CAUSE NO. 2013-29761

GLORIA ALEXANDER and ANGEL ALEXANDER	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Transferred to the 152nd Judicial District Court of Harris County, Texas
	§	
	§	(MDL Pretrial Court Before the Honorable Judge Robert Schaffer)
ESIS/GENERAL MOTORS LLC and JTEKT OF NORTH AMERICA, INC.	§	
	§	
Defendants.	§	
	§	
IN RE: GENERAL MOTORS IGNITION SWITCH LITIGATION	§	

GENERAL MOTORS LLC'S COMBINED MOTIONS FOR NO-EVIDENCE SUMMARY JUDGMENT AND TRADITIONAL SUMMARY JUDGMENT

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To reach a jury under Texas law, Plaintiffs Gloria and Angel Alexander must produce evidence to support each and every element of their claims against General Motors LLC ("New GM"), and that evidence must be more than a mere scintilla. Plaintiffs try to discharge their obligation here simply by pointing to product safety recalls related to the electric power steering ("EPS") and ignition switches that covered their vehicle, but Texas case law is clear that reliance on such recalls is insufficient to survive summary judgment or put a product defect claim before a jury.

Accordingly, as explained more fully below, New GM is entitled to a "no evidence" summary judgment under Texas law because Plaintiffs literally have no evidence to support their allegations of a product defect. Plaintiffs proffer no evidence showing that the ignition switch recall condition existed in their particular vehicle; that the EPS or ignition switch recall conditions manifested in this accident; or that the recall conditions caused the accident or any alleged injuries. Indeed, Plaintiffs have not designated a single expert witness or disclosed any expert opinions on defect or causation elements, despite the fact that Texas law requires expert testimony to substantiate allegations of a product defect that are not within the purview of a lay witness. In addition, New GM is entitled to a traditional summary judgment because the undisputed facts—including the car's "black box," eyewitness testimony, physical evidence, and unrebutted expert testimony—unequivocally and affirmatively establish that Plaintiffs' 2007 Cobalt did not experience either recall condition (power steering or ignition switch failure) in this accident. Accordingly, New GM is entitled to summary judgment on all of Plaintiffs' claims.

BACKGROUND

This is a personal injury product liability suit. Plaintiff Gloria Alexander alleges she was

driving a 2007 Chevrolet Cobalt ("Subject Vehicle") when "the power steering assist failed, causing car [sic] to veer into oncoming traffic and crashed [sic] head on into a brick wall" before another vehicle struck the driver's door. Ps' Second Am. Pet. ¶ 67. Plaintiffs allege that the vehicle "failed in its design to prevent loss of control" and that "unsafe operation of . . . the steering and ignition switch" rendered it defective and unreasonably dangerous "in that it would cause serious vehicle malfunctions resulting in accidents." *Id.*

More specifically, Plaintiffs contend that the ignition switch can unexpectedly and suddenly move from the "on" or "run" position to the "off" or "accessory" position during vehicle operation and, as a result, "the motor engine [sic] and certain electrical components such as power-assisted steering and anti-lock brakes are turned off," allegedly "leaving the driver unable to control the vehicle." *Id.* ¶¶ 20-21. Plaintiffs allege that Gloria Alexander's accident and injuries resulted from the "[f]ailure of the steering and ignition switch or other systems." *Id.* ¶ 71.

In short, Plaintiffs allege that defects in the Subject Vehicle's ignition switch and EPS caused Plaintiff Gloria Alexander's crash, and they are suing under theories of strict liability, negligence, and breach of express and implied warranties. *Id.* ¶¶ 69-70, 71-73, 77, 81-82. They seek damages for Plaintiff Gloria Alexander's alleged injuries and Plaintiff Angel Alexander's alleged "property damage and economic losses." *Id.* ¶¶ 88-89.

UNDISPUTED FACTS SUPPORTING TRADITIONAL MOTION FOR SUMMARY JUDGMENT[1]

A. The Subject Accident

On December 21, 2012, Plaintiff Gloria Alexander was the driver and sole occupant of

[1] New GM fully stands by its September 16, 2015, Deferred Prosecution Agreement ("DPA") with the United States Attorney for the Southern District of New York, and the Statement of Facts associated with that Agreement. Nothing in this filing is intended to contradict the Statement of Facts or New GM's representations in the DPA.

Plaintiff Angel Alexander's 2007 Cobalt. She was entering a highway when traffic began slowing in front of her. *See* Dep. of Gloria Alexander (attached as Ex. A), at 115:21-116:12. When she applied the brakes, she claims that the Subject Vehicle started going faster. *Id*. at 118:23-119:1. It crossed two lanes and struck a concrete center barrier before a pickup truck hit her driver's side door. *Id*. at 141:4-12; *see also* Dep. of Robert Valyan (attached as Ex. B), at 18:1-9. Following the accident, a bystander reached inside the Subject Vehicle and turned the ignition key from the "on" or "run" to the "off" position. Ps.' Second Am. Pet. ¶¶ 17, 67; Ex. A at 168:1-12; *see also* Tex. Peace Officer's Crash Report (attached as Ex. C), at 1.

The Subject Vehicle's airbag Sensing and Diagnostic Module ("SDM"), sometimes referred to as the car's "black box," contains an Electronic Data Recorder ("EDR") that records various vehicle systems parameters during a crash event and for the five seconds immediately preceding the event. If certain vehicle components or systems are not operating normally within acceptable limits or fail a self-test, the EDR will record that information in the form of a Diagnostic Trouble Code ("DTC"). *See* Aff. of Robert P. Rucoba (attached as Ex. D) ¶ 4. In concert with other evidence discussed above, the Subject Vehicle's SDM data indicates that the ignition switch was in the "run" position at the time of the accident. *See* Aff. of Thomas Mercer (attached as Ex. E) ¶¶ 6-9. The SDM data also contained no stored steering DTCs, as would be expected if the EPS had failed. *See* Ex. D ¶¶ 7, 9-10.

B. Recall Campaigns Involving the Subject Vehicle's Ignition Switch and Electric Power Steering.

The Subject Vehicle is included within the scope of GM Recall No. 10023, a product recall campaign relating to the potential loss of EPS. *See* March 1, 2010 correspondence from New GM to NHTSA pursuant to 49 C.F.R. § 573.6 (attached as Ex. F), which provides in part:

General Motors has decided that a defect, which relates to motor

> vehicle safety, exists in certain 2005-2010 model year Chevrolet Cobalt and 2007-2010 model year Pontiac G5 vehicles. Certain vehicles equipped with electric power steering **may** experience a sudden loss of power steering assist that could occur at any time while driving. If the power steering assist is lost, a message is displayed on the Driver Information Center and a chime sounds to inform the driver. **Steering control can be maintained**, as the vehicle will revert to a manual steering mode, but would require greater driver effort at low vehicle speeds.

Ex. F at 1 (emphasis added).

The Subject Vehicle is also included within the scope of GM Recall No. 13454, relating to ignition switch torque performance and the potential for unintentional ignition switch rotation. *See* February 24, 2014 correspondence from New GM to NHTSA pursuant to 49 C.F.R. § 573.6 (attached as Ex. G), which provides, in part:

> General Motors has decided that a defect which relates to motor vehicle safety exists in 2005-2007 model year Chevrolet Cobalt and 2007 model year Pontiac G5 vehicles. The ignition switch torque performance **may** not meet General Motors' specification. **If** the torque performance is not to specification, the ignition switch **may** unintentionally move from the "run" position to the "accessory" or "off" position with a corresponding reduction or loss of power. This risk may be increased if the key ring is carrying added weight or the vehicle goes off road or experiences some other jarring event. The timing of the key movement out of the "run" position, relative to the activation of the sensing algorithm of the crash event, may result in the airbags not deploying, increasing the potential for occupant injury in certain kinds of crashes.

Ex. G at 1 (emphasis added); *see also* New GM's Am. Special Exceptions and Am. Answer to Pls.' Second Am. Pet., ¶ II.A.5.

C. Expert Opinions

Despite having ample time to do so,[2] Plaintiffs failed to designate a single expert witness or provide expert reports with any opinions supporting Plaintiffs' highly technical defect allegations. New GM timely disclosed its experts. *See* New GM's Disclosure of Expert Witnesses, served May 2, 2016 (attached as Ex. I). New GM's experts have opined that the ignition switch and EPS recall conditions did not cause or contribute to the Subject Accident:

- The Subject Vehicle's ignition switch did not rotate from the "run" to the accessory" or "off" position either before or during the Subject Accident sequence, and did not cause or contribute to the Subject Accident. *See* Ex. E ¶¶ 6-12.

- No mechanical problems with the Subject Vehicle's electric power steering system caused or contributed to the Subject Accident. *See* Ex. D ¶¶ 10-11.

GOVERNING LAW

A. No-Evidence Motion for Summary Judgment

Texas Rule of Civil Procedure 166a(i) provides that:

> After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

Tex. R. Civ. P. 166a(i).

A no-evidence motion "is essentially a motion for a pretrial directed verdict. Once such a motion is filed, the burden shifts to the nonmoving party to present evidence raising an issue of material fact as to the elements specified in the motion." *See Mack Trucks, Inc. v. Tamez*, 206

[2] Pre-trial deadlines in this matter—Bellwether Trial #2—were set by the Court's November 5, 2015 Scheduling Order. *See* Agreed Scheduling Order. The parties extended Plaintiffs' deadline to designate expert witnesses and provide expert reports to April 1, 2016, and New GM's deadline to May 2, 2016. *See* Rule 11 Agreement dated Feb. 24, 2016 (attached as Ex. H).

S.W.3d 572, 581-82 (Tex. 2006). To meet this burden, the non-movant must produce more than a scintilla of evidence on this point; she must produce sufficient "evidence [that] would allow reasonable and fair-minded people to differ in their conclusions." *Sanchez v. Mulvaney*, 274 S.W.3d 708, 711 (Tex. App.—San Antonio 2008, no pet.) (citing *Forbes, Inc. v. Granada Biosciences, Inc*., 124 S.W.3d 167, 172 (Tex. 2003)). "Less than a scintilla of evidence exists if the evidence is so weak as to do no more than create a mere surmise or suspicion of a fact." *See id.* (citing *Forbes*, 124 S.W.3d at 172).

B. Traditional Motion for Summary Judgment

Under Texas Rule of Civil Procedure 166a, a defendant may move, at any time, for summary judgment in its favor. *See* TEX. R. CIV. P. 166a(b). The moving party must show that no genuine issue of material fact exists and the party is entitled to judgment as a matter of law. *Id.* at 166a(c); *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995). A motion for summary judgment is proper "at any time after the adverse party has appeared or answered." TEX. R. CIV. P. 166a(a). If the evidence disproves as a matter of law even one element of the plaintiff's cause of action, the defendant is entitled to summary judgment. *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991). Once the movant has established a right to summary judgment, the burden shifts to the non-movant to present evidence that would raise a genuine issue of material fact. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979).

ARGUMENTS SUPPORTING NO-EVIDENCE
MOTION FOR SUMMARY JUDGMENT

Plaintiffs filed their Original Petition on May 20, 2013. This case is set for trial on

September 19, 2016, discovery closes on June 13, 2016,[3] the parties have exchanged written discovery and conducted depositions, and New GM timely served its expert disclosures. In the three years since this case was filed—and despite having more than adequate time and opportunity—Plaintiffs have failed to produce any admissible evidence sufficient to raise a genuine issue of fact regarding their product liability claims.

To prevail on their strict liability, negligence, and breach of express and implied warranty claims, Plaintiffs must prove three common elements, among others: (1) the Subject Vehicle was defective; (2) the defect manifested itself at the time of the Subject Accident; and (3) the defect caused injury to Plaintiffs. *See McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967) (strict liability); *Gonzales v. Caterpillar Tractor Co.*, 571 S.W.2d 867 (Tex. 1978) (negligent design); *Dico Tire v. Cisneros*, 953 S.W.2d 776 (Tex. App.—Corpus Christi, 1997, writ denied) (causation in a negligent design case); *Costilla v. Aluminum Co. of Am.*, 835 F.2d 578, 579 (5th Cir. 1988) (applying Texas law) ("[T]he determination of defect for purposes of dangerousness for § 402A liability often resolves the issue of defect for unmerchantability liability."); TEX. BUS. & COM. CODE § 2.715(b)(2) (proximate cause required in breach of warranty claim). Because Plaintiffs have not produced any evidence supporting these essential elements, New GM is entitled to summary judgment on all of Plaintiffs' claims.

A. Plaintiffs Have No Evidence of an Ignition Switch Defect in Their Vehicle.

Plaintiffs do not proffer any evidence of a defect in their vehicle other than pointing to the fact that New GM issued two recalls on the car. But proof of a product recall, by itself, is legally insufficient to show evidence of a product defect under Texas law. *See Parsons v. Ford Motor Co.*, 85 S.W.3d 323, 331 (Tex. App.—Austin 2002, pet. denied) (evidence of a recall is

[3] At the last status conference on May 13, 2016 and at the parties' request, the Court agreed to extend the discovery deadline until June 24, 2016. A formal order amending the discovery deadline has not yet been signed.

only admissible "if there is otherwise independent evidence of the defect in the specific vehicle in question") (emphasis added and citations omitted); *Rutledge v. Harley-Davidson Motor Co.*, 364 F. App'x 103, 107-08 (5th Cir. 2010) (affirming summary judgment where the plaintiff's only evidence of defect consisted of recall notices).

In *Rutledge*, the plaintiff claimed that a defect in her motorcycle caused her to run off the road and crash. *Id.* at 104. Harley-Davidson later issued two recall notices related to a steering defect. *Id.* The plaintiff alleged that the recall condition caused her accident. *Id*. To support its motion for summary judgment, Harley-Davidson submitted an affidavit from an engineering expert who concluded that the recall condition did not cause the accident. *Id*. The plaintiff produced no expert testimony, relying solely on the recall notices as evidence of the defect. *Id*. The trial court granted summary judgment, and the appellate court affirmed, because the plaintiff "offered no evidence . . . to show that a specific defect existed in her motorcycle." *Id*. at 107.

Likewise, Plaintiffs here offer no evidence that their vehicle's ignition switch fell below its torque-performance specifications. Their only "proof" is the ignition switch recall notice itself, which states that there was a low-torque ignition switch installed in many vehicles, and that 2007 Cobalt vehicles were among the model years that may have been equipped with the defective switch. *See* New GM's Am. Special Exceptions and Am. Answer to Pls.' Second Am. Pet., ¶ II.A.5. As in *Parsons* and *Rutledge*, Plaintiffs cannot rely merely upon the ignition switch recall to show that the ignition switch in their particular 2007 Chevrolet Cobalt was defective. Accordingly, New GM is entitled to summary judgment on Plaintiffs' ignition switch defect claims.

B. Plaintiffs Have No Evidence that the EPS or Ignition Switch Recall Conditions Manifested in the Subject Vehicle During the Subject Accident.

Even if Plaintiffs could show that their vehicle had a defect (which they cannot), they

would also need to show manifestation of the defect. A manifested defect is a central tenet of Plaintiffs' product liability claims, and "the absence of a manifested defect precludes a cognizable claim." *In re Air Bag Prods. Liab. Litig.*, 7 F. Supp. 2d 792, 805 (E.D. La. 1998) (applying Texas law). The record here contains no evidence of a manifestation of the EPS recall condition (described in GM Recall No. 10023) in the Subject Vehicle at the time of the Subject Accident. Plaintiffs have failed to come forward with any evidence that the Subject Vehicle experienced a sudden loss of power, that a message indicating a loss of power steering appeared on the Subject Vehicle's Driver Information Center, or that any DTCs reflecting an EPS system fault were present.

Plaintiffs also do not have evidence that the ignition switch recall condition (described in GM Recall No. 13454) manifested before or during the Subject Accident. Putting aside their lack of evidence that the Subject Vehicle's ignition switch fell below its torque-performance specifications, Plaintiffs have no admissible evidence that the ignition switch actually rotated from the "on" to the "accessory" or "off" positions, nor any evidence of a sudden power loss, during or immediately before the Subject Accident.

Plaintiffs' failure to produce any evidence that defects in either the EPS or ignition switch systems manifested at the time of the Subject Accident entitles New GM to summary judgment on their product defect claims.

C. The Existence and Manifestation of a "Defect" Are Outside the Experience of the Average Person and Require Proof by Expert Testimony.

Under Texas law, "expert testimony is generally encouraged if not required to establish a products liability claim." *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 42-43 (Tex. 2007) (holding that expert testimony was required to establish causation because "[a] lay juror's general experience and common knowledge do not extend to whether design defects such as

those alleged in this case caused releases of diesel fuel during a rollover accident") (citing *Tamez*, 206 S.W.3d at 583; *Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 137 (Tex. 2004)). "If juries were generally free to infer a product defect . . . from an accident or product failure alone, without any proof of the [defect condition] that caused the accident, expert testimony would hardly seem essential. Yet we have repeatedly said otherwise." *Id.*

Texas courts have consistently required expert testimony for product defect claims involving a range of automotive components and conditions, including, for example, tires (*Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 807 (Tex. 2006) ("Without reliable expert testimony establishing these essential elements of a manufacturing defect claim, plaintiffs' proof was legally insufficient to establish liability.")); carburetors (*General Motors Corp. v. Hopkins*, 548 S.W.2d 344, 348 (Tex. 1977)[4] (where the reason for a carburetor malfunction is beyond common experience or knowledge, "[t]he jury and court must therefore depend upon the explanations and opinions of the experts."); fires (*Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600-01 (Tex. 2004) (holding that expert's opinion that he "suspected" electrical system caused vehicle fire after visual inspection of truck and review of service manuals and NHTSA database was insufficient to raise fact question of defect)); airbags (*Praytor v. Ford Motor Co.*, 97 S.W.3d 237, 241 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (concluding that expert testimony was required to establish causation); seatbelts (*Gen. Motors Corp. v. Harper*, 61 S.W.3d 118, 133 (Tex. App.—Eastland 2001, pet. denied) (reversing plaintiff's verdict because design expert's testimony failed to establish causation); and unintended acceleration (*Armstrong*, 145 S.W.3d at 137)).

In *Armstrong*, the Texas Supreme Court reiterated the broad requirement of expert

[4] *Overruled on other grounds by Duncan v. Cessna Aircraft Co.* 665 S.W.2d 414, 428 (Tex. 1984).

testimony in automotive product defect claims:

> We have consistently required competent expert testimony and objective proof that a defect caused [sudden] acceleration. The courts of appeals have done the same, holding liability cannot be based on unintended acceleration alone, lay testimony regarding its cause, or defects not confirmed by actual inspection. Courts elsewhere do too. These requirements are not peculiar to unintended acceleration cases.

145 S.W.3d at 137 (citations omitted).

As with the cases cited above, whether (1) the Subject Vehicle's ignition switch fell below its torque-performance specifications or (2) an EPS failure caused a loss of power steering, are outside the experience of the ordinary person and require the testimony of qualified experts in engineering and automotive design. Plaintiffs, however, did not disclose any experts or expert opinions to establish the existence or manifestation of a defect in the Subject Vehicle's ignition switch or EPS, and thus have no expert evidence to support their claims.

Whether the EPS or ignition switch recall conditions existed in the Subject Vehicle, manifested in the Subject Accident, or caused or contributed to the Subject Accident, requires the opinions of qualified experts. But Plaintiffs did not disclose any experts or expert opinions on these issues, on which they bear the burden of proof. Accordingly, New GM is entitled to summary judgment on Plaintiffs' product defect claims.

D. Plaintiffs Have No Expert Opinions to Prove that the EPS or Ignition Switch Recall Conditions, or the Subject Accident, Caused Plaintiff Gloria Alexander's Alleged Injuries.

In addition to requiring expert testimony to establish a defect and manifestation of that defect, Texas law also requires Plaintiffs to produce expert testimony to prove that alleged defects in the Subject Vehicle caused their alleged injuries and damages. *See Gharda USA, Inc. v. Control Solutions, Inc.*, 464 S.W.3d 338, 348 (Tex. 2015) ("We have consistently required

expert testimony and objective proof to support a jury finding that a product defect caused the plaintiff's condition.") (emphasis added and citation omitted). *See also, e.g., City of Dallas v. Furgason*, No. 05-06-00875-CV, 2007 Tex. App. LEXIS 7539, at *4 (Tex. App.—Dallas Sept. 18, 2007, no pet.) ("Generally, however, expert testimony is necessary to establish causation regarding medical conditions.") (emphasis added).

Expert testimony is also required to differentiate between pre-existing conditions and injuries where a claimant, like Plaintiff here, has a prior medical history. *See, e.g., Cerny v. Marathon Oil Corp.*, 480 S.W.3d 612, 622 (Tex. App.—San Antonio 2015, pet. pending) (affirming no-evidence summary judgment when "no expert evidence was presented differentiating between the [plaintiffs'] pre-existing physical conditions and the new health problems they claim arose" because of the defendant's conduct.); *Kemp v. Havens*, No. 14-05-00060-CV, 2006 Tex. App. LEXIS 3655, at *11 (Tex. App.—Houston [14th Dist.] April 27, 2006, no pet.) ("[E]xpert testimony is required to establish than an automobile accident caused a person to suffer herniated disks when that person suffers from other preexisting conditions and injuries.").

Plaintiffs seek damages for alleged injuries to Plaintiff Gloria Alexander's [redacted], as well as her [redacted]. *See* excerpt from Plaintiff Fact Sheet of Gloria Alexander (attached as Ex. J), at 10. But she previously complained of the same injuries before the Subject Accident:

- Plaintiff previously sought treatment for a torn foot ligament after she fell. *See* Ex. A, at 56:7-57:3.

- In 1990 or 1991, Plaintiff suffered a work-related back injury as a flight attendant. A medical doctor concluded that she could not fully recover, and thus was not qualified to return to work. She still receives medical benefits related to that injury. *Id.* at 5:15-8:24.

- In 2002, Plaintiff was driving a vehicle when another vehicle "ran the stop

sign and . . . hit [her], T-boned [her] in the driver's side of the car." *Id*. at 44:14-17. She had $80,000 in medical expenses related to a torn left rotator cuff and neck injuries. *Id*. at 46:3-11; 48:22-49:17; 58:18-59:1.

- Another motor vehicle accident in 2009 further "aggravated" Plaintiff's prior back injury. *Id*. at 32:10-33:13. She underwent medical treatment, but was "never made . . . whole." *Id*. at 38:8-25. That 2009 incident also aggravated her pre-existing neck and shoulder injuries. *Id*. at 59:14-60:3.

Plaintiff testified that she has been involved in so many accidents that she "cannot tell you each time that [she] was hit." *Id*. at 51:21-52:7. Those described above are merely the ones she can recall and that required "some sort of physical therapy." *Id*. at 53:20-54:1.

Plaintiffs have no expert opinions showing that the EPS or ignition switch recall conditions caused Plaintiff Gloria Alexander's alleged injuries in the Subject Accident, nor do they have any expert opinions establishing that her alleged injuries even resulted from the Subject Accident, as opposed to being pre-existing injuries from other incidents. Because Plaintiffs have failed to disclose any experts or expert opinions whatsoever regarding injury causation, New GM is entitled to summary judgment on all of Plaintiffs' claims.

ARGUMENTS SUPPORTING TRADITIONAL MOTION FOR SUMMARY JUDGMENT

New GM is also entitled to a traditional summary judgment on Plaintiffs' product liability claims because the undisputed facts prove that the Subject Vehicle's ignition switch did not rotate out of the "run" position, the Subject Vehicle did not experience a power loss, and there were no EPS malfunctions at the time of the Subject Accident.

A. The Subject Vehicle's Ignition Switch Did Not Rotate During the Subject Accident, and the Subject Vehicle Did Not Lose Power.

The ignition switch recall states that **if** the ignition switch torque performance in a covered model year vehicle does not meet General Motors' specification, "the ignition switch **may** unintentionally move from the 'run' position to the 'accessory' or 'off' position with a

corresponding reduction or loss of power. This risk **may** be increased if the key ring is carrying added weight or the vehicle goes off road or experiences some other jarring event." Ex. G at 1. The undisputed facts show that the Subject Vehicle's ignition switch did not rotate out of the "run" position, and the Subject Vehicle did not lose power, immediately before or during the Subject Accident.

The data from the SDM, or "black box," of Plaintiffs' vehicle is among the most compelling evidence on this point. When the Subject Vehicle's SDM detects certain accelerations indicating a crash event or potential crash event, it records a number of vehicle system parameters that are present at the time of the event, and during the five-second period (at one-second intervals) preceding the event ("pre-crash data"). *See* Ex. D ¶ 5; Ex. E ¶¶ 6-7. The "Vehicle Power Mode," which reflects whether the SDM received power at the time of the event and during the five-seconds preceding the event, is one of the parameters recorded in the 2007 Chevrolet Cobalt. *Id.* An SDM recording of the "Vehicle Power Mode Status" as "Run" is evidence that the ignition switch was in the "run" or "crank" position before or during the event. Ex. E ¶ 7. The SDM data that the Subject Vehicle recorded shows the "Vehicle Power Mode Status" was "Run," and the Run/Crank Ignition Switch Logic Level indicated an "Active" state at no more than one second prior to the first event in the sequence of the two events from the Subject Accident. *Id.* The SDM data also indicates the Subject Vehicle's passenger's airbag was suppressed (Automatic Passenger SIR Suppression System) from deploying (seat was empty) and the data was marked as "Valid." *Id.* ¶ 9. Had the ignition switch been in the "Accessory" or Off" states, the airbag suppression data would have been marked as "Invalid." *Id.* Together with other supporting evidence, the SDM data supports the conclusion that the ignition switch did not rotate out of the "Run" position either immediately before or during the

accident sequence. *Id.* ¶¶ 7-12.

Further, Plaintiff Gloria Alexander testified that the Subject Vehicle "sped up" or "started going faster" during the accident sequence. *See* Ex. A, at 118:25-119:8. This testimony indicates the Subject Vehicle did not lose power, because a car without power stalls instead of speeds up. She also admitted in her deposition that the engine was still running after the Subject Vehicle came to rest. She testified that after the crash, when the pickup truck driver, Robert Valyan, approached her car,

> A. [H]e said to me, "Turn -- put the car in park and turn -- you know, turn the key off" is what he said. . . .
>
> * * *
>
> Q. And then he says, "Can you turn off the car," so you turn off the car?
>
> A. Yes. Because there was smoke coming from under the hood of the car. There was smoke, so --
>
> Q. And the engine's still running and there's smoke and --
>
> A. Right -- no, the smoke was coming up. The smoke was coming up and he told me to put it in park is what he told me and turn the key off is what he said.
>
> * * *
>
> Q. Okay. So you reach down with your right arm and put it into park?
>
> A. Yes.
>
> Q. And you got it into park, right?
>
> A. Yes.
>
> Q. Okay. Then you turned the ignition switch to the off position?
>
> A. Yes.

Id. at 144:2-24, 18-145:3. Later in her deposition, she clarified that she remembers that she put the transmission gear selector in park, and either Mr. Valyan or a police officer reached in the window and turned off the ignition switch. *Id.* at 168:9-169:13. In their Second Amended Petition, Plaintiffs specifically allege that a police officer responding to the accident "found the car's ignition switch to be in the 'on' position and turned it into the off position." Pls.' Second

Am. Pet. ¶ 67. Plaintiffs also admit that "[a]t the 'run' position, the vehicle's motor engine [sic] is running and the electrical systems have been activated; . . . ." *Id.* ¶ 17 (emphasis added).

The SDM data and Plaintiff Gloria Alexander's undisputed testimony confirm that there was no loss of power, that the Subject Vehicle's ignition switch did not rotate before or during the accident, did not manifest a defect, and did not cause or contribute to the crash or Plaintiffs' alleged injuries or damages. Thus, the pleadings and summary judgment evidence on file show there is no genuine issue as to any material fact, and New GM is entitled to summary judgement Plaintiffs' ignition switch defect claims.

B. The Record Evidence Proves That The Subject Vehicle's Electric Power Steering Did Not Fail During the Subject Accident.

Plaintiffs also allege that the Subject Vehicle's "power steering assist failed" and caused the subject accident. Pls.' Second Am. Pet. ¶ 67. As discussed above, the undisputed facts prove that the ignition switch did not rotate, and thus the ignition switch cannot be the cause of the alleged loss of power steering assist. The uncontroverted evidence also shows that a failure of the EPS system did not cause the Subject Accident.

The Subject Vehicle's EPS system included a power steering control module ("PSCM"), torque sensor, and electric motor mounted to the steering column. *See* Ex. D ¶ 6. According to GM Recall No. 10023, some of the covered model year vehicles may develop a condition in which oil from the grease in the steering system assembly migrates through the electric power steering motor shaft bearing, affecting the motor output signal. *Id.* ¶ 7. When this condition occurs, diagnostic software in the PSCM sets diagnostic trouble code C0475. *Id.* The condition may cause the affected vehicle to experience a sudden loss of power steering assist during operation. *Id.* The PSCM does not clear the DTC C0475 from memory until after 100 subsequent consecutive malfunction-free ignition cycles. *Id.* ¶ 8.

Ten days after the Subject Accident, electronic data was retrieved from the Subject Vehicle's PSCM using a Vetronix Tech 2 diagnostic tool, and from the SDM, using a Bosch Crash Data Retrieval tool. *Id*. ¶ 9. The SDM data shows that the ignition switch was cycled a single time between the time of the crash and the data retrieval. *Id*. ¶ 9. Since fewer than 100 ignition cycles occurred between the time of the Subject Accident and the time of the interrogation, DTC C0475 would be present if the Subject Vehicle had experienced a loss of power steering assist as described in GM Recall No. 10023. *Id*. Based on the absence of DTC C0475 from that data, it is undisputed that the EPS condition described in GM Recall No. 10023 was not present in the Subject Vehicle at the time of the Subject Accident, and therefore did not cause or contribute to cause the Subject Accident. Accordingly, based on the undisputed facts, New GM is entitled to summary judgment on Plaintiffs power steering defect claims.

PLAINTIFFS' BREACH OF WARRANTY CLAIMS FAIL AS A MATTER OF LAW

New GM is also entitled to judgment as a matter of law on Plaintiffs' claims for breach of warranty—both express and implied—because: (1) Plaintiffs filed the claims after the expiration of the statute of limitations; (2) implied warranties do not attach to the sale of used goods; and (3) Plaintiffs have produced no evidence to support a breach of the implied warranty of fitness for a particular purpose.

A. Plaintiffs' Breach of Warranty Claims Are Untimely.

Under Texas law, causes of action for breach of express and implied warranties must be commenced within four years after the causes of action have accrued. TEX. BUS. & COM. CODE § 2.725(a)-(b); *see American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 435 (Tex. 1997) ("Section 2.725(b) of the Texas Business and Commerce Code provides a four-year limitations period for all warranty claims.") (emphasis added). The causes of action accrue when goods are tendered

for delivery. *Id*. § 2.725(b); *Cherry v. Chustz*, 715 S.W.2d 742, 745 (Tex. App.—Dallas 1986, no writ). The Subject Vehicle was tendered for delivery to its original buyer in 2007. *See* Certified Title History (attached as Ex. K), at 6. Thus, the statute of limitations for any breach of express or implied warranty claims expired in 2011, prior to the date of the Subject Accident. Plaintiffs filed this lawsuit on May 20, 2013—two years after the expiration of the statute of limitations. Therefore, the Court should dismiss Plaintiffs' untimely claims for breach of express and implied warranties as a matter of law.

B. Implied Warranties Do Not Attach to the Sale of Used Goods.

Plaintiffs' breach of implied warranty claims also fail as a matter of law because implied warranties do not attach to the sale of used goods. Under Texas law, "no implied warranty to the sale of used goods attaches where they are purchased with knowledge that they were used." *Southerland v. Ne. Datsun, Inc.*, 659 S.W.2d 889, 891 (Tex. App.—El Paso 1983, no writ). Here, Plaintiff Angel Alexander purchased the Subject Vehicle used from CarMax Auto Superstores in 2009. *See* Ex. K, at 11. Further, she knew she was buying it used. *See* Dep. of Angel Alexander (attached as Ex. L), at 25:15-16. Because he bought it knowing it was used, the Court should dismiss Plaintiffs' breach of implied warranty claim as a matter of law.

C. Plaintiffs Have No Evidence That New GM Breached the Implied Warranty of Fitness for a Particular Purpose.

The implied warranty for a particular purpose warrants a good for a specialized purpose where the seller of the good knows at the time of contracting the particular purpose and knows the buyer is relying on the seller's skill or judgment in selecting the product for that purpose. TEX. BUS. & COM. CODE § 2.315. The warranty of fitness for a particular purpose only applies if the "particular purpose" is a "non-ordinary" purpose. *Chandler v. Gene Messer Ford, Inc.*, 81 S.W.3d 493, 503 (Tex. App.—Eastland 2002, pet. denied); *see Williams v. Ford Motor Co.*, No.

04-01-00839-CV, 2003 WL 21010601, at *2 (Tex. App.—San Antonio 2003, pet. denied) (unpublished opinion). An implied warranty of fitness for a particular purpose does not attach to the normal use of a good. *See Chandler*, 81 S.W.3d at 503.

Plaintiffs have no evidence to support any claim that they intended to use the Subject Vehicle for anything other than its ordinary purpose, that they communicated any non-ordinary purpose to New GM, or that they relied on New GM's skill or judgment in selecting the Subject Vehicle for an alleged "non-ordinary" purpose. New GM is, therefore, entitled to a no-evidence summary judgment on Plaintiffs' claim that New GM breached the implied warranty of fitness for a particular purpose.

CONCLUSION

Defendant General Motors LLC respectfully prays that the Court grant its Combined Motions for No-Evidence Summary Judgment and Traditional Summary Judgment; that Plaintiffs take nothing by this suit; and that all claims brought by Plaintiffs be dismissed; and for such other and further relief, both at law and in equity, to which it may show itself justly entitled.

Respectfully submitted,

/s/ Kyle H. Dreyer

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing pleading was served upon all counsel of record, as listed below, via electronic mail on this 9th day of June 2016:

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