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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT 47

HON. RANDOLPH M. HAMMOCK, JUDGE

HILARIO CRUZ, ET AL.,)	
)	
PLAINTIFFS,)	
)	
VS.)	CASE NO. BC493949
)	
SOLOMON MATHENGE, ET AL.,)	A.M. & P.M.
)	
DEFENDANTS.)	
)	
_____)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

THURSDAY, JULY 20, 2017

A.M. & P.M.

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M A S T E R I N D E X

JULY 20, 2017, A.M. & P.M. SESSION

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2 CASE NAME: CRUZ VS. MATHENGE
3 LOS ANGELES, CALIFORNIA THURSDAY, JULY 20, 2017
4 DEPARTMENT 47 RANDOLPH M. HAMMOCK, JUDGE
5 REPORTER: MARK SCHWEITZER, CSR 10514
6 TIME: 9:45 A.M.

7 -o0o-

8 THE FOLLOWING PROCEEDINGS WERE HELD IN
9 OPEN COURT OUTSIDE THE PRESENCE OF THE JURY:

10

11 THE COURT: Let's go on the record. Let's have
12 counsel state an appearance for purposes of this hearing.

13 MR. WOLDEN: Kirk Wolden for Solomon Mathenge, your
14 Honor.

15 MR. TAPLEY: Jerome Tapley for plaintiffs.

16 MR. TURNBULL: Brett Turnbull for plaintiffs.

17 MR. SENIOR. Julian Senior for Nissan, your Honor.

18 MR. TABAK: Jordan Tabak for Nissan, your Honor.

19 THE COURT: Okay. I'm sorry to throw a wrench into
20 things, but when I was looking at things last night, it
21 occurred to me that this was just wrong. And I think it
22 should be self-evident, and I just want to make a record, and
23 then I'll hear from you all. Because when the question is
24 like -- I'll look at the question.

25 Before August 29, 2014, did Hilario Cruz know of
26 facts that would have caused a reasonable person to suspect
27 that he had suffered harm that was caused by some's wrongful
28 conduct. The answer is yes. It has to be. Because he knows

1 that Solomon Mathenge drove through the light and killed his
2 friend. So that's why it was wrong.

3 Did you want to be heard on that?

4 MR. SENIOR: Yes, actually, your Honor.

5 THE COURT: Okay.

6 MR. SENIOR: Okay. So --

7 THE COURT: Why wouldn't the answer just be
8 absolutely yes, just merely because of Solomon Mathenge?

9 MR. SENIOR: There are two different tests under the
10 delayed discovery rule. There is the subjective test, and
11 there is the objective test, and the objective test which
12 plaintiffs want is the second part.

13 So the subjective test says if you know that you've
14 been harmed by someone, if you're in a car accident, then
15 you've got a duty to go out there and investigate. So it kind
16 of goes to the -- the thing about the medical malpractice
17 cases where somebody leaves a sponge inside of them, that's
18 the kind of discovery that you don't find out about because you
19 don't even know you are harmed until years later.

20 Now, the second test under Verdict Form 410, which
21 is the second paragraph, that's the objective test that says
22 would a diligent investigation, and if you look directly at
23 the CACI VF-410, that's where it specifically says would a
24 reasonable person with a diligent investigation have found out
25 that the actual subject vehicle caused them harm. So that's
26 why there are two different tests.

27 But I think more importantly, and what I've
28 discussed with plaintiffs' counsel this morning, the red lined

1 version is -- we've all got to follow the source here -- we
2 got our dates wrong. And that's why the red lined version --

3 THE COURT: I always thought that was the case too.
4 But let's think about that for a second. Let's talk about the
5 dates.

6 MR. SENIOR: Sure.

7 THE COURT: All right. So why do you think it's
8 August -- I mean, it's two years -- you take the date in which
9 he filed it, and you go two years back.

10 MR. SENIOR: Yes.

11 THE COURT: I always felt that was the case, and I
12 kept saying it over and over and over. But you guys were so
13 adamant, and you were clear about it, that's fine. Let me
14 think about it. Okay? Let's look at the dates first.

15 So it would be before August -- yes. I agree. I
16 agree. So does everyone agree -- forget about what language
17 I'm going to use. I'm probably going to use mine, but I'm
18 going to listen, okay? But let's at least see if we can all
19 agree on the date, that it actually should be April 16, 2013,
20 in lieu of the August 29, 2014, correct?

21 MR. WOLDEN: For Cruz.

22 THE COURT: For Cruz. And for Mathenge also? Oh,
23 he filed differently. It would be February --

24 MR. SENIOR: I think we've got 18th in there.

25 MR. WOLDEN: Which is correct, your Honor.

26 THE COURT: Okay. So now looking at -- what I'm
27 proposing to do, I'm certainly going to agree, if everyone
28 agrees, Question 1 will be before April 16, 2013. Because

1 Cruz didn't file a request for something until April 16, 2015,
2 right?

3 MR. SENIOR: Right.

4 THE COURT: This is why I kept saying that was how
5 we did it, but that's okay. Fine. And then going to Question
6 2, I would also change that to April 16, 2013, correct?

7 MR. TAPLEY: Yes, your Honor.

8 MR. SENIOR: Yes, your Honor.

9 THE COURT: And then Questions 3 and 4, which is as
10 to Mathenge, which has a different date, you all agree that
11 that date really instead of the date of the accident, it
12 should be February 18th, 2013. Everyone agree on that, right?

13 MR. WOLDEN: Yes, your Honor.

14 THE COURT: Which is what I said. No problem. All
15 right. So now that might change things. Hold on. It would
16 be 2/18/13. So would it be safe to say the defendants are
17 urging -- just keep it the way it was agreed to by the
18 parties, just changing the date.

19 Is that your position for today?

20 MR. SENIOR: The way it was agreed to by the parties
21 prior to your changes last night, yes, your Honor.

22 THE COURT: Perfect. I got it. And you just argue
23 the -- you just made the argument as to why it should be that
24 way.

25 MR. SENIOR: And that's what the CACI says.

26 THE COURT: I understand completely. Did you want
27 to be heard? Which version do you want to use? The ones that
28 they are suggesting or the ones that I'm suggesting?

1 MR. TAPLEY: The one that you are suggesting.

2 MR. WOLDEN: For Mathenge, your Honor, we
3 respectfully feel that the new language the Court added
4 injects argument into the form, and we'll submit on that.

5 THE COURT: You mean the alleged thing?

6 MR. WOLDEN: No, no. In terms of who was driving
7 the car, who was --

8 THE COURT: I am lost. Mr. Mathenge was driving the
9 car.

10 MR. WOLDEN: I understand, right.

11 THE COURT: I don't understand your objection.

12 MR. WOLDEN: Okay.

13 THE COURT: When you say it interjects argument,
14 what do you mean? Be specific so I can either -- so I can
15 make an intelligent ruling to the extent I'm able to.

16 MR. WOLDEN: Sure. Your Honor, I think adding the
17 language the Court suggested is a function of argument by
18 counsel. Who was driving the car, who was not driving the
19 car, that sort of information.

20 THE COURT: Okay, fine. I understand.

21 MR. WOLDEN: And I just want to make a record for
22 that, your Honor.

23 THE COURT: Fine. Everyone has made their record.
24 Everyone has got their position. I'm using mine, okay? I
25 know I'm right. I agree. I always went with the CACI, but I
26 remember the defense telling me very intelligently the CACI is
27 just a recommended version and sometimes needs to be adapted.
28 I don't think the CACI ever contemplated a case like this,

1 where someone was injured and there was a lawsuit filed, and
2 then later on we discovered something else that may have
3 caused somebody harm later on. That CACI doesn't cover that.

4 I can tell just by the first question in the CACI
5 that you were injured by someone's harm. It didn't
6 contemplate a situation like this. All right? So I have
7 thought about it, and I read all the cases. I think this is
8 the appropriate instruction. That's what I'm going to give.
9 I'm giving it over the defendants' objection.

10 MR. SENIOR: May I make one more comment, your
11 Honor, and I'll make it quick, and I'll stop. It's just that
12 the Court's version, you're inviting a plaintiff to do exactly
13 what the Court said in Fox versus Endicott you can't do, which
14 is sit on your hands and not do an investigation.

15 THE COURT: No, that's not true. That's not true.
16 That's not true. You still have all your arguments. Okay.
17 Your argument is a powerful one as to Mathenge, certainly.
18 You know? And your attorney started making them yesterday in
19 his closing, right? Clearly and effectively, maybe. I don't
20 know. Someone that's being prosecuted for felony
21 manslaughter, maybe they should do something more, and who
22 is adamant that the brakes weren't working.

23 His son does a one-hour Google search and finds
24 nothing? I don't know. I don't know what the jury is going
25 to accept on that. I don't think this changes anything. It
26 just correctly states what the law is and what the question
27 should be because it really is whether or not a reasonable
28 person should have realized -- because we already know he had

1 a case against Mathenge. At least he felt so. And he filed a
2 case. He filed it quickly too. He filed it within months.

3 It's a question of whether or not a reasonable
4 person would have thought maybe I should -- there might be
5 something wrong with the car and I need to do something about
6 that more than he did. That's really what it comes down to.

7 All right. So I think the record is there. I'm
8 going to make the changes. I'm going to give you each a copy.
9 I wanted to give it to you in advance, especially Mr. Klein,
10 so he could adopt his argument if he wants on the new form.

11 Did you want any additional time to make any kind of
12 adoption, either on your Power Point or in your argument now
13 that you know I'm giving this Special Interrogatory?

14 MR. KLEIN: I don't understand that Special
15 Interrogatory. So I'm not going to argue it.

16 THE COURT: Okay. So you don't want more time,
17 then.

18 MR. KLEIN: Correct.

19 THE COURT: Perfect. Anybody else? Okay. We're
20 going to have to take a few moments. I'll go ahead and --
21 I'll have Phil do it. We'll get 16 copies, two for each side,
22 one for me, and then we'll get the jury in. And that won't
23 take long.

24 All right. Let's see if we can still get this to
25 the jury by noon. I think we can.

26 (Recess taken.)

27 THE FOLLOWING PROCEEDINGS WERE HELD

28 IN OPEN COURT IN THE PRESENCE OF THE JURY:

1
2 THE COURT: Good morning, everyone. We're back on
3 the record in the Cruz versus Nissan and all related matters.
4 All our 12 jurors are present. All the alternates are
5 present. All counsel are present.

6 All right. We're going to continue on with the
7 defendant's closing argument.

8 So, Mr. Klein, you may proceed.

9 MR. KLEIN: Thank you, your Honor.

10 **CLOSING ARGUMENT BY DEFENDANT NISSAN COUNSEL KLEIN (CONTINUED)**

11 MR. KLEIN: Good morning. The good news is once you
12 start deliberations, you by and large get to control the
13 schedule.

14 I want to start by making something clear. I
15 touched on it yesterday. Nobody at Nissan doesn't think that
16 what happened here was a tragedy. And we took it very
17 seriously to understand what happened. What caused this
18 tragedy. And we have already done a lot of testing, and I'm
19 going to talk about that. But we went out and hired other
20 experts and did additional testing to find out what happened.
21 And we're criticized for spending money to do that, but no
22 real criticism about what the testing showed. Pebbles thrown
23 at the crash test. Nothing with Mr. Walker.

24 So there was talk yesterday about Mr. Mathenge
25 taking responsibility. We took the responsibility of
26 researching and understanding and finding out what happened
27 here, and we presented that evidence to you.

28 So this is the slide we left off on yesterday from

1 opening statement. The basic theme. And then next slide. I
2 mentioned this to you yesterday. And Ms. Mathenge is here
3 this morning. This is testimony from when she was testifying
4 July 11th. So a couple weeks ago there, from her deposition.

5 After the preliminary hearing, after hearing her
6 father testify about how the vehicle sped up, what conclusion
7 did you reach? And she said, "I trusted the officer did his
8 job, and perhaps I accepted another theory."

9 "Which is what?"

10 "Pedal confusion."

11 We heard about the close-knit family yesterday.
12 Pedal confusion. Now, she testified that around Thanksgiving
13 2004 (Sic) she heard about something else, and the something
14 else is what I described yesterday. The red herring. That
15 other people made complaints.

16 So you've heard all the evidence which she had not
17 heard around Thanksgiving 2014 about the other complaints.
18 And how they are different in many respects, but one key
19 respect. Nobody said their vehicle sped up. And I apologize,
20 I'm going to beat the dead horse a couple more times this
21 morning. The only way you speed up is if you step on the gas
22 pedal.

23 This is a slide from Dr. Young about pedal error.
24 It happens a lot, he testified. It happens to all kinds of
25 vehicles. There's nothing unique about the QX56. In evidence
26 is his data showing how the pedals are set up in the vehicle.
27 Nothing unique about it that would cause this, but the way the
28 sequence lays out fits the pattern.

1 The foot inadvertently contacts the accelerator
2 pedal near the doughnut shop. Perceived brake failure because
3 he thought he was on the brake and was really on the gas.
4 Failure to detect and correct that error, starting to panic.
5 You are convinced you are on the brake pedal when you're
6 really on the gas pedal. The panic increases as he passes the
7 security camera, sees the red light, and now he's got to step
8 the brake all the way to the floor, and what he's doing is
9 pressing the gas there and an object stops the vehicle.

10 He talked about these factors that are identified by
11 the government and his own research that cause it. And one of
12 the factors is being unfamiliar with the vehicle, and we heard
13 about how Mr. Mathenge normally drove Lincoln Town Cars and
14 had just recently switched into this big SUV and had literally
15 been driving it for a matter of days, less than a couple
16 weeks. Older drivers make more errors. It's just what the
17 data shows. And panic, as he said, prevents the error
18 correction.

19 And I've talked about this. I'm not going to read
20 this slide. This is just some of Dr. Young's testimony from
21 trial. That it happens during normal driving. Our studies
22 show pedal errors occur most frequently in normal driving
23 situations, like when you're passing the doughnut shop just
24 north of Melrose, going north on Highland. And once it
25 happens, once you get that confusion set in, it prevents error
26 detection. This is the suggestion that the panic starts it.

27 No, the panic comes in after you make the error, and
28 then you are focused on driving, you don't figure out what's

1 going on.

2 Now, one of the instructions the Court gave you
3 yesterday is about causation. And the last sentence -- it
4 talks about conduct, but it's still talking about factors.
5 The bottom line is if something would have happened but for
6 what they are alleging here, they are alleging there was some
7 brake problem. And if he's never touching the brake pedal,
8 then the braking system cannot be a factor if the driver is
9 stepping on the gas and the vehicle is speeding up.

10 So you're going to get a verdict form in a little
11 bit, and this is going to be the front page of it. And the
12 first question is was the design of the 2004 Infiniti QX56's
13 braking system a substantial factor in causing harm to Hilario
14 Cruz, Araceli Mendez, and Mr. Mathenge? And I'm going to blow
15 it up a little bit because it's important to also check this.

16 This is the first question on the verdict form. If
17 you answered no to Question 1, then answer no further
18 questions. Have the presiding juror sign and date this form.

19 I've laid out, tried to put together the evidence.
20 If he's on the gas pedal, the braking system was not a factor.
21 No, you're done.

22 Wait a minute. We have a C1179 code on this
23 vehicle. 3A.1. So let's talk about 3A.1 for a few minutes
24 because that's the plaintiffs' best hope of trying to make the
25 round peg fit in the square hole, but it still doesn't work.

26 The 3A.1 everyone agrees was in history, three years
27 later when it's downloaded. And that tells us all we know is
28 it's set some time prior to when it's downloaded, sometime

1 before 2014 is when it's set. It doesn't tell us when it's
2 set. So there's innuendo that it must have been set at the
3 time of this incident. But there's also evidence that, during
4 the life of this vehicle, there were other events. Plaintiffs
5 yesterday put up a slide saying there were no C1179's with
6 Mr. Bhakta or Mr. Rohrer. We don't know that. There's no
7 evidence that the black box was ever downloaded on the vehicle
8 before 2015.

9 What we do know from Mr. Bhakta is he experienced
10 what he described as an ABS event, which sounds a lot like
11 what the OI, the other incident witnesses, described as an OHB
12 braking event because they are the same. They are turning on
13 the ABS/VDC pump. So was it set then?

14 There's also something called jamming that will set
15 a 3A.1. So you heard testimony about this from Mr. Leaphart
16 and then a little bit from Dr. Kanellakopoulous. This is the
17 delta-stroke sensor. So this little white part moves up and
18 down on this spring. You saw Mr. Leaphart demonstrate this.

19 Zero is about 1.9 volts. So the spring is
20 compressed a little bit. And if the spring moves just
21 .8 millimeters when it's not supposed to, it will set the 3A.1
22 code as a jam error.

23 Now, let's think about this crash. Mr. Mathenge
24 drives into the Caravan at a high rate of speed. As mounted
25 in the brake booster, that's the front of the vehicle.

26 Now, you've had this experience with a bag or
27 something on your seat. And you step on the brake hard. What
28 happens? Bag goes onto the floor. That's inertia. One of

1 Newton's laws. Same thing happens with this. You slam into
2 the van, this little white thing on the spring is going to
3 keep moving, and it just has to move .8 millimeters. And
4 Mr. Leaphart said the initial impact is 30 G's.

5 So this little light thing now weighs 30 times more
6 than it did. And then it separates fairly quickly, but then
7 there's a second impact with the pole where the QX56 pushes
8 the van into the pole, and then it spins out to where it
9 stops, and that whole event takes three or four seconds. You
10 just need to have this thing moved off center .8 millimeters
11 for half a second, and it will set a 3A.1 code.

12 Did Dr. Kanellakopoulous rule that out?

13 "Question: So is it fair to say, doctor, that you
14 did no evaluation to look at an actual DSS, delta-stroke
15 sensor, look at how it's positioned within this booster and
16 determine whether a 3A.1 fault could have been caused by the
17 crash itself?"

18 "I'm not an accident reconstruction expert. So I
19 could not have done this analysis that you're referring to."

20 Now, the plaintiffs have the burden of proving that
21 the 3A.1 code was set and was a cause of this crash. They
22 have to rule out the other potential causes like this and not
23 say well, he could have asked Mr. Meyer. Tell me about the
24 accident reconstruction. No. I'm putting the blinders on.
25 I'm not going to look at that.

26 Next, I hope this doesn't get lost because a lot of
27 this testimony was technical. The 3A.1 code is only set when
28 the foot is not on the brake pedal. It's checking the zero

1 position, that is, when the brake pedal's at rest, not being
2 applied. That's when it's at 1.9 volts. That was
3 Dr. Kanellakopoulous. Here he's talking about the input
4 criteria to set a 3A.1 code, and one of them is you're not
5 pressing the brake.

6 Now, plaintiffs' counsel suggested yesterday, oh,
7 it's simple. What happens is Mr. Mathenge is driving along on
8 Highland. He goes to step on the brake pedal to stop at the
9 light on Willoughby, and boom, 3A.1 set. No, 3A.1 is not set
10 by stepping on the brake pedal. It's set when you're not
11 stepping on the brake pedal. And it reads an error on the
12 zero setting.

13 Mr. Leaphart put up the diagram, and this easel is
14 in evidence, I think.

15 So here is 3A.1. Offset. 3A.1, no brake pedal.
16 Here is the plausibility 3A.3. Brake pedal on. Both of
17 them -- remember the 3A. Those are the Continental codes that
18 Nissan can't see. Both of them map to a C1179 when you plug
19 in the Nissan consult tool at the dealership.

20 So all these OI's, where they find a C1179 after
21 they have some issue with their brakes, listen to the OI
22 testimony. They all said it started when they stepped on the
23 brake pedal. They were having 3A.3's.

24 MR. TURNBULL: Objection.

25 THE COURT: What's the objection?

26 MR. TURNBULL: That's not in evidence. There's no
27 EEPROMs that say 3A.3's. That's just untrue --

28 THE COURT: Again, what attorneys say is not

1 evidence. You're going to rely upon yourselves as to what the
2 evidence is. Evidence, as I described it, testimony,
3 exhibits, et cetera. Attorneys can make comments or, you
4 know, fair comments about the evidence, or extrapolate
5 reasonably from the evidence that's there. So you determine
6 whether that's a fair comment or not based upon the evidence.

7 Continue on.

8 MR. KLEIN: Exactly right. Counsel's right. There
9 were no -- you have to get Continental to download the EEPROM
10 data. So we don't know if the OI's had 3A.3. What we do know
11 is they had C1179, and we do know that it started when they
12 stepped on the brake pedal. And we do know the only way you
13 get a C1179, when you're stepping on the brake pedal, is by a
14 3A.3 code. So that's my extrapolation of the evidence.

15 MR. TURNBULL: Objection, Judge. Same objection.

16 THE COURT: Objection's overruled.

17 Continue on.

18 Follow my instructions. Again, listen to what the
19 attorneys say. Obviously, they have something valuable to
20 say. But when it comes down to it, I'm instructing on the law
21 and what to consider, okay?

22 Continue on.

23 MR. KLEIN: And Mr. Leaphart explained, and I'm not
24 going to go through it all because you heard it last Friday,
25 that the Technical Service Bulletin was to address 3A.3
26 because that's where the warranty claims were coming from.

27 Mr. Leaphart testified that the C1179 was not active
28 on August 29, 2012. It's not the cause of what happened here.

1 And he gave you the reasons. There's no brake warning light
2 on the dash. The Technical Service Bulletin says that's one
3 of the symptoms. And the OI witnesses report seeing the light
4 come on their dash. There was no sound of the pump, the
5 ABS/VDC pump coming on. There was no feel of pulsing in the
6 brake pedal. But then he explained further.

7 If we take Mr. Mathenge at his word and he's pumping
8 the brake pedal, actually the gas pedal, eight to ten times
9 over a 15-second period going from the doughnut shop to the
10 crash, he doesn't allow enough time for 3A.1 to set because
11 there has to be a half-second delay. And that was
12 Mr. Leaphart's testimony.

13 You can't set a 3A.1 if you're pumping the brake
14 pedal. And you're heavy on the brake pedal, Mr. Walker's
15 testing shows you go right into ABS mode and the vehicle
16 stops.

17 So all of this actually proves in another way that
18 Mr. Mathenge was not stepping on the brake pedal. And again,
19 I'm not going to go through it all again, the physical
20 evidence is consistent with pedal error. He's speeding up
21 from the doughnut shop to the security camera to the crash.
22 And the only way you do that is you're on the wrong pedal.

23 Yesterday, though, they tried to suggest that
24 Mr. Leaphart had said he couldn't rule this out, that maybe it
25 was set at the time of the wreck. But this is Mr. Leaphart's
26 testimony. He said you can't exclude that. He said that's
27 correct. "That's what I said in my deposition, but my opinion
28 is that it did not happen. I didn't exclude that it couldn't

1 have happened. I said my opinion is that it did not because
2 if he did, if he had set the 3A.1 or if the vehicle had set
3 it, he would have had the feedback. The light's on, the pump,
4 the sound, the pulse. He didn't have any of that. And it
5 doesn't make sense for the other reasons. If he's pumping, he
6 can't set it anyway."

7 So let's talk about the other incident witnesses.
8 Here are the people you heard from, six by deposition, one
9 live, Mr. Banks. None of them sped up.

10 Rebecca Carnell saw the brake warning light come on.
11 She felt grinding. Happened while she was going five to ten
12 miles per hour. File that away for a second. Low speed. She
13 did not accelerate. She still drives this vehicle. She's put
14 another 67,000 miles on her QX56.

15 Now, in her deposition initially she said, "I don't
16 remember if the brake warning light came on." So we went, and
17 this is also part of her deposition, got the actual service
18 record when she first took it into the dealership. Client
19 states when coming to a stop, vehicle made a grinding sound
20 and brake light came on.

21 So you remember with Mr. Walker they showed a few
22 examples from the warranty data and said it doesn't always say
23 the brake light came on, and it doesn't always say there's a
24 grinding sound. And Mr. Walker said that's right.

25 There's about a sentence in there that the service
26 department puts in on the spreadsheet, but that doesn't mean
27 that it didn't come on because we know from the Technical
28 Service Bulletin that the what happens when you go into OHB

1 mode. It turns that warning light on. So you know you need
2 to take it to the dealership and get it reflashed.

3 (VIDEO EXCERPT PLAYED.)

4 "Question: When you applied the brakes during this
5 January 31, 2010, incident, did that cause the QX56 to
6 accelerate?

7 "Answer: Accelerate? No, I don't think so."

8 It didn't cause Rebecca Carnell to accelerate.

9 Melora Leiser, same thing. The woman from Dallas,
10 she stopped, said there was a grinding noise. She did not
11 speed up.

12 Anthony Anderson was going very slow. Five to eight
13 miles per hour. Warning light came on, heard grinding noise.
14 Felt metal to metal rubbing. He did not go faster.

15 Why is the speed important, that these are happening
16 at low speeds? Look at Mr. Walker's data. We did testing of
17 the system to figure this out. The yellow is when he is in
18 OHB mode. The blue is normal braking. And this is the brake
19 pedal travel, how far down you push the brake. And you see
20 with light braking ten pounds and medium braking 15 pounds.

21 The pedal goes a little further. Three quarters of
22 an inch to an inch further down. But in hard braking, when
23 you've got to get stopped because the traffic light's ahead of
24 you, there's absolutely no difference. You don't feel a
25 difference in the pedals. You go right through OHB to ABS as
26 Mr. Walker put it.

27 So these people are going slow speed. They are
28 experiencing this extra pedal travel at low speed.

1 Mr. Mathenge is going at least 35 to 41 when he crosses
2 Melrose. That's a different scenario. Everybody keeps saying
3 something different happened on August 29, 2012.

4 Mr. Rousseaux, he did not speed up.

5 (VIDEO EXCERPT PLAYED.)

6 "Question: For the first incident, did the car
7 speed up at all?

8 "Answer: No, sir.

9 "Question: For the second incident, once you heard
10 the noise and you saw the light, did the car speed up at all?

11 "Answer: No, sir."

12 He heard the noise, he saw the light. The car did
13 not speed up. And I played the rest of that answer yesterday
14 because it kind of encapsulates this case. He said that
15 doesn't even make any sense. Why would the car speed up if
16 you're stepping on the brake pedal? Amen.

17 Mr. Banks, the one that came here and testified
18 live, he's going five miles per hour. The vehicle slowed and
19 stopped. He felt a vibration, saw the brake warning light
20 come on. He heard a noise. Fits the pattern of the Technical
21 Service Bulletin, and he did not speed up.

22 Rick Nord, this was the guy who works for Homeland
23 Security, Secret Service, says he doesn't know much about
24 cars, but his brake light came on, he felt the grinding. He
25 had just finished training on how to use the parking brake to
26 stop a car. And he feels this weird pedal thing, and he steps
27 on his parking brake to stop the car. He did not speed up.

28 Mr. Surana saw his ABS and other lights come on,

1 heard grinding noise, felt the pedal pulsate every time he
2 experienced this issue. His vehicle never accelerated. Did
3 not speed up.

4 Witnesses for both sides agree that there were no
5 other incidents where the driver reported that the vehicle
6 sped up or accelerated. We asked Dr. Kanellakopoulous, you
7 looked at all the stuff the plaintiffs gathered. Did you see
8 anywhere they sped up? Nope.

9 Mr. Luepke testified about the TECH LINE reports
10 that come from Nissan dealerships. He went through all those.
11 He was asked did you see where any sped up? Nope.

12 Dr. Young, Mr. Leaphart, Mr. Walker all on our
13 behalf looked at all of the data that had been produced,
14 warranty data, et cetera. Did you see anywhere they sped up?
15 No.

16 There's no dispute about these other incidents.
17 They didn't speed up. They are different from what happened
18 on August 29, 2012.

19 But wait. These people are saying the brake pedal
20 is going to the floor.

21 It can't. This is Mr. Arndt, the LAPD. I'm not
22 going to belabor this. He measured it all. You get -- when
23 you bottom out the brake pedal, you're three inches off of the
24 floor. But okay. People feel something different. I get
25 that.

26 They are literally not touching the floor, but they
27 feel something different at low speed, light braking, there's
28 an extra three quarter to an inch of travel. There's two

1 potential reasons for why people would say brake pedal to the
2 floor. The OI witnesses feel that three quarters to an inch.
3 The brake pedal feels different.

4 But that's not what happened here. If you actually
5 have a loss of brake fluid, that's when you will actually push
6 your brake to the floor or as far as it will go, and you can't
7 stop. But LAPD confirmed there's no loss of brake fluid in
8 Mr. Mathenge's vehicle. The brakes were still working.

9 The other time when you see somebody say my brake
10 pedal went to the floor is when they are stepping on the gas
11 pedal. And this is -- I've added the stuff that's stipulated.
12 The rest of this is Mr. Young's easel that he drew when he was
13 here testifying.

14 Even the testimony from Mr. Walker. And there's no
15 dispute about it. Even with no vacuum and no electronics.
16 Let's take the OHB, disconnect it. Let's remove the brake
17 booster, because Mr. Walker did this, you still have hydraulic
18 fluid when you push the brake pedal that gets pushed to the
19 calipers that tighten on the rotors and slow the vehicle down.
20 And Mr. Mathenge had brake fluid. If he had stepped on the
21 brake pedal, it would have slowed the vehicle down.

22 But people make these comments, "My brake pedal went
23 to the floor" about all vehicles. Dr. Doug Young talked about
24 this; so did Mr. Walker. This is a slide we showed with
25 Dr. Young, and then we also spent a little bit of time.

26 Maybe we could have tried to spend a week or two
27 reading these and videotaping it and showing you videos of
28 reading these. These are samples of thousands that are on the

1 Internet. NHTSA Vehicle Owner Questionnaires for all types of
2 vehicles where people say my brake pedal went to the floor.
3 It's just what people say when they felt something funny with
4 their brakes.

5 These, Exhibit 3189, shown with Dr. Young, are for
6 the Toyota Sequoia, which has the same brake booster system
7 designed by Continental as the Nissan Armada and the Infiniti
8 QX56. It's the only other manufacturer. There's been this
9 implication that, oh, Nissan went a different way in deciding
10 to have OHB. There's two. Toyota went one way. They just
11 turned on the warning light. Nissan gives you OHB. And we're
12 going to talk more about that when we talk about risk benefit.

13 But Mr. Walker gave this long answer. The brake
14 pedal going to the floor is a colloquial term we use casually
15 to say my brakes didn't do something like I expected. It's in
16 our language as a society. Every manufacturer has similar
17 complaints. No manufacturer is immune from that.

18 So you have to look deeper. What's really going on?
19 That's why we tested the vehicle, to find out what's going on.

20 And Mr. Walker found two things. There is only one
21 OHB mode, and the brakes work in OHB mode.

22 There's been some implication that there's a
23 different -- that these different 3A codes that are all mapped
24 to a C1179, maybe there's a difference in OHB mode. Nobody
25 ever explained that. Mr. Walker said that's not true. OHB
26 mode means you've turned on the ABS/VDC pump to give you extra
27 braking. Whether it's a 3A.0, 3A.1, 3A.3, goes to C1179,
28 turns on that pump. That's what it does. It's the same mode.

1 And we tested it, what happens when you're in that mode.

2 Again, the yellow bars are when the vehicle's in OHB
3 mode with that pump turned on. The blue bars are normal
4 braking. Now we're looking at deceleration. How fast you're
5 stopping.

6 In every circumstance except when you get to 45 or
7 60, you get more braking power with OHB on because you've
8 turned on the anti-lock brake pump. That was Nissan's intent
9 in making the decision to turn on that pump. When you're up
10 here at 45 to 60 and you're slamming on the brake pedal, you
11 go right to ABS with normal braking; so it's virtually
12 indistinguishable. The brakes work in OHB mode.

13 So back briefly. This is that first question. Was
14 the design of the braking system a substantial factor in
15 causing harm? No. The brakes worked. The other incident
16 witnesses experienced something very different. Primarily
17 they didn't speed up. All the evidence points to one thing
18 that happened on August 29, 2012. Pedal error.

19 So let's kind of look at a summary of the evidence
20 in a different fashion. How many crash tests did the
21 plaintiffs do to prove their accident reconstruction is right?
22 How many other incidents did you hear where the driver said
23 the vehicle sped up or accelerated? Zero.

24 How many witnesses said that a brake pedal really
25 can go to the floor? Zero.

26 How many brake tests -- okay. People say that,
27 okay? But show me a test done by plaintiffs showing a brake
28 pedal going to the floor and not stopping. They say it

1 happens all the time. 4,000 people complained about it.
2 Doesn't it seem like it ought to be easy to duplicate, put on
3 film and show you?

4 Did you ever see that? You heard people say my
5 brake pedal went to the floor. I ran through a stop sign.
6 Did you ever hear about the man from Missouri? Show me. Show
7 me.

8 Mr. Surana said he put a video on YouTube. Did you
9 see it? We saw zero video that in OHB mode the brakes really
10 don't work. We have 134 tests from Mr. Walker. Every time in
11 OHB mode it works.

12 How many driving tests were done by the plaintiffs
13 to prove that the brakes actually fail in OHB mode? Zero.

14 How many driving tests were done by the plaintiffs
15 to prove that there's a special secret 3A.1 OHB mode that's
16 different? Zero.

17 They criticized Mr. Walker saying were you in 3A.1?
18 He said it doesn't matter. OHB is OHB. But it was
19 Dr. Kanellakopoulous who came up with the suggestion that it's
20 somehow different. Did he test it? Did he prove it? They
21 have the burden of proof.

22 Number of experts who drove a QX56 in OHB mode and
23 found the brakes did not work. Zero.

24 Number of documents and videos created by
25 Dr. Kanellakopoulous to record the times he stepped on the
26 brake in the QX56 in OHB mode and it stopped.

27 I want to talk about documents for a second. The
28 day before his deposition, after he's already formed his

1 opinions, Dr. Kanellakopoulos goes out and drives an exemplar
2 vehicle in OHB mode, and he testified it stopped. We don't
3 know if they had cameras ready. They didn't invite us to come
4 watch. We don't know if there's any data recorded. We never
5 got anything. We got Dr. Kanellakopoulos telling us the
6 vehicle stopped. Why wouldn't they want to document that?

7 Instead, we get a whole bunch of smoke about
8 documents that Nissan didn't produce, like Gary Treadwell. He
9 had all these notebooks. Look at Exhibit 180. It's in
10 evidence. That's the section from -- if you don't believe
11 Nissan produced this, that's the section from Gary Treadwell's
12 notebooks that pertain to the delta-stroke sensor issue.

13 There's been all this stuff about this email in
14 March of 2008 talking about some safety assessment being done
15 in Japan. Look at Exhibit 180. This page from it, from
16 April 15th of 2008, a month later, that summarizes in one page
17 what's going on. The brakes work. The documents were
18 produced.

19 Number of accidents reported by the seven other
20 incident witnesses plaintiffs showed you. Zero.

21 Again, innuendo. These vehicles are still out
22 there. There's no evidence of that. After 2005, all the
23 newer vehicles got the software reflashed. What are they
24 trying to do? They are trying to create fear. Oh, my gosh,
25 there could be another. Another what? They didn't show you
26 any accidents. They didn't show you an OI witness who had an
27 accident. The only accident we know of involved pedal error.

28 Out of the 37,000-plus warranty claims for brakes,

1 the number plaintiffs showed you that actually resulted in an
2 accident.

3 They were able to pick whatever roads they wanted
4 to. They picked three with Mr. Walker that they looked at.
5 How many did they show you where there was an accident? Zero.

6 Causation. The braking system cannot be a factor if
7 the driver is stepping on the gas. It is that simple. Lots
8 of smoke, a big red herring. In the end all of that proves
9 that something different happened on August 29, 2012.

10 If you answer that question no, you're done. So I'm
11 going to spend a few minutes talking about the other questions
12 on the verdict form. I don't think you need to get to them,
13 but I want to talk about them. A lot of the same evidence
14 pertains to them.

15 The second question is going to be do the benefits
16 of the design outweigh the risks of the design. In the real
17 world, most drivers will never experience OHB mode. You heard
18 a lot of numbers from Dr. Young, 700,000. 37,000 warranty
19 claims. That's a small percentage. 5, 6 percent.

20 Now, think about this for a second because Dr.
21 Kanellakopoulous said oh, it just happens when it ages.
22 Remember this? Does it make sense? Or is it MSU? Because
23 then they tell you that the claims started coming in right
24 away when the vehicles were still new. Wait, I thought it
25 happens after it ages.

26 Of those that do, where they have the brake warning
27 light come on, the vast majority of them just take it in and
28 get the reflashed software. 37,000, we got 4,000 who say my

1 brake pedal went to the floor.

2 Comparing risk to benefit, as Mr. Walker explained,
3 Toyota just turns on the warning light, which plaintiffs say
4 sometimes people don't notice. So maybe on the Toyota system
5 they don't know they need to get it fixed. You need feedback
6 with the OHB system, and, and, and you get more braking.
7 Yellow bar is higher with OHB. Extra braking.

8 There's the yellow bar chart again.

9 Witness for both sides agree all of the experts who
10 drove a vehicle in OHB mode stopped. Dr. Kanellakopoulous
11 testified about it, didn't document it. Mr. Walker documented
12 it. Mr. Leaphart was with him. Dr. Young also drove one. It
13 stopped. Andrew Levitt.

14 Now, there was also an argument from the very
15 beginning of the trial that Nissan never tested OHB mode. So
16 if you don't believe that, look at Exhibit 2050. Mr. Walker
17 testified about it. He says it's one of many test reports,
18 Nissan test reports. The vehicle was initially designed at
19 NTC, the Nissan Technical Center in Japan. They did testing
20 there.

21 When they brought it to the U.S., Nissan Technical
22 Center North America, NTCNA, did additional testing. And that
23 document is one example out of many test reports about this
24 vehicle. And the very top row, remember Mr. Walker showed it
25 to you, was testing the vehicle in OHB mode. Both objectively
26 and subjectively. The document's in evidence. It was tested.

27 Now, what plaintiffs really mean, I think, is there
28 wasn't a test where a regular driver -- I don't know how you

1 find those, who unexpectedly experienced OHB mode. But we
2 know, based on the warranty claims versus the number of
3 vehicles out there, most of the people are never going to
4 experience it. And of those that do, 90 percent of them don't
5 say my pedal went to the floor. They just take it to the
6 dealership and get it fixed.

7 What does it feel like? Dr. Young, the human
8 factors expert, the only human factors expert you heard from,
9 said it felt very similar to ABS mode. He was asked, well,
10 should Nissan have done some sort of -- get a bunch of people
11 who aren't expecting that who are regular drivers? And he
12 says no, it doesn't make any sense. It feels like ABS. And
13 some people are not familiar with ABS. So we're trying to get
14 the word out about that, that ABS feels a little different.

15 But when the warranty claims started coming in,
16 again, there's testing.

17 Andrew Smith testified he participated in two
18 separate evaluations in OHB mode to understand, to try to
19 understand what the customers were complaining about, the ones
20 who said the pedal went to the floor. He said one of them was
21 on city streets around Farmington Hills around the Detroit
22 area, where Nissan Technical Center North America is located,
23 and the other was at Nissan's test facility, their test track
24 in Arizona.

25 There's additional testing done when the warranty
26 claims start coming in. And what he found out was when the
27 brake warning light comes on like it's supposed to, pedal felt
28 different, heard a grinding noise, and the vehicle stopped.

1 Well, we can tell people that it's going to feel
2 different when you have ABS. We did. The owner's manual,
3 this portion that pertains to the brakes is in evidence at
4 2039. You will feel a slight vibration on the brake pedal
5 accompanied by a noise. That's what happens with the ABS
6 system comes on. It's okay. It's the way the brakes are
7 supposed to work.

8 Now, I get it. A lot of people don't read their
9 owner's manual. But what's Nissan supposed to do? Sit you
10 down, when you buy the vehicle, and say okay, there's this
11 thing called OHB mode. You may never experience it, but if
12 you do, it's just regular ABS. What's that? Well, you'll
13 feel this pulsing, but you're getting more braking power.

14 Are you going to sit there at the dealership for
15 that? And how many other things do we have to talk about that
16 they might or might not experience?

17 So I think the question -- the answer to Question
18 No. 2 is yes. The benefits of the design, you get more
19 braking power, you get feedback, you know you need to take it
20 in and get it fixed. The benefits outweigh the risks of the
21 design.

22 Okay. Was Nissan negligent for failing to recall?
23 All the same stuff I already talked about still pertains. So
24 the technical service bulletins were an effort to address the
25 customer complaints. That's what it was about. And we're
26 just going to address those people who experience it and
27 complain about it. Most people are not going to experience
28 it.

1 The brakes work. The issues were customers who
2 didn't like the feel.

3 Mr. -- this is a different perspective on it.
4 Again, I don't want to get this lost in all the other
5 evidence. Mr. Blenkarn, this was one of the videos that was
6 shown you. All of the TECH LINE reports from Infiniti and
7 Nissan dealers are submitted to the National Highway Traffic
8 Safety Administration under law. NHTSA did not think any
9 further action was needed. That was Mr. Blenkarn's testimony.
10 And he also testified the only way the brakes can fail is if
11 you actually lose fluid.

12 Mr. Yakushi says all of the information -- all of
13 the consumer reports are submitted electronically to the NHTSA
14 as required by the law, TREAD Act. And are all customer
15 complaints submitted to NHTSA? As far as I know,
16 electronically, yes, they are.

17 Plus the NHTSA has their own VOQ. You go online or
18 you call NHTSA for the vehicle owner questionnaire. So that's
19 why NHTSA asked Mr. Yakushi about it. Hey, we're seeing more
20 warranty claims than we think are normal on this. What's
21 going on? And Mr. Yakushi explained to them what's going on,
22 and he made sure that the NHTSA had all of the information.

23 He said in an email, we need to head them off, and
24 he explained in his deposition what I meant was we needed to
25 make sure they had all the information, and he confirmed they
26 did. NHTSA looks at the information, and NHTSA took no
27 further action with regards to any type of safety issue with
28 the OHB.

1 So this is the agency of the federal government that
2 is charged with requiring vehicle manufacturers to do recalls
3 if they feel there's a need to do a recall. This agency has
4 all of the same information, and they did not feel that it was
5 necessary to do a recall.

6 So they had that additional information to weigh on
7 these questions about whether Nissan was negligent in doing a
8 recall. But then they also have on Question 4 on causation,
9 Mr. Leaphart says the TSB reflash would not have prevented
10 setting a 3A.1. It was targeted at 3A.3, which is the one
11 that happens when you're actually stepping on the brake pedal.

12 So even if this vehicle had been reflashed when it's
13 at the Infiniti dealership in Santa Monica, there's no
14 evidence that it would have made any difference to whenever
15 this 3A.1 code was set. Perhaps in the actual crash.

16 So on Questions 3 and 4, no, Nissan was not
17 negligent. No, the negligence failure to recall, there's no
18 evidence it would have made any difference here.

19 5 and 6 are whether Mr. Mathenge was negligent. We
20 talked about that yesterday.

21 Questions 7 and 12 are on damages. So I want to
22 just call your attention to a couple of the instructions.
23 5000. That's in the packet you got yesterday. You must not
24 let sympathy or bias or prejudice influence your decision.
25 And damages must be reasonable. They must reasonably
26 compensate. You can't speculate or guess.

27 I want to talk about a little math here. The
28 plaintiffs have said throughout the trial and again yesterday

1 what should have happened is the software should have been
2 reflashed on Mr. Mathenge's QX56. That's their solution.
3 Mr. Leaphart says it wouldn't matter because that was directed
4 at 3A.3, not 3A.1. But that was their solution.

5 Mr. Banks came in and said well, I paid \$1,100 to
6 have my whole brake booster replaced. You know, that big
7 black round thing that was cut away. That was \$1,100.

8 How much does it cost to do a software reflash where
9 the technician plugs in the consult, puts in a card, and the
10 computer does the reflash automatically? They know from that
11 big warranty sheet, because it shows, it's about 50 bucks. It
12 depends on what the labor rate is at the dealership. Some
13 charge more. Maybe in Santa Monica they charge a little bit
14 more than they did in Stockton. About 50 bucks.

15 But yesterday, they did some math. \$1,100 times
16 236,000, which is a number they made up. There's no evidence
17 of it. It came from plaintiffs' counsel's questions. And
18 you've been instructed twice that what is in the question is
19 not evidence. 1,100 times 263,000 equals 232 million. So
20 they took a number that's inflated, \$1,100 to replace the
21 brake booster, when they say the fix is reflash the software
22 which costs \$50.

23 So they jack up that number twelvefold. Then they
24 make up another big number, and they multiply them together
25 and get a really big number. MSU, making stuff up.

26 Why are they doing that? Is it because there's
27 research that says oh, if we throw out this really huge number
28 in front of a jury, it gets them thinking about big numbers?

1 You know, a million dollars is still a lot of money.
2 It's more money than most people in the world will ever see in
3 their whole lifetime. But we want the jury thinking about
4 really big numbers. MSU.

5 The measure of damages are in the Court's
6 instructions. What you have to try to figure out is an
7 impossible task. Love, companionship, comfort, that's what
8 was lost. Math involving this other stuff has nothing to do
9 with that. So you've got to try to figure out, for example,
10 with Araceli Mendez. And I'm just giving you the facts here.

11 The evidence that came in, she's basically been
12 raised by her grandmother. And what you have to figure out is
13 the value -- and I'm not saying it's nothing, of course not,
14 that she lost her mother. But this is the evidence you have
15 to try to come up with a number.

16 You also have Mr. Johnson with respect to Araceli
17 Mendez, the economist who came in and said remember, it's
18 about \$400,000. But on cross-examination he said well, that's
19 the total value of all of her household services and income.
20 And I'm assuming all of it would have been given to Araceli.
21 None to Hilda, none to Stephanie, none anywhere else. Even
22 that \$400,000 number was exaggerated.

23 But then we have Dan Girvan, who testifies if
24 Mr. Mathenge buckles up, he doesn't get his closed head
25 injury. But yesterday, we have plaintiffs' counsel arguing
26 well, I think he would have, and I think you should give him
27 \$13 million for an injury that he would not have had had he
28 worn his seat belt.

1 Next question is about comparative responsibility.
2 I don't think you have to get here. If you answer the first
3 question no, the brake system on the Infiniti was not a cause,
4 you never have to get to any of these other questions, but in
5 this crash, because of pedal error, it's a hundred percent
6 Mr. Mathenge.

7 And the last questions are about exemplary punitive
8 damages. Plaintiffs have to prove this by clear and
9 convincing evidence. And there's an instruction in your
10 packet that gives you that definition.

11 But here's the definitions. Malice is despicable by
12 gets defined down below. Willful and knowing disregard of the
13 safety -- willful and knowing.

14 Oppression is despicable. Despicable conduct is so
15 vile, base, or contemptible that it would be looked down on
16 and despised by reasonable people.

17 Fraud means intending to harm these plaintiffs.

18 So you heard testimony from six different current or
19 former Nissan employees. Let me just take one example,
20 Mr. Smith. He testified that he went to Germany to meet with
21 Continental. He went down to Mexico at the assembly plant to
22 meet with them. He did testing in Detroit. He did testing in
23 Arizona. He did a lot of work on this issue.

24 Is that despicable? Nissan developed the technical
25 service bulletins to address customers who didn't like the
26 feel of OHB.

27 The NHTSA independently looked at all the claims and
28 said ah, the complaints are people don't like the feel of ABS.

1 And we hear that a lot. We know all manufacturers hear the
2 claim, "My brake pedal goes to the floor." No. We've looked
3 at the information. You don't need to do a recall. So we
4 have an independent look at this.

5 Mr. Walker: "OHB gives you feedback, gives you
6 extra braking power." Dr. Kanellakopoulous: "So my opinion
7 on Nissan's OHB decision is that it most likely came from a
8 good place, from good intentions. Giving you more braking
9 power." And this is despicable.

10 These are the summary of Mr. Leaphart's opinions.
11 He wrote this on an easel pad. C1179 was not related. I've
12 gone over that.

13 The Technical Service Bulletin would not have
14 prevented this C1179 because it was directed to 3A.3.

15 The software design was not defective because it was
16 doing what it was supposed to do. They changed it to reduce
17 the number of false positives to reduce the customer
18 complaints.

19 Mr. Walker, summary of his opinions: The design's
20 not defective.

21 The subject vehicle is okay. He checked out the
22 brake system, and it worked. It just confirmed that LAPD
23 already told us. If Mr. Mathenge had stepped on the brakes,
24 the vehicle would have stopped.

25 Brake failure did not cause this crash. The driver
26 did not brake, which is what caused this crash.

27 All of the pieces fit together. The vehicle sped up
28 and went wild because Mr. Mathenge got confused and stepped on

1 the gas pedal.

2 Between the doughnut shop and the security camera,
3 pumping the accelerator pedal, whoo, whoo, whoo, passing the
4 security camera at least at 51 miles per hour. Seeing the red
5 light at Willoughby and some cars stopped there. I got to
6 stop. Press that pedal to the floor. That's 72 miles per
7 hour, crash into the Dodge Caravan.

8 He was never stepping on the brake pedal. If he
9 had, the vehicle would have slowed. All of the evidence is
10 that the vehicle would have slowed and stopped if he had
11 stepped on the brake pedal.

12 So we come full circle. This case is about a
13 failure to brake, not brake failure. Didn't see any single
14 test that showed you the brake failure.

15 So good news, maybe. This is my last chance to
16 speak to you. Plaintiffs' counsel have some more time to
17 rebut because they have the burden of proof. So they get to
18 speak last, and then the case will go to you. I don't get a
19 chance to stand up and say anything more in response to what
20 they do. I did, however, point out that one instruction.

21 I don't know what they are going to do. But
22 sometimes plaintiffs try to appeal to sympathy. I mean, I
23 think it's great he's here, but this is the first time we've
24 seen Mr. Mathenge's son. That's not what decides the case.
25 This was a tragedy. Nobody wanted this. But everything fits
26 what the explanation for the tragedy. It's certainly not
27 anything Mr. Mathenge intended. But it happened. The car
28 sped up.

1 Thank you.

2 THE COURT: Thank you very much, Mr. Klein. All
3 right. We're going to take a 10-minute recess. Remember my
4 admonitions. Do not form any opinions. Do not discuss it
5 amongst yourselves. All the other admonitions I've given to
6 you. I'm going to hold this tight to 10 minutes because we
7 want to get plaintiffs' rebuttal and my final instructions so
8 you can get this case before noon. So go out in the hallway,
9 and we'll see you in 10 minutes. Five after 11:00. 11:05,
10 please.

11 (Recess taken.)

12 THE COURT: Okay. We're back on the record in Cruz
13 versus Nissan and all related matters. All jurors are
14 present. All four alternates are present. All counsel are
15 present.

16 All right. At this time I believe the plaintiffs
17 will be giving a rebuttal argument. And as Mr. Klein noted,
18 they get the last word, and the reason why is because they
19 have the burden of proof on the majority of those issues where
20 I've instructed you. So that's why the plaintiffs get the
21 last word.

22 So I assume that the plaintiffs would like to give a
23 rebuttal argument.

24 MR. KIESEL: With the Court's permission.

25 THE COURT: Mr. Kiesel.

26 **REBUTTAL ARGUMENT BY PLAINTIFF COUNSEL KIESEL**

27 MR. KIESEL: Ladies and gentlemen, good morning. So
28 I'm going to be brief because I know that you've heard all the

1 evidence, but there's a couple of points I want to respond to
2 so that you have my perspective on what the evidence shows.

3 So let's start with this. There's no question
4 everyone agrees that Mr. Mathenge was doing 51 miles an hour
5 at the point he was visualized on the video camera. But
6 here's the thing, and Mr. Klein just said it. And it's the
7 entire case. If he applied his brakes, he'd have stopped.
8 There was enough space for him to apply his brakes from the
9 distance he was from the intersection to stop the vehicle.
10 You could pick whatever speed you want, but at the speed we
11 know he was at at the camera, if he applies his brakes, the
12 car stops. That's not in doubt.

13 Now, Mr. Klein would have you believe that
14 Mr. Mathenge, even though we have a sound that I'm not even
15 going to try to repeat, for the benefit of the court reporter,
16 which is his pumping the accelerator and not the brake, and
17 therefore, he's speeding up.

18 Common sense tells you that Mr. Mathenge was not
19 fully engaged with his foot to the floor on the accelerator
20 that entire distance because if that were true, one of two
21 things would have happened: Mr. Mathenge would be dead.
22 There's no way he hits a vehicle broadside at 72 miles an
23 hour and does not die. And if he actually survives a
24 72-mile-an-hour impact, that's actually what he does, does a
25 District Attorney not prosecute the man for vehicular
26 manslaughter.

27 He's going 72 in a 35-mile-an-hour zone on a weekday
28 where there's other vehicles on the road. Something that he

1 wouldn't be prosecuted for. I'm leave that in your judgment.

2 Look, there is a problem with the software. We're
3 missing the boat here. Because they actually reflashed these
4 cars. Remember this. The number of vehicles that were
5 supposed to have the sensor fail was five out of a million.
6 That's what the numbers were. Five out of a million were
7 supposed to have this failure, which is when they were going
8 to go into the OHB mode. Five out of a million is .0005.
9 Three zeros and a five. That's five out of a million.

10 What actually happened was 14 percent, 14 percent of
11 that fleet had a problem. That's a problem, which is why they
12 were reprogramming the cars. I'll leave it to your judgment
13 on the evidence why 4,527 people reported their car would not
14 stop, why the Secret Service agent had to use the emergency
15 brake because his car wasn't stopping. You've heard the
16 evidence. I'm not going to restate that.

17 Last bit. A defense that Nissan has here, a defense
18 is that Mr. Mathenge failed to sue them within two years.
19 There's going to be a Special Interrogatory question that's
20 going to be presented to you. He failed to sue them within
21 two years because he had to sue by August 29, 2014, or he
22 loses his claim. Unless he doesn't know and he couldn't
23 reasonably have known about a defect which was the basis of
24 this lawsuit.

25 And the evidence presented to you is this: Nissan
26 concealed the defect. That's what they were intent on doing.
27 Concealing it. Not letting anyone know about it. They didn't
28 recall the vehicles. Had they recalled the vehicles back in

1 2006, then when this collision occurred, if it ever did occur,
2 Investigator Arndt, when he went on the NHTSA website looking
3 to see if there ever had been a recall, would have went wow,
4 this vehicle is a part of a recall. And Mr. Mathenge's
5 statements, which were consistent from the scene to the
6 hospital and many times throughout, I was stepping on the
7 brake. The brake pedal went to the floor. I was pressing the
8 brakes.

9 In fact, the emergency room doctor said it best. He
10 was making his best efforts to stop the vehicle, and it would
11 not stop.

12 Mr. Mathenge takes responsibility for what happened
13 here. It is a tragic, tragic untold loss. And quite frankly,
14 if you were to assess some comparative fault on Mr. Mathenge,
15 that would be okay. If you feel like Mr. Mathenge, when he
16 was doing 51, should have been going more like 45 or more like
17 42 and that played a role in this thing, you should hit
18 Mr. Mathenge with some comparative fault. That would be the
19 right thing to do.

20 But what Nissan has done here is they put
21 100 percent of this fault on Mr. Mathenge. They are not
22 taking responsibility. They say well, we did a safety
23 assessment to see what the problem was, but you heard the
24 Interrogatory that we read to you where they said we've lost
25 it. We do not have the safety assessment. They don't have
26 the safety assessment because they lost it.

27 I'll leave you to decide what happened to that
28 safety assessment, but it was never produced. They have not

1 taken responsibility for what occurred here. And that's your
2 mission, I would suggest to you as a jury.

3 Tell Nissan you are responsible for what happened
4 here. And assess appropriate compensatory damages for
5 Mr. Mathenge and the others who suffered so tragically in this
6 lawsuit.

7 And with that, I thank you for your attention and
8 the work you're going to do.

9 THE COURT: Thank you very much.

10 Mr. Turnbull, 20 minutes.

11 MR. TURNBULL: Yes, sir.

12 **REBUTTAL ARGUMENT BY PLAINTIFF COUNSEL TURNBULL**

13 MR. TURNBULL: I'm a little disappointed, to be
14 completely frank with you. I'm a little disappointed. There
15 were things said to you, and I realize it's after all of the
16 evidence has come in, and I realize that now is obviously not
17 the time to put on evidence that rebuts things, but there were
18 some things said to you that were knowingly untrue. And it
19 kind of -- really kind of makes me sad.

20 Mr. Banks, when he talked about the \$1,100 that it
21 took to repair his car, and Mr. Nord, the \$1,100 that it took
22 to fix the car, that's because the only way to fix this
23 problem, and Mr. Banks talked about -- remember that, when he
24 talked about when he went to the dealership, they said you
25 can't really just program it. It won't completely fix it.
26 You got to do the booster too. They know. They know that's
27 the truth.

28 They talked about there weren't any other accidents.

1 They know that's not true. I know Mr. Berry knows that's not
2 true. They said that no one else has been cleaved or killed
3 because of this issue. They know that's not true.

4 MR. KLEIN: Objection. There's no evidence of that.

5 THE COURT: I'll let the jury determine that. These
6 are counsel's comments.

7 Continue on.

8 MR. TURNBULL: And you know, what saddens me the
9 most, as I think about all the people who didn't know about
10 C1179, just like the police in this case. And just like the
11 prosecutor's office for a period of time. They didn't know.
12 They didn't know.

13 So when you bury a defect, when you conceal it, and
14 you're the one who chooses to hide it, you don't get the
15 benefit of coming into a courtroom and saying things like
16 nobody else has died that we know of. You don't get the
17 benefit of saying that Hilario Cruz should have sued us
18 sooner. I thought they were done blaming people. I thought
19 they were done pointing fingers. That's what I believed to be
20 the case.

21 Now they are blaming Hilario. He didn't sue us fast
22 enough. We concealed it. You didn't figure it out. Gotcha.

23 You're going to get the Special Interrogatory form
24 that says could Hilario Cruz have discovered through a
25 reasonable investigation that this car was the cause of this
26 issue.

27 You're going to have that in your hands. And under
28 the law, the law is good. And what it says is that you don't

1 get the right, when you're the one who conceals and buries
2 things, to benefit from them. I can't even believe they
3 argued it, to be honest with you. It's offensive.

4 So the answer is no, would a reasonable and diligent
5 investigation. The police and the prosecutor's office didn't
6 know. They had to go and do an EEPROM download to dig this
7 out of this car.

8 I'll add to that this: When it comes to the C1179
9 code in Solomon Mathenge's car, it's inescapable. It's like a
10 hook that they just can't get rid of. You remember in opening
11 statement how they had the full-on dog-and-pony show about all
12 the things happening until after the wreck? Did you notice
13 they didn't go into that? Because their expert said it didn't
14 happen after the wreck? Did you notice that?

15 Do you remember the Interrogatory that we read where
16 Nissan admitted it happened before the wreck, not during the
17 wreck? And then what do they do? They come in today and try
18 to tell you about a jammed sensor and throw Hail Marys at
19 that.

20 And then they made a comment that surprised me a
21 little. They said -- it bothers me. It saddens me. They say
22 that we have the burden of proof. So we have to disprove all
23 of these things. And you know what? They know that isn't
24 true. The question is is it more likely true than not true.
25 That's what the law says. The question is is it more likely
26 true that Solomon Mathenge encountered OHB, on August 29,
27 2012, than not true. That's the question.

28 Because if he encounters OHB, and that's what

1 resulted in him panicking and created an emergency situation,
2 which is what happened, then the law provides for that.

3 And what the law says is that everything that
4 happened, once it was an emergency in terms of his conduct or
5 his actions, whether he's hitting pedals, whether he's not
6 hitting the emergency brake? He had three seconds. That's
7 the defense? He should have hit the emergency brake? Nissan
8 saying that? I mean, at some point they have to take some
9 level of responsibility here.

10 And I'll tell you this. This 72, if you don't
11 believe 72, which, with all due respect, this is not a
12 72-mile-an-hour impact. I think we all know that. Then all
13 of the pieces of the puzzle they just discussed don't fit.
14 They don't fit at all.

15 If you don't believe 72, you are free to believe
16 Ms. Draper. Remember early in the case? You're free to
17 believe her, that it was a constant speed. That it was 40 to
18 50 miles per hour. If you don't believe 72, then you are free
19 to believe Ms. Johnson, who took a little liberty with her
20 brake light thing. She said in her deposition she didn't
21 remember one way or the other. She comes in here, Nissan's
22 direct examination, and all of a sudden she's gung ho about
23 brake lights. But you are free to believe her too about
24 whatever you choose, 40 to 50 miles per hour.

25 You are free to believe Mr. Rousseaux. When they
26 talk about low speed, you know, it's interesting, they pick
27 and choose the evidence. You notice that? It's very
28 interesting. Mr. Rousseaux, they talk about all these

1 happened at low speeds. You remember that? And they put up a
2 slide from Mr. Rousseaux and put a few bullet points there.

3 But it saddens me because you know what they didn't
4 put up there? The things that rebut what they say. That he's
5 going around 60 to 65 miles per hour on the highway when he
6 encounters OHB.

7 Folks, this isn't just a low speed deal. And that's
8 why we had -- I know you all got sick of hearing these videos
9 because they feel redundant. But at the end of the day, they
10 all had a little bit of a different purpose.

11 Mr. Surana finally pointed out in order to hear the
12 sound and in order to feel the grind, you actually have to
13 hold it down there for a few seconds. You all remember that?
14 And you have to hold it down there for three to five seconds
15 before you get those things.

16 They are all a little bit different. But you are
17 free to believe people. You are free to believe the 4,500
18 people who said that their brake pedal went to the floor.
19 Whether it touches the floor, really, does it matter? If it
20 feels like it's going to the floor, you see why that's a
21 little bit of a problem? You are free to believe ordinary
22 people that say C1179 feels like no brakes. You are free to
23 believe that Nissan hired this Toyota sudden acceleration team
24 for a reason.

25 Let me show you another thing. You just got told
26 that when it comes to sudden acceleration, that it normally
27 happens in everyday driving by Mr. Young. You remember that?

28 Well, this is one of his papers. Cars Gone Wild. I

1 think they were talking about it --

2 MR. KLEIN: Excuse me. This is not evidence. He
3 showed the title, and that was it.

4 THE COURT: It's overruled. I think he did -- this
5 so far they have seen, correct?

6 MR. KLEIN: Correct.

7 THE COURT: I don't know if he intends to show the
8 entire article.

9 MR. TURNBULL: I was going to show his findings.

10 THE COURT: Well, is this document, the entire
11 document, in evidence?

12 MR. KLEIN: No.

13 THE COURT: If it's not in evidence, you can't use
14 it. The body of it -- you can certainly talk about what he
15 said.

16 MR. TURNBULL: Well, the first page was shown,
17 Judge.

18 THE COURT: I thought it was a clip of it.

19 MR. KLEIN: Correct.

20 MR. TURNBULL: Okay. Well, they pick and choose the
21 evidence. They pick and choose the evidence. You are free to
22 believe -- Mr. Levitt could have done a crash test at 72. You
23 are free to believe that there's a reason he threw away his
24 original engineering analysis. You are free to believe that
25 Walker and Leaphart did these tests, and it was different sub
26 fault in 3A.1.

27 You are free to believe Mr. Mathenge encountered a
28 sudden emergency and panicked when it went into OHB.

1 Solomon Mathenge claims he was not negligent because
2 he acted with reasonable care in an emergency situation. He
3 was not negligent if he proves all the following: Sudden and
4 unexpected emergency situation in which someone was in
5 apparent danger of immediate injury.

6 Solomon Mathenge did not cause the emergency, and he
7 acted as a reasonably careful person would have in similar
8 circumstances, meaning an out-of-control car, feeling of no
9 brakes, brake pedal to the floor.

10 And I want to clarify one thing. And I know that
11 Mr. Kiesel brought this up. When it comes to the 51, up to
12 that point, that's his part. That's his part. And if you
13 want to apportion fault for the 51 in a 35, I understand that.

14 Absolutely nobody here from the Cruz family is
15 saying that would be something that was appropriate. But once
16 he encounters OHB and, as he said, applies the brakes and
17 nothing is happening and he panics, everything after that,
18 everything after that -- folks, they want you to believe that
19 he accelerated 100 percent of acceleration in this panic for
20 350, 400 feet while avoiding cars, avoiding a median. He
21 didn't roll the car over. He didn't leave yaw marks.

22 They want you to think from the waist up that he's
23 Mario Andretti. But from the waist down, he can't figure out
24 what pedal is what. It makes no sense.

25 What makes sense is that he went to put on the
26 brakes. He had three seconds. They weren't working, and then
27 after that, nobody knows. Nobody knows.

28 At the end of the day, what we're asking for is your

1 verdict. Without accountability, there's no justice. Without
2 justice, there's no freedom.

3 You've all been extremely attentive. I'm thankful
4 for that. Help us fix those cars. Thank you very much.

5 THE COURT: Thank you very much.

6 Okay, ladies and gentlemen, I'm going to read you
7 the pre-deliberation instructions. You can follow along if
8 you want.

9 (Jury instructions read, not reported.)

10 THE COURT: I'm going to add this.

11 So please report this.

12 I'm going to urge you, write how you voted on each
13 question that you answer, because you may be asked how you
14 voted on that particular question, okay? This way you won't
15 forget. So use your extra forms and record how you vote on
16 each question. Okay? The questions you answered. I'm going
17 to urge you to do that. Because you may be asked in polling
18 how did you vote on Question No. 7, okay? Yes, no, whatever
19 it is.

20 Okay.

21 (Jury instructions read, not reported.)

22 THE COURT: Back on the record. I'm going to have
23 the four of you kind of wait outside in the hallway. We'll
24 see what they are going to do and when they are going to come
25 back in the afternoon. And then I'll probably have some
26 further instructions for you as to what to do.

27 I probably will have you stay here today. If they
28 go into the next day, I'll find out when they are going to

1 come, and maybe we can make some sort of accommodations where
2 you can be available by phone if we need you to come back in
3 under certain conditions. Okay? We'll talk about that later.

4 But for now, once the jury goes back in the back
5 room, I'm going to have you go in the hallway and just wait
6 until they break for lunch, assuming that they do, and then
7 I'll have you come back at 1:30 or whenever they are going to
8 come back, and you'll just hang out in the immediate area, and
9 then I'll give you further instructions later on today as to
10 whether you need to come back if they go to tomorrow. Okay?
11 All right.

12 Off the record again.

13 (Jury instructions read, not reported.)

14 THE COURT: That concludes my instructions. We're
15 now going to have the clerk swear in the courtroom attendant.

16 (Courtroom attendant sworn.)

17 THE COURT: All right. So, ladies and gentlemen,
18 the 12 jurors are going to go back in the jury room. The
19 courtroom assistant is going to escort you. Take all your
20 items with you.

21 The four alternates, go wait in the hallway. You
22 figure out what you want to do in terms of taking your lunch
23 break. Let us know. Let the courtroom attendant know. And
24 then, when you want to come back from your lunch break.

25 Remember, you can only deliberate when all 12 of you
26 are in that room. That's the only time you can ever discuss
27 or express opinions, okay? And then we'll go from there. All
28 right. Good luck to you in your deliberations.

1 THE FOLLOWING PROCEEDINGS WERE HELD IN
2 OPEN COURT OUTSIDE THE PRESENCE OF THE JURY:

3
4 THE COURT: Back on the record outside the presence
5 of all the jurors and the alternative jurors.

6 I wanted to put on the record I'm going to lodge the
7 proposed -- first of all, I'm lodging the original Special
8 Interrogatories 1 and 2 that were agreed to by the parties
9 yesterday which I abandoned over the objection of the
10 defendant. I've also lodged for the record their proposed
11 Special Verdict form that we discussed this morning on the
12 record.

13 MR. SENIOR: I have a nonred-lined version if you'd
14 prefer that.

15 THE COURT: Whichever you want to lodge.

16 MR. SENIOR: It would probably be easier if copies
17 are made.

18 THE COURT: Okay. Anything else we need to address
19 before we recess?

20 MR. SENIOR: We have some exhibit issues we need to
21 address.

22 THE COURT: Are you prepared to address them now?

23 MR. SENIOR: I am.

24 THE COURT: I would suggest that -- can we do this?
25 Unless they ask for a specific exhibit, don't give it back to
26 them? What do you want to do? There's a lot of exhibits and
27 boxes. It's up to you.

28 MR. KLEIN: Well, we're certainly not going to put

1 them in there until they come back from lunch.

2 THE COURT: Who knows what they do? I have no idea.
3 We're not going to make the exhibits available until the
4 afternoon. We'll agree on that.

5 Why don't you guys meet and confer. We can always
6 put something on the record at 1:30 if you need to.

7 MR. KLEIN: That's fine.

8 THE COURT: Off the record.

9 (DISCUSSION HELD OFF THE RECORD.)

10 (Recess taken.)

11 THE FOLLOWING PROCEEDINGS WERE HELD IN
12 OPEN COURT OUTSIDE THE PRESENCE OF THE JURY:

13

14 THE COURT: On the record in Cruz versus Nissan and
15 all related matters. We're outside the presence of the jury.
16 The jury is deliberating. The alternates are outside.

17 We're going to address some exhibit issues?

18 MR. SENIOR: Yes, your Honor.

19 THE COURT: Is there something for me to decide?

20 MR. SENIOR: We wanted to enter exhibits into
21 evidence, and all of these are stipulated to.

22 THE COURT: Excellent. Go right ahead.

23 MR. SENIOR: So first of all, we have Exhibits
24 2179-6 through 2179-8. We'd move that into evidence.

25 Video 3188-10. That's the one we just played.

26 Then we have a video 2566.

27 THE COURT: I assume if they have a request to watch
28 a video, I assume we'll have to bring them out.

1 MR. SENIOR: 2594 and 2601.

2 Exhibit Nos. 2608, 2621, and 2622.

3 Then we have the Carr Engineering photos, which is
4 Exhibit 2758, and then Exhibit -- all pages. And then
5 Exhibit 2760.

6 THE COURT: Unless you say otherwise, it's going to
7 be the entire document unless you say otherwise.

8 MR. SENIOR: We have 2771-1, 2771-8, 2774-1, 2774-9,
9 -10, -11, and -12.

10 THE COURT: All right. So all these documents are
11 admitted without objection.

12 (Defendant's Exhibits 2179-6 through 2179-8,
13 3188-10, 2566, 2594, 2601, 2608, 2621, 2622, 2758,
14 2760, 2771-1, 2771-8, 2774-1, 2774-9, 2774-10,
2774-11, 2774-12 received.)

15 THE COURT: Does that cover all the defense exhibits
16 now?

17 MR. SENIOR: Unless someone taps me on the shoulder
18 and says I've missed so-and-so, I believe that's it, your
19 Honor.

20 THE COURT: What about the plaintiff? Have you
21 gotten all your exhibits in?

22 MR. TAPLEY: I believe we have.

23 THE COURT: So obviously, I can always go back on
24 the record and admit other things if there's a stipulation.

25 MR. SENIOR: We did have a discussion with
26 plaintiffs' counsel. There were a few exhibits.

27 MR. PITTMAN: I'd say maybe five to seven.

28 THE COURT: Plaintiffs' 5 or five or seven exhibits

1 for the plaintiff?

2 MR. SENIOR: Five or six exhibits of the plaintiff
3 that, after reviewing them, we think that portions of them
4 need to be redacted. I believe plaintiffs' counsel does agree
5 that they will redact them before they go back to the jury.
6 So we'll work with them.

7 THE COURT: But they have already been admitted.

8 MR. SENIOR: Yes.

9 THE COURT: So it's a question of there's going to
10 be a redaction and there's going to be a stipulation with the
11 redaction. If there's a problem with the redaction and
12 someone is objecting, then I'll decide. But everything looks
13 good for now in terms of exhibits?

14 MR. SENIOR: Yes.

15 THE COURT: Okay. Thank you all very much.

16 (Recess taken.)

17 (Alternate jurors enter.)

18 THE COURT: We're on the record in the Cruz versus
19 Nissan and all related matters. Counsel is present. The
20 jurors are deliberating, and we have the alternates in the
21 jury box.

22 I've been advised by the foreperson that they are
23 not going to be reaching a verdict today. So I'm going to go
24 ahead and release you at all. I'm just excusing you for the
25 day. So you are excused and are to report back by 10:00
26 o'clock. Check in here at 10:00 o'clock, and we'll give you,
27 you know, you don't have to hang around necessarily per se in
28 the hall. You can go down to the jury room or go walk around,

1 as long as we're able to reach you within 15 minutes on the
2 phone call.

3 Then that's going to be my order tomorrow. Okay?
4 It may change for next week. But for tomorrow, you are to be
5 here by 10:00 o'clock. Check in with the courtroom assistant
6 by 10:00 o'clock, and then make sure you leave some sort of
7 cell phone where you can be reached. You are free to walk
8 around, as long as you can report back here within 15 or 20
9 minutes at the latest.

10 Remember my admonitions. All the things we
11 discussed. We'll see you tomorrow. All right?

12 Off the record.

13

14 (Proceedings concluded at 4:00 P.M.)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
DEPARTMENT 47 HON. RANDOLPH M. HAMMOCK, JUDGE

HILARIO CRUZ, ET AL.,)
)
 PLAINTIFFS,)
)
 VS.) CASE NO. BC493949
)
 SOLOMON METHENGE, ET AL.,) **A.M & P.M. SESSION**
)
 DEFENDANTS.)
)
 _____)

I, MARK SCHWEITZER, OFFICIAL COURT REPORTER PRO TEM
OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF
LOS ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT,
DATED JULY 20, 2017, A.M. & P.M., COMPRISES A FULL, TRUE, AND
CORRECT TRANSCRIPT OF THE PROCEEDINGS HELD IN THE
ABOVE-ENTITLED CAUSE.

DATED THIS 20TH DAY OF JULY, 2017.

/S/ MARK SCHWEITZER
MARK SCHWEITZER, RPR, CRR, CSR NO. 10514