *GM to Recall 8.45 Million More Vehicles in North America*, June 30, 2014, <http://online.wsj.com/articles/gm-to-recall-7-6-million-more-vehicles-in-u-s-1404153705?cb=logged0.442486526677385> (last visited 7-6-14) ("The proposed fix is the same one the company once considered using to repair older model Chevrolet Cobalt compact cars and

evidence concerning “any defect and any alleged ‘recall,’” GM had mountains of evidence that demonstrate its drive-by-wire electrical systems—including the power steering, cruise control, and braking systems—were harming thousands of GM customers nationwide.

11. But both Old and New GM fraudulently concealed this information, and lied under oath regarding related electrical failures. In the course of this fraud, GM conspired in bankruptcy, waiting to disclose this information until well after the bankruptcy sale. In hindsight, the financial collapse of 2008-2009 created the perfect opportunity for GM to shed the many lawsuits it was facing as it actively concealed key evidence. Certainly it would be more difficult to justify a taxpayer-funded bailout if GM disclosed the truth—that it put profits ahead of safety.

12. For example, Exhibit D is a report by Bruce Bowman, a GM expert and former GM engineer utilized by GM in the 2007 Litigation, dated February 18, 2009. In the report Mr. Bowman states that there is nothing wrong with the brake system of the subject Malibu. We know that that statement is not accurate and was not accurate when made. Based on the referenced USA Today article quoted *supra*, GM had actual knowledge of the risks the 5/31/14 recall creates to “the cars’ traction control, electronic stability control and panic braking assist features.”¹²

other small cars, which later were found to have a defective ignition switch that when jarred could turn off power to air bags, power steering and power brakes.”).

¹¹ *Id.*

¹² USA Today, “*Documents show another delayed GM recall*,” May 29, 2014, <http://www.usatoday.com/story/money/cars/2014/05/29/another-delayed-gm-recall/9740545/> (last visited 5-30-14).

13. Additionally, the USA Today article highlights that GM was aware of this product defect as early as 2009 when “GM recalled about 8,000 Pontiacs from the 2005 and 2006 model years” with “nearly identical” electrical systems to the subject Malibu.¹³ But GM, when responding to Plaintiffs’ *Third Set of Requests for Production* in the 2007 Litigation, never mentioned anything related to the Pontiac recall or the Cobalt.¹⁴ Responses to these requests were never amended to include the Pontiac recall, or disclose information GM had in its possession at the time the request was made, but purposefully withheld the information.¹⁵ It should be noted that Plaintiffs’ underlying claims against GM were not resolved until August 9, 2010.

14. New GM, in its Motion to Enforce, claims that the power steering and BCM recall of 5/15/14 are “inapplicable” to Plaintiffs’ Malibu.¹⁶ Plaintiffs, this Court, and the public writ large can no longer accept GM’s unsupported statements of purported fact.¹⁷ Much like New GM’s buckshot approach to litigating, New GM has no idea what is true and what is false.

¹³ *Id.*

¹⁴ Exhibit E, *Defendant General Motors Corp.’s Amended Objections and Responses to Plaintiffs’ Third Set of Requests for Production*, pp. 5-6.

¹⁵ Reuters, “Two GM lawyers, quality control executive among those pushed out over switch,” June 9, 2014, <http://www.reuters.com/article/2014/06/09/us-gm-recall-dismissed-idUSKBN0EK1XY20140609> (last visited 7-7-14).

¹⁶ *New GM’s Motion to Enforce*, Doc. No. 12807, pp. 18.

¹⁷ Consumer Reports, “GM recall puts bad ignition switches back in some cars: Automaker issues a new recall to fix its recall,” August 8, 2014, <http://www.consumerreports.org/cro/news/2014/08/gm-recall-puts-bad-ignition-switches-back-in-some-cars/index.htm> (last visited 8-14-14).

FACTUAL BACKGROUND

15. On October 18, 2005 Adam Powledge was driving his four children, Isaac, Rachel, Christian, and Jacob to school in the family's 2004 Chevrolet Malibu. As Adam approached the 4600 Block of I-45 North in Houston, Texas, near the intersection of Holland Road, he lost control of the vehicle. Witnesses described the Malibu traveling at a high rate of speed, even as other vehicles began slowing for approaching traffic. As the Malibu drove off the interstate and onto the median it made a straight-line that was so direct in its trajectory that there is one explanation for its course—a vehicle malfunction.

16. Adam, Rachel, Isaac, Christian and Jacob died at the scene. The wreckage was so severe that valuable evidence was lost. As traumatic as the accident was, GM's subsequent actions have caused further trauma to Plaintiffs.

17. On September 6, 2007 Plaintiffs filed suit against GM asserting that the crash was the result of an electrical malfunction.¹⁸ During the course of the litigation GM blamed Adam for the crash—GM's primary legal defense was that Adam committed murder-suicide and acted purposefully. On June 1, 2009 GM entered bankruptcy. A government orchestrated purchase allowed New GM to purchase assets and avoid liabilities of Old GM.

18. Plaintiffs were ordered to mediate, and subsequently agreed to a confidential settlement based on a fundamental belief—that GM was litigating in good faith and adhering to due process by producing relevant, discoverable evidence and

¹⁸ Exhibit E, Plaintiffs' Fourth Amended Petition, Powledge, et al v. General Motors Corp., Cause No. 07-CV-1040 (July 3, 2008).

testifying truthfully while under oath. That belief was misplaced. Rather than conducting discovery in a forthright manner, GM was committing fraud by withholding key documents concerning the electrical and mechanical systems of Plaintiffs' Malibu.

19. On March 31, 2014 GM notified the National Highway Safety Administration of a safety recall that GM initiated due to a defect in the power steering system. Plaintiffs' 2004 Chevy Malibu driven by Adam on October 18, 2005 was included in the list of vehicles that were recalled. Then, on May 15, 2014 GM recalled Plaintiffs' Malibu concerning a "problem with the wiring harness associated with the brake lamp."¹⁹ This can cause "the vehicles' brake lights to illuminate when the brakes aren't being engaged, or, on the other hand, **prevent the lights from illuminating when the driver hits the brakes.**"²⁰ Importantly for Plaintiffs' claim, the problem can also "disable important systems like **electronic stability control, traction control, panic braking assist, and cruise control.**"²¹ And now, on June 30, 2014 GM made another recall concerning the 2004 Malibu concerning the ignition switch.

20. Contrary to GM's smears and accusations, Adam did nothing wrong—he was the innocent victim of GM's negligence, gross negligence and cover-up. Plaintiff and her family, as they mourned this unspeakable loss, had to contend with these baseless accusations. GM knowingly made these accusations as it withheld evidence that proves Adam Powledge did not murder his children. GM's conduct—and its choice to blame

¹⁹ Yahoo!News, "Huge GM Recall: Chevrolet Corvette, Malibu, Silverado, Tahoe, Cadillac CTS, GMC Sierra, More," May 15, 2014, https://autos.yahoo.com/news/huge-gm-recall-chevrolet-corvette-141857653.html?soc_src=mediacontentsharebuttons (last visited 5-30-14).

²⁰ *Id.*

²¹ *Id.*

Adam and conceal evidence that proves Plaintiffs' claims—was intentional and reckless. The conduct under the circumstances was extreme and outrageous, causing Plaintiff Doris Powledge Phillips extreme emotional distress. These constitute Plaintiffs' claims, and they did not exist prior to the Sale Order. Plaintiffs have been victimized twice. Once by Old GM's negligence, and another time by New GM's deceit and dishonesty—or in legal parlance **fraud**.

SUMMARY OF THE ARGUMENT

21. GM committed fraud and concealed material evidence during the 2007 litigation. Now GM asks that this Court facilitate and sanction its fraud. Our judicial system's credibility is at stake. If GM's fraudulent conduct is excused through enforcement of the Sale Order, and without the benefit of discovery, a dangerous precedent is set. Litigants will be encouraged to suppress or misrepresent evidence, hoping to ride out litigation. Fraudulent concealment in bankruptcy will become routine based on a cold-hearted cost benefit analysis. This Court must set the price for fraud as high as possible.

ARGUMENT

I. The Sale Order does not cover post-sale fraud claims.

22. New GM argues that Plaintiffs' underlying accident and the alleged product defect claim is subject to the Sale Order. But that is not Plaintiffs' claim today. Plaintiffs' fraud claim concerns injuries that she was completely unaware of until just this year. GM was orchestrating a fraud, withholding documents, and undermining Plaintiffs' ability to

meet the evidentiary burdens of her product defect case. GM's fraud facilitated a settlement based on lies.

23. Like the plaintiffs in *In re Lawrence*, Plaintiffs' claims are "not directed at the sale, but damages arising from non-disclosure of material information known to the defendants..." *In re Lawrence*, 293 F.3d 615, 624 (2d Cir. 2002). And like that court "this Court [should find] that defendants are engaging in tactics to obfuscate the record ... [i]f there were misrepresentations at the time of the sale, this Court approved such sale not fully knowing all the salient facts" and Plaintiffs' fraud claims should proceed. *Id.*

24. In *Lawrence*, the plaintiffs complained that "they should not have to forfeit their right to press their [fraud] claims simply because they sold their shares in bankruptcy court..." *Id.* at 621. In that case the district court refusal to recharacterize the plaintiffs' claims as a collateral attack on the sale order under Rule 60(b)(3) was reversed because such an outcome would "severely limit the recourse available to plaintiffs who uncover a fraud more than a year after the purchase in question..." *Id.* The *Lawrence* plaintiffs were entitled to attack the sale order due to the fact that "[t]he alleged fraud was not, and could not with due diligence have been, discovered during the original Sale Order proceedings." *Id.* at 625. And while the holding in *Lawrence* concerns Rule 60(b)—that includes a 1-year limitation—Plaintiffs' injuries were "inherently undiscoverable [because the] nature [of GM's fraud made it] unlikely to be discovered within the prescribed limitations period despite due diligence." *TIG Ins. Co. v. Aon Re, Inc.*, 521 F.3d 351, 358 (5th Cir. 2008)(quoting *S.V. v. R.V.*, 933 S.W.2d 1, 6 (Tex. 1996)).

25. Plaintiffs' claims were not subject to the Sale Order—they are the result of GM's conduct, and the discovery of that conduct—post Sale Order.

II. New GM's "nothing-to-see-here" defense is fanciful.

26. Plaintiffs' fraud claim did not exist prior to the Sale Order, as GM (both Old and New) fraudulently induce Plaintiffs into an unfair settlement and the public and this Court into embracing a sale that was rotten at its core, based on lies, half-truths, and glaring omissions. Looking back, everyone can appreciate why "[i]t was an absolute condition of New GM's purchase offer that New GM not take on all of Old GM's liabilities."²² New GM—comprised of the same people that concealed the defects in Plaintiffs' vehicle—appreciated how badly New GM needed to avoid the future consequences of presale accidents.

27. New GM's Motion to Enforce suggests business as usual. Plaintiffs' counsel "continue to file (sic) lawsuits against New GM [] as if the Sale Order and Injunction does not exist..."²³ New GM's argument requires a level of cognitive dissonance that is mind-numbing in its scope: We—the debtor and buyer in a protected, government backed and financed sale—colluded, benefiting from fraudulently concealed information. Our fraud ensured the trivialization of lives destroyed by GM's deceit, and allowed the underpaying of meritorious product defect claims. But it is "[a] critical element of protecting the **integrity of the bankruptcy sale process** [] to ensure that New GM, **as a good faith purchaser for substantial value**, receive[s] the benefit of its Court-

²² *New GM's Motion to Enforce*, Doc. No. 12807, pp. 4.

²³ *Id.* at 3.

approved bargain.”²⁴ So... Judge, please rubber-stamp our fraud. This is New GM’s position. That New GM can use “integrity” to describe its insider purchase of assets minus liabilities while committing a fraud on the Court and Plaintiffs is remarkable.

28. GM has lost sight of the fact that the Sale Order was to allow a seemingly honest, yet financially struggling, enterprise to survive as a pillar of the American economy. The Section 363 sale was never intended to be a vehicle to avoid the consequences for years of abuse, neglect, and conscious indifference to the American consumer.

III. *Archer v. Warner*’s expansive language is instructive—Plaintiffs’ claims should proceed.

29. In *Archer v. Warner* the Supreme Court considered whether a creditor could pursue a fraud claim, even after reaching a settlement.²⁵ Citing to *Brown v. Felsen*, 442 U.S. 127, 129, 99 S. Ct. 2205, 2208, 60 L. Ed. 2d 767 (1979), the Supreme Court held that while “the Archers’ settlement agreement and releases may have worked a kind of novation, [] that fact does not bar the Archers from showing that the settlement debt arose out of ‘false pretenses, a false representation, or actual fraud...’”²⁶ “‘Congress intended the fullest possible inquiry’ to ensure that ‘all debts arising out of’ fraud are ‘excepted from discharge,’ **no matter what their form.**”²⁷

30. GM’s Sale Order is *sui generis*, for certain, but the extreme nature of GM’s fraud and conspiracy requires a unique remedy. At a minimum, Plaintiffs are entitled to

²⁴ *Id.* at 5.

²⁵ *Id.*

²⁶ *Id.*

EXHIBIT

A

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July 27, 2010

**MEDIATION STATEMENT ON BEHALF OF
MOTORS LIQUIDATION COMPANY
SUBJECT TO RULE 408 – NOT ADMISSIBLE AS EVIDENCE**

Mary Burdin, Esq.
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4514 Cole Avenue
Suite 1450
Dallas, Texas 75205-4181

Re: *In re Motors Liquidation Company, et al. f/k/a General Motors Corp., et al.*, Case No. 09-50026 [Powledge Mediation]

Dear Ms. Burdin:

I. INTRODUCTION

Motors Liquidation Company (“MLC”) and its attorneys recognize that the Claimants have suffered a great personal tragedy. However, there is no credible evidence that the Powledge crash was caused by any vehicle defect or malfunction. As sad as the underlying facts may be, MLC is confident that a jury would find that the vehicle was not the cause of the accident. Even if liability could somehow be established, Claimants’ inflated settlement demands suggest that they believe—incorrectly—that there is punitive damages exposure in this case. In fact, the Claimants cannot recover punitive damages against MLC, both because the bankruptcy court would not allow it and because there is no factual support for it. Further, if this case cannot be settled at mediation, it will likely not be litigated in Galveston, Texas as the Claimants suggest. Rather, MLC will ask for the case to be transferred and litigated in the United States District Court for the Southern District of New York.

Importantly, this case was previously settled in principle for far less than the Claimants’ latest demand. Specifically, in mid-April 2009, following the deposition of Claimants’ expert and provision of the reports and test data prepared by defense experts, a settlement was negotiated with Claimants’ then counsel in which it was agreed that Claimants would settle all claims for the sum of \$375,000. Claimants ultimately backed out of the agreed settlement and

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hired new counsel. While Claimants now distance themselves from such agreement, it is important to note that the expert report of Stephen Syson, upon which Claimants rely for virtually every assertion made in their Opening Statement, is exactly the same analysis that was presented before the \$375,000 settlement agreement was reached. This is an important consideration to MLC's posture and position for mediation.

There is no doubt that a judge or jury will sympathize with the Claimants and their loss, but they will also require them to prove the vehicle was defective. To do so, there would need to be a finding that the cruise control system malfunctioned, the brakes failed, the brake electrical disconnect switch failed, and the steering stopped working, *all* at the same time. When consideration is given to how the vehicle actually works, none of these claims are credible, much less all of them.

II. FACTUAL BACKGROUND

A. The Accident

On October 18, 2005, Adam Powledge ("Powledge"), was driving his 2004 Chevrolet Malibu, VIN 1G1ND52F34M598780,¹ at approximately the 4600 block of Interstate 45, and near the intersection of Holland Road, in Texas City, Galveston County, Texas. (See Pls. Fourth Am. Pet., attached hereto as Exhibit A, ¶ 1.) According to witnesses, Mr. Powledge sideswiped another vehicle before going off the road and onto the grass shoulder/median between the freeway and the access road. He entered the median at a shallow angle, then came back down into the center of the median, where he drove a considerable distance in a straight line, at high speed, directly into a large support post for an overhead highway sign. (See photographs attached as Exhibit B.)

Witnesses say Mr. Powledge made no apparent attempt to maneuver the Malibu back onto the road or to slow down or stop. Linda Paige Gilman, the driver of the car that was sideswiped, testified in her deposition that she watched the car the whole time, and the brake lights never came on. (See Gilman Dep. 19:4-20, attached hereto as Exhibit C.)

Due to the speed and location of the impact, the Malibu split in half and caught fire. All occupants died from blunt force trauma, including head injuries and multiple fractures. It is unknown why Mr. Powledge drove into the pole without steering or braking to avoid it. What is

¹ Plaintiff Doris A. Powledge ("Mrs. Powledge") purchased the Malibu used from Norman Frede Chevrolet in Houston, Texas on January 21, 2005. At the time, the vehicle had 22,682 miles on it. The vehicle previously was registered in California to Alamo Rent-A-Car, which had purchased the vehicle new from Prospect Motors in Jackson, California. At no time during its history of usage did anyone report a problem with the acceleration, steering, or braking control systems of the car.

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known is that this tragic incident cannot be explained as the result of a vehicle defect or malfunction.²

B. The Petition

On September 21, 2007, Plaintiffs Mrs. Powledge, along with Mr. Powledge's two surviving children Austin Powledge and Amber Powledge, and Mr. Powledge's mother Mary Lou Powledge ("Plaintiffs" or "Claimants") on behalf of themselves and as representatives of the estates of Mr. Powledge, Jacob Powledge, Christian Powledge, Rachel Powledge, and Isaac Powledge filed their Original Petition and Request for Disclosure (the "Action"). On June 30, 2008, Plaintiffs filed their Fourth Amended Petition ("Petition") alleging that Defendant General Motors Corporation ("GM") was negligent "in the design, manufacture, assembly, marketing, and/or testing" of the Malibu and this negligence was the proximate cause of the fatal injuries to Mr. Powledge, Jacob, Christian, Rachel, and Isaac. (*See* Pet. ¶ 14.) Plaintiffs allege the following defects: (i) electrical, computer, and mechanical failures that allowed the vehicle's engine to race out of control; (ii) unwanted engine racing; (iii) unwanted engine acceleration; (iv) violations of GM's internal performance, reliability, and quality standards; (v) breach of implied warranties of fitness for a particular purpose and merchantability; and (vi) violations of FMVSS provisions and recommended guidelines set forth by SAE. (*See* generally Pet.)

The Petition alleges economic and non-economic damages for (i) disfigurement, conscious physical and emotional pain, torment, mental anguish, and/or emotional distress prior to death for the victims; (ii) loss of care, maintenance, support, services, advice, counsel, reasonable contributions of a pecuniary value, loss of companionship and society, loss of consortium, and mental anguish for Plaintiffs Mrs. Powledge and Austin, Amber, and Mary Lou Powledge; (iii) medical, funeral, and burial expenses for Plaintiff Mrs. Powledge; (iii) loss of inheritance for Plaintiffs Doris, Austin, and Amber Powledge; (iv) prejudgment and postjudgment interest; and (v) costs of suit.³

² Although the evidence will show that Mr. Powledge made no apparent attempt to maneuver the Malibu back onto the road or to slow down or stop, MLC does not now take the position that Mr. Powledge committed suicide. As noted in the report of expert witness Dr. Lighthall, Mr. Powledge could have experienced some kind of disabling medical event. He also could have inadvertently applied the wrong pedal, hitting the accelerator instead of the brake.

³ On June 3, 2010, Mrs. Powledge filed Plaintiff's Original Petition (the "DTPA Petition") against defendants Norman Frede, Norman Frede Chevrolet Co, Alamo Rent A Car LLC, G. Richard Wagner, and GM setting forth a claim under the Texas Deceptive Trade Practices Act in connection with the Action and claiming economic damages of \$200,000,000.00 and mental anguish damages of \$100,000,000.00. (*See* Pl's Original Pet., attached hereto as Exhibit D.) The filing of the DTPA Petition was directly in violation of the automatic stay provisions found at section 362(a) of chapter 11 of title 11 of the United States Code and MLC formally requested on June 25, 2010 that Mrs. Powledge withdraw the DTPA Petition. On July 9, 2010, Mrs. Powledge filed Plaintiff's Motion for Non-suit ("Motion for Non-suit") requesting that the District Court of the 10th Judicial District, Galveston County, Texas, enter a non-suit against GM without prejudice. (*See* Mot. for Non-suit, attached hereto as Exhibit E.)

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The former venue of the Action prior to the chapter 11 filing was the 10th Judicial District Court in Galveston County, Texas (the "Texas State Court"), and the Action was pending before the Honorable David E. Garner.

C. The Chapter 11 Filing

On June 1, 2009, GM commenced voluntary cases under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") before the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"). The bankruptcy stayed all proceedings relating to the Action. Shortly after filing, GM filed a motion to essentially sell its assets and transfer certain liabilities to Vehicle Acquisition Holdings, LLC, which has now changed its name to General Motors Company ("New GM"). New GM is a Delaware corporation. On July 5, 2009, the Bankruptcy Court issued an order approving the asset-sale motion ("Sale Order"). Liability for all claims or causes of action asserted in this Action against MLC have been retained by MLC.

On September 16, 2009, the Bankruptcy Court entered the Order Pursuant to Section 502(b)(9) of the Bankruptcy Code and Rule 3003(c)(3) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") Establishing the Deadline for Filing Proofs of Claim (Including Claims Under Bankruptcy Code Section 503(b)(9)) and Procedures Relating Thereto and Approving the Form and Manner of Notice Thereof establishing November 30, 2009 at 5:00 p.m. (Eastern) as the deadline to file proofs of claim against MLC based on prepetition claims.

On November 24, 2009, four proofs of claim based on the Action were filed by Angel Hagmaier, Esq. ("Hagmaier") with the Bankruptcy Court on behalf of Plaintiffs Mrs. Powledge and Amber, Austin, and Mary Powledge and assigned claims number 44614, 44615, 44616, and 44617 (the "Proofs of Claim"), each asserting a claim for \$250,000,000.

On February 23, 2010, the Bankruptcy Court entered the Order Pursuant to 11 U.S.C. § 1050(a) and General Order M-390 Authorizing Implementation of Alternate Dispute Procedures, Including Mandatory Mediation (the "ADR Order") [Docket No. 5037]. (See ADR Order, attached hereto as Exhibit F.) The ADR Order provides a mechanism whereby MLC can designate a claim for mediation by requesting that a Claimant "cap" their claim at a fixed amount. Specifically, the ADR Order states that "if the claim Amount Cap is accepted by [MLC], the Claim Amount Cap will become binding on the Designated Claimants, and the ultimate value of his or her Unliquidated/Litigation Claim will not exceed the Claim Amount Cap." (ADR Order (Ex. F) at 4-5.)⁴

⁴ If the "cap" is accepted by MLC, MLC may then be responsible for all or a portion of the fees and costs associated with any subsequent mediation, as consideration for the "cap" forever barring a claimant from seeking recovery above this "cap."

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Pursuant to the Bankruptcy Court's ADR Order, on March 23, 2010, Claimants sent their Capping Claim Letters to MLC. (See Mar. 23, 2010 Capping Claim Ltrs., attached hereto as Exhibit G.) On April 8, 2010, MLC sent a letter (the "April 8 Letter") accepting the cap offers (the "Claim Amount Cap") submitted in relation to this Action as follows:

Claim No. 44614	\$55,000,000
Claim No. 44615	\$5,000,000
Claim No. 44616	\$5,000,000
Claim No. 4417	\$5,000,000

(See Apr. 8 Ltr. attached hereto as Exhibit H.) The April 8 Letter made it clear that acceptance of these caps by MLC would result in permanent capping of the Action and the ultimate value of the Proofs of Claim could not exceed the Claim Amount Cap of \$70,000,000. (See Apr. 8 Ltr. (Ex. H) at 1 ("Please note that upon mailing of the ADR Notice, [MLC] will direct their claims agent to update the official claims register with the Claim Amount Cap listed above. This means that, pursuant to the ADR Order, the ultimate value of your claim(s) shall not exceed the Claim Amount Cap and **that you are forever barred from seeking recovery above the Claim Amount Cap.**") (emphasis in original).)

On April 15, 2010, MLC sent notice to Hagmaier (the "ADR Notice") submitting the Proofs of Claim to alternate dispute resolution pursuant to the procedures established by the ADR Order (the "ADR Procedures"). (See ADR Notice, attached hereto as Exhibit I.) The ADR Notice further made a settlement offer in the amount of an allowed general unsecured claim for \$750,000.

On May 13, 2010, Hagmaier rejected MLC's offer and made a counteroffer (the "Counteroffer") as follows:

Claim No. 44614	\$27,500,000
Claim No. 44615	\$5,000,000
Claim No. 44616	\$5,000,000
Claim No. 4417	\$3,000,000

(See May 13, 2010 Ltr., attached hereto as Exhibit J.) On June 1, 2010, MLC rejected the Counteroffer and designated the claims for nonbinding mediation. (See June 1, 2010 Ltr., attached hereto as Exhibit K and Mediation Notice, attached hereto as Exhibit L.)

D. The Claimants' Prior Settlement of Their Claims for \$375,000

Initially, Plaintiffs were represented by attorney E. Todd Tracy of Dallas, Texas, in association with Anthony G. Buzbee of Galveston, Texas. Mr. Tracy is a very well known, successful, and experienced attorney with a particular focus upon automotive product liability matters. Similarly, Mr. Buzbee is a well known, successful plaintiffs' attorney in the Galveston

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area. Following the deposition of Plaintiffs' expert and the exchange of the reports and test data prepared by defense experts (as discussed below), a settlement was negotiated with Mr. Tracy in which it was agreed that Claimants would settle all claims for the sum of \$375,000. This agreement was reached in mid-April, 2009. Although Mr. Tracy advised that he had been given full authority to negotiate a settlement, Mrs. Powledge refused to follow through with the settlement agreed to by counsel. On April 24, 2009, Mr. Tracy and Mr. Buzbee filed their Unopposed Motion to Withdraw as Counsel of Record. On June 25, 2009, the Texas Court granted the motion.

The chapter 11 filing occurred shortly thereafter. On June 15, 2009, Plaintiffs filed their Designation of Attorney-in-Charge appointing Hagmaier as new counsel for Plaintiffs. On June 25, 2010, Dax O. Faubus filed his Notice of Appearance with the Bankruptcy Court, joining in Hagmaier as counsel for the Plaintiffs. (See Notice of Appearance, attached hereto as Exhibit M.)

III. MLC'S POSITION

A. Claimants Cannot Prove That the Crash Was Caused By a Product Defect

Claimants' assertion that MLC is strictly liable for the car accident fails because Claimants cannot prove that the crash was caused by a product defect. (See Pet. ¶ 14.) Texas has adopted section 402A of the Restatement (Second) of Torts, providing for strict liability for the sale of dangerously defective products. See *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 788-89 (Tex. 1967). The essential elements of a strict liability case are: (1) a product defect; (2) that existed at the time the product left the manufacturer's hands; (3) the defect made the product unreasonably dangerous; and (4) the defect was a producing cause of plaintiff's injuries. See *Rourke v. Garza*, 530 S.W.2d 794, 798, 801 (Tex. 1975), *abrogated on other grounds by, Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007); *Parsons v. Ford Motor Co.*, 85 S.W.3d 323, 330 (Tex. App.—Austin 2002, pet. denied).

Here, Claimants have no evidence of any actual product defect. This is fatal to their case, under any theory of recovery. At best, Claimants have a set of mismatched *theories*, none of which have been substantiated by scientific evidence or testing on the part of their expert, and all of which have either been rebutted by videotaped testing performed by MLC, or disavowed in Claimants' own expert's deposition testimony.

Numerous entirely independent defects are alleged in Claimants' effort to make out a claim that the car was somehow responsible for this tragic incident. For all of these claims, Claimants rely upon the report of Mr. Stephen Syson (the "Claimants' Expert"). What they overlook is that the Claimants' Expert gave a deposition at which he admitted that he had no actual evidence to support the assertions contained in his report. Claimants further ignore the fact that the Claimants' Expert's theories were rebutted by actual vehicle testing. The testing is described in detail in the reports of four defense experts: (1) electrical engineer David G.

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McKendry's ("McKendry") report addressed throttle, acceleration and cruise control issues; (2) mechanical engineer Bruce R. Bowman's ("Bowman") report addressed brake related issues; (3) electrical engineer Karl Stopschinski's ("Stopschinski") report addressed cruise control electronics and accident reconstruction; and (4) biomechanics expert Dr. James Lighthall's ("Lighthall") report evaluated biomechanics and injury mechanism issues. The McKendry report is attached as Exhibit N; the Bowman report is attached as Exhibit O; the Stopschinski report is attached as Exhibit P, and the Lighthall report is attached as Exhibit Q.

The Claimants' Expert's theories require failures of both the cruise control and brake systems, as well as the inability to steer. As explained in the expert reports of Mr. McKendry and Mr. Stopschinski, the cruise control design requires that multiple conditions be met before it will engage at all. Testing done by Mr. Bowman shows that the brakes are able to stop the car even with the throttle fully applied. Further, the application of the brake pedal cuts off power to the cruise control. It does this through a brake switch that is entirely separate from the cruise control system. So, at a minimum, Claimants' contentions require an unexplained and electronic failure in the cruise control electronics *and* a complete failure of the brakes *and* a failure of the brake switch. These are three separate and distinct systems.

Claimants' Expert further claimed that in the process of driving through the median, the right front wheel hit a concrete culvert, deflating the tire and denting the wheel rim. Claimants included a photograph of the culvert in their Opening Statement. Mr. Stopschinski's report shows that the raised edge of the culvert is only a couple of inches high. The raised edge is far too minimal to puncture a tire and dent a steel wheel rim. Further, Mr. Bowman performed a videotaped demonstration with an exemplar vehicle showing that steering control is maintained with a deflated front tire and that a vehicle can easily be steered through similar grassy terrain in this condition.

Additionally, despite Claimants' arguments otherwise, the fact that the brake pedal was found to be bent after the crash does not establish why it is bent. The brake pedal deformation is readily explainable as a result of impact damage. (*See* report of Mr. Stopschinski (Ex. P).) Further, the brakes are a mechanical/hydraulic system, not an electronic system. Ineffectiveness of the brakes would require a separate, independent malfunction—separate from whatever is speculated to have caused the vehicle to accelerate. (*See* report of Mr. Bowman (Ex. O).)

Finally, Mr. Bowman did a test in which he measured the force required to bend an exemplar brake pedal, and provided the results of that test to Dr. Lighthall, a biomechanics expert. Dr. Lighthall reviewed the autopsy reports and Mr. Bowman's measurement of the force needed to bend a brake pedal. He reported that the force level sufficient to bend the brake pedal would have caused an ankle fracture that was not found during the autopsy of Mr. Powledge. The brake pedal is merely one of many parts of the car that were bent and distorted by the violent crash.

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Accordingly, Claimants' claims fail because they cannot demonstrate that there was any defect in the vehicle. *See Rourke*, 530 S.W.2d at 798; *Parsons*, 85 S.W.3d at 330.

Moreover, Claimants' reliance on alleged vehicle recalls and consumer complaints is not persuasive. Claimants' Opening Statement, in the section titled "The Defective Car," places great emphasis upon a list of recalls taken from the National Highway Traffic Safety Administration ("NHTSA") website and upon complaints allegedly made to the NHTSA by drivers or passengers of other vehicles. None of this information is admissible in court, much less persuasive. The reliance upon recalls is entirely misplaced. (*See* Opening Statement at 8 and attachments C and D.) Claimants neglect to mention that Claimants' Expert himself admitted under oath at deposition that not a single one of the recalls applies to the car at issue. (*See* Dep. of Stephen Syson, 18:6-12, excerpts attached hereto as Exhibit R.) The recalls cited by the Claimants' Expert are simply irrelevant and would not be admissible at trial.

Similarly, statements allegedly made by other consumers are unreliable, inadmissible hearsay. This is well established under Texas law:

Complaint letters in a manufacturer's files may be true, but they also may be accusatory and self-serving; they are rarely under oath and never subject to cross-examination. As they are necessarily out-of-court statements, they are hearsay if offered to prove the truth of the assertions therein – that the incidents complained of occurred as reported . . . Thus, consumer complaints in a company's files are generally hearsay within hearsay, and require their own exception in addition to that for business records generally.

Nissan Motor Co. Ltd. v. Armstrong, 145 S.W.3d 131, 139-140 (Tex. 2004). While the law grants certain exemptions to the hearsay rule to "data, findings, and reports" made by government agencies, those exemptions do not apply to "out-of-court complaints" sent to the government from third parties who are not under oath. *Id.* at 142 (emphasis added). Thus, because Claimants cannot demonstrate any defect and any alleged "recalls" or consumer statements are irrelevant and inadmissible, Claimants' claims will fail at trial.

B. Plaintiff's Burden of Proof in an Unintended Acceleration Case

It is important to note that Plaintiffs will bear the burden of proof at trial. The proof required in an unintended acceleration case has been clearly stated by the Texas Supreme Court:

In all [unintended acceleration] cases, it was not enough that a vehicle accelerated when claimants swore they had done nothing. Instead, we have consistently required competent expert testimony and objective proof

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that a defect caused the acceleration. The courts of appeals have done the same, holding liability cannot be based on unintended acceleration alone, on lay testimony regarding its cause, or on defects not confirmed by actual inspection.

Nissan Motor Co. Ltd., 145 S.W.3d at 137 (footnotes omitted).

These requirements are not peculiar to unintended acceleration cases. We recently held in *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600-01 (Tex. 2004)]that an engine fire in an older vehicle was not evidence that the vehicle was defective; there were simply too many potential causes to assume from the one that the other must have been the culprit. Instead, we held that a specific defect must be identified by competent evidence **and other possible causes must be ruled out.**

Nissan Motor Co. Ltd., 145 S.W.3d at 137 (footnotes omitted; emphasis added).

These requirements are especially compelling in unintended acceleration cases. Not only are there many potential causes (from floor mats to cruise control), but one of the most frequent causes (inadvertently stepping on the wrong pedal) is untraceable and unknown to the person who did it.

Nissan Motor Co. Ltd., 145 S.W.3d at 137 (footnotes omitted; emphasis added). In essence, the claimants are trying to bootstrap the fact that an accident occurred into proof of a product defect. That is flatly unacceptable under Texas law:

Accordingly, we again affirm that the mere occurrence of an unintended acceleration incident is not evidence that a vehicle is defective.

Nissan Motor Co. Ltd., 145 S.W.3d at 137 (footnotes omitted; emphasis added).

C. Comparative Fault Will Reduce or Bar Any Recovery

Even if Claimants could prove that MLC was somehow strictly liable or negligent for the car accident—and they cannot—their claims will be barred by the doctrine of comparative fault. Texas law applies “modified” comparative fault principles that diminish wrongful death recovery based on negligence of plaintiff’s decedent. *See Gen. Motors Corp. v. Sanchez*, 997 S.W.2d 584, 594 (Tex. 1999). A plaintiff’s recovery is barred completely if he or she bears more than 50% of the responsibility. *See Tex. Civ. Prac. & Rem. Code* § 33.001.

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Under the facts of this case, there is ample evidence from which it could be found that Mr. Powledge was negligent. Eye witness, Linda Paige Gilman, testified in her deposition that she watched the Powledge car the whole time from when it passed her until it hit the overhead sign support pole. The car drove in a straight line into the pole, and she is “absolutely certain” that the brake lights never came on. (*See* Dep. of Linda Paige Gilman, 19:4-20:1, Ex. C.) The evidence will also show that after the crash, the throttle was found to be held in an open position. Claimants’ own expert conceded when his deposition was taken that, at best, the condition of the throttle post-crash only proves the throttle was applied at impact. (*See* Dep. of Stephen Syson, 117:1-18, Ex. R.) This is exactly what would occur if the driver’s foot was on the gas pedal at impact. This evidence supports the conclusion that the crash was caused entirely by driver error. At the very least, it constitutes comparative fault that would reduce or bar recovery.

D. Claimants Will No Longer Have Access to a “More Favorable” State Forum

Claimants imply that if mediation is not successful, they will benefit from a favorable state court forum—the Texas Court. However, any determination regarding the allowance or disallowance of Claimants’ claims is a core proceeding to be determined by the Bankruptcy Court, not the Texas Court.

Cases or proceedings “arising under” or “arising in” a case under title 11 are considered core proceedings.⁵ By filing a proof of claim, a creditor renders his claims core proceedings and necessarily becomes a party under the bankruptcy court’s core jurisdiction and submits himself to the “equitable power of the bankruptcy court to disallow its claim.” *Gulf States Exploration Co. v. Manville Forest Prods. Corp. (In re Manville Forest Prods. Corp.)*, 896 F.2d 1384, 1389 (2d Cir. 1990) (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989)); *see S.G. Phillips Constructors, Inc. v. City of Burlington (In re S.G. Phillips Constructors, Inc.)*, 45 F.3d 702, 705 (2d Cir. 1995). (*See* Proofs of Claim, attached hereto as Exhibit S.)

⁵ Although section 157(b)(2) of title 28 of the United States Code specifically excludes from the definition of core the “liquidation or estimation of contingent or unliquidated personal injury or wrongful death claims against the estate for purposes of distribution in a case under title 11” (28 U.S.C. § 157(b)(2)), this exclusion is of no moment because this matter does not concern “the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims” so as to implicate Section 157(b)(2)(B), but rather merely concerns the allowance or disallowance of timely filed Proofs of Claim as a matter of law. *In re Alper Holdings USA*, 386 B.R. 441, 450 (Bankr. S.D.N.Y.) (stating that in personal injury action the courts in the Second Circuit have repeatedly held that proceedings to determine the allowance or disallowance of claims are core matters), *aff’d*, 398 B.R. 736 (S.D.N.Y. 2008); *see also In re Chateaugay Corp.*, 111 B.R. 67, 76 (Bankr. S.D.N.Y. 1990) (“the bankruptcy court must have jurisdiction to make the threshold determination of whether as a matter of law, a claim exists which can be asserted against the debtor, even if that claim sounds in personal injury or wrongful death”), *aff’d*, 146 B.R. 339 (S.D.N.Y. 1992).

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Even if Claimants' claims do not remain in the Bankruptcy Court, the claims would not be litigated in state court. *See* 28 U.S.C. § 157(b)(5) (stating that "the district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending"); *accord In re Chateaugay Corp.*, 111 B.R. at 72.⁶ Accordingly, Claimants will not benefit from the perceived more favorable state court forum in litigating their Proofs of Claim. Rather, Claimants will be required to litigate their claims in the Southern District of New York.

E. Claimants' Claims Are Capped For All Purposes

Contrary to the Claimants' recent statements, Claimants cannot seek more than the caps to which they have already agreed, even if ADR is unsuccessful. Pursuant to the ADR Order, Claimants' cap was accepted by MLC and the Claim Amount Cap is binding upon the Claimants for all purposes. (*See* ADR Order (Ex. F) at 4-5; April 8 Ltr. (Ex. H).) Claimants were clearly notified of the capping procedures and the effect of capping their Proofs of Claim pursuant to the ADR Order and various correspondence from MLC. (*See* ADR Order (Ex. F) at 4-5; various correspondence Exs. G-L.) In fact, MLC's agreement to pay for the mediation costs, as well as designation of such claims for mediation in advance of many other claims, was consideration for the "cap," forever barring Claimants from seeking recovery above this "cap."

Thus, Claimants' statement in the Opening Statement that "[i]n the event this case does not settle at mediation, MLC may rest assured that Claimants will pursue damages many times greater than the caps at trial, where Federal Rule of Evidence 408 will exclude any reference to the agreed caps" is simply wrong. Any attempt to pursue damages greater than the Claim Amount Cap would violate the Bankruptcy Court's ADR Order and subject Claimants to possible sanctions by the Bankruptcy Court.

F. Claimants' Damages Claims are Significantly Exaggerated

1. *Claimants Are Not Entitled To Punitive Damages*

Claimants will not recover punitive damages from MLC. The purpose of awarding punitive damages is to punish wrongdoers and deter future wrongful conduct. *See In re Johns-Manville Corp.*, 68 B.R. 618, 627 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987), citing *Williams v. City of N.Y.*, 508 F.2d 356 (2d Cir. 1974); *Sibley v. KLM-*

⁶ Though a district court could abstain from exercising jurisdiction to try personal injury tort claims in a district court under 28 U.S.C. § 1334(c)(1) and permit the claim to be tried in state court, it is unlikely to do so here because "transfer is the rule and abstention is the exception." *In re Ice Cream Liquidation, Inc.*, 281 B.R. 154, 159 (Bankr. D. Conn. 2002) (citing *In re Pan Am Corp.*, 16 F.3d 513, 516 (2d Cir. 1994)); *see also In re Winstead Mem. Hosp.*, 236 B.R. 556, 562 (Bankr. D. Conn. 1999) ("The doctrine of abstention . . . is an extraordinary and narrow exception to the duty of a [Federal] Court to adjudicate a controversy properly before it.").

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Royal Dutch Airlines, 454 F. Supp. 425 (S.D.N.Y. 1978). However, in situations where the recovery of punitive damages by some creditors depletes the recovery afforded to other creditors, courts have regularly exercised their equitable power pursuant to section 105 of the Bankruptcy Code to disallow or subordinate punitive damage claims. See, e.g., *In re Johns-Manville*, 68 B.R. at 627; *In re A.H. Robins Co., Inc.*, 89 B.R. 555, 562 (E.D. Va. 1988). Awarding punitive damage claims to certain unsecured creditors in cases where all unsecured creditors are not receiving full satisfaction of their claims in effect forces those impaired creditors to pay for the debtor's wrongful conduct. See *In re Johns-Manville Corp.*, 68 B.R. 618, 627-28 (Bankr. S.D.N.Y. 1986) (stating "it is well within the authority of this court to disallow a claim for punitive damages . . . where allowing such a claim would ill serve the policy of such awards").

Punitive damage claims are particularly inappropriate in instances such as this one, where the debtor is liquidating, as there is no deterrent purpose in awarding punitive damages. Notably, in chapter 7 liquidations, punitive damages are subject to statutory subordination and relegated to a fourth level in the distribution scheme—below that of unsecured claims—because they may be cut off when available funds are insufficient to pay even compensatory damages. 11 U.S.C. § 726(a)(4).⁷

Here, Claimants appear to seek punitive damages based on MLC's alleged "tradition" of placing unreasonably dangerous products on the market, specifically the Malibu. (See Opening Statement at 9.) However, MLC is liquidating. Further, under MLC's anticipated chapter 11 plan, unsecured creditors will not receive full value on account of their claims.⁸ Thus, it is very unlikely that Claimants would be able to recover punitive damages against MLC even if they had evidence to support such claims, which they do not.⁹

2. *Damages Recoverable in a Wrongful Death Claim Are Limited*

Moreover, the Claimants' claims for conscious pain and suffering lack factual support. "In Texas, only pain consciously suffered and experienced is compensable." *Ruiz v.*

⁷ Although section 726(a)(4) of the Bankruptcy Code is not directly applicable to chapter 11 cases, in addition to the court's equitable authority under section 105 of the Bankruptcy Code, courts have also contemplated that section 510(c) of the Bankruptcy Code provides statutory authority for the subordination of punitive damage claims in chapter 11 cases. See *In re Colin*, 44 B.R. 806, 810 (Bankr. S.D.N.Y. 1984) ("the [] trustee's claim for punitive damages against the estate shall, pursuant to § 510(c) of the [Bankruptcy] Code, be accorded a status inferior to all general nonsubordinated unsecured claims."); *In re Johns-Manville Corp.*, 68 B.R. at 627 ("Finally, it should be observed that arguably under § 510 of the [Bankruptcy] Code, bankruptcy courts have the statutory power to subordinate claims for punitive damages.").

⁸ The most Claimants could hope to receive would be punitive damages that would be equitably subordinated to unsecured claims.

⁹ Even if Claimants somehow were able to obtain an award for punitive damages in state court—and they cannot—the Bankruptcy Court would have to examine such award.

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Guerra, 293 S.W.3d 706, 722 (Tex. App.—San Antonio 2009, no pet.), citing *SunBridge Healthcare Corp. v. Penny*, 160 S.W.3d 230, 248 (Tex. App.—Texarkana 2005, no pet.). “The duration of the pain and mental anguish is an important consideration.” *Id.*, citing *HCRA of Tex., Inc. v. Johnston*, 178 S.W.3d 861, 871 (Tex. App.—Fort Worth 2005, no pet.). Consciousness of approaching death is a proper element to be considered in evaluating mental suffering. *Ruiz*, 293 S.W.3d at 723, quoting *Jenkins v. Hennigan*, 298 S.W.2d 905, 911 (Tex. App.—Beaumont 1957, writ ref’d n.r.e.).

The autopsy reports indicate that all of the occupants of the Malibu died from blunt force trauma, including head injuries and multiple fractures. There is no evidence that any of the decedents survived the crash even for a short time. The crash severity was such that the deaths were almost certainly instantaneous. Claimants cannot make the factual showing that any of the decedents remained conscious after the crash. While Texas law does allow the “consciousness of approaching death” to be considered when evaluating mental suffering, the parties can only speculate as to what decedents were thinking prior to the crash, or for how long. Moreover, the time during which any of the decedents could have been aware of impending death was very short. The police report shows that the car traveled a total of 1419 feet through the grass before hitting the pole. At 60 miles per hour, this would take only 16 seconds, and all parties agree that the actual speed of the car was faster than that. Accordingly, while a jury could potentially award damages for conscious pain and suffering, the suggestion that this would be a major factor in assessing damages is strained.

3. *Lost Earning Capacity/Loss of Support Damages Are Limited*

Finally, any damages ultimately obtained based on lost earning capacity/loss of support that would have been provided by Mr. Powledge will be limited based on Mr. Powledge’s spotty work history and modest earnings. Mr. Powledge was employed by Mission Petroleum at the time of his death (October 18, 2005). He was hired approximately three months earlier as a dispatcher, at a pay rate of \$12.50 per hour. His application for employment at Mission Petroleum reflects an erratic job history prior to his employment at Mission Petroleum, with modest earnings. Accordingly, any damages recovered for lost earning capacity/loss of support that would have been provided by Mr. Powledge would be limited.


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IV. CONCLUSION

We appreciate your services as mediator and look forward to seeing you in your office on August 9, 2010. In the meantime, if you have any questions, please call us.

Respectfully submitted,


Angela C. Zambrano

*With permission
CK*

cc: Angel Hagmaier, Esq.
Dax O. Faubus, Esq.
Kent B. Hanson, Esq.
Joseph H. Smolinsky, Esq.

EXHIBIT

B



**SYSON-HILLE
and
ASSOCIATES**

Engineering Services
Since 1982

The Tracy Law Firm
5473 Blair Road, #200
Dallas, TX 75231

July 14, 2008

Attn: Mr. E. Todd Tracy

Re: **POWLEDGE vs. GENERAL MOTORS CORPORATION**

Dear Mr. Tracy,

I. ASSIGNMENT

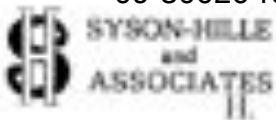
- A. Since my education, training, and experience encompasses almost all aspects of automobile design and engineering, my task in this case was to try and determine, based upon a reasonable degree of probability, whether or not a defect existed in the subject vehicle, and whether such a defect "most likely" caused the accident and the resulting deaths to the Powledge family. I say "most likely" because, although the evidence may be strong and overwhelming on a particular point, still, we may never know with "certainty" what occurred in the Powledge vehicle before the impact.
- B. In ascertaining whether a defect was present in the subject vehicle, naturally, I had to first determine whether other causes of the accident existed. Although one could come up with a number of scenarios which "possibly" could have occurred, the most "probable" other such causes would have been: (1) whether this accident was intentionally caused by Mr. Powledge (i.e., whether he was committing suicide); (2) whether Mr. Powledge unintentionally caused the accident because of some physical ailment (i.e., stroke, heart attack, seizure, etc.); (3) whether the accident was caused by something inside the vehicle, like a floor mat/stuck pedal/pedal misapplication; and (4) whether an environmental, mechanical, or electrical defect existed in the vehicle that caused unwanted acceleration.

II. QUALIFICATIONS

- B. My curriculum vita is attached as **Attachment A**.

REPORT OF STEPHEN R. SYSON - PAGE 1

- C. My expertise includes the field of automotive design analysis engineering -- the specialty of analyzing the design and performance of vehicles, including restraint systems. While employed by GM, I was assigned to the GM Safety Research and Development Laboratory (SRDL) at the GM Proving Grounds, from September 1971 through August 1978, as an engineer in the restraints, structures and analytical groups. Additionally, I was responsible for analyzing crash tests, sled tests and field performance of GM vehicles and restraint systems.
- D. It has been part of my background and training to:
- A. Utilize general mechanical engineering knowledge and skills, including numerous principles of the laws of physics and their application to the operation of mechanical objects.
 - B. Utilize special knowledge of automotive engineering, including knowledge of principles of physics and mechanical engineering, as applied to the design, manufacture and performance of automobiles and component parts, including restraint systems.
 - C. Utilize special background and training in principles of design and analysis of design of automotive restraint systems and the performance of automotive restraint systems:
 - a. In the testing environment;
 - b. In studying the relationship between testing and "real world/ field" performance based on testing and analysis of testing; and
 - c. In actual "real world" collisions.
- E. Portions of my opinions are also based on a review of testing and analysis conducted by or for the National Highway Traffic Safety Administration (NHTSA) and by General Motors, as well as my own experience in the conduct and analysis of such testing. Crash, sled and component testing of restraint systems is performed to analyze the behavior of vehicle component parts under controlled laboratory conditions.
- F. During the development phase of vehicle design and manufacture, such tests are routinely used by engineers to:
- 1. Investigate and predict the behavior of the vehicle and its components in "real world" settings;
 - 2. Set criteria for designs; and,
 - 3. Validate designs.
- G. It is recognized as sound engineering practice to document the occurrences of failure during controlled testing, to investigate the causes of the failure, and note any corrective action taken. During my employment at GM, for example, Test Incident Reports, sometimes called Test Information Reports (TIR's), were filled out in the event of a failure and then followed-up. I have reviewed similar documents from General Motors in other litigation, which analyze vehicle test anomalies.

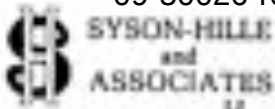


- II. If a component fails during developmental testing, the responsible design engineer would be expected to take corrective action to control or eliminate the causes of the failure.
1. Failure during controlled testing, if not corrected, is predictive of failure under field conditions.

III. DESIGN EXPERIENCE

During my almost 40-year career, I have:

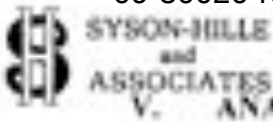
- A. Designed the following prototype hardware while working for General Motors:
 1. The upward deploying air cushion passive restraint system "air pillow" used on many of today's automobiles (US Patent: 3,801,126);
 2. The steering column mounting system for the GM do Brasil Opala;
 3. The prototype steering column mounting system for the GM X body (US Patent: 4,241,937).
- B. Participated in the analysis, testing and development of structural designs for the following GM vehicles:
 1. 1976-1997 G (full size) van;
 2. 1977-1990 B-C (full size) car;
 3. 1978-1986 A-G (intermediate) car; and
 4. 1980-1984 X (compact) car.
- C. Analyzed the structural performance and overall crash safety assessment for the "Competitive Car Program." As part of that program I reviewed the crash test data and high speed motion pictures of both front and rear crash tests of vehicles from auto manufacturers in the US, Japan and Europe.
- D. Represented General Motors on the SAE (Society of Automotive Engineers) impact simulation subcommittee.
- E. Represented the GM Safety Research and Development Laboratory at the 1979 E body (sport luxury) Project Center.
- F. Performed the structural analysis and testing for the Large Research Safety Vehicle (LRSV) structure at Minicars. (Struble, 1981)
- G. Supervised the development of new restraint systems for the Volvo 240 series vehicle under NHTSA contract. (Foster, 1981) and presented the design proposals to Volvo for approval. Volvo adopted the design proposals and there were NO driver fatalities in 240 series vehicles on US highways for several years after their release into production. (Insurance Institute for Highway Safety, 1995)



- H. Designed the roof and floor structure for the Paratransit Vehicle, a taxi to carry handicapped individuals, under contract to the Urban Mass Transit Administration. (UMTA, Struble, 1981)
- I. Designed the side impact protection enhancements for the Modified Integrated Vehicle (MIV) program. (Hanneman, 1982) In the MIV program, Charles Strother and I proposed various modifications to improve the rear impact crash safety of the GM "X" body cars, including reinforcing the seats. (Strother, 1980)
- J. Continued to study the design of safety systems, particularly vehicle performance in collisions with a rearward force component, since becoming involved in the full time analysis of real world collisions. In that regard, I co-authored a Society of Automotive Engineers (SAE) paper regarding rearward force collision seat performance (Saczalski, 1993) which studied the following seat restraint system issues:
 - 1. The design and field performance of at least fifty different production vehicle seats from all over the world;
 - 2. Reviewed almost two hundred US seat design Patents and several foreign patents for automotive seats ; and
 - 3. Reviewed lab tests for many production seats.
- K. Published papers on other automotive restraint issues through the Society of Automotive Engineers (SAE) and by the American Society of Mechanical Engineers (ASME).
- L. Conducted presentations on the methodology for determining occupant kinematics and analyzing physical evidence of occupant contact. (Syson, 1999).

IV. METHODOLOGY

- A. The assignment was accomplished using methods commonly accepted and used by automotive engineers who are similarly engaged in the profession of accident analysis and automotive defect analysis.
- B. The opinions herein are based on my background, experience and expertise in the field of automotive design analysis engineering, and on the application of recognized laws of physics and principles of mechanical and automotive engineering applied using accepted engineering methods to the specific issues raised by the events in question.
- C. The analysis I used is based on "ruling out" scenarios similar to what a physician does to make a diagnosis.



V. ANALYSIS OF AN INTENTIONAL ACTION BY MR. POWLEDGE CAUSING THE ACCIDENT

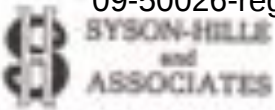
- A. My analysis began with a study of the facts and physical evidence, including:
1. The police accident report, police video and scene photographs;
 2. Scene photographs and video by Michael Williams taken on October 25, 2005;
 3. Scene photographs and scene diagram by Scientific Analysis taken on October 30, 2005;
 4. Scene photographs and video by Dr. Mike Andrews and Kirk Parks taken April 17, 2008;
 5. The Galveston County Medical Examiner's Reports;
 6. National Weather Service data;
 7. The Malibu Classic at issue, an undamaged exemplar Malibu Classic, and an undamaged Malibu;
 8. Discovery materials, including depositions from this and other cases;
 9. Literature regarding brake systems, speed controls, cruise controls, and other causes of stuck throttle;
 10. NHTSA customer reports for other vehicle speed control failures;
 11. NHTSA recalls on cruise control systems; and
 12. Medical / Employment records of Adam Powledge.

B. Examination of the above facts and physical evidence leads to several conclusions and comments:

1. Mr. Adam Powledge was driving the Malibu Classic, Jacob Powledge was the right front passenger, and Isaac, Rachel and Christian Powledge were riding in the back seat. All occupants were wearing their seatbelts.
2. The Malibu Classic was traveling at a high rate of speed on southbound Interstate 45 in Texas City, Texas.
3. The following is Corporal Rich's description of the collision:

Investigation into the crash of Unit #1 (2005 Malibu Classic) on 10/25/05.
Unit #1 struck another unit while southbound damaging the other unit's passenger side rearview mirror while on the freeway. TCRD case #05-10103.
Unit #1 then drove onto the grass median between the main lanes of the freeway and the two lane feeder road. Unit #1 drove 1,414 feet in the grass median from the time it left the main lanes of the freeway until it struck a steel support beam for a traffic direction sign owned by the Texas Department of Transportation.
The vehicle split in half and caught fire killing all of the occupants.
It's unknown why the driver drove in the median for such a long time.

4. The accident scene was inspected by Dr. Mike Andrews and Kirk Parks at my request on April 17, 2008. Cones were put up to replicate the measurement information from the police investigation. Following the replication of the police measurements, police photographs were used to place chalk paint marks in the vehicle tire pathways that could be seen and utilized from the police photographs.



- E. The eyewitnesses indicated that the Malibu Classic was traveling 80-90 mph as it left the travel lane shoulder and entered the median. The impact damage to the vehicle supports that it was traveling at a high rate of speed. I believe that it would be impossible to accurately determine a closing speed or delta velocity using any type of crush measurements because the vehicle is simply too damaged. In fact, the vehicle was literally in pieces after the accident and upon being towed away from the scene. Further, there is no pole impact testing with a vehicle traveling at speeds approaching 80 mph that have been conducted on the subject vehicle. Therefore, there is no test data to correlate with the vehicle damage seen in the photographs prior to its removal from the scene. Lastly, using any type of computer program for this accident requires too many subjective variable inputs that can improperly influence the outcome.
- F. Mr. Powledge was able to steer and control his vehicle and thus avoided striking several vehicles that were on I-45. He managed only to slightly sideswipe another Malibu side mirror to side mirror before leaving the travel lane of I-45 and entering the grass median. Damage to the other Malibu is shown below:



- G. After his departure from the southbound travel lanes of I-45 into the grass median, Mr. Powledge was able to steer and control his vehicle such that he managed to avoid a guardrail, a large electric box, a reflector post, and a traffic information sign pillar by moving toward the opposite side of the median. Based on the initial travel path of the Powledge vehicle after the vehicle left I-45, it appears that Mr. Powledge was trying to get onto the feeder road.



- H. Photographs provided by Laurie Williams that were taken by her husband Michael 7 days after the accident still clearly depict the tire marks made by Mr. Powledge's vehicle. The Williams' photographs and the Scientific Analysis photographs taken October 30, 2005 reveal that as Mr. Powledge reached the far side of the median after avoiding the obstacles described above, he contacted the top of a cement and steel drainage culvert with his left side front tire. This culvert was never photographed by the police or mentioned by the police in the scene diagram. The culvert has a sharp edge that is several inches tall. Measurements by Scientific Analysis taken on October 30, 2005, revealed that the centerline of Mr. Powledge's left front tire was 1.3' into the concrete culvert.



- I. The concrete culvert edge damaged the left front inner wheel and punctured the tire. The wheel and tire damage affected Mr. Powledge's ability to steer and control his vehicle.

- J. The contact with the drainage culvert is evident in a police photograph where there is clearly a "curb strike" type dent in the rim and a large cut in the tire at the same position. This event would have rapidly deflated his left front drive tire and immediately pulled the Powledge vehicle back to the left (toward the middle of the grass median).



- K. Scene measurements by Scientific Analysis regarding the grass median include: width 50'; west side slope is 7 degrees; east side slope is 10 degrees; depth is 2'; flow line is 24' wide. The sloped sides would re-direct Mr. Powledge's vehicle back to the center of the grass median and make steering even more difficult to the right (toward the feeder road).





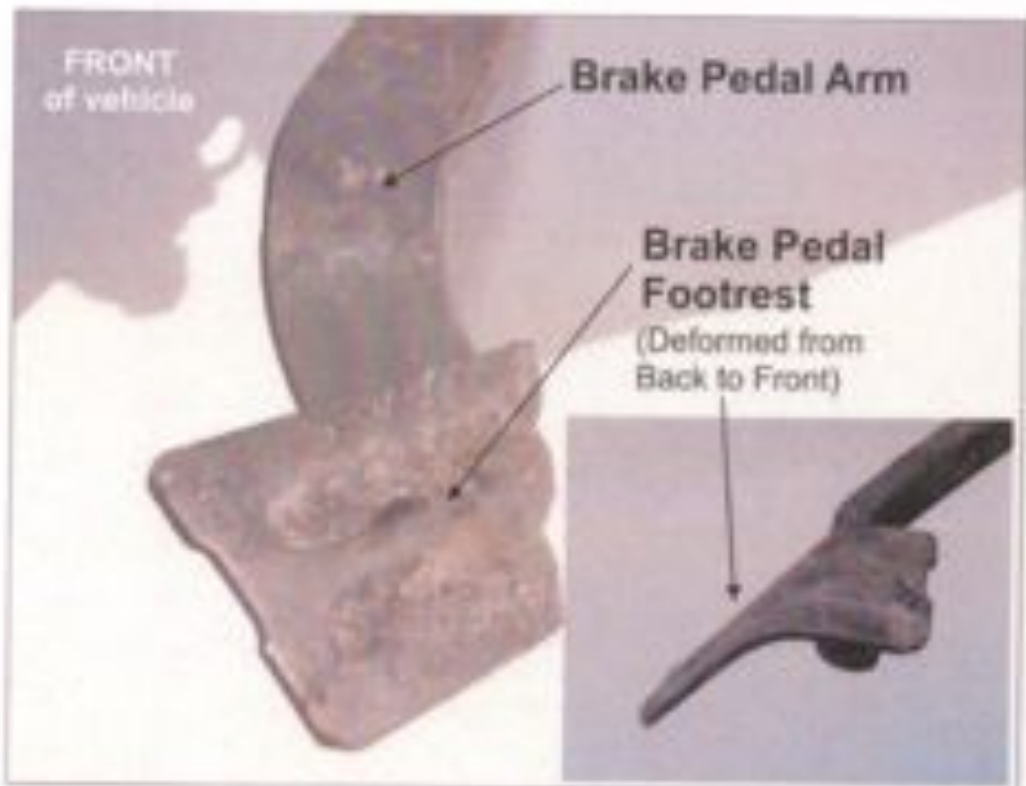
The re-directed motion of the vehicle back to the left (middle of the median) is evident in numerous photographs. As Mr. Powledge's vehicle moved left toward the flow line of the median and the deflated tire and bent wheel affected his steering and control capability, these conditions would tend to straighten out the vehicle into the lowest portion of the median.



- M. During the last 700' of this accident after striking the concrete culvert with the left front tire, Mr. Powledge's brakes were ineffective, his engine was racing and his steering was not overly effective since the left front tire was deflated and his left front wheel was bent.
- N. Even though the deflated left front tire and damaged wheel affected Mr. Powledge's steering and control capability, there is evidence from the police photos that clearly demonstrate that Mr. Powledge's vehicle did not strike the sign support structure in a direct head-on manner. Instead, these photographs show that the impact was offset to the far left-side of the vehicle consistent with a person that was trying to steer around the obstacle.



- Q. During one of my many inspections of the subject vehicle, the brake pedal was located. The brake pedal has significant deformation in the forward direction. In other words, the flat part of the pedal that your foot applies pressure to is bent from the rear to the front of the vehicle. This almost conclusively proves that Mr. Powledge had his foot on the brake pedal at the time of the impact. If Mr. Powledge was trying to commit suicide, it does not make sense that he would be applying his brakes at the moment of impact.





- P. The left front brake pads on the subject vehicle were overheated, despite there being little or no fire damage to that part of the Malibu Classic. In fact, the rubber tires are still intact.

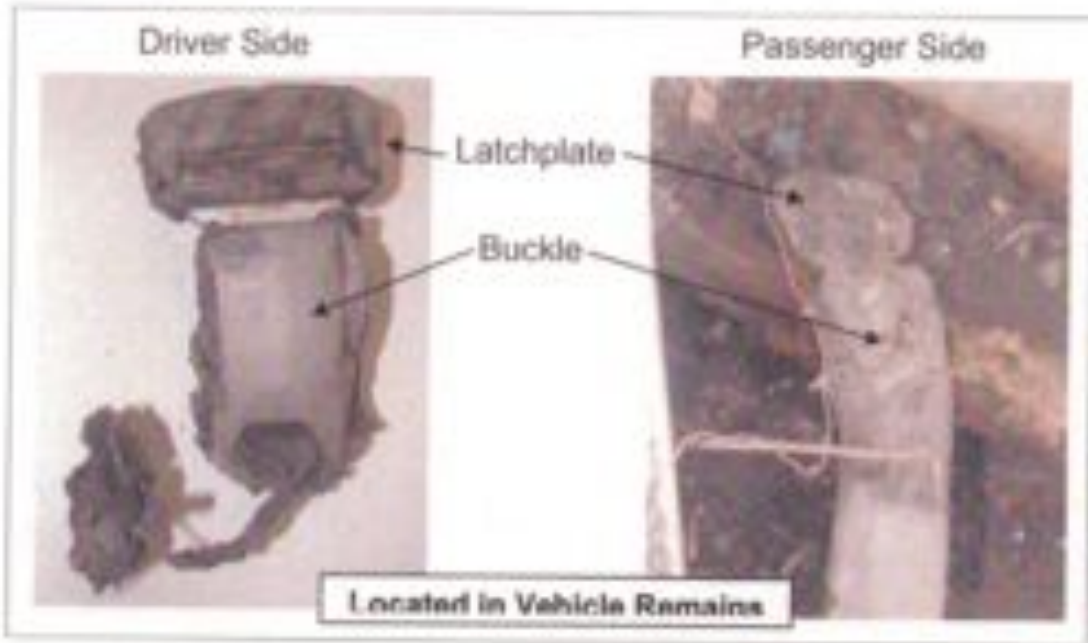


- Q. The brake pad material is overheated and spalled, indicating hard brake/pedal application. If Mr. Powledge was trying to commit suicide, it does not make sense that he would apply his brakes to this extent before the impact.





The driver's latch plate and buckle was located among the debris. The driver's latch plate is still in its respective buckle. It does not make sense that a person predisposed to killing himself in a vehicle crash would buckle up for safety before killing himself.



- S. Further, the buckle from the right front and one buckle from the rear seat were located in the debris. The latch plates were likewise in place in each of these buckles. Photographs taken by the police have the other two rear seat buckles documented. Again, the latch plates are inserted. It does not make sense that a man intent on killing all of his children would make them buckle up for safety before he killed them in a vehicle crash.
- T. The police report indicates that seat belt status was "unknown." However, the evidence proves that all 5 occupants had their seat belts buckled at the time of the accident.





Lastly, the police photos show that the tire marks left in the median grass from the subject vehicle appear very heavy and defined. Photographs taken 7 days after the accident still show the distinct tire marks and the torn grass and disrupted soil. The subject vehicle, a front-wheel drive with anti-lock brakes, would have a tendency to drag the rear tires along, while braking under full throttle (the rear not subject to the engine driveline). The rear tires would, however, be rotating, disrupting and tearing the soil and grass surface more so than just traveling at a high rate of speed with no braking. By contrast is the Malibu, whose side mirror was struck by Mr. Powledge's vehicle during the accident that had pulled off into the median after being struck. The struck Malibu left no tire marks in the grassy median shown in the police photo, and we know it pulled onto the grass and ultimately came to a stop.



- V. I also watched Corporal Rich's cruiser video and noted that two trucks had pulled off into the median on opposite sides while the Powledge vehicle was still on fire. The police photographs after the fire do not show that tire marks were left in the grass median from either of these vehicles even though we know they pulled onto the median grass and stopped.





- W. I pulled the National Weather Service data for rainfall in the area to determine if the tire marks from the Powledge vehicle that were photographed by the police and the Williams' could have been due to wet ground. According to the two reporting stations for the National Weather Service for this area, there was no precipitation from October 11-18. (**Attachment B**). As such, the tire marks in the grass median cannot be attributed to wet ground conditions.
- X. Knowing that there were at least three other vehicles that were clearly in the grass median, this begs the question, why didn't these other vehicles leave any tire marks in the grass median when the Powledge vehicle left such well-defined tire marks? The answer is simple. The Powledge vehicle's rear tires were braking while the front tires were accelerating. The other vehicles' in the grass median did not experience a similar condition as the Powledge vehicle. The fact that these tire marks are still present 12 days (date Scientific Analysis photographed scene) after this accident reinforce the dramatic nature in which the tire marks were made.
- Y. Based on a reasonable degree of engineering probability, the totality of the evidence proves that this accident was not intentionally caused by Mr. Powledge.



SYSON-HILLE
and
ASSOCIATES
VI.

VI. ANALYSIS OF AN UNINTENTIONAL ACTION BY MR. POWLEDGE SUCH AS MEDICAL CONDITION CAUSING THE ACCIDENT

- A. Based upon my review of the medical records, and in addition to what I understand Ms. Powledge will testify to, there is no evidence that Mr. Powledge had any sort of past history of heart, stroke, or seizure conditions, or other medical conditions which would lead one to believe that some sort of medical ailment caused him to leave the roadway or caused him to be unable to control his vehicle. In fact, he had a complete medical checkup two months before the accident wherein he was cleared to go to work for a new employer. Specifically, Dr. Kyler S. Knight concluded on August 1, 2005 that "*Adam Powledge is not at a higher risk for injury because of any physical or mental disabilities.*"
- B. Additionally, it does not make sense that a man who was having medical trouble such as a heart attack, seizure, or stroke would be able to swerve to avoid so many obstacles, and also be able to push on the brakes hard enough to bend the brake pedal bracket and leave the type of long, defined brake marks in the grass median. Of course, as noted earlier, we know that the evidence strongly supports that Mr. Powledge was attempting to steer and stop his vehicle prior to impact. Therefore, because he was attempting to steer and brake, there is no evidence or reasonable inference to support the hypothesis that Mr. Powledge suffered from any medical condition which caused him to have the accident.

VII. ANALYSIS OF A DISPLACED FLOOR MAT/STUCK PEDAL/PEDAL MISAPPLICATION CAUSING THE ACCIDENT

- A. I am familiar with claims by consumers, and NHTSA studies, whereby accelerator pedals have been depressed unintentionally due to a floor mat dislodging. I had Mr. Tracy check with Ms. Powledge to determine if this vehicle contained floor mats. It is my understanding that Ms. Powledge is expected to testify that the vehicle did not contain floor mats when the vehicle was purchased from Norman Frede Chevrolet in March 2005 when they bought the vehicle. No floor mats were ever purchased.
- B. I also reviewed a recall for the 2003 model year Malibu that had been recalled for a stuck gas pedal. (Recall No. 22583856 pivot pin) The gas pedal design for the 2004 model year vehicle was compared with the earlier year vehicle, and I found it to be different in design. Specifically, there was no pivot pin used in the 2004 model year vehicle.
- C. Based on no floor mats and the design change to the gas pedal assembly, I ruled out these as potential causes for the accident.
- D. Even though the vehicle industry and the NHTSA routinely blame drivers for pedal misapplication, I also ruled out pedal misapplication, since the brake pedal was bent in a manner consistent with it being applied on the side furthest from the gas pedal.

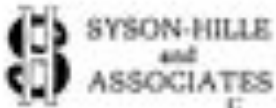
- E. Pedal misapplication can also be ruled out due to the brake pad spalling and disrupted grass and soil in the median.
- F. The totality of evidence supports proper brake pedal application, not improper gas pedal misapplication.

VIII. ANALYSIS OF A MECHANICAL/ELECTRICAL FAILURE OR ENVIRONMENTAL CONDITION CAUSING THE ACCIDENT

- A. Based on the tire marks in the grass median, the evidence is overwhelming that Mr. Powledge was braking at the time of the impact, and that he had been for a lengthy period of time before the impact. Naturally, the question becomes: why did his vehicle not stop?
- B. Contrary to GM's position in its build sheet for this particular vehicle, and in its answers to discovery, the subject vehicle clearly does have ABS components in place. These components are only used on ABS systems and were connected to the vehicle's wiring harness.



- C. In fact, the service manual for this vehicle shows that Malibu Classic vehicles with hub mounted speed sensors have anti-lock brake systems.
- D. So why would the vehicle's engine be racing when the brakes were being applied hard enough to bend the brake pedal, overheat the brake pads and leave defined tire braking marks?



- E. According to the testimony of GM's brake expert, Roger Newscock, a vehicle whose brakes do not properly stop a vehicle is unsafe. Specifically, Mr. Newscock opined, in *Flynn v GMC*, as follows: "the vehicle is not intended or designed such that it will gain speed when the brakes are applied. It would appear that some mechanical malfunction is involved" if the vehicle fails to slow down when a person is standing with both feet on the brakes.
- F. GM has had problems in the past with its brakes not properly stopping vehicles when a vehicle accelerates out of control. (Attachment C).
- G. Mr. Newscock testified in *Flynn v GMC* that police units were reporting that their brake systems were experiencing hard pedal or no brake support. Mr. Newscock also testified in *Flynn v GMC* as follows:

21 Q What are the specific accidents that you
22 were involved in investigating?
23 A I've been involved in two police car
24 accidents in Indiana, and one in Ohio, Michigan,
25 New York. That's all that come to mind at this time.
Page 204
26 Q Did any of those drivers report to you that
27 basically their brakes just failed to stop the vehicle?
28 A Yes.
29 Q Did any of those report to you that they had
30 a hard brake pedal and the brakes wouldn't stop the
31 car?
32 A Yes.
33 Q Are any of those accidents included in the
34 reconstruction that have been brought in or been used
35 in do you know?
36 A I don't know.
37 Q Now, the witness reported to you that the
38 brakes failed to provide normal braking action in
39 connection with the hard brake pedal, is that right?
40 A Yes.
41 Q General Motors did not undertake the kind
42 of analysis for the group of incidents that you were
43 off?
44 A Not that I know of.
45 Q About how many total accidents did General
46 Motors have reported to it by police departments
47 involving the police package (Capri or where police said
48 they did not get normal brake function)?
49 A I don't know.
50 Q Did General Motors do any statistical work
51 with regard to the police vehicles to determine whether
52 the particular brake configuration that was used in
53 that vehicle was overrepresented compared to other
54 similar vehicles?
55 A I'm not aware of any statistical analysis
56 being done there.

- H. Since the subject brake pedal is made of thick steel that is bent, yet the vehicle struck the sign support while traveling at least 80 mph per eyewitnesses, this accident involves a brake system failure. The brakes failed to adequately stop the Powledge vehicle even though Mr. Powledge was definitely pushing on the brakes up to and including the moment of impact. Failing to properly stop a vehicle is a defect which renders a vehicle unreasonably dangerous and in violation of FMVSS 105.
- I. I examined the remains of the vehicle to determine what was left of the power train. I found that both the engine and transmission had separated from their mount, and that both the engine and transmission had collision and fire damage. The intake manifold had either burned or broken off; however, the throttle body was located in the debris. It was stuck at the near full throttle position. There was a throttle cable connection, and a cable connection for a cruise control.



- J. I then inspected the power train of an exemplar 2004 Malibu Classic. The throttle was controlled by two cables. One cable attached to the throttle pedal, while the other attached to a stepper-motor type cruise control.



- K. The 2004 Malibu Service Manual also indicates that, when a Malibu Classic is equipped with a cruise control, both accelerator pedal and cruise control input to the throttle are through pull-type cables. However, it should be noted that an exemplar 2004 Malibu built just 3 months prior to this Malibu Classic had drive by wire throttle system and integrated electronic cruise control.
- L. There is a number of customer complaints from other Ecotec engine based vehicles indicating that this design occasionally results in an unwanted acceleration condition. (Attachment C.) Some of the complaints demonstrate that the throttle return spring, or other device to close the throttle (if the throttle cable, or throttle control electro-mechanical systems fail), is inadequate to close the throttle and prevent a runaway vehicle.

There have been numerous recalls of mechanical, electrical and environmental failures associated with "vehicle speed control" device failures over the years. (Attachment D). Here are a few:

- 1981 Buick LeSabre- accelerator pump lever pin loosed;
- 1984 Ford Mustang- secondary throttle shaft would stick in open position;
- 1986 Lincoln Continental- aluminum casting flash on the face of the throttle body was breaking off and trapped between throttle plate and throttle body;
- 1987 Dodge Dakota- speed control cable partially disengaged and would bind at the carburetor;
- 1987 Chevrolet Cavalier- accelerator cable may contain water that freezes which restricts cable movement;
- 1991 Jeep Cherokee- transmission throttle control rod spring improperly installed causing the throttle to close slowly;
- 1992 Pontiac Sunbird- a kink in the accelerator cable caused the accelerator control cable to stick;
- 1994 Buick Century- water in accelerator control cable makes cable movement difficult;
- 1994 Cadillac Fleetwood- excessive friction occurring in accelerator pedal assembly prevented engine from returning to normal idle speed.

N. If the throttle fails to close promptly when the driver takes his/her foot off the accelerator pedal, the throttle control system is in violation of FMVSS 124 (Accelerator Control Systems), both S5.1 and S5.3, which require redundant systems to close the throttle, and that the throttle close within a second after the gas pedal is released. If the cable guide moves off the throttle shaft, both springs disconnect from the throttle, and the throttle will not close. Such a single point failure is prohibited by FMVSS 124. An exemplar throttle body was purchased and disassembled to study the two spring connection. GM uses two springs that connect at the same positions. This unitized dual spring serves as the two distinct energy sources that FMVSS 124 requires to close the throttle. It is clear that GM's design of this unit is a violation of FMVSS 124 S5.1.

85.1 There shall be at least two sources of energy capable of returning the throttle to the idle position within the time limit specified by 85.3 from any accelerator position or speed whenever the driver removes the opposing actuating force. In the event of failure of one source of energy by a single severance or disconnection, the throttle shall return to the idle position within the time limits specified by 85.3, from any accelerator position or speed whenever the driver removes the opposing actuating force.



- O. A throttle control system, like that on the subject Chevrolet Malibu Classic, which does not meet FMVSS 124 is defective and unreasonably dangerous.
- P. The cruise control for the subject vehicle was also studied to evaluate its propensity to fail. The vehicle industry has had numerous recalls for mechanical and electrical cruise control failures dating back to the mid-1980's.
- 1984 Oldsmobile Cutlass- cruise control cable may separate from the conduit end fitting;
 - 1984 Corvette- cruise control vacuum solenoid valves may malfunction;
 - 1984 Toyota Camry- cruise control computer malfunctions due to continuous exposure to cold ambient temperature.
- Q. The subject vehicle uses a stepper motor type cruise control. The stepper motor cruise control has had numerous failures over its design and service life. GM stepper motor cruise controls have been reported to the NHTSA for unwanted acceleration problems. In fact, I downloaded the NHTSA database for reports on GM vehicles that have stepper motors and similar cable attachments as the subject vehicle where a complaint was registered for unwanted acceleration. (**Attachment C**). Many of these complaints sound eerily similar to the Powledge accident.
- R. Stepper motor cruise controls are subject to intermittent electromechanical failure modes that have been documented for years. These include exposure to excessive heat and cold, moisture, open intermittent circuits and short circuits as well as failures associated with Electromagnetic Interference (EMI) and Radio Frequency Interference (RFI).
- S. The vehicle industry has known for years that sudden acceleration can occur when intermittent electrical malfunctions happen. A 1988 Japanese government study on unwanted acceleration found that "*comvised analysis of and investigation of malfunctioning of the electronic devices taking into consideration not only electromagnetic noise but environmental conditions such as temperature, humidity, and vibration are needed.*"
- T. Intermittent electronic failures are recognized by the *Electronic Troubleshooting Handbook*:

Whenever too much heat is applied to electrical or electronic devices, problems occur. Heat increases resistance of circuits, which in turn increases the current. Heat will cause the materials to expand, dry out, crack, blister, and wear down much more quickly; sooner or later, the device will break down.

Moisture (water and other liquids) causes expansion, warping, quicker wear, and abnormal current flow (short circuits).

Dirt and other contaminants, such as fumes, vapors, abrasives, soot, grease, and oils, are materials that cause electrical and electronic devices to clog or gum up and operate abnormally until they finally break down.

Abnormal and excessive movement can lead to breakdown; vibrations and physical abuse are the leading causes of these types of breakdowns.

- U. A study conducted by Boeing in 1988 evaluated automotive designs for GM, Ford and VW by using Boeing's "Sneak Analysis" technique for identifying and correcting reliability robbing design conditions called "sneaks" that frequently evade detection by traditional analysis and testing. Boeing found that one design in three in vehicles contained "sneaks" that would result in "loss of system, loss of life, or major project delay because no 'work around' was available until the sneak condition was corrected." One component Boeing found that was subject to "sneaks" was the cruise control module.
- V. The microprocessor manufacturer for this particular cruise control (Phillips) describes in their chip data sheet that the absolute maximum operating temperature for this chip is 250 degrees Fahrenheit and anything beyond that range would cause single or multi mode failures.

ABSOLUTE MAXIMUM RATINGS

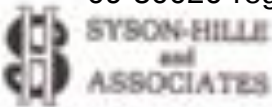
PARAMETER	MINIMUM	MAXIMUM
Storage temperature range	-55 to 150	150
Operating temperature range	-40 to 125	125
Lead temperature (soldering)	260	260
Lead temperature (wave soldering)	260	260
Welding temperature	350	350
Power dissipation (continuous) (Note 1)	1.0	1.0

Phillips Chip on Exemplar Cruise Controller



Notes: 1. Power dissipation is limited by ambient temperature, board cooling, and component placement. 2. Lead temperature is limited by component type and placement. 3. Storage temperature range is limited by component type and placement.

- W. However, as noted below, engine temperatures under hood routinely get above 125 degrees Centigrade (260 degrees Fahrenheit.)
- X. Other electronic circuitry components are designed for the harsh environment experienced under hood.



Use of vehicular electronic stability controls is growing. A new quartz MEMS gyroscope can handle the harsh under hood environment, where temperatures exceed 125°C and shock and vibration are significant.

Apr 1, 2007

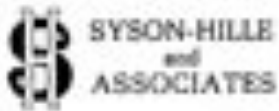
Dr. Lutz E. Grottel, Senior System Architect
Texas

sensors

- Y. Failing to properly locate, shield, protect and/or insulate a cruise control module is a defect that renders the vehicle unreasonably dangerous because the circuitry can be corrupted, which affects performance.
- Z. Based on a reasonable degree of probability, I believe that a mechanical/electrical or environmental failure in the design of the throttle body and/or cruise control system occurred which caused the Powledge vehicle to experience unwanted acceleration. A manufacturing defect also existed in that improper testing, analysis, evaluation and real world environmental impact study was not conducted as I discuss in section XI below.
- AA. The brake system was then incapable of stopping the vehicle while its engine raced out of control. In reviewing the NHTSA database, many people have reported that their vehicle accelerated out of control after the brakes were applied. Still others reported that the engine continued to accelerate after the brakes were applied, and others reported that the brakes did not stop the vehicle properly during an unwanted acceleration. (Attachments C, D).
- BB. This unwanted acceleration and inability to stop was the producing cause of the loss of control of the vehicle and its ultimate accident.

IX. ALTERNATIVE DESIGNS RE ENVIRONMENTAL/MECHANICAL/ELECTRICAL FAILURES

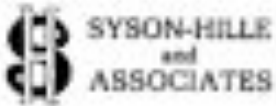
- A. Throttle control system that actually meets FMVSS 124.
- B. Drive by wire and integrated cruise control module, as used on the Malibu that preceded this vehicle by 3 months.
- C. Ignition cutoff under panic braking conditions.
- D. Fuel cutoff or fuel restrictor device.
- E. Relocate cruise control module so that it is free from EMI / RFI contacts, hot and cold temperature fluctuations as well as moisture and pollutants.
- F. Redundant fail safe designs so in the event of a failure, there is a "work around" system to prevent loss of system control.
- G. Speed sensitive acceleration cruise control based on European Patent 1375233A1.



- H. Police package braking system like on the Caprice and Roadmaster.
- I. Hydraulically assisted ABS brakes like those used on 2004 Silverado pickup.
- D. The safer brake, throttle and/or cruise control system designs to resolve or guard against the brakes failing, the throttle sticking, the vehicle speed control system failing and/or the cruise control module failure are not cost prohibitive and affect neither the function nor the appearance of the vehicle. These design alternatives were both economically and technologically feasible to incorporate into the 2004 Chevrolet Malibu Classic and would most likely have prevented the Powledge family's fatal loss of control accident.

X. IDENTIFICATION OF RISKS, HAZARDS AND DANGERS

- A. A safety engineer's primary responsibility is to identify potential risks, hazards and dangers associated with reasonably foreseeable uses and misuses of a product. Then, he should attempt to design out the dangers, guard against them or, as a last resort, warn about them. This is known as the engineering triad.
- B. GM's engineers should have used one of the many available techniques to analyze the safety of the Malibu brake, throttle control system, vehicle speed control and/or cruise control system.
- C. GM should have used a similar Sneak Analysis as described by Boeing in its analysis of the vehicle industry. I have seen no Sneak Analysis on the throttle control, speed controls or cruise control components.
- G. GM should have analyzed the risks of the throttle failing to close, the vehicle speed control failing, the cruise control failing or whether the brake system could properly stop this vehicle if an unwanted acceleration occurred. They, apparently, failed to do so. In support of this position, I have seen no documented FMEA, DFMA, fault tree analysis or any other similar analysis on the subject components. This would explain why the NHTSA has had so many reported claims of unwanted acceleration with this design throttle/cruise control system.
- H. In 1999, the University of Maryland published a paper on factors affecting cruise controls. The study found that many cruise control modules are exposed to operating heat far greater than what they can handle. However, the study found that cruise control modules were not being properly tested and evaluated by the vehicle industry to study real world environments. The study recommended that vehicle manufacturers adopt a Physics of Failure (PoF) approach which is a five step methodology:
 - I. PoF based virtual qualification is used to identify the product configuration, life cycle loads, and preliminary assessment of potential failure sites, damage mechanisms, and failure modes;



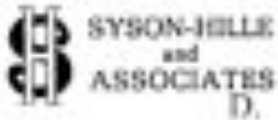
2. Accelerated stress test planning including load detection, failure detection, and response monitoring analysis;
 3. Overstress limits are explored in a vehicle environment;
 4. Accelerated life testing based on step 3; and
 5. Correlate accelerated stress tests results to field life estimates.
1. I have seen no Pof analysis conducted by GM of the speed control system, cruise control module or braking system for the subject vehicle.

XI. CONCLUSIONS

- A. The Ecotec power train, like that used in the 2004 Malibu Classic, is unreasonably susceptible to vehicle speed control failures, which dealers are often unable to diagnose or cure. **(Attachments C and D).**
- B. Since the subject 2004 Chevrolet Malibu Classic engine's throttle control system is presently stuck 70 to 80% open, the throttle control system fails to meet FMVSS 124. Failure to comply with FMVSS 124 is negligence per se.
- C. The cruise control on the subject vehicle is mounted so close to the engine and engine components, exposure to all of the heat, moisture, and excessive vibration can create just the type of environment to produce a failure. That failure may be inoperability or a permanent opening of the throttle body in a multi-mode failure. This location, lack of shielding/insulation can cause an environmental, mechanical or electrical failure.
- D. The brakes are incapable of stopping the vehicle when the throttle, speed control or cruise control malfunctions and the vehicle experiences unwanted acceleration.
- E. The brake system, throttle control, vehicle speed control and cruise control system is defectively designed and manufactured for the reasons stated above.

XII. SUMMARY

- A. A vehicle throttle control system, speed control and/or cruise control that experiences unwanted acceleration makes a vehicle defective and unreasonably dangerous. Failing to properly test, evaluate, analyze and study the components in real life vehicle environments is a manufacturing defect.
- B. A vehicle whose brakes fail to timely stop the vehicle when unwanted acceleration occurs is defective and unreasonably dangerous.
- C. The driver has limited time and control options. For example, he could turn off the ignition, leaving a vehicle that is very hard to brake and steer, and has limited electrical power.



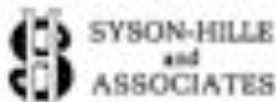
D. One must also consider the effect of panic in this situation from the driver to the passengers, the movement of the vehicle due to evasive action, the movement of the vehicle after it struck the concrete culvert, the movement of the vehicle after the left front tire deflated and left front wheel bent, and the consequences of the noise associated with the racing engine, out of control vehicle and screaming from within the vehicle during the 12 seconds prior to impact with the sign.

XIII. BREACH OF WARRANTY (EXPRESS OR IMPLIED)

- A. Consumers expect that their vehicle will not race out of control.
- B. Consumers expect that their vehicle will not experience unwanted acceleration.
- C. Consumers expect that their braking system will stop their vehicle.
- D. When the subject vehicle raced out of control and would not stop with the brakes applied, the subject vehicle failed to perform as expected.

XIV. COMPLIANCE WITH FMVSS

- A. Defendant may argue that its vehicle complied with all applicable FMVSS provisions. I disagree that the subject vehicle complied with the FMVSS 105 and 124 for the reasons stated no matter what GM's compliance testing shows.
- B. However, even if the vehicle met the standards, the preamble to the FMVSS clearly states these standards are minimal in nature.
- C. Compliance with FMVSS does not mean a vehicle is free of safety defects. In fact, millions of vehicles, tires, and child seats have all been recalled due to safety defects even though they complied with all applicable standards.
- D. In certain years, there are more vehicles recalled, than actually sold.
- E. The FMVSS are inadequate to protect the motoring public. For instance, FMVSS 206 fails to evaluate door hinges or door performance in rollovers or when vertical forces are incurred. FMVSS 207 fails to evaluate the weight of an occupant. FMVSS 208 fails to consider any affect on the neck, face, internal organs other than heart or any body structure below the knees. FMVSS 213 fails to evaluate child seats in side impacts or rollovers. FMVSS 216 fails to evaluate roof strength while a test dummy is in place. FMVSS 124 was enacted when engines were carbureted. Most of the FMVSS do not even require dynamic testing.
- G. The standards fail to adequately evaluate vehicles under real world conditions. Laboratory test conditions are not the place to test a vehicle. A vehicle should be tested in its real world environment.



- II. If the subject vehicle was tested under real world conditions, the components discussed in this report would fail to comply with even these mediocre safety standards.

This report is subject to amendment and supplementation subject to a review of additional documents to be produced by the defendant in this matter. Further, I would like the opportunity to comment on any reports provided by the defendant in this matter.

Sincerely,



Stephen R. Syson
Syson-Hille & Associates

ATTACHMENTS:

- A. Curriculum Vita
- B. Weather Service Data
- C. Struck Throttle Database from NHTSA
- D. NHTSA recalls on speed control defects
- E. Other supporting materials referenced in the report

REFERENCES:

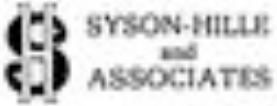
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EXHIBIT C

Powledge Expert Report Assessment

Bruce R. Bowman:

Mr. Bowman's report inaccurately states the opinions and conclusions that I provided in my report.

For example, Mr. Bowman claims, "*Mr. Syson states that the front brakes of the subject vehicle did not operate due to overheat.*" I did not make any such statement. I indicated that the heating of the brake pads is consistent with brake application.

Mr. Bowman also suggests, "*Mr. Syson states that a rolling tire, without braking does not leave marks in the grass. The demonstrations at both high speed and low speed clearly shows that a rolling tire does leave marks in the grass.*" I did not make any such statement. I indicated that, at the scene of this accident, several other vehicles drove across the grass leaving no markings similar to those left by the Powledge Malibu; therefore, at this accident site, the condition of the subject vehicle caused it to leave the marks. The fact that Mr. Bowman was able to leave marks at various speeds at an entirely different location under circumstances without documented similarity to the collision site and where the grass appears to be dead, rather than alive, further confirms that the Powledge vehicle was not operating in a way demonstrated in the tests, nor was it operating like the other vehicles at the scene.

He misquotes my report, again, in the next paragraph, "*Mr. Syson states that because the brake pedal pad is bent, that it is proof Mr. Powledge was pushing hard on the brake pedal.*" I did not make any such statement. I said that the brake pedal deformation almost conclusively proves that Mr. Powledge had his foot on the brake pedal at the time of the impact. Mr. Bowman's analysis of the brake pedal damage and test data regarding the bending of the brake pedal are entirely consistent with my statement.

Mr. Bowman states the following opinions:

"1) The brake system on the subject 2004 Chevrolet Malibu Classic was not defective at the time of this accident.

2) The proximate cause of the accident was not the brake system.

3) The accident was caused by driver."

These opinions are not supported by his testing or analysis. His tests show that a non-defective brake system will stop a Malibu operating at wide-open throttle. His tests further show that the Powledge Malibu was not just driving through the grass at the scene. His tests also serve to confirm that Mr. Powledge had his foot on the brake at the moment of impact. His tests, combined with the scene evidence prove conclusively that Mr. Powledge was NOT the cause of the collision, since the evidence at the scene shows that Mr. Powledge was making every effort to avoid the objects in the median, until the left tire and wheel damage reduced his ability to keep the vehicle under control.



Dr. James W. Lighthall

Dr. Lighthall comments on eyewitness testimony, "*No brake lights were observed on the Powledge vehicle that would indicate braking prior to impact.*" Dr. Lighthall implies that the testimony is only consistent with Mr. Powledge not applying his brakes. There are other equally likely explanations, including the fact that the witnesses were not in a suitable position to observe the Malibu's brake lights, that they weren't paying close attention, that the movement of the vehicle distracted their attention from the brake lights, or that the electro-mechanical problem causing the vehicle's throttle to stick open was affecting the brake lights, as indicated by several GM throttle control recalls.

Eyewitness testimony is often difficult to treat as reliable. Mr. Rick Accurso, for example, states on page 23 of his deposition that he wasn't even looking for brake lights. His wife, Linda Gilman, says on page 19 of her deposition that she's certain there were no brake lights, while on page 20, despite that certainty, she failed to observe Mr. Powledge steering around at least two objects in the median. She also indicates that the Powledge Malibu was so far ahead of her that she couldn't see his license plate, yet she had a clear view of his brake lights. Mr. Klibert says in his deposition that he didn't see any brake lights, but he also has Mr. Powledge striking the wrong side of the Gilman/Accurso vehicle. Ms. Gilman describes Mr. Powledge as being in the vehicle, while Mr. Klibert describes him as being thrown out. Mr. Klibert says there was lots of traffic, while Ms. Gilman describes traffic as being light. Mr. Klibert indicates that Mr. Powledge slowed after striking the Gilman vehicle, but Ms. Gilman and Mr. Accurso describe no such slowing. Mr. Klibert, like Ms. Gilman, fails to observe Mr. Powledge steering around various objects in the median.

Dr. Lighthall says in his report, "*Emergency braking concomitant to a severe frontal impact results in fracture/dislocation of the ankle and displacement of the bones of the ankle into the lower leg. The forces associated with this type of displacement cause the bones of lower leg, the tibia and fibula, to fracture. The resultant lower leg injury is a segmental spiral fracture termed a Pylon fracture. There is inconsistent information in the coroner's report; regardless, there is no indication in the report of an ankle fracture or fractures of the lower leg.*" Mr. Powledge's lower right and part of his upper right leg was separated. The right lower leg (the part which might be fractured) is missing.

Dr. Lighthall says, "*Photographs of the path of travel of the Powledge vehicle taken at the accident scene are straight and true, indicating the driver did not attempt to make any evasive maneuver, either through braking or steering, to avoid impact.*" This statement is so clearly false as to render any further statements by Dr. Lighthall moot. It is obvious, based on the fact that he failed to note Mr. Powledge's injury pattern in the scene photos, that Dr. Lighthall did not look at the scene photographs carefully. As noted above, the police photographs and accident diagram clearly show Mr. Powledge driving around obstacles, until impact with a drain damages his left front wheel and tire.

The remainder of Dr. Lighthall's report serves only to speculate why Mr. Powledge drove in a "straight" path, based on his erroneous interpretation of the scene evidence.

David G. McKendry

Mr. McKendry, like Mr. Bowman, comments on the Malibu's brake system capability, *"However, the vehicle's brake system is designed to be able to overpower the engine, even at a wide open throttle condition and at high speeds, and bring the vehicle to a controlled stop. This has been demonstrated by me and others on various vehicles, including an exemplar demonstration with a 2004 Chevrolet Malibu Classic in January, 2009, and has always resulted in the vehicle coming to a controlled stop."* This statement is deceptive. It presupposes that the driver recognizes that the brakes are working, and makes no attempt to pump the brake pedal to, for example, try to disconnect the cruise control. In every vehicle that I have tested, pumping the brakes several times depletes the vacuum boost and makes it very difficult to even slow the vehicle, never mind stop it. If the engine is running at a high load, such as traveling at high speed, there is no vacuum available to replenish the booster. Many vehicles have vacuum pumps, or vacuum reservoirs to compensate for these conditions. For example, GM provided vacuum pumps on numerous vehicles in the 1980's to provide supplemental vacuum to run the cruise control, since those engines produced so little vacuum under load. Volvo, VW and others provide vacuum reservoirs to provide multiple brake applications under heavy loads.

On page 5 of his report, Mr. McKendry asserts, *"Mr. Syson states that the throttle body was found to be stuck open at about 70-80% of full throttle. This can happen when a throttle is being kept open at the time of a collision due to mechanical damage and stress that occurs during an accident."* This statement, obviously, begs the question. If, as the physical evidence demonstrates, Mr. Powledge has his right foot on the brake pedal, what is keeping the throttle plate open at 70-80% of full throttle, if and when the collision damage traps it?

On page 6 of his report, he says, *"Mr. Syson claims his Attachment C contains "a number of customer complaints from other Ecotech engine based vehicles" including some noting problems with the throttle return spring. The references to "return" that were found in the attachment were about the customer not having returned the vehicle to the dealer. The references to spring seem to be referring to, cities such as Spring Valley, High Springs, and Citrus Springs."* This paragraph misquotes my report, in much the same way that Mr. Bowman did. I never said that the customer complaints about cruise controls mentioned anything about throttle return springs. I said that, if the reports were accurate, the throttle return springs weren't working to close the throttle as required by the FMVSS.

Mr. McKendry goes on to review the various features of the stepper motor cruise control that serve to prevent undesired opening of the throttle, and to permit the throttle to close if the brake pedal is applied, or the cruise switch is turned off. One of the things he mentions is *"Asynchronous resets for oscillator failure, low voltage, and watchdog circuitry."* What he fails to mention is that these features are built into the Phillips 80C51 microcontroller, which is sensitive to EMI, and specifically NOT recommended for safety-critical systems. This collision occurred near the Houston Space Center where there are high-powered transmitters. EMI can "freeze the circuit operation" of this chip.

Numerous GM vehicles have similar features. Many have stepper motor cruise controls. There are 14 recalls of GM vehicles with cruise controls since 1988. Only one relates to a problem that would not affect proper stepper motor cruise operation. GM uses stepper motor cruise controls in millions of vehicles, but hundreds of thousands have been recalled. Therefore, one cannot conclude, based on the presence of features in the throttle control system that don't always work, using a microprocessor that is not recommended for such uses, that the throttle control system did not malfunction in the Powledge case.

Karl Stopchinski

Mr. Stopchinski makes a number of statements in his report that are inconsistent. On page 3 for example, he makes two statements that are not in complete agreement. First, he states, *"Another group of objects in the grassy median along the vehicle path is comprised of an access panel, a concrete bordered drain, and reflector post that are about 700 feet from the final impact point. The Powledge vehicle drove along the west side of these objects while remaining in the grassy median."*

On that same page he contradicts that statement, *"The vehicle then travelled (sic) another approximately 700 feet, crossed the concrete drain...."* On page 4, he compounds the inconsistency, *"Police photographs showing their condition reveal minor localized deformation of wheel on the inboard flange and adjacent abrasions and/or cuts on the tire. There was nothing along the vehicle's path prior to impact that would cause this type of damage."* The wheel damage is certainly more than minor, and it was clearly caused by impacting the drain some 700 feet prior to impact.

Mr. Stopchinski also makes comments about the throttle being stuck in the open position, *"A section of the throttle body including the throttle valve and lever that had been broken free from the vehicle was inspected. It was not burned. The throttle section was fractured from the intake manifold and a portion of the inlet tube was attached. This inlet tube was removed and photographed. The throttle valve shaft was deformed and the throttle lever was broken from the shaft. The throttle valve was found fixed in an open position greater than full throttle. In my opinion, no conclusion can be made about the position of the throttle at impact based upon its current position. The extreme vehicle damage and movement of the throttle body and connected components that occurred during the impact likely forced the throttle lever/valve past the fully open position, deforming and pinning it in place. The return springs remained approximately in place and would have forcefully acted on the throttle lever to close the throttle in its normal operating condition. The cable mounting bracket was attached and deformed and a portion of the accelerator pedal cable remains attached to the bracket. The accelerator cable was ripped apart in the crash."* This statement makes no engineering sense. Since the throttle shaft is bent, the throttle must have been open, when the damage occurred. Besides, there are no stock Malibu vehicles that I am aware of that can travel 80 to 90 miles per hour without the throttle plate being open.

Mr. Stopchinski also indicates that the impact of the sign support is 6" to the left of the Malibu centerline. In a central impact, the Malibu throttle body is literally the first mechanical engine component to be struck by the support. Obviously, the force of the initial impact bent the throttle shaft rearward while the throttle was open. The throttle body was disassociated from the wreckage and not burned, consistent with it being thrown clear in the initial impact. It would be impossible to bend the throttle shaft with cables when it is detached from its mount.

Mr. Stopchinski notes that there are numerous ways that a driver may be able to cope with a stuck throttle condition, *"The incident vehicle's equipment, by design, has safeguards that were in place and would have been functional in this vehicle at the time of this event to prevent actuation of the throttle by any means other than the driver. In any event, the incident vehicle contained design features that are effective in stopping a moving vehicle including release of the accelerator pedal, moving the gear shift selector lever to Neutral or Park, or simply turning the ignition key to off. Of course, use of the brake will prevent the vehicle from accelerating and traveling at a high speed as occurred in this incident."* These are interesting hypotheses, but his own tests show that they would be generally ineffective, or unlikely to be applied by a driver within the few seconds that would be available to avoid a collision. Assuming the vehicle is traveling 80 to 90 miles per hour that is roughly 125 feet per second. Given test data showing at most 3 to 4 feet per second deceleration while coasting on grass, he'd still be traveling over 100 feet per second (about 70 miles per hour) when he hits the sign support, if he puts the shift lever in neutral or park or turned off the ignition at that time.

The brake system won't work to slow the vehicle, if he has pumped the brakes and the throttle remains open, or he cuts the ignition. If he cut off the ignition, at the point where steering became difficult, he could accidentally lock the column. In my experience with cases involving stuck throttles, very few people turn off the key, because of the above concern with the anti-theft feature.

My testing shows that braking power can be maintained under the circumstances of multiple brake application and low engine vacuum due to an open throttle or stalled engine, only if there is an electrical vacuum pump, or large vacuum reservoir in the system. Both technologies were readily available and in use on vehicles in 2004.

Summary

None of the defense experts provides a reasonable explanation for this collision. At the moment of impact, Mr. Powledge had his right foot on the brake, yet the throttle was still open. None of the defense experts provides a reasonable explanation for the throttle position or the brake pedal damage. The only explanation provided is that Mr. Powledge was having a medical problem, or was trying to kill himself and four innocent children. Neither explanation is consistent with Mr. Powledge's general mental and physical health.

Neither a medical problem nor suicidal tendencies is consistent with Mr. Powledge's driving for more than half of the vehicle's off-road excursion. Then, the only injury producing contact occurs after the left front wheel and tire are damaged, and the vehicle becomes less controllable.

Safer alternative designs, such as a vacuum reservoir or electrically driven vacuum pump were readily available, and would have made the vehicle ACTUALLY perform the way the defense experts CLAIM it would.

EXHIBIT D

Bowman Consulting LLC
4660 Fenton Road
Hartland, Michigan 48353

Engineering Report
Powledge v. General Motors Corporation
February 18, 2009

I am a mechanical engineer with over 36 years of experience in automotive engineering. I received a Bachelor of Science Degree from Rochester Institute of Technology in 1971 and a Master of Science Degree from Stanford University in 1972. I have completed the Traffic Accident Reconstruction course at Northwestern University. My Curriculum Vitae is attached.

Material Reviewed

I have reviewed the following documents relating to this case:

- Texas Accident Report # 05-10172
- Deposition of Corporal C. Rich
- Deposition of B. Quiroga
- Deposition of R. Klibert
- Report by Mr. S. Syson
- 80 MPH video of path
- Photographs of exemplar throttle body
- Photographs of scene by Dr. Andrews
- Photographs of exemplar cruise control
- Photographs of exemplar throttle cable
- Photographs by Texas City Police
- Photographs by Texas City Fire Marshal
- Photographs by M. Byrd
- Photographs by D. McKendry
- Photographs of vehicle-source unknown
- Video of scene by L. Williams
- Photographs of scene by L. Williams
- Photographs by Scientific Analysis

Additionally, I have inspected the subject vehicle involved in this accident and have inspected the accident scene.

Accident Facts

The accident report states the crash occurred at 8:52 am Tuesday October 18, 2005 on IH45 North, ¾ miles South of Holland Road in Texas City, Texas. Mr. Adam W. Powledge was driving a 2004 Chevrolet Malibu Classic VIN: 1GIND52F34M598780. Mr. Powledge had struck another southbound vehicle. Mr. Powledge then drove into the grass median between the south bound lanes of IH45 and a feeder road. He drove 1419 feet in the grass and then stuck a steel support beam. The vehicle split in half and then caught fire. All of the occupants were killed.

Additional Information

I participated in vehicle demonstrations specifically with regard to this matter. Two exemplar 2004 Chevrolet Malibu Classic vehicles were used to demonstrate tire marks in the grass and performance characteristics of throttle, cruise control and braking systems. One vehicle was used in the Houston, Texas area to demonstrate the tire marks left in grass at high speed, hard braking, ABS braking, locked wheel braking, with a flat tire, steering, and low speed. The other vehicle was used in the Phoenix, Arizona area at the General Motors Proving Ground to demonstrate maximum speeds and braking performance.

The demonstrations were video taped and acceleration, speed, and distance were recorded. Photographs of the vehicle and tire marks were taken. Also recorded were engine RPM, throttle position, brake switch function, cruise switch function, and pedal force on some demonstrations.

Preliminary review of the information indicates that the marks in the grass are characteristically specific to constant speed, acceleration, braking, and a flat tire. The maximum speed is about 107 MPH, the vehicle can be stopped using the brakes when the throttle is held at wide open and the brakes show specific damage when overheated.

Raw video, photographs and data; recorded with a VC3000, are attached.

Vehicle Inspection

I inspected the accident scene on November 25, 2008. The inspection consisted of walking through the scene in the grass and taking photographs.

I inspected the subject vehicle on December 11, 2008. I specifically inspected the brake system. I disassembled the rear wheels, tires and brake drum. The keepers were still on both rear drums. The rear brakes were intact and showed no adverse wear or heat degradation. The right front brake assembly was covered in melted aluminum and I did not attempt to disassemble the right front brake. I took photographs of the previously disassembled left front brake pads and measured the thickness (inboard 0.360-0.376, outboard 0.430-0.440 inches). I photographed the throttle body which was stored separate from the vehicle. I located and photographed the brake pedal assembly.

Design

The brake system on the 2004 Chevrolet Malibu Classic is vacuum power assisted dual piston hydraulic master cylinder with front disc and rear drum brakes. Some vehicles were manufactured with antilock brake system (ABS) and some were manufactured without ABS. The subject vehicle was not manufactured with ABS. All of these vehicles were manufactured with a diagonal split brake system.

Discussion

My inspection revealed that the only brake system concern is that the left front brake pads were worn beyond the replacement thickness. This is poor owner maintenance but still provided maximum braking capability. The subject vehicle did not have an ABS brake system even though the wheel bearings had ABS wheel speed sensors. This is because it is less expensive and higher quality control to manufacture all of these vehicles with ABS wheel bearings, than to have two different kinds (ABS and non-ABS). I found no evidence of overheating of either the front or rear brakes. I have run many vehicles, including an exemplar in this matter, to the point of brake failure due to overheating. This vehicle has none of the characteristics of overheating.

Mr. Syson states that the front brakes of the subject vehicle did not operate due to overheat. One of the demonstrations shows that when the front brakes overheat, the rear brakes do not work. This is because the brake system is a diagonal split. The left front and right rear brakes work off the same chamber of the master cylinder; while the right front and left rear work off the other chamber. Therefore, when the front brakes fail due to overheat the rear brakes also fail.

Mr. Syson states that a rolling tire, without braking does not leave marks in the grass. The demonstrations at both high speed and low speed clearly shows that a rolling tire does leave marks in the grass.

Mr. Syson states that because the brake pedal pad is bent, that it is proof Mr. Powledge was pushing hard on the brake pedal. I have had a demonstration done which shows that when pushing on the brake pedal pad that it only bends about 45 degrees with force applied instead of the approximately 90 degrees of the subject pedal. This is due to the direction of the applied load. After 45 degrees the force drops to zero. Attached is a copy of General Motors Corporation Test Procedure GMN5101. This states that the brake pedal shall withstand a force of 600 pounds without deformation. Six hundred pounds of force is more than a person will push with their leg and foot on the brake pedal.

Opinion

My opinions based on my education, experience, investigation and analysis of this action, to a reasonable degree of engineering certainty are:

- 1) The brake system on the subject 2004 Chevrolet Malibu Classic was not defective at the time of this accident.
- 2) The proximate cause of the accident was not the brake system.
- 3) The accident was caused by driver.

Respectfully submitted,




Bruce R. Bowman

EXHIBIT

E

Respectfully submitted,



KYLE H. DREYER
State Bar No. 06149500

JEFFREY J. COX
State Bar No. 04947530

LOREN B. LOWE
State Bar No. 24060483

**HARTLINE, DACUS, BARGER, DREYER
& KERN, L.L.P.**

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Suite 1000

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(214) 369-2100

(214) 369-2118 – facsimile

**ATTORNEYS FOR DEFENDANT
GENERAL MOTORS CORPORATION**

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of May, 2008, a true and correct copy of this pleading was served on all counsel of record in accordance with the Texas Rules of Civil Procedure.



I.
GENERAL RESPONSE AND PREFATORY OBJECTIONS

General Motors' investigation of the facts relating to this incident is incomplete and is continuing. General Motors has not yet received or collected all documents relating to this action, interviewed all witnesses in this lawsuit, nor completed its discovery or preparation of its defenses to Plaintiffs' allegations. General Motors reserves the right, at any time in this litigation, to identify additional witnesses, information or documents, if any, that pertain to any such theories known or unknown, or which may be discovered.

General Motors understands the vehicle involved in this case is claimed to be a 2004 Chevrolet Classic (VIN 1G1ND52F34M598780) ("subject vehicle"). Though Plaintiffs have not identified any specific components as being defective or the cause of the alleged unwanted acceleration, General Motors presumes Plaintiffs intend to claim some sort of defect relating to the vehicle's throttle control system, which includes the throttle body assembly, accelerator cable assembly, and accelerator pedal assembly. For the purpose of discovery as it relates to these components only - (1) the throttle body assembly; (2) the accelerator cable assembly; and (3) the accelerator pedal assembly - the proper scope of vehicles using the same components as the subject vehicle would include 2004-2005 N-Cars equipped with a 2.2L L61 4-cylinder engine that have been marketed as the Chevrolet Classic, Pontiac Grand Am, and Oldsmobile Alero.

By answering these discovery requests, General Motors does not intend to make any admission regarding the admissibility of any documents referenced, identified, or produced. Once Plaintiffs provide more specific information regarding their defect claims, General Motors may need to further refine or broaden the scope of its responses. Finally, since this case is in its preliminary

stages, General Motors reserves the right to file supplemental Responses, if necessary, as the case develops.

II.
OBJECTIONS AND RESPONSES

REQUEST FOR PRODUCTION NO. 1:

If the subject vehicle contained ABS brakes, furnish the performance specifications.

RESPONSE:

For the reasons described in more detail in General Motors' Amended Response to Interrogatory No. 1 previously served in this litigation, General Motors has confirmed the subject vehicle was not equipped with ABS brakes when it left General Motors' possession. Therefore, performance specifications for ABS brakes would not be relevant and would not lead to the discovery of admissible evidence. *See* TEX. R. CIV. P. 192.3(a).

REQUEST FOR PRODUCTION NO. 2:

Furnish all recalls, service campaigns, service bulletins, dealer bulletins or by whatever name called involving the subject platform vehicle or any vehicle with the 4 cylinder engine like that used in the subject vehicle.

RESPONSE:

For the reasons discussed more fully in the General Response and Prefactory Objections above, General Motors will search for and produce, if found, recalls, service campaigns, service bulletins and dealer bulletins relating to the throttle control system and/or unwanted acceleration in 2004-2005 N-Cars equipped with a 2.2L L61 4-cylinder engine (Chevrolet Classic, Pontiac Grand Am, and Oldsmobile Alero) (subject to Protective Order).

General Motors objects to further response to this Request because it is overly broad, vague, ambiguous, not properly limited in time and scope, and asks for information that is not relevant and will not lead to the discovery of admissible evidence. *See* TEX. R. CIV. P. 192.3(a).

To date, Plaintiffs have not identified any component or subsystem alleged to be defective. Plaintiffs have only generally alleged that the vehicle experienced unwanted acceleration, but fail to say what was the specific cause. In addition, this Request is not limited to the subject Chevrolet Classic or vehicles substantially similar to the subject Chevrolet Classic, but instead seeks the production of documents related to "any vehicle" with the 4-cylinder engine like that used in the "subject vehicle." Without more, a request for all recalls, *etc.* for vehicles with the same engine size constitutes a failure to describe with reasonable particularity the information and materials Plaintiffs seek, or how such information or materials may be relevant to the claims and allegations in this action. *See* TEX. R. CIV. P. 196.1(b).

REQUEST FOR PRODUCTION NO. 3:

Furnish all claims, complaints or notices that defendant has received from the NHTSA pertaining to the 2005 Chevrolet Cobalt and allegations that the accelerator throttle was sticking.

RESPONSE:

General Motors objects to this Request because it is overly broad, vague, ambiguous, not properly limited in time and scope, and asks for information that is not relevant and will not lead to the discovery of admissible evidence. *See* TEX. R. CIV. P. 192.3(a). For example, Plaintiffs' defect allegations in this matter relate to the unwanted acceleration of the subject 2004 Chevrolet Classic. This Request is not limited to the subject Chevrolet Classic or vehicles substantially similar to the subject Chevrolet Classic, but instead seeks the production of documents related to the "2005 Chevrolet Cobalt," which does not have the same throttle control system as the subject vehicle.

EXHIBIT

F

CAUSE NO. 07-CV 1040

DORIS POWLEDGE, INDIVIDUALLY §
AND AS REPRESENTATIVE OF THE §
ESTATE OF ADAM POWLEDGE, §
DECEASED, THE ESTATE OF RACHEL §
POWLEDGE, DECEASED, THE ESTATE §
OF ISAAC POWLEDGE, DECEASED, §
THE ESTATE OF CHRISTIAN §
POWLEDGE, DECEASED, AND THE §
ESTATE OF JACOB POWLEDGE, §
DECEASED; §
AND CONNIE MCNEIL AS NEXT §
FRIEND TO AUSTIN POWLEDGE, §
A MINOR; §
AND AMBER POWLEDGE §
AND MARY LOU POWLEDGE, §
INDIVIDUALLY, §

IN THE DISTRICT COURT

2009 JUL -3 AM 10:39
District Clerk
GALVESTON COUNTY, TX

Plaintiffs,

and

RONALD ALTON POWLEDGE,

Intervenor,

VS.

10th JUDICIAL DISTRICT

GENERAL MOTORS CORPORATION,

Defendant.

GALVESTON COUNTY, TEXAS

PLAINTIFFS' FOURTH AMENDED PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, DORIS POWLEDGE, both in her individual capacity and as representative of the ESTATE OF ADAM POWLEDGE, deceased, the ESTATE OF RACHEL POWLEDGE, deceased, the ESTATE OF ISAAC POWLEDGE, deceased, the ESTATE OF CHRISTIAN POWLEDGE, deceased, and the ESTATE OF JACOB POWLEDGE, deceased; CONNIE MCNEIL, as next friend to AUSTIN POWLEDGE, a minor; and AMBER POWLEDGE and MARY LOU POWLEDGE, individually

Coded
SF

(hereinafter referred to as "Plaintiffs"), and respectfully file this Fourth Amended Petition against GENERAL MOTORS CORPORATION (hereinafter referred to as "Defendant"), and in support hereof would state and show the following:

I. Discovery Control Plan

1. Plaintiffs intend to conduct discovery under Level 3 pursuant to Rule 190.4 of the Texas Rules of Civil Procedure.

II. Parties

2. Plaintiff Doris Powledge appears in this action as the surviving spouse and representative of the Estate of Adam Powledge, deceased. She also appears in this action as the surviving mother and representative of the estates of her children, Rachel Powledge, Isaac Powledge, Christian Powledge, and Jacob Powledge, deceased. Doris Powledge resides in and is a citizen of League City, Texas.

3. Plaintiff Austin Powledge is a surviving minor child of Adam Powledge, deceased. He brings forth his causes of action through his next friend and natural mother, Connie McNeil. He resides in and is a citizen of Crosby, Texas.

4. Plaintiff Amber Powledge is an individual who is a surviving child of Adam Powledge, deceased. She resides in and is a citizen of League City, Texas.

5. Plaintiff Mary Lou Powledge is the natural surviving mother of Adam Powledge, deceased. She resides in and is a citizen of League City, Texas.

6. Defendant General Motors Corporation is a foreign Corporation doing business in Texas, and service of process upon this Defendant is not necessary at this time as Defendant has previously filed an answer.

III. Facts

7. On or about October 18, 2005, Adam Powledge was driving a 2004 Chevrolet Malibu (VIN# 1G1ND52F34M598780) at approximately the 4600 Block of IH45 North, and near the intersection of Holland Road, in Texas City, Galveston County, Texas. According to the police report, at some point in time, his vehicle apparently struck another vehicle while southbound. Mr. Powledge's vehicle then apparently drove on the grass median until it struck a steel support beam, at which point it split in half and caught fire, killing all of the occupants.

8. At the time of the accident, Jacob Powledge was the right-front passenger, Christian Powledge was the back-right passenger, Rachel Powledge was the back-middle passenger, and Isaac Powledge was the back-left passenger.

9. At the time of the accident, all of the occupants of the vehicle were properly seated and properly wearing their 3-point seat belts.

10. However, despite being properly restrained, Adam Powledge, Jacob Powledge, Christian Powledge, Rachel Powledge, and Isaac Powledge all sustained fatal injuries when their vehicle failed to protect them.

IV. Cause(s) of Action as to Defendant General Motors Corporation

11. It was entirely foreseeable to and well-known by the Defendant that accidents and incidents involving its vehicles, such as occurred herein, would on occasion take place during the normal and ordinary use of said vehicle.

12. The injuries and damages complained of herein occurred because the vehicle in question was not reasonably crashworthy, and was not reasonably fit for unintended, but clearly foreseeable, accidents. The vehicle in question was unreasonably dangerous in the event it should be involved in an incident such as occurred herein.

13. Defendant designed, manufactured, marketed, assembled, and/or tested said vehicle in question to be unreasonably dangerous and defective within the meaning of Section 402(A) Restatement (Second) Torts, in that the vehicle was unreasonably dangerous as designed, manufactured, assembled, marketed, and/or tested because of the following defects:

- a. The vehicle experienced an electrical failure that allowed the vehicle's engine to race out of control;
- b. The vehicle experienced a computer failure that allowed the vehicle's engine to race out of control;
- c. The vehicle experienced a mechanical failure that allowed the vehicle's engine to race out of control;
- d. The vehicle experienced unwanted engine racing;
- e. The vehicle experienced unwanted engine acceleration that lead to a loss of control and/or an accident event;
- f. The vehicle experienced unwanted acceleration that lead to a loss of control and/or an accident event;
- g. The vehicle violated GM's internal performance, reliability, and/or quality standards;
- h. The vehicle breached implied warranties of fitness for a particular purpose and/or merchantability;
- i. The vehicle violated applicable FMVSS provisions and recommended guidelines set forth by the SAE;
- j. The defects were design and/or manufacturing defects;
- k. The vehicle experienced an unwanted acceleration due to a stuck throttle. Defendant had experienced a stuck throttle on other 4 cylinder engines like that used on the subject vehicle that have been reported to the NHTSA and to Defendant. These vehicles include Chevrolet, Saturn, Pontiac, and Cobalt vehicles;
- l. The vehicle may have needed to be the subject of a recall, service bulletin, or service campaign based on a later model year vehicle experiencing problems associated with unwanted engine acceleration;
- m. The ABS brakes failed to stop the vehicle as it was on dirt and grass which would not permit the brakes to override the acceleration;
- n. Defendant violated FMVSS 124 in that there are not two separate energy sources to return the throttle to closed;
- o. Defendant's violation of FMVSS 124 caused the out of control condition which lead to the fatal crash;
- p. Defendant used a throttle cable and cruise control cable on this vehicle rather than a drive by wire system which is a safer design; and/or

q. The vehicle's cruise control failed stuck or malfunctioned.

14. Defendant was negligent in the design, manufacture, assembly, marketing, and/or testing of the vehicle in question.

15. The foregoing acts and/or omissions of Defendant were a producing and/or proximate cause of the Plaintiffs' damages.

16. The foregoing acts and/or omissions of Defendant were a producing and/or proximate cause of the fatal injuries to Plaintiffs Adam Powledge, Jacob Powledge, Christian Powledge, Rachel Powledge, and Isaac Powledge.

V. Damages To Plaintiffs

17. As a result of the acts and/or omissions of Defendant, Plaintiff Adam Powledge suffered disfigurement, conscious physical and emotional pain, torment, mental anguish, and/or emotional distress prior to his death, and these injuries survive his death through his estate.

18. As a result of the acts and/or omissions of Defendant, Plaintiff Jacob Powledge suffered disfigurement, conscious physical and emotional pain, torment, mental anguish, and/or emotional distress prior to his death, and these injuries survive his death through his estate.

19. As a result of the acts and/or omissions of Defendant, Plaintiff Christian Powledge suffered disfigurement, conscious physical and emotional pain, torment, mental anguish, and/or emotional distress prior to his death, and these injuries survive his death through his estate.

20. As a result of the acts and/or omissions of Defendant, Plaintiff Rachel Powledge suffered disfigurement, conscious physical and emotional pain, torment,

mental anguish, and/or emotional distress prior to her death, and these injuries survive her death through her estate.

21. As a result of the acts and/or omissions of Defendant, Plaintiff Isaac Powledge suffered disfigurement, conscious physical and emotional pain, torment, mental anguish, and/or emotional distress prior to his death, and these injuries survive his death through his estate.

22. As a result of the acts and/or omissions of Defendant, Plaintiff Doris Powledge has suffered past and future: loss of care, maintenance, support, services, advice, counsel, reasonable contributions of a pecuniary value, loss of companionship and society, loss of consortium, and mental anguish as a result of the fatal injuries to Adam Powledge, Jacob Powledge, Christian Powledge, Rachel Powledge, and Isaac Powledge.

23. As a result of the acts and/or omissions of Defendant, Plaintiff Doris Powledge has suffered a loss of inheritance of the assets that Adam Powledge, Jacob Powledge, Christian Powledge, Rachel Powledge, and Isaac Powledge, in reasonable probability, would have added to the estate and left at natural death to Plaintiff.

24. As a result of the acts and/or omissions of Defendant, Plaintiff Doris Powledge has become obligated to pay reasonable and necessary medical, funeral, and burial expenses as a result of the fatal injuries to Adam Powledge, Jacob Powledge, Christian Powledge, Rachel Powledge, and Isaac Powledge.

25. As a result of the acts and/or omissions of Defendant, Plaintiff Austin Powledge has suffered past and future: loss of care, maintenance, support, services, advice, counsel, reasonable contributions of a pecuniary value, loss of companionship

and society, loss of consortium, and mental anguish as a result of the fatal injuries to his father, Adam Powledge.

26. As a result of the acts and/or omissions of Defendant, Plaintiff Austin Powledge has suffered a loss of inheritance of the assets that Adam Powledge, in reasonable probability, would have added to the estate and left at natural death to Plaintiff.

27. As a result of the acts and/or omissions of Defendant, Plaintiff Amber Powledge has suffered past and future: loss of care, maintenance, support, services, advice, counsel, reasonable contributions of a pecuniary value, loss of companionship and society, loss of consortium, and mental anguish as a result of the fatal injuries to her father, Adam Powledge.

28. As a result of the acts and/or omissions of Defendant, Plaintiff Amber Powledge has suffered a loss of inheritance of the assets that Adam Powledge, in reasonable probability, would have added to the estate and left at natural death to Plaintiff.

29. As a result of the acts and/or omissions of Defendant, Plaintiff Mary Lou Powledge has suffered past and future: loss of care, maintenance, support, services, advice, counsel, reasonable contributions of a pecuniary value, loss of companionship and society, loss of consortium, and mental anguish as a result of the fatal injuries to her son, Adam Powledge.

30. The above and foregoing acts and/or omissions of Defendant, resulting in the fatal injuries to Plaintiffs Adam Powledge, Jacob Powledge, Christian Powledge, Rachel Powledge, and Isaac Powledge, have caused actual damages to Plaintiffs in an amount in excess of the minimum jurisdictional limits of this Court.

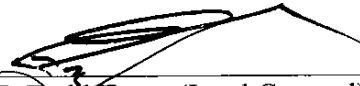
VI. Prayer

31. For the reasons presented herein, Plaintiffs pray that upon a final trial of this cause, Plaintiffs recover judgment against Defendant for:

- a. economic and non-economic damages;
- b. prejudgment and post-judgment interest beginning October 18, 2005;
- c. costs of suit; and
- d. all other relief the Court deems proper.

Respectfully submitted,

The TRACY firm


E. Todd Tracy (Lead Counsel)
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Andrew G. Counts
State Bar No. 24036408
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And

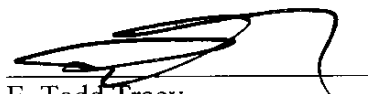
The Buzbee Law Firm

Anthony G. Buzbee
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(409) 762-0538 Fax

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing has been sent to all counsel of record on this 1st day of July, 2008, in accordance with the Texas Rules of Civil Procedure.



E. Todd Tracy
Andrew G. Counts

James M. Wilson
DISTRICT CLERK
GALVESTON COUNTY, TX

JUL -3 AM 09:39