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 ORIGINAL FILED
 Superior Court of California
 County of Los Angeles

SEP 22 2015

Sherril K. Carter, Executive Officer/Clerk
 By Natasha Rose, Deputy
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 8 SUPERIOR COURT OF CALIFORNIA
 9 COUNTY OF LOS ANGELES [CENTRAL DISTRICT]

10 HILARIO CRUZ, individually and as for
 11 Minors Hilda and Stephanie Cruz,

12 Plaintiffs,

13 vs.

14 NISSAN NORTH AMERICA, INC.,

15 Defendant.

16 SOLOMON MATHENGE,

17 Cross-Complainant,

18 vs.

19 NISSAN NORTH AMERICA, INC., INFINITI
 20 OF SANTA MONICA, CONTINENTAL
 21 TEVES, CONTINENTAL AUTOMOTIVE
 SYSTEMS, INC., and ROES 1 through 50,
 inclusive,

22 Cross-Defendants.

Case No. BC493949,
 Related Case BC529912

**CROSS-COMPLAINT BY SOLOMON
 MATHENGE FOR DAMAGES
 INCLUDING PUNITIVE DAMAGES,
 AND FOR EQUITABLE INDEMNITY;
 DEMAND FOR JURY TRIAL**

24 Cross-Complainant SOLOMON MATHENGE, by and through his undersigned counsel,
 25 cross complains for damages and equitable indemnity against Cross-Defendants NISSAN NORTH
 26 AMERICA, INC., INFINITI OF SANTA MONICA, a business of unknown form and origin,
 27 CONTINENTAL TEVES, CONTINENTAL AUTO SYSTEMS, INC and Roes I-XX.

28 I. SOLOMON MATHENGE brings these claims against Cross-Defendants NISSAN

File by Fax

1 NORTH AMERICA, INC (“NNA”), INFINITI OF SANTA MONICA (collectively “NISSAN” and
2 “NISSAN Cross-Defendants”), and CONTINENTAL TEVES and CONTINENTAL
3 AUTOMOTIVE SYSTEMS, INC. (collectively “CAS” or “CAS Cross-Defendants”), as the entities
4 which developed, designed, manufactured, assembled, tested, marketed, promoted, advertised,
5 distributed, sold, warranted, maintained, and serviced MATHENGE’s 2004 Infiniti QX56 SUV, and
6 its Delta Stroke Sensor component.

7 2. Cross-Complainant MATHENGE’s 2004 QX56, and all Defective Vehicles, suffer
8 from the same intrinsic design defect involving the Delta Stroke Sensor (“DSS”), an electrical
9 component housed within the active brake booster. All Defective Vehicles pose a significant and
10 immediate safety threat to all users of such vehicles and to the public in general in that DSS failure
11 disables the braking ability of Defective Vehicles to the point where drivers are, without warning
12 and suddenly, unable to stop their vehicle within a reasonably safe time and distance, or at all. As
13 the result of the failure of the DSS in MATHENGE’s 2004 QX56 the COLLISION described in
14 greater detail below, and the injuries and loss suffered by MATHENGE and others, occurred.

15 3. For many years, the NISSAN and CAS Cross-Defendants have continued, to their
16 significant financial gain, to conceal and hide the critical DSS safety defect to consumers including
17 MATHENGE. NISSAN should have long ago voluntarily recalled all Defective Vehicles,
18 including MATHENGE’s 2004 QX56, to fix and render said Vehicles safe to operate on the roads.
19 Instead, NISSAN and CAS have hidden the defect and the foreseeable likelihood of its catastrophic
20 consequences.

21 WHEREFORE, Cross-Complainant MATHENGE alleges as follows:

22 4. At all times relevant to this action, the NISSAN and CAS Cross-Defendants
23 intentionally, recklessly, and/or negligently concealed, suppressed, and omitted the risks, dangers,
24 defects and disadvantages of Defective Vehicles, and their DSS component. At all times relevant to
25 this action, said Cross-Defendants designed, supplied, marketed, sold, distributed, advertised,
26 warranted, serviced and maintained such VEHICLES as safe to use, when, in fact, they had reason
27 to know, and did know, that its Defective Vehicles were not safe to use for their intended purpose.
28 Such Vehicles posed a serious risk to the safety of owners, users, passengers, occupants, pedestrians

1 and fellow drivers due to the DSS defect.

2 JURISDICTION AND VENUE

3 5. Plaintiff, one or more Cross-Defendants, and Defendant and Cross-Complainant
4 SOLOMON MATHENGE are all residents of California, and Los Angeles County.
5 MATHENGE's Defective Vehicle was purchased in Santa Monica and in Los Angeles County, and
6 Los Angeles County is where the COLLISION occurred. None of the causes of action stated here
7 has been assigned or otherwise given to any other court or tribunal. The NISSAN and the CAS
8 Cross-Defendants do substantial business in the State of California, and within this County, are
9 registered to and in fact are doing business within the State of California and otherwise maintain
10 requisite minimum contacts with the State of California. Additionally, NNA and CAS distribute in
11 this County, receive substantial compensation and profits from sales, maintenance, and service of
12 Defective Vehicles in this County, and have and continue to conceal and make material omissions
13 in this County so as to subject them to *in personam* jurisdiction and venue in this Court.

14 CROSS-COMPLAINANT

15 6. Defendant and Cross-Complainant SOLOMON MATHENGE is an individual who
16 resides in the County of Los Angeles, State of California. He is a Defendant in this proceeding,
17 having been sued for wrongful death by Hilario Cruz individually, and for survival damages for and
18 on behalf of Cruz's decedent children, six (6) year old Hilda and four (4) year old Stephanie. By
19 this Cross-Complaint, MATHENGE sues the NISSAN and CAS Cross-Defendants for his own
20 damages arising from the COLLISION and COLLISION AFTERMATH, and cross-complains for
21 implied equitable indemnity against them on the claims stated against him as a defendant.

22 THE COLLISION

23 7. Cross-Complainant MATHENGE was operating his 2004 QX56, VIN
24 #5N3AADBC14N8D9115, on August 29, 2012 as he approached the intersection of Highland and
25 Willoughby in Los Angeles. He attempted to brake but his car did not respond, and he was unable
26 to slow his Defective Vehicle. He made an emergency maneuver to avoid colliding with the
27 vehicles in front of him but was unable to avoid colliding with a vehicle driven by Saida Mendez-
28 Bernardino. MATHENGE was seriously injured, and three others, including a six year old girl and

1 a four year old girl, were killed as a consequence. Cross-Complainant MATHENGE first became
2 aware of the possibility of a hidden and concealed defect in his 2004 QX56 in early December 2014
3 as a potential cause of the COLLISION, at the time news reports began to surface about the
4 settlement of a class action in *Banks v. Nissan North America, Inc.*

5 THE COLLISION'S AFTERMATH

6 8. After the COLLISION, Cross-Complainant MATHENGE was confronted with the
7 sickening reality that the COLLISION in which was involved had killed a young mother and her
8 two small children. MATHENGE was not believed and falsely accused of having recklessly and
9 intentionally caused these tragic deaths. Starting after February 2013 and through to date, he has
10 faced insinuation, accusation, and a criminal investigation that has led to him being charged with,
11 arraigned for, and aggressively prosecuted for multiple counts of criminal homicide, charges which
12 have yet to be withdrawn. MATHENGE would not have been subjected to any of this intolerable
13 and uncivilized treatment, and its extreme emotional distress, had the NISSAN and CAS Cross-
14 Defendants not acted in the outrageous way in which they did, intentionally hiding and concealing
15 the DSS Defect from Cross-Complainant MATHENGE, the government, and the public, in a
16 manner substantially certain to cause severe emotional distress to those injured thereby. Cross-
17 Complainant MATHENGE first became aware of the possibility of a hidden and concealed defect
18 in his 2004 QX56 in early December 2014 as a potential cause of the COLLISION AFTERMATH,
19 at the time news reports began to surface about the settlement of a class action in *Banks v. Nissan*
20 *North America, Inc.*

21 CROSS-DEFENDANTS

22 9. Cross-Defendant NISSAN NORTH AMERICA, Inc. is an active California
23 corporation which directs and coordinates all of Nissan's activities, including design, development,
24 and marketing of Infiniti and Nissan vehicles including Defective Vehicles in the U.S. market. This
25 Cross-Defendant engaged in these activities affecting the design and sale of all Defective Vehicles,
26 including MATHENGE's 2004 QX56, from its principal place of business in Gardena, California,
27 and has continued to perform significant and meaningful activities in connection with them in
28 California since 2004.

1 consumer expects--suddenly and without any advance warning. This DSS defect was the sole and
2 substantial factor in causing the COLLISION, and the unthinkable tragedy it has and continues to
3 wreak on those foreseeably and directly affected by the COLLISION.

4 GENERAL ALLEGATIONS

5 A. Delta Stroke Sensor Function and Failure

6 14. Cross-Complainant MATHENGE alleges that the following accurately describes the
7 function of the DSS in Defective Vehicles, and the sudden, unexpected, dangerous and unsafe
8 braking failure it defective condition causes.

9 15. The DSS installed in all Defective Vehicles is an electronic component which
10 interfaces with and connects to the Electronic Control Unit ("ECU"). The DSS provides input and
11 information to the ECU which is vital to the proper and effective operation of the braking system on
12 all Defective Vehicles. The DSS is contained within the brake booster assembly unit of all
13 Defective Vehicles, and cannot be inspected or examined without costly removal and destruction of
14 the expensive brake booster assembly. The DSS was designed and supplied by the CAS Cross-
15 Defendants.

16 16. The DSS measures the application of manual driver pressure to the brake pedal.
17 Succinctly, the DSS determines whether the driver has pressed the brake pedal, and if so, how
18 much, and how fast. The DSS does this by interpreting the mechanical movement of the brake
19 pedal into an electrical signal within a range of pre-set values which values are then communicated
20 to the ECU.

21 17. The ECU is responsible for providing information to the Anti-Lock Braking System
22 ("ABS") actuator/Vehicle Dynamic Control system ("VDC") and the Electronic Brake Distribution
23 ("EBD") unit in all Defective Vehicles. The DSS is a safety device that is used in conjunction with
24 ABS actuator to determine how much vacuum pressure to apply to the power assist for each wheel's
25 brake in the event of brake lock-up—it is used to enable the anti-lock braking function. Power
26 assist is the term used to describe the mechanical advantage created by modern power braking
27 systems on automobiles, including Defective Vehicles. Defective Vehicles are designed to generate
28 power assist through a vacuum-boosted system, and the braking boost available to each of the

1 brakes is substantial, amounting to up to 250 times the pressure manually exerted by the driver
2 against the pedal. Upon DSS failure, Defective Vehicles no longer have vacuum boost. The
3 resulting failure mode instead relies upon something NISSAN calls its Optimized Hydraulic
4 Braking ("OHB") system. Defective Vehicles operating in OHB mode have substantially reduced
5 braking ability and substantially increased stopping distances. As such, DSS failure caused by the
6 DSS defect, as NISSAN and the CAS Cross-Defendants has known for many years, materially and
7 dangerously diminishes the braking power of Defective Vehicles—well below reasonable consumer
8 expectations and needs.

9 18. When DSS failure occurs, the electronic computer system in all Defective Vehicles
10 registers a diagnostic error code C1179 which may be downloaded and read by technicians using
11 certain proprietary diagnostic equipment the NISSAN Cross-Defendants developed and used,
12 primarily through its retail automobile dealer service departments, to diagnose and repair all
13 Defective Vehicles.

14 19. After a Defective Vehicle which has suffered DSS failure is turned off and then then
15 on again, the system resets itself and the power assist functions as it should until the defective DSS
16 fails again, repeating the same sudden and unexpected loss of braking event.

17 20. Within the last two months, Cross-Complainant has discovered and been made aware
18 of a class action lawsuit involving the DSS defect. He then learned about many other drivers who
19 have also suffered DSS failure in their Defective Vehicles. These drivers describe an essentially
20 analogous experience of applying the brakes, pushing the pedal all the way to the floor and with
21 little if any braking response which is far less than adequate to stop the Vehicle in a safe manner.
22 This experience is typically associated with illumination of instrument panel lights including the
23 brake and/or VDC light on the instrument panel. Most all of these drivers, who, unlike
24 MATHENGE, did not suffer catastrophic consequences as a result of their first DSS failure, have
25 gone on to suffer multiple failures before taking their Vehicles to NISSAN dealerships where they
26 are given the run-around and misled about the problem by the dealerships, and even NISSAN and
27 CAS corporate. Some have had paid for the ineffective reprogramming fix called for by the
28 fraudulent TSB, only to have the Defect generally re-manifest.

1 **B. NISSAN's Longstanding Knowledge of the DSS Defect and its Danger**

2 21. On May 12, 2006, Cross-Defendant NNA issued a document entitled Technical
3 Service Bulletin ("TSB") No. NTB06-040 to its dealerships and to mechanics. The TSB involves
4 all 2004-2006 Nissan Titan and Armada vehicles fitted with Vehicle Dynamic Control ("VDC").
5 Likewise, on May 12, 2006, NISSAN issued a similar TSB No. NTB06-011 involving 2004-2006
6 QX56 vehicles. The TSB's are referred to herein collectively as "TSB." The TSB identifies an
7 issue with Defective Vehicles, including Plaintiff MATHENGE's 2004 QX56, involving a braking
8 issue which results in error code C1179 on computerized diagnostic interrogation. The TSB was
9 developed in conjunction with the CAS Cross-Defendants.

10 22. Around the time the TSBs were issued Cross-Defendant NNA delivered copies of
11 the TSB to the National Highway Transport Safety Administration ("NHTSA"). The TSB was
12 delivered to NHTSA in order for NNA to comply with 49 C.F.R., 579.5. 49 C.F.R. 579.5 which
13 requires that Defendant "furnish to NHTSA's Early Warning Division a copy of all notices,
14 bulletins, and other communications [sent to various sources] . . . regarding any *defect* in its
15 vehicles or items of equipment (including any failure or malfunction beyond normal deterioration in
16 use, or any failure of performance, or any flaw or unintended deviation from design specifications,
17 whether or not such *defect* is safety-related." (emphasis added). Thus, by no later than May 12,
18 2006, NISSAN had already concluded that the *defect* identified in the TSB (resulting in error code
19 C1179 for DSS failure) constituted a defect in all Defective Vehicles including Plaintiff
20 MATHENGE's 2004 QX56. However, in neglecting to advise the U.S. Government and NHTSA
21 of the safety nature of the defect, NNA actively misled and defrauded the government, which relied
22 on the TSB to describe a defect which was not a safety hazard.

23 23. Based upon counsel's investigation to date and their understanding of NNA's
24 internal procedures, the issuance of a Technical Service Bulletin such as the TSB requires the
25 completion of several internal steps at NNA, each of which takes significant time and effort. First,
26 the defect must be reported to NISSAN's Total Customer Satisfaction Department from either of
27 the following sources: 1) NNA's own testing; or 2) customer complaints. NNA in turn spends
28 significant time and effort analyzing the testing data and/or customer complaint database. Once

1 NNA concludes that a complaint may involve a defect that is worthy of further attention, it conducts
2 further investigation and testing to analyze and troubleshoot the problem. Then, after the defect is
3 isolated and analyzed, NNA purports to develop a fix. NNA, with the CAS Cross-Defendants,
4 developed and implemented the lengthy 22 page TSB which describes a means of reprogramming
5 the VDC Control Unit through use of an 8 MB (Orange) Reprogramming Card to address the Delta
6 Stroke Sensor/C1179 defect in Defective Vehicles. The internal NISSAN investigation which
7 preceded issuance of the May 12, 2006 TSB would have taken months or even years to complete,
8 and directly the involved the CAS Cross-Defendants.

9 24. The DSS failure investigation began, according to Cross-Defendant NNA, at the start
10 of production in 2003. As such, NISSAN and the CAS Cross-Defendants had actual knowledge of
11 the Delta Stroke Sensor/C1179 error code *defect* at the "start of production" in the Spring of 2003.

12 25. To analyze the defect, Cross-Defendant NNA's internal procedures require it to
13 perform its own testing to replicate the defect. Additionally, Nissan Total Customer Satisfaction
14 was required to review and analyze customer complaints of Delta Stroke Sensor failure/error code
15 C1179. Cross-Complainant's counsel has been contacted by approximately 100 owners of
16 Defective Vehicles, each of whom describe an essentially analogous experience of applying the
17 brakes and pushing the pedal all the way to the floor, but experience little braking response, and far
18 less than adequate to stop the vehicle in a safe manner. These descriptions of Defective Vehicle
19 owners' experiences involving the Delta Stroke Sensor failure/C1179 defect are consistent with the
20 descriptions of many individuals who have reported the DSS issue to NISSAN or who filed
21 complaints with NHTSA since 2004 regarding braking failure in Defective Vehicles. NNA's own
22 testing created the same failure effect which is a clear safety issue and not "vibration in the brake
23 pedal while braking" as Cross-Defendant NNA purports to describe the problem in the TSB.
24 NISSAN and CAS were well aware of the significant safety hazard posed by the Delta Stroke
25 Sensor/C1179 defect identified in the TSB by 2003.

26 **C. NISSAN'S Ongoing Concealment of the DSS Defect**

27 26. The NISSAN and CAS Cross-Defendants knew well before 2006 that the DSS
28 Defect caused a significant loss of braking power, thus posing a significant safety hazard to

1 operators of all Defective Vehicles, and for those who might unluckily cross their paths. The Cross-
2 Defendants knew full well that the defect would present itself without warning and suddenly in
3 whatever dynamic driving situation a Defective Vehicle operator (and those around him or her)
4 might then be facing, such as a busy intersection. Yet, rather than acknowledge the safety hazard
5 posed by the defect ultimately described in the TSB, NISSAN and CAS falsely concealed the safety
6 hazard posed by the defect, deceptively describing the manifestation of the defect in the TSB as
7 follows: "The brake warning light is or was ON. and/or The ABS warning light is or was ON.
8 and/or There is or was vibration in the brake pedal while braking." NISSAN intentionally and
9 deceptively concealed the true safety hazard posed by the Delta Stroke Sensor/error code C1179
10 defect in the TSB and elsewhere because they were aware that disclosure of the defect as a safety
11 hazard would have likely forced NISSAN to incur significant losses to cover the replacement/recall
12 of Brake Boosters to render Defective Vehicles, like MATHENGE's 2004 QX56, safe to drive, and
13 face multiple product defect suits. NISSAN and CAS intentionally mis-described the true hazard in
14 order to conceal it from public disclosure and knowledge, an unscrupulous plan which NISSAN has
15 continued to execute until the present. NISSAN and CAS have also hindered and obstructed public
16 disclosure of documents which would have confirmed the true safety hazard DSS failure poses and
17 their long-standing internal knowledge, and have continuously rejected and denied that the DSS
18 issue is a defect or that it poses any safety issue in very recent filings in other litigation.

19 27. The TSB identified a supposed "reprogramming" fix which it had developed to
20 allegedly remediate the DSS Defect. This "fix" was no fix at all, and the NISSAN and CAS Cross-
21 Defendants were well aware of this no later than late 2006. Due to repeated, post-reprogramming
22 DSS failures in the majority of reprogrammed Defective Vehicles, NISSAN had internally
23 abandoned the reprogramming fix as a legitimate or adequate remedial measure for DSS failure by
24 no later than late 2007, if NISSAN ever believed or had reason to believe it was a reasonable fix at
25 all. In early 2008, a redesigned DSS which corrected the defect intrinsic to the prior DSS went into
26 production as part of a new brake booster assembly part. Despite the availability of this safe and
27 effective part, which incorporated a new, non-defective DSS, NISSAN and CAS did not notify the
28 owners of Defective Vehicles of its availability or of the need to replace their existing brake booster

1 assembly to make their Vehicles safe to drive on public highways and roads. NISSAN failed to
2 advise those who had had their Defective Vehicles reprogrammed using NISSAN's and CAS'
3 fraudulent and defective "fix" that reprogramming was not an effective or reasonable solution to
4 mitigate the DSS safety hazard, or that there was a reasonable and safe fix in the form of
5 replacement with a newly designed Brake Booster Part which NISSAN itself began selling and
6 installing in production vehicles in early 2008. NISSAN continued to allow and promote use of the
7 cheap but ineffective reprogramming fix discussed in the TSB for those Defective Vehicle owners
8 who complained about the Defect when it manifested in their Vehicles, and failed and refused to
9 explain and rectify the reasonable confusion caused by its continued reliance on the TSB and its
10 reprogramming "fix." NISSAN and CAS allowed so, because the cost of brake booster assembly
11 replacement is approximately \$1,000.00, recklessly choosing money and profits in conscious
12 disregard of the safety of: (1) people driving and riding in Defective Vehicles like Plaintiff
13 MATHENGE; and, (2) even more tragically, complete innocents who had the misfortune to be in
14 the path of a Defective Vehicle during DSS failure, like six (6) year old Hilda Cruz and four (4)
15 year old Stephanie Cruz, who fell fatal victim to NISSAN's and CAS' corporate greed on August
16 29, 2012.

17 28. Despite these facts, the NISSAN Cross-Defendants' TSB remains an active technical
18 service bulletin, and neither NISSAN nor CAS have done nothing to withdraw, correct, modify, or
19 clarify their concealed fraud, or to otherwise admit to the true nature of the safety hazard posed by
20 the defect.

21 29. The NISSAN and CAS Cross-Defendants' fraud and concealment of the Delta
22 Stroke Sensor/Error Code C1179 defect and its manifest safety implications are evidenced by the
23 foregoing inaction and conduct in light of its undisputed knowledge of the safety defect. Through
24 customer complaints and/or its own testing of the Delta Stroke Sensor/error code C1179 defect,
25 NISSAN and CAS knew full well they were dealing with a defect which causes the substantial loss
26 of braking power—an obvious safety hazard. Yet, rather than acknowledge the safety hazard posed
27 by the defect ultimately described in the TSB, NISSAN and CAS falsely concealed the safety
28 hazard posed by the defect in the TSB and elsewhere. Since May of 2006, NISSAN and CAS have

1 continued to conceal the true safety hazard posed by the Delta Stroke Sensor/error code C1179
2 defect despite a mounting body of evidence, primarily in the form of increasing complaints by
3 Owners of Defective Vehicles to NHTSA and to NISSAN directly, of sudden and frightening losses
4 of substantially all braking power. Given the safety hazard posed by said defect, and its positive
5 obligation to correct its prior misrepresentation to NHTSA and others in the TSB that the defect did
6 not constitute a safety issue, NISSAN and CAS remain obligated to correct the prior
7 misrepresentation in the TSB and to disclose the true facts regarding the Delta Stroke Sensor/error
8 code C1179 defect to Owners of Defective Vehicles.

9 **FIRST CLAIM FOR RELIEF**

10 **(Strict Product Defect)**

11 30. Cross-Complainant MATHENGE hereby incorporates by reference paragraphs 1-29
12 as though fully set forth herein.

13 31. On or about August 29, 2012, MATHENGE suffered severe physical and emotional
14 injuries when, due to the wrongful conduct of the NISSAN and CAS Cross-Defendants, he was
15 involved in the COLLISION.

16 32. The NISSAN and CAS Cross-Defendants designed, engineered, manufactured
17 tested, assembled marketed, advertised, distributed, sold, warranted, serviced and repaired, the
18 Defective Vehicle involved in the Collision, and the DSS.

19 33. The NISSAN and CAS Cross-Defendants are strictly liable to MATHENGE for his
20 injuries and harm because his 2004 QX56 was defective and unreasonably dangerous for normal
21 use due to its defective DSS design, below reasonable consumer expectations, and because of
22 NISSAN'S and CAS' failure to warn or provide any let alone adequate and timely warning of the
23 substantial hazard Defective Vehicles posed when operated in a reasonably expected and
24 foreseeable manner.

25 34. The NISSAN and CAS Cross-Defendants designed, engineered, manufactured
26 tested, assembled marketed, advertised, distributed, sold, warranted, serviced and repaired
27 Defective Vehicles, and placed and allowed them to remain in the stream of commerce in a
28 condition unreasonably dangerous to consumers, knowing the product would reach the ultimate

1 consumer without substantial change in the defective condition it was from the date when it left
2 each NISSAN and CAS Cross-Defendants' control and care, and responsibility.

3 35. The NISSAN and CAS Cross-Defendants knew or should have known that the
4 ultimate users or consumers of this product would not, and could not, inspect their Defective
5 Vehicles so as to discover the latent defect of the DSS. MATHENGE's 2004 QX56, like all
6 Defective Vehicles, was defective when it left Cross-Defendants' care, custody and control.

7 36. The NISSAN and CAS Cross-Defendants knew or should have known of the
8 substantial dangers involved in the reasonably foreseeable use of Defective Vehicles whose
9 dangerous design, manufacturing and lack of warnings caused it to have and to maintain
10 unreasonably dangerous propensity to suffer sudden and unexpected loss of braking power without
11 warning during normal and expected operation.

12 37. MATHENGE's Defective Vehicle was, at the time of MATHENGE and others'
13 injuries, being used in the manner intended by the NISSAN and CAS Cross-Defendants, and in a
14 manner that was reasonably foreseeable by NISSAN and CAS as involving a substantial danger not
15 readily apparent if adequate warning of the danger had been given at any time.

16 38. MATHENGE was a foreseeable user of his Defective Vehicle.

17 39. MATHENGE's damages and injuries were the legal and proximate result of the
18 NISSAN and CAS Cross-Defendants' failure to design and manufacture, and to provide adequate
19 warnings and disclosure of the hidden defect from which Defective Vehicles suffered.
20 MAHTNEGE has suffered special and general damages in excess of the jurisdiction of this Court as
21 a result.

22 40. Based upon the NISSAN and CAS Cross-Defendants' fraud and reckless conduct,
23 engaged in in conscious disregard of MATHENGE, and others' rights as more particularly
24 described in Paragraphs 7-8, 13-29, above, MATHENGE is entitled to an award of punitive
25 damages against Cross-Defendants.

26 **SECOND CLAIM FOR RELIEF**

27 **(Negligence)**

28 41. Cross-Complainant MATHENGE hereby incorporates by reference paragraphs 1-40

1 as though fully set forth herein.

2 42. The NISSAN and CAS Cross-Defendants owed a duty to MATHENGE to use
3 reasonable care in the design, engineering, manufacturing, testing, assembly, marketing,
4 advertising, inspection, distribution, sale, warranting, servicing, warning about, and ongoing
5 maintenance and remediation of safety-related defects in Defective Vehicles and their DSS
6 component.

7 43. MATHENGE was a foreseeable user of his Defective Vehicle.

8 44. The NISSAN and CAS Cross-Defendants breached their duty, *inter alia*, in one or
9 more of the following ways:

- 10 • Designing, supplying, manufacturing, and otherwise placing in the stream of
11 commerce, Defective Vehicles which suffered from an intrinsic DSS defect;
- 12 • Failing to adequately identify and mitigate the hazard in the testing,
13 inspection, and assembly of Defective Vehicles prior to the MATHENGE
14 Vehicle having been placed in or returned to service;
- 15 • Failing to make timely and adequate correction and/or remediation during the
16 warranty period and thereafter (given the obvious safety-related nature of the
17 defect);
- 18 • Failing to warn of and disclose the Defect in a reasonable manner at any
19 time; and
- 20 • Otherwise being careless and negligent.

21 45. The NISSAN and CAS Cross-Defendants knew or should have known at all relevant
22 times that all Defective Vehicles, including MATHENGE's 2004 QX56 suffered from a dangerous
23 safety-related braking defect in the DSS.

24 46. Safer and readily available alternative designs and manufacturing processes existed
25 were available which could have and would have avoided the COLLISION, and MATHENGE's
26 injuries and damages. The NISSAN and CAS Cross-Defendants failed unreasonably to employ or
27 utilize these alternatives, or to warn.

28 47. The NISSAN and CAS Cross-Defendants designed, engineered, manufactured,

1 tested, assembled, marketed, advertised, inspected, maintained, distributed, sold, warranted,
2 serviced, and maintained and otherwise placed Defective Vehicles in the stream of commerce in an
3 unreasonable manner and in a condition unreasonably dangerous to the consumer, including
4 MATHENGE.

5 48. MATHENGE's damages and injuries were the legal and proximate result of the
6 NISSAN and CAS Cross-Defendants' failure to design and manufacture, and to provide adequate
7 warnings and disclosure of the defect from which Defective Vehicles suffered, and in failing to
8 provide any or adequate warning at any time of the hazard they knew about to the exclusion of all
9 others. MATHENGE has suffered special and general damages in excess of the jurisdiction of this
10 Court as a result.

11 49. The NISSAN and CAS Cross-Defendants' negligence was of a gross and egregious
12 nature, and well beyond the boundaries of conduct described as simply "below the standard of
13 care." Based upon NISSAN's and CAS' recklessness, engaged in in conscious disregard of
14 MATHENGE, and others' rights as more particularly described in Paragraphs 7-8, 13-29, above,
15 MATHENGE is entitled to an award of punitive damages.

16 **THIRD CLAIM FOR RELIEF**

17 **(Intention Infliction of Emotional Distress)**

18 50. Cross-Complainant MATHENGE hereby incorporates by reference paragraphs 1-49,
19 as though fully set forth herein.

20 51. The NISSAN and CAS Cross-Defendants have engaged in outrageous conduct
21 against MATHENGE. As described above, their conduct in designing, manufacturing, distributing,
22 providing warnings, warranting, servicing and maintaining MATHENGE's Defective Vehicle, and
23 fraudulently concealing and hiding it dangerous DSS Defect from MATHENGE and all owners and
24 operators of Defective Vehicles, despite the availability of a reasonable and certain fix for the DSS
25 Defect, until it reasonably and foreseeably caused the COLLISION, and the COLLISION
26 AFTERMATH, was so extreme as to go beyond all possible bounds of decency, and to be
27 reasonably regarded as intolerable in a civilized community.

28 52 The NISSAN and CAS Cross-Defendants, by their conduct and actions, and

1 knowledge, intended to cause MATHENGE, as an operator of one of their unsafe Defective
2 Vehicles, emotional distress, and were substantially certain their conduct and actions would cause
3 MATHENGE severe emotional distress.

4 53. The NISSAN and CAS Cross-Defendants' conduct was in reckless disregard of
5 MATHENGE's rights in that they knew that emotional distress would probably result from its
6 outrageous conduct, and NISSAN gave little or no thought to the consequences of such conduct.

7 54. MATHENGE has suffered severe emotional distress as the result of the COLLISION
8 AFTERMATH.

9 55. The NISSAN and CAS Cross-Defendants' conduct was a substantial factor in
10 causing MATHENGE's severe emotional distress.

11 56. Based upon Cross-Defendants' fraud and reckless conduct, engaged in in conscious
12 disregard of MATHENGE, and others' rights as more particularly described in Paragraphs 7-8, 13-
13 29, above, MATHENGE is entitled to an award of punitive damages.

14 **FOURTH CLAIM FOR RELIEF**

15 (Negligent Infliction of Emotional Distress)

16 57. Cross-Complainant MATHENGE hereby incorporates by reference paragraphs 1-56,
17 as though fully set forth herein.

18 58. The NISSAN and CAS Cross-Defendants' conduct in designing, manufacturing,
19 distributing, selling, warning, warranting, servicing and repairing MATHENGE's Defective
20 Vehicle, and fraudulently concealing and hiding it dangerous DSS Defect from MATHENGE and
21 all owners and operators of Defective Vehicles, despite the availability of a reasonable and certain
22 fix for that DSS defect, until it reasonably and foreseeably caused the COLLISION, and the
23 COLLISION AFTERMATH, was grossly negligent and wrongful.

24 59. As a result of the pre-existing known and foreseeable relationship between the
25 NISSAN and CAS Cross-Defendants on the one hand, and owners and operators of Defective
26 Vehicles including MATHENGE on the other, NISSAN and CAS had a duty to take reasonable
27 steps to protect and to disclose to MATHENGE the safety-related defect in his 2004 QX56 before
28 he injured or killed himself or others. NISSAN and CAS breached this duty when, since before and

1 at least 2006, they engaged in the despicable, fraudulent and unreasonable concealment of the
2 dangerous DSS Defect.

3 60. MATHENGE has suffered severe emotional distress as the result of the COLLISION
4 AFTERMATH.

5 61. NISSAN's and CAS' conduct was a substantial factor in causing MATHENGE's
6 severe emotional distress.

7 62. The NISSAN and CAS Cross-Defendants' negligence was of a gross and egregious
8 nature, well beyond the boundaries of conduct described as simply "below the standard of care."
9 Based upon NISSAN's and CAS' recklessness, engaged in in conscious disregard of MATHENGE
10 and others' rights as more particularly described in Paragraphs 7-8, 13-29, above, MATHENGE is
11 entitled to an award of punitive damages.

12 **FIFTH CLAIM FOR RELIEF**
13 **(Implied Equitable Indemnity)**

14 63. Cross-Complainant SOLOMON MATHENGE incorporates by reference paragraphs
15 1-62, as though fully set forth herein.

16 64. Plaintiff Hilario Cruz, individually and under Cal. Civ. Proc. Code section 377.34 for
17 decedent minors Hilda, Stephanie, and Araceli Cruz (in a related matter) have filed complaints for
18 personal injury and property damage, wrongful death and survival.

19 65. Plaintiff MATHENGE incorporates the allegations of the operative Cruz Complaints
20 herein solely as evidence of its allegations and claims against MATHENGE, but not for the
21 purposes of admitting any factual allegation of those Complaints.

22 66. As set forth above, the COLLISION was caused solely, directly by and through the
23 active negligence and wrongdoing of the NISSAN and CAS Cross-Defendants, which was the sole
24 and substantial factor in the COLLISION that took the lives of Hilda and Stephanie Cruz, and their
25 mother.

26 67. Any and all damages sustained or recovered by the Plaintiffs are the direct result of
27 NISSAN's and CAS' negligence and other wrongful conduct.

28 68. In the event that MATHENGE is held liable in the principal Cruz action and related

1 action, such liability arises only by reason of the active and primary negligence of NISSAN and
2 CAS, and through no fault of MATHENGE, whose fault, if any, is secondary and passive only.

3 69. For the foregoing reasons, MATHENGE is entitled to equitable indemnification and
4 equitable contribution from the NISSAN and CAS Cross-Defendants.

5 70. MATHENGE has and will continue to incur expenses of attorneys' fees, court costs,
6 and other litigation expenses to defend against the principal Cruz complaint, and that by reason of
7 the foregoing, MATHENGE is entitled to recover such fees, expenses and costs incurred in this
8 action against NISSAN and CAS. The amount of said fees, expenses and costs is unknown at this
9 time, and leave of court will be sought to amend this Cross-Complaint to reflect the actual amounts
10 when the same have been ascertained.

11 **RELIEF REQUESTED**

12 WHEREFORE, Cross-Complainant SOLOMON MATHENGE prays judgment against the
13 NISSAN and CAS Cross-Defendants, and each of them, as follows:

14 **ON HIS FIRST AND SECOND CLAIMS FOR RELIEF:**

- 15 1. Special, compensatory damages
- 16 2. General damages;
- 17 3. Punitive damages;
- 18 4. Costs of suit;
- 19 5. Interest; and
- 20 6. Such other and further relief as the court deems proper.

21 **ON HIS THIRD and FOURTH CLAIMS FOR RELIEF:**

- 22 1. Emotional distress damages;
- 23 2. Punitive damages;
- 24 3. Costs of suit;
- 25 4. Interest; and
- 26 5. Such other and further relief as the court deems proper.

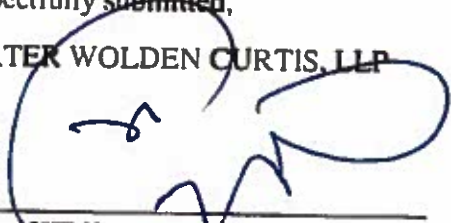
27 **ON HIS FIFTH CLAIM FOR RELIEF:**

- 28 1. Injunctive relief including a declaration that the NISSAN and CAS Cross-

1 Defendants are obligated to indemnify MATHENGE for any and all losses incurred against him
2 including fees and expenses, and for any award made against him on the principal and related
3 complaints;

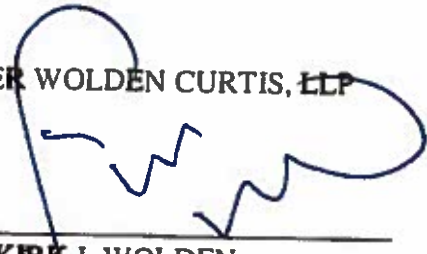
- 4 2. Restitution and payment of money in an amount to be determined by the Court;
- 5 3. Attorneys' fees, and costs and expenses of suit;
- 6 4. Interest; and
- 7 5. Such other and further relief as the court deems proper.

8 Dated: September 20, 2015

Respectfully submitted,
CARTER WOLDEN CURTIS, LLP

By: _____
KIRK J. WOLDEN
Attorney for Cross-Complainant

15 **DEMAND FOR JURY TRIAL**

16 Cross-Complainant SOLOMON MATEHNGE hereby demands trial by jury on all claims to
17 which he is a party.

CARTER WOLDEN CURTIS, LLP

By: _____
KIRK J. WOLDEN
Attorney for Cross-Complainant

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**PROOF OF SERVICE – CCP § 1013, 1013a, 2015.5
and California Rules of Court, Rule 2.306**

Cruz v. Mathenge, et al.

Los Angeles County Superior Case No. BC493949, Related Case BC529912

I, DeeAnne Bagley, declare that:

I am a citizen of the United States and am over the age of eighteen years and not a party to the within above-entitled action. I am an employee of Carter Wolden Curtis, LLP and my business address is 1111 Exposition Boulevard, Suite 602, Sacramento, CA 95815.

On September 22, 2015, I served the within document:

**CROSS-COMPLAINT BY SOLOMON MATHENGE FOR DAMAGES INCLUDING
PUNITIVE DAMAGES, AND FOR EQUITABLE INDEMNITY; DEMAND FOR JURY
TRIAL**

On the parties in said action addressed as follows:

SEE ATTACHED SERVICE LIST

- BY FACSIMILE MACHINE (FAX):** On _____, 2015, at _____ a.m./p.m. by use of facsimile machine telephone number (916) 567-1112, I served a true copy of the aforementioned document(s) on the parties in said action by transmitting by facsimile machine to the numbers as set forth above. The facsimile machine I used complied with California Rules of Court, Rule 2.301 and no error was reported by the machine. Pursuant to California Rules of Court, Rule 2.306, I caused the machine to print a transmission record of the transmission, a copy of which is attached to this Declaration.
- BY MAIL:** I am familiar with my employer's practice for the collection and processing of correspondence for mailing with the United States Postal Service and that each day's mail is deposited with the United States Postal Service that same day in the ordinary course of business. On the date set forth above, I served the aforementioned document(s) on the parties in said action by placing a true and correct copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, for collection and mailing on this date, following ordinary business practices, at Sacramento, CA, addressed as set forth above.
- BY PERSONAL SERVICE:** By personally delivering a true copy thereof to the office of the addressee above.
- BY TRANSMITTING VIA EMAIL OR ELECTRONIC TRANSMISSION:** The document(s) listed above to the addressees listed on the attached service list at the email addresses listed thereon.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on September 22, 2015 at Sacramento, CA.


DeeAnne Bagley

SERVICE LIST

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