IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
NEWARK DIVISION

JOANNE NEALE, KERI HAY, KELLY MCGARY, SVEIN A. BERG, GREGORY P. BURNS, DAVID TAFT, JEFFREY KRUGER and KAREN COLLOPY individually and on behalf of others similarly situated, Plaintiffs, vs. VOLVO CARS OF NORTH AMERICA, LLC, and VOLVO CAR CORPORATION, Defendants.	No. 2:10-cv-04407-JLL-JAD **CLASS ACTION** **JURY TRIAL DEMANDED**

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR DISCOVERY REGARDING PLAINTIFFS' RENEWED MOTION FOR CLASS CERTIFICATION

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I. INTRODUCTION

On November 19, 2015, this Court issued a Scheduling Order which provided that instead of responding to Plaintiffs' Renewed Motion for Class Certification, Defendants had the option to "apply to the Court for limited discovery based solely on Plaintiffs' motion as read in connection with the Court of Appeals' decision." (DE # 332). Apparently ignoring this directive, Volvo has now filed a motion that seeks to re-open discovery for the purpose of asking two ***former*** putative class members – both of whom have already been deposed and responded to numerous discovery requests – questions about their recent driving experiences and the re-sale of their vehicles. Incredibly, Volvo also seeks to issue deposition subpoenas directed to the presumably unrepresented ***third parties*** to whom these ***former*** putative class members sold their vehicles. It also wants to serve another round of discovery requests on all but one of the class representatives, with the possibility of telephonic follow up depositions. Finally, Volvo has indicated that it also intends to unilaterally re-open expert discovery.

Contrary to the Court's November 19, 2015 Order, Volvo's motion relies on nothing from either the Third Circuit's opinion or from Plaintiffs' Renewed Motion for Class Certification that would support these requests. Instead, the motion is a thinly veiled effort to further delay these proceedings, harass these former class representatives and third parties, seek an end-run around the Court's *Daubert* rulings, and is entirely without merit. Indeed, Volvo's own conduct in this litigation demonstrates that the information it seeks is completely irrelevant to Plaintiffs' class certification motion. It previously established in a deposition that Plaintiff Svein Berg

had sold his vehicle to a third party without disclosing the existence of the defect. Yet, this information - which Volvo now claims to be so critical - was never utilized by it in opposing Plaintiffs' initial motion for class certification. There is nothing in the Third Circuit's opinion that suddenly makes this information important. To the contrary, this case has always been solely concerned with the material information (*i.e.,* the existence of a design defect) that Volvo failed to disclose to consumers.

As Plaintiffs previously noted in their October 2, 2015 letter to the Court (DE # 326), Volvo is engaging in an obvious tactic of delay, which to this point has already included its filing of several motions for reconsideration, a Writ of Mandamus, a Rule 23(f) petition and, now a motion to essentially reopen discovery.[1] This is most likely an overall strategy to try and run out the clock on putative class members – some of whom own vehicle model years dating back to 2003. Because Volvo's dilatory tactics are transparent and improper – and because its most recent attempt to seek discovery from absent class members and third parties is entirely without merit – the Court should deny Volvo's motion, and order it to respond to the merits of Plaintiffs' Renewed Motion for Class Certification.

II. FACTUAL BACKGROUND

Discovery first commenced in this case in or around April 12, 2011, when the parties participated in an Initial Pretrial Conference with Your Honor. On that same

[1] As noted above, Volvo's brief also suggests that it intends to submit new expert testimony in connection to the class certification briefing, and apparently contemplates another round of expert depositions as well. This request is also without merit and Defendant should be barred from offering new and/or previously precluded expert testimony or evidence.

date, the Court issued a Scheduling Order that, among other things, set the end of fact discovery for April 30, 2012. This schedule was subsequently modified several times, and fact and expert discovery ultimately concluded in late 2012.

The discovery conducted over this period was extensive. The parties took over 20 depositions and exchanged well over 15,000 pages of documents. Every one of the Plaintiffs, numerous Volvo witnesses, and experts for both sides were deposed. The parties ultimately proffered a total of five expert witnesses, all of whom were subjected to a *Daubert* challenge from the opposing side. Following extensive briefing on these issues, Judge Cavanaugh issued a series of opinions in March 2013 that (a) granted all of Plaintiffs' motions to preclude Volvo's experts and (b) denied all of Volvo's motions to preclude Plaintiffs' experts. These orders are summarized below:

Witness Name	**Submitted By**	**Summary of Subject Area(s)**	**Doc. Nos.**
Charles Benedict (not precluded)	Plaintiffs	Opined that the narrow, plus-shaped openings in the Class Vehicles' sound traps was a design defect, and the root cause of water intrusion.	270-271
Walter Bratic (not precluded)	Plaintiffs	Costs associated with repairing the defect.	270-271
Allan Kam (not precluded)	Plaintiffs	NHTSA investigative procedures, findings and recalls.	274-275
Christine T. Wood (precluded)	Volvo	Effectiveness of a recall; reasonable consumer standard.	268-269
Edward Caulfield (precluded)	Volvo	Opined that there was no evidence of a uniform defect in the Class Vehicles.	272-273

Thereafter, Volvo filed motions for reconsideration with respect to the Court's orders precluding Wood and Caulfield. Both were denied on October 16, 2013. Volvo did not file an interlocutory appeal of any of these non-final judgments relating to experts.

On July 3, 2012, Volvo filed eight motions for summary judgment which sought to have all of Plaintiffs' claims dismissed. Meanwhile, on August 7, 2012, Plaintiffs moved to certify a nationwide class or, in the alternative, six state subclasses. This briefing was completed in December of 2012.

On March 26, 2013, Judge Cavanaugh issued an order and opinion that (a) denied Plaintiffs' motion to certify a nationwide class, (b) granted Plaintiffs' motion to certify six state subclasses, and (c) denied all of the motions for summary judgment filed by Volvo. In denying the motions for summary judgment, the Court found that several triable issues of fact existed, including "whether the design of the Sunroof Drainage Systems were defectively designed, whether Defendants knew of the defect but failed to disclose it to the Class, and whether the maintenance instructions were inadequate and/or uniformly deficient." Volvo then moved for reconsideration of the Order granting class certification on the basis that the subsequent Supreme Court decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), precluded class certification. The District Court determined that Comcast was distinguishable and denied Volvo's motion for reconsideration.

On October 29, 2013, Volvo filed two interlocutory appeals with the Third Circuit. The first sought the issuance of a Writ of Mandamus with respect to the Court's order denying its motions for summary judgment. That petition was summarily denied

on February 27, 2014. Volvo's second appeal sought interlocutory review of the Court's class certification order pursuant to FED. R. CIV. P. 23(f). That petition was granted, fully briefed on the merits, and argued before Judges D. Brooks Smith, Michael A. Chagares and Thomas M. Hardiman on June 2, 2015.

On July 22, 2015, the Third Circuit issued a precedential opinion that vacated this Court's class certification order, and remanded the case for further proceedings. *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353 (3d Cir. 2015). Among other things, the court (a) rejected Volvo's contention that every member of a certified class must possess Article III standing, finding that the "cases or controversies" requirement is met if at least one representative plaintiff has standing; and (b) rejected Volvo's reliance on Comcast, *supra*, which it described as "distinguishable" and "inapposite to the case before us." Id. at 362.

However, the Third Circuit also vacated and remanded this Court's class certification order on the basis that it "did not specifically identify the claims certified, as required by *Wachtel v. Guardian Life Insurance Co. of America*, 453 F.3d 179, 184 (3d Cir. 2006)." *Neale*, 794 F.3d at 369. The Third Circuit expressed concern that the Court's order did not specifically "identify which claims would be subject to class treatment." *Id*. It noted that *Wachtel* and FED. R. CIV. P. 23(c)(1)(B) "require[] district courts to include in class certification orders a clear and complete summary of those claims, issues, or defenses subject to class treatment." *Id*. (*quoting Wachtel*, 453 F.3d at 184). Because the Third Circuit found that the Court's order did not sufficiently provide this information, the order was "**remand[ed] to the District Court so that it can provide a**

complete list of the class claims, defenses and issues for each of the six statewide classes in accordance with what *Wachtel* requires." *Id*. at 370. (emphasis supplied).

The Third Circuit also vacated and remanded the Court's FED. R. CIV. P. 23(b)(3) predominance analysis with instructions that this Court "should evaluate the relevant claims (grouping them where logical and appropriate) and rule on the predominance question in light of the claims asserted and the available evidence." *Id*. at 373. The Third Circuit's remand directive to this Court were clear: "We will vacate and remand the District Court's class certification decision to allow the District Court to define the class membership, claims, and defenses, and so that it may rigorously analyze predominance in the first instance." *Id*. at 375.

Consistent with the Third Circuit's directive and this Court's Order (DE #332), Plaintiffs' filed a renewed motion for class certification on December 22, 2015 that relied on the same facts and evidence, including the previously submitted expert reports that were submitted with Plaintiffs' initial motion for class certification.

III. ARGUMENT

A. The Additional Discovery Sought by Volvo is Irrelevant to the Court's Rule 23 Analysis.

Volvo's motion is based on a fundamental misunderstanding of the Third Circuit's opinion and of issues and classes that Plaintiffs seek to have certified. Generally speaking, Plaintiffs seek to certify classes that consist of persons or entities who currently own or lease a Class Vehicle, and/or who previously owned or leased a Class Vehicle "and can be identified as having incurred out-of-pocket expenses related

to a Sunroof Defect." *See* Plaintiffs' Memorandum in Support of their Motion for Class Certification at 16-17, attached as Exhibit A to the Certification of Mathew D. Schelkopf ("Schelkopf Cert.").[2] The phrase "Class Vehicle" is specifically defined to include the following six Volvo vehicle models that contain sunroofs: S40, S60, S80, V70 (model years 2004 to 2011); XC90 (model years 2003 to 2011); and V50 (model years 2005 to 2011) (collectively, the "Class Vehicles"). *Id.* at 1, n.1.

The discovery proposed by Volvo has no relevance to the standing, typicality or adequacy of any of the proposed class representatives. Each of the proposed class representatives (as well as the non-representative Plaintiffs) have alleged in the operative complaint that the sunroof defect manifested in their vehicles, and that they were injured as a result. *See, e.g.,* Second Amended Complaint (DE #66) ¶¶ 19-24 (describing the problems experienced by Plaintiff Hay with her sunroof); ¶¶ 48-55 (same for Plaintiff Taft). All of the Plaintiffs testified at their depositions as to their experiences with water intrusion and the defect in their Class Vehicles. *See* Hay Dep. at 167-177, attached as Exhibit B to the Schelkopf Cert.; Taft Dep. at 213-21, attached as Exhibit C to the Schelkopf Cert.

Volvo cites no authority for the notion that any of the substantive claims for which Plaintiffs have moved for class certification require a showing of *multiple* failures or *multiple* manifestations of the injury. Nor could it, as these causes of action contain no such requirement. *See* N.J. STAT. ANN. § 56:8-2 (defining unlawful conduct that is

[2] As Ordered by the Court, Plaintiffs' Renewed Motion for Class Certification has been served but not filed on the docket.

actionable under the New Jersey Consumer Fraud Act as "…any unconscionable commercial practice, deception…or the knowing, concealment, suppression, or omission of any material fact … in connection with the sale or advertisement of any merchandise…") (emphasis supplied). Additionally, Plaintiffs have defined the classes to include people who purchased the vehicle with the design defect and/or have paid to have it repaired. As such, there is no requirement that a person experienced *multiple* failures in order to be a member of the class.[3] Whether someone had a second or third water intrusion is entirely irrelevant to whether any of the proposed class representatives are adequate, or whether any putative class member is a member of the class.

For similar reasons, Volvo's argument that discovery from absent class members is needed to assess whether Mr. Taft is a member of the California Class lacks merit. The Court has a sufficient record to make the determination as to whether any of the proposed classes should be certified, and if so how the class should be defined. *See Furstenau v. AT&T Corp.*, No. 02-5409 (GEB), 2004 U.S. Dist. LEXIS 27042, at *15, n.5

[3] Presumably Volvo has records that would show whether someone who had a repair with the changed sound traps later returned for a second repair at a dealer. For this reason alone, its effort to obtain discovery concerning these repairs should be denied. *See Gunter v. Ridgewood Energy Corp.*, No. 95-438 (WW), 1996 U.S. Dist. LEXIS 22298, at *8 (D.N.J. Oct. 15, 1996) (noting that courts have prohibited discovery from absent class members where it seeks information "on matters already known to defendants."). *Clark v. Universal Builders*, 501 F.2d 324, 341 n.24 (7th Cir. 1974), *cert. denied*, 419 U.S. 1070 (1974)). In *Gunter*, the defendants offered to withdraw their discovery requests to the plaintiffs regarding information they could obtain from another defendant. *Id.* at *9. Moreover, additional discovery of the Plaintiffs would be of little to no value to Volvo because it never bothered to inspect the Plaintiffs vehicles.

(D.N.J. Sept. 2, 2004) (discussing the district court's broad discretion over the framing of the class definition). It is only after the Court conducts its rigorous analysis that the parties can determine whether Mr. Taft is a member of any class that may be certified – not the other way around. Knowing the answer to this question is not a precondition to resolving Plaintiffs' Renewed Class Certification Motion.

Finally, Volvo also criticizes Plaintiffs for not offering any "evidence that every vehicle in the proposed class has experienced or will experience a clogged sunroof drain and resulting water leak." Def. Mem. at 4 (emphasis supplied). Once again, Volvo has misread or misunderstood Plaintiffs' Class Certification Memorandum. That brief explains why this standard is irrelevant as a matter of law, given the numerous Circuit Court decisions that have certified classes in similar defect cases where the problem has not manifested in all of the products. Exhibit A to Schelkopf Cert. at 30, n.47. And as a factual and practical matter, Volvo offers no explanation as to how seeking discovery from two former class representatives will inform this issue one way or another. As noted above, the record is already clear that all of the proposed class representatives did experience water leaks.

At bottom, it is Plaintiffs who bear the burden of demonstrating that the relevant Rule 23 requirements are satisfied. If Volvo believes Plaintiffs have not met this burden, it is free to point that out in connection with the class certification briefing. If Volvo believes it has evidence related to how changes to the sound traps could limit the vehicle models included in the class, it can advance that argument in its brief. It should

not, however, be permitted to embark on the discovery fishing expedition contemplated in its motion.

B. The Discovery Proposed by Volvo is Burdensome and Designed to Harass Third Parties and Putative Class Members.

Volvo makes much of the fact that Plaintiffs Taft and Hay have since sold their vehicles to third parties,[4] and contends that whether they disclosed the existence of the sunroof defect to these third parties is somehow relevant to the Court's predominance analysis. Volvo's attempt to shift the focus to what disclosures may or may not have been made by these Plaintiffs is obviously a red herring – this case has always been concerned with the material information that *Volvo* omitted when it manufactured and sold these vehicles to consumers.

Volvo notes that if Taft and Hay failed to disclose "these allegations" about the sunroof defect to the persons that bought their vehicles, then those "purchasers may have legal claims against them, rendering their facts different from other class members." Def. Mem. at 7. But the existence of atypical circumstances or defenses unique to a plaintiff is only relevant to class certification insofar as it bears on whether *a proposed class representative* has met Rule 23's typicality or adequacy requirements. *See, e.g., Beck v. Maximus, Inc.*, 457 F.3d 291, 301(3d Cir. 2006) ("A proposed class representative is neither typical nor adequate if the representative is subject to a unique defense that is likely to become a major focus of the litigation."). Since neither Taft nor

[4] Ms. Hay purchased a pre-owned 2005 Volvo in or around 2008. Mr. Taft purchased a new 2004 Volvo in or around 2003.

Hay are being proffered as class representatives, Volvo's quest for information about whether an unnamed third party might have a cause of action against them (based upon the existence Volvo's defective design) could not possibly bear any fruit relevant to the class certification issues. If anything, Volvo's argument highlights the correctness of Plaintiffs' position: the existence of the Sunroof defect is a material fact that Volvo should have disclosed.

Volvo also points out that Taft and Hay technically remain as Plaintiffs in the litigation, but overlooks the second half of this equation: they are, at most, putative class members. *See* Def. Mem. at 4. This distinction is significant because – setting aside the facts that discovery has closed in this case years ago and that both of these Plaintiffs have already been deposed – courts have delineated between seeking discovery from proposed class representatives and from absent class members. With respect to the latter category, courts have long recognized that "[i]ndividualized class member discovery thwarts the efficiencies of a class action and places 'undue burdens on the absent class members.'" *Columbus Drywall & Insulation, Inc. v. Masco Corp.*, No. 04-CV-3066, 2009 U.S. Dist. LEXIS 96790, at *10-11 (N.D. Ga. Oct. 19, 2009) (*quoting Collins v. Int'l Dairy Queen*, 190 F.R.D. 629, 631 (M.D. Ga. 1999)). As such, it is "generally improper" under FED. R. CIV. P. 23 to "permit discovery directed towards absent or passive class members." *Id.* at *11 (citations omitted). *See also, In re Carbon Dioxide Indus. Antitrust Litig.*, 155 F.R.D. 209, 212 (M.D. Fla. 1993) ("Absent a showing of such particularized need, the Court will not permit general discovery from passive class

members."); *McCarthy v. Paine Webber Group, Inc.*, 164 F.R.D. 309, 313 (D. Conn. 1995) ("Discovery of absent class members, while not forbidden, is rarely permitted").

These authorities are consistent with how this Court has addressed this issue. The Court in *In re Lucent Techs. Sec. Litig.*, No. 00 CV 621 (JAP), 2002 U.S. Dist. LEXIS 24973 (D.N.J. July 15, 2002) applied this reasoning to deny motions to compel responses to discovery requests that were directed to plaintiffs who had filed cases, but were not class representatives. The defendants had argued that this discovery was "relevant to class certification issues," and to rebut the presumption of reliance in that fraud-on-the-market securities case. *Id.* at *5. Judge Pisano affirmed the Magistrate Judge's order denying this requested discovery, agreeing "that the forty-one non-lead, non-representative plaintiffs should be treated as passive class members and thus not subject to discovery. Other courts have similarly concluded." *Id.* at *6 (collecting cases). Likewise, in *Gunter v. Ridgewood Energy Corp.*, No. 95-438 (WW), 1996 U.S. Dist. LEXIS 22298 (D.N.J. Oct. 15, 1996), the Court issued a protective order which prevented the defendants from obtaining discovery from absent class members. *Id.* at *13.

The true lack of merit underlying Volvo's request is perhaps best illustrated by footnote 8 of its brief, wherein it claims not to "seek any additional discovery from Plaintiff Berg because he sold his vehicle prior to his deposition and testified regarding the circumstances of his sale." *See* Def. Mem. at 7, n.8. During Mr. Berg's May 26, 2011 deposition, he responded to questions about the re-sale of his vehicle to a third party as follows:

Q. Okay. You eventually sold the vehicle at some point; is that right?

A. Right.

Q. When did you sell the vehicle?

A. May of 2010.

…..

Q. Did she [the buyer] negotiate the price down with you?

A. No. No. She [the buyer] accepted the price.

Q. So she paid what you were asking?

A. Yeah.

Q. Okay. So you never mentioned that there was a sunroof problem with the vehicle?

A. No.

Q. Did she ever ask?

A. No.

Berg Dep. at 165-171, attached as Exhibit D to the Schelkopf Cert.

While Volvo had this testimony from Mr. Berg acknowledging that he did not disclose the sunroof defect to the buyer, it never attempted to depose the purchaser of that vehicle, and did not rely on this fact in connection with its September 25, 2012 memorandum opposing Plaintiffs' initial motion for class certification. It makes no effort to rectify this discrepancy, or to explain how anything from the Third Circuit's opinion or otherwise would somehow merit an increased level of importance to this information.

Finally, granting Volvo's request to re-open fact and expert discovery would force the parties to start from scratch and would be unduly burdensome. Volvo suggests that the requested discovery could be completed in as little as "three months." Def. Mem. at 8. Defendant purposely misleads the Court in this regard. For example, while Defendant may only intend to propound new written discovery, take Plaintiffs' and third-party depositions, and issue new expert reports, discovery is not a one-way street. If Volvo was permitted to take new discovery on events that occurred since 2012, then Plaintiff must do the same so as not to be prejudiced. Plaintiff would also need to take depositions and could not do so until Defendant updated its previous document production, which alone would not be complete for many months, assuming there are no discovery disputes along the way.

Similarly, allowing the re-opening of expert discovery will take much longer than Volvo suggests. If the Court permitted Volvo to serve new expert reports -- and respectfully, it should not -- then Plaintiffs will likely have to serve their own new expert reports in rebuttal. In addition to the service of reports and depositions of experts, there are also likely to be inspections of parts and vehicles cited by the experts, extensive *Daubert* briefing and other tasks. In all, the parties previously engaged in expert discovery for well over a year before this case went up on appeal. In short, conducting the discovery Volvo requests would set this case back at least a year before the Court considers a renewed motion for class certification. This process is unnecessary to the resolution of the pending motion, unduly burdensome, and should be rejected by the Court.

Clearly, Volvo has resorted to grasping at straws in a transparent effort to delay this case. Its request for additional discovery should, accordingly, be denied.

C. Good Cause Does Not Exist for Modifying the Scheduling Order.

Volvo argues that it would be "unfair" for a scheduling order entered in 2011 to govern Plaintiffs' renewed class certification. *See* Def. Mem. at 8. However, Volvo has failed to demonstrate that any of the newly critical evidence it seeks bears any relevance to class certification.

This Court has recently stated that "[a] trial court may grant leave to modify or amend a scheduling order only when 'good cause' is shown." *Williams v. Murray, Inc.*, No. 12-2122 (MAS) (TJB), 2015 U.S. Dist. LEXIS 111364, at *11 (D.N.J. Aug. 24, 2015) (quoting *Harrison Beverage Co. v. Dribeck Importers, Inc.*, 133 F.R.D. 463, 469 (D.N.J. 1990)). "This is because 'scheduling orders are at the heart of case management. If they can be disregarded without a specific showing of good cause, their utility will be severely impaired.'" *Id.* (quoting *Koplove v. Ford Motor Co.*, 795 F.2d 15, 18 (3d Cir. 1986)). For the reasons discussed in sections A and B *supra*, the requested fact and third-party discovery is completely irrelevant to the class certification analysis and, therefore, good cause does not exist to modify the scheduling order.[5]

[5] Moreover, permitting a second deposition of a party is generally disfavored. *See e.g., Presidio Components, Inc. v. American Tech. Ceramics Corp.*, No. 08cv335 IEG (NLS), 2009 U.S. Dist. LEXIS 25562, at *14 (S.D.Cal. Mar. 25, 2009) (stating that, "[a]bsent a showing of good cause, generally the court will not require a witness to appear for another deposition"); Fed. R. Civ. P. 26(b)(2) ("the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that…the burden or expense of the proposed discovery outweighs its likely benefit.").

With regard to expert discovery, Volvo has not even attempted to demonstrate that there is good cause to permit the service of new expert reports. In fact, in support of the renewed motion for class certification Plaintiffs submitted the exact same expert reports that were exchanged during expert discovery and ruled admissible by the Court in 2012. There is no good cause to re-open expert discovery and the Court should reject Volvo's attempt to circumvent the Court's previous *Daubert* rulings.

Defendant's reliance on the fact that courts have a continuing obligation to ensure class certification is appropriate is misplaced. The fact that evidence may come to light after class certification that subsequently make class certification improper, has no bearing on whether discovery should be re-opened. The Court's continuing obligation to ensure class certification is proper does not mean that the Court must allow discovery to proceed in perpetuity. Such a ruling would make scheduling orders worthless and impede the Court's ability to conclude discovery and proceed to trial. *Koplove*, 795 F.2d at 18. The Court will have a sufficient opportunity to determine if class certification is appropriate again when it addresses the merits of Plaintiffs' motion.

Volvo asks this Court to adopt a bright-line rule that additional discovery must be permitted any time there is a delay in case proceedings because facts may have evolved. Applying this rationale, if the Court were to again grant class certification and Volvo inevitably appeals pursuant to FED. R. CIV. P. 23(f), Volvo would thereby be entitled to new discovery on events that may have occurred during such appeal. As a result, litigation in class actions would proceed endlessly and indefinitely. Such an argument goes against all legal logic. *See* FED. R. CIV. P. 1.

IV. CONCLUSION

For the reasons set forth above, Volvo's motion should be denied in its entirety. Volvo – which has now had the benefit of having Plaintiff's motion for class certification for over a month – should be ordered to promptly provide a substantive response without the discovery fishing expedition that it seeks.

Dated: February 2, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing on counsel of record for Defendants via ECF on February 2, 2016.

//s// Matthew D. Schelkopf
Matthew D. Schelkopf

IN THE UNITED STATES DISTRICT COURT
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JOANNE NEALE, KERI HAY, KELLY MCGARY, SVEIN A. BERG, GREGORY P. BURNS, DAVID TAFT, JEFFREY KRUGER and KAREN COLLOPY individually and on behalf of others similarly situated, Plaintiffs, vs. VOLVO CARS OF NORTH AMERICA, LLC, and VOLVO CAR CORPORATION, Defendants.	No. 2:10-cv-04407-JLL-JAD **CLASS ACTION** **JURY TRIAL DEMANDED**

CERTIFICATION OF MATTHEW D. SCHELKOPF
IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR DISCOVERY REGARDING PLAINTIFFS' RENEWED MOTION FOR CLASS CERTIFICATION

I, Matthew D. Schelkopf, hereby declare:

1. Along with my co-counsel, I represent the Plaintiffs in this action. Attached hereto as exhibits are true and correct copies of the following documents referenced in Plaintiffs' Opposition to Defendants' Motion for Discovery regarding Plaintiffs' Renewed Motion for Class Certification.

2. Attached hereto as Exhibit A is a true and correct copy of the Redacted Memorandum of Law In Support of Plaintiffs' Renewed Motion for Class Certification, which was served (but not filed) on December 22, 2015.

3. Attached hereto as Exhibit B is a true and correct copy of excerpts from the transcript of the Deposition of Keri Hay, dated June 23, 2011.

4. Attached hereto as Exhibit C is a true and correct copy of excerpts from the transcript of the Deposition of David Taft, dated June 6, 2012.

5. Attached hereto as Exhibit D is a true and correct copy of excerpts from the transcript of the Deposition of Svein Berg, dated May 26, 2011.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Dated: February 2, 2016

/s/ Matthew D. Schelkopf
Matthew D. Schelkopf

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
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OTHER AUTHORITIES

I. SUMMARY OF ARGUMENT

The previously-certified classes in this case against Defendants Volvo Cars of North America, LLC and Volvo Car Corporation (together, "Volvo") consist of consumers who purchased or leased six Volvo vehicle models[1] with a uniform defect in their sunroof drainage systems. As described below, the defect relates to defectively designed "sound plugs" located at the end of the sunroof drainage tubes. This defect inevitably causes the sound plugs to become clogged with dirt and other debris. This results in water being diverted directly to the interior, rather than the exterior, of the vehicle, causing damage to the passenger compartments, floorpans, carpets, electrical components (including safety-related electrical sensors) and wiring. Plaintiffs allege that Volvo knew of but did not disclose the existence of this defect.

The lengthy history of this case recently cumulated in an opinion issued by the Third Circuit on July 22, 2015,[2] which vacated and remanded this Court's prior class certification order and provided the parties and this Court with a roadmap for the FED. R. CIV. P. 23 analysis. As discussed below, it also squarely rejected Volvo's argument that every single class member must demonstrate that they

[1] For purposes of this motion, these models include the following six Volvo vehicle models: S40, S60, S80, V70 (model years 2004 to 2011); XC90 (model years 2003 to 2011); and V50 (model years 2005 to 2011) (collectively, the "Class Vehicles").

[2] *Neale v. Volvo Cars of N. Am., LLC*, 14-1540, 2015 U.S. App. LEXIS 12629 (3d Cir. July 22, 2015).

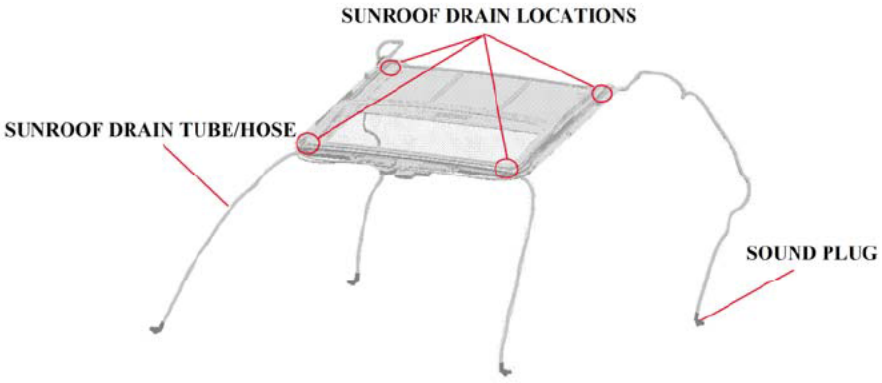
possess Article III standing, holding instead that only the named Plaintiffs must do so. Plaintiffs in this case, who have already defeated eight motions for summary judgment filed by Volvo, have clearly demonstrated that they have standing here.

What follows is a refined request for class certification which is carefully crafted to address the specificity ordered by the Third Circuit in *Neale.* Plaintiffs have submitted a detailed proposed order that sets forth all of the legal and factual questions common to the class. They have specifically delineated all of the claims, issues and defenses that are appropriate for class treatment, consistent with *Wachtel v. Guardian Life Insurance Co. of America*, 453 F.3d 179, 184 (3d Cir. 2006). And they have submitted a proposed trial plan that suggests the method by which the Court can effectively preside over a trial to resolve each of these issues.

As set forth below, the factual record clearly demonstrates that the relevant issues that remain to be resolved in this case (*e.g.*, whether the Class Vehicles contain a defect, whether Volvo knew of the defect and failed to disclose it, and whether this conduct caused injuries to Class Members) will all rise or fall based upon evidence common to Plaintiffs and putative Class Members. Plaintiffs are asserting common legal claims based on the same legal theories against the same Defendants to remedy the same defect in the same product. For these reasons, and for those that follow, the proposed classes should be certified.

II. FACTS COMMON TO PLAINTIFFS AND CLASS MEMBERS

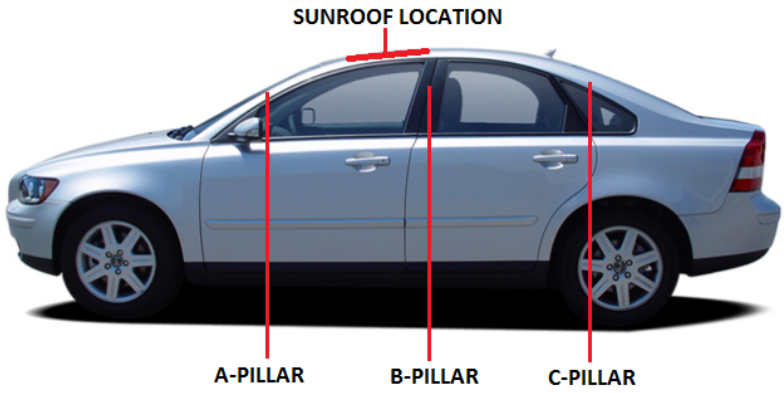
The sunroofs in the Class Vehicles consist of a frame, glass panel, and a sunroof tray (or "gutter") with four drainage holes. Attached to the sunroof tray is a sunroof drainage system that includes rubber drainage tubes and sound traps at the end of the drain tubes. [redacted][4] The diagram below shows the location of the sunroof tray, drainage holes, drainage tubes and sound traps (also referred to as sound plugs).



[3] [redacted]

[4] Deposition of Staffan Sandberg ("Sandberg Dep."), 76:12-24, attached to Schelkopf Cert. at Exhibit 1.

The two drain tubes closest to the front windshield are routed through the A-Pillars, and two rear drain tubes travel downward along the rear body pillars.



[redacted][5] [redacted]

[redacted].[7]

[5] Please refer to the expert report of Dr. Charles E. Benedict PhD, PE ("Benedict Report") (Schelkopf Cert., Ex. 3), submitted in support of Plaintiffs' Motion for Class Certification. *See* Docket Entry No. 87-2. Dr. Benedict's report sets forth the liability, including the existence, nature and scope of the sunroof drainage defect at issue, as well as, it being the result of a uniform defect by Volvo.

[6] *See* Sandberg Dep. at 29:25-30:15 (Schelkopf Cert., Ex. 2).

[7] *See* Deposition of Stefan Persson ("Persson Dep.") at 39:17-40:17 (Schelkopf Cert., Ex. 4).

Unfortunately, the sound traps are defective because they greatly inhibit the flow of water and debris through the two front drainage tubes. This restrictive design inevitably results in the sound traps becoming blocked and clogged with dirt, debris, leaves and other naturally occurring particles, thereby causing a backup of water in the sunroof drainage system. When this occurs, the water will often enter the interior of the vehicle through the connections between the sound traps and the sunroof drainage tubes or by backing up into the sunroof tray and overflowing into the vehicle's interior. As a result, the overflowed water gravitates to the lowest point in the vehicle and often collects in the driver and passenger side floorpans.

The extensive fact and expert discovery has confirmed Plaintiffs' theory of the case and understanding of the defect. [redacted][8] [redacted][9] [redacted][10] [redacted]

[8] *See* Persson Dep. at 39:24-40:17 (Schelkopf Cert., Ex. 4).

[9] McCloskey Dep. at 46:16-25; 47:2-4 (Schelkopf Cert., Ex. 1).

[10] *Id.* at 47:16-48:1 (Schelkopf Cert., Ex. 1).

[redacted][11]

[redacted]

[redacted]

[redacted][12]

[redacted]

[redacted]

[redacted]

[redacted][15]

[redacted]

[redacted]

[11] *Id.* at 48:11-24(Schelkopf Cert., Ex. 1).

[12] *Id. See also* Deposition of Darren Bisaccia ("Bisaccia Dep."), 24:20-24 (Schelkopf Cert. Ex. 5).

[13] [redacted]

[14] McCloskey Dep. at 53:10-18 (Schelkopf Cert., Ex. 1).

[15] *Id.* at 64:3-18 (Schelkopf Cert., Ex. 1); Bisaccia Dep. 120:11-21 (Schelkopf Cert., Ex. 5).

[redacted][17] [redacted]

[redacted][19]

[redacted][20] [redacted]

[redacted]

[16] McCloskey Dep. at 77:2-8 (Schelkopf Cert., Ex. 1). [redacted] *See also* Deposition of Christopher Densley ("Densley Dep.") at 51:4-19, Schelkopf Cert., Ex. 6.

[17] McCloskey Dep. at 78:25-79:8 (Schelkopf Cert., Ex. 1).

[18] A technical journal is an internal, non-public, document issued by Volvo to Volvo retailers in order to address concerns and/or corrective action related to a common issue within its vehicles. *See* Bisaccia Dep. 67:8-17, 70:12-15 (Schelkopf Cert., Ex. 5).

[19] *Id.* at 85:2-87:1 (Schelkopf Cert., Ex. 5).

[20] *See* Neale.VCC.0003856 (emphasis supplied) attached to Schelkopf Cert. at Exhibit 7.

[21] *See* Schelkopf Cert. Ex. 7, [redacted]

[redacted].[22] Plaintiffs allege that Volvo's conduct and the existence of the defect has caused and will continue to cause extensive damage to the Class Vehicles by allowing an ingress of water into the interior of the Class Vehicles. Moreover, when the Sunroof Drainage Defect occurs it may pose a safety risk to the operator of the vehicle since the water intrusion can damage important electrical components and/or sensors.[23]

[22] Bisaccia Dep., 81:14-82:25; 83:17-84:17 (Schelkopf Cert., Ex. 5) [redacted]

[23] As an example, some Class Vehicles contain a "yaw sensor" that is located on the interior floorpan. The yaw sensor is an electrical component which detects changes in vehicle momentum – or yaw rate – that may cause a vehicle to spin out, oversteer or understeer. When the yaw sensor detects a sudden change in the yaw rate of a vehicle then it informs the Electronic Stability Control ("ESC") to take the appropriate actions by applying braking to only certain wheels as needed to correct vehicle stability. Water ingress caused by the Sunroof Drainage Defect can result in the catastrophic damage and inoperability of this important component. Second Amended Complaint ("SAC") ¶¶ 88-96; *See also* Benedict Report at ¶¶43-53 (Schelkopf Cert., Ex. 3).

III. PROCEDURAL BACKGROUND

A. PRIOR PROCEEDINGS IN THIS COURT.

This case was commenced over five years ago, on August 27, 2010. Volvo initially filed a motion to strike or dismiss the class action allegations in the complaint. Judge Cavanaugh denied that motion on April 11, 2011.[24] Then, following an Initial Pretrial Conference with Magistrate Judge Dickson on April 12, 2011, the parties began extensive discovery proceedings. Plaintiffs, Volvo witnesses and experts for both sides have all been deposed. Fact and expert discovery concluded in 2012. *See* Docket Entry No. 65.

As summarized in the chart below, the parties collectively proffered a total of five expert witnesses. Following extensive briefing, Judge Cavanaugh issued a series of opinions between March 1 and 4 of 2013 that (a) granted all of Plaintiffs' motions to preclude Volvo's experts and (b) denied all of Volvo's motions to preclude Plaintiffs' experts:

Witness Name	Submitted By	Summary of Subject Area(s)	Docket Entry Nos.
Charles Benedict (not precluded)	Plaintiffs	Opined that the narrow, restrictive plus-shaped openings in the sound traps was a design defect, and the root cause of water intrusion.	270-271
Walter Bratic (not precluded)	Plaintiffs	Costs associated with repairing the defect.	270-271

[24] *See* Docket Entry Nos. 43-44.

Allan Kam (not precluded)	Plaintiffs	NHTSA investigative procedures, findings and recalls.	274-275
Christine T. Wood (precluded)	Volvo	Effectiveness of a recall; reasonable consumer standard.	268-269
Edward Caulfield (precluded)	Volvo	Opined that there was no evidence of a uniform defect in the Class Vehicles.	272-273

Volvo filed motions for reconsideration with respect to the Court's orders precluding Wood and Caulfield. Both were denied on October 16, 2013.[25] Volvo did not seek an interlocutory appeal of any of these non-final judgments and, therefore, Volvo's experts remain precluded from this litigation.

On July 3, 2012, Volvo filed eight motions for summary judgment which sought to have all of Plaintiffs' claims dismissed.[26] Meanwhile, on August 7, 2012, Plaintiffs moved to certify a nationwide class or, in the alternative, six state subclasses. This briefing was completed in December of 2012.

On March 26, 2013, Judge Cavanaugh issued an order and opinion that (a) denied Plaintiffs' motion to certify a nationwide class, (b) granted Plaintiffs' motion to certify six state subclasses, and (c) denied all of the motions for summary judgment filed by Volvo.[27] In denying the motions for summary judgment, the Court found that several class-wide triable issues of fact existed,

[25] *See* Docket Entry Nos. 291, 293.

[26] *See* Docket Entry Nos. 72-79.

[27] *See* Docket Entry Nos. 279-280.

including "whether the design of the Sunroof Drainage Systems were defectively designed, whether Defendants knew of the defect but failed to disclose it to the Class, and whether the maintenance instructions were inadequate and/or uniformly deficient."[28]

Volvo then moved for reconsideration of the order granting class certification on the basis that the subsequent decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), precluded class certification. This Court determined that *Comcast* was distinguishable and denied Volvo's motion for reconsideration.[29]

B. PROCEEDINGS IN THE THIRD CIRCUIT.

On October 29, 2013, Volvo filed two interlocutory appeals with the Third Circuit. The first sought the issuance of a Writ of Mandamus with respect to this Court's order denying its motions for summary judgment.[30] Volvo purported not to seek a Writ directing this Court to rule in its *favor* on these motions, but rather to direct this Court to "rule on the merits of the motions" and "state on the record the

[28] *See Neale v. Volvo Cars of N. Am., LLC*, No. 2:10-cv-4407(DMC)(MF), 2013 U.S. Dist. LEXIS 43235, at *34-35 (D.N.J. Mar. 26, 2013).

[29] *See* Docket Entry No. 289. On April 11, 2014, while these proceedings were on appeal in the Third Circuit, Chief Judge Simandle issued an administrative order reassigning the case from Judge Cavanaugh to Judge Linares.

[30] Docket No. 13-4252 (3d Cir.).

reasons for granting or denying these motions."[31] Among other arguments, Volvo contended that had this Court "actually considered and ruled upon" its arguments, it "would have allowed for a more thorough and well-reasoned disposition of that motion."[32] This petition was summarily denied on February 27, 2014.

Volvo's second appeal sought interlocutory review of the Court's class certification order pursuant to FED. R. CIV. P. 23(f).[33] That petition was granted, fully briefed on the merits, and argued before Judges D. Brooks Smith, Michael A. Chagares and Thomas M. Hardiman on June 2, 2015.

On July 22, 2015, the Third Circuit issued a precedential opinion that vacated this Court's class certification order, and remanded the case for further proceedings. *Neale*, 2015 U.S. App. LEXIS 12629, at *1-2. As summarized below, the court addressed four issues raised in Volvo's appeal.

First, the court rejected Volvo's contention that the class certification order was erroneous because it included putative class members who did not suffer an injury and, therefore, lacked Article III standing. *Neale*, 2015 U.S. App. LEXIS

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[31] Volvo Mandamus Br. at 1. Schelkopf Cert., Ex. 9.

[32] *Id.* at 13. *See also, id.* at 16 ("…any argument that the district court actually considered any decided this issue on the merits is untenable.").

[33] Docket No. 13-8088 (3d Cir.). As noted above, while Volvo unsuccessfully sought reconsideration of this Court's orders precluding Wood and Caulfield as purported experts on its behalf, it did not seek an interlocutory appeal of these orders. Nor did it seek to appeal this Court's orders denying its motion to preclude Plaintiffs' proposed experts.

12629, at *6. Volvo argued that all members of a certified class must possess Article III standing. *Id.* at *7. Writing for a unanimous panel, Judge Smith squarely rejected these arguments. The court held that "[i]n the context of a class action, Article III must be satisfied 'by at least one named plaintiff.'" *Id.* at *9 (quoting *McNair v. Synapse Grp. Inc.*, 672 F.3d 213, 223 (3d Cir. 2012)). Based upon the panel's survey of representative and group litigation dating back to medieval times, it reached the following unambiguous holding:

> We now squarely hold that unnamed, putative class members need not establish Article III standing. Instead, the "cases or controversies" requirement is satisfied so long as a class representative has standing, whether in the context of a settlement or litigation class. This rule is compelled by *In re Prudential* and buttressed by a historical review of representative actions.[34]

Id. *14 (citing *In Re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 289 (3d Cir. 1998)). *See also, id.* at *21 ("…a class action is permissible so long as at least one named plaintiff has standing…Requiring individual standing of all class members would eviscerate the representative nature of the class action.") (internal citations omitted).

[34] This was reiterated by the Third Circuit a few days later in another case. *In re Cmty. Bank of N. Virgina Mortg. Lending Practices Litig., PNC Bank NA*, No. 13-4273, 2015 U.S. App. LEXIS 13186, *37 (3d Cir. July 29, 2015) ("…only named plaintiffs, and not unnamed class members, need to establish standing. ") (citations omitted).

Second, although the panel found that Volvo's standing argument "fails," *Neale*, 2015 U.S. App. LEXIS 12629, at *33, it nevertheless remanded the class certification order on the basis that it "did not specifically identify the claims certified, as required by *Wachtel v. Guardian Life Insurance Co. of America*, 453 F.3d 179, 184 (3d Cir. 2006)." *Id.* The Third Circuit expressed concern that the Court's order did not specifically "identify which claims would be subject to class treatment." *Id.* It noted that *Wachtel* and FED. R. CIV. P. 23(c)(1)(B) "require[] district courts to include in class certification orders a clear and complete summary of those claims, issues, or defenses subject to class treatment."[35] *Id.* at *34 (quoting *Wachtel*, 453 F.3d at 184). Because the Third Circuit found that the Court's order did not sufficiently provide this information, it was vacated and "remand[ed] to the District Court so that it can provide a complete list of the class claims, defenses and issues for each of the six statewide classes in accordance with what *Wachtel* requires." *Id.* at *36.

Third, the Third Circuit also vacated and remanded the Court's FED. R. CIV. P. 23(b)(3) predominance analysis with instructions that it "should evaluate the relevant claims (grouping them where logical and appropriate) and rule on the

[35] Specifically, the court stated that a class certification order "'must include (1) a readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified, and (2) a readily discernible, clear, and complete list of the claims, issues or defenses to be treated on a class basis.'" *Neale*, 2015 U.S. App. LEXIS 12629, *35 (quoting *Wachtel*, 453 F.3d at 187-88).

predominance question in light of the claims asserted and the available evidence." *Neale*, 2015 U.S. App. LEXIS 12629, *45. It noted that this Court's opinion did not distinguish "between the six statewide classes or the relevant claims brought by those putative classes." *Id.* at *40. The court also found that *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 297 (3d Cir. 2011) – a case on which this Court relied in its class certification opinion – was not "sufficiently analogous to the case at bar, nor did it obviate the need to evaluate the claims and evidence asserted in order to evaluate predominance for a litigation class." *Id.* at *42 (citations omitted).

Finally, the Third Circuit rejected Volvo's reliance on *Comcast,* which it described as "distinguishable" and "inapposite to the case before us." *Id.* at *45.

The case was thus remanded "to allow the District Court to define the class membership, claims, and defenses, and so that it may rigorously analyze predominance in the first instance." *Neale*, 2015 U.S. App. LEXIS 12629, at *52. In accordance with this mandate, and consistent with the Third Circuit's opinion, Plaintiffs now seek class certification pursuant to FED. R. CIV. P. 23(a), (b)(3) and (b)(2).

IV. ARGUMENT

A. THE PROPOSED CLASSES AND CLAIMS.

Plaintiffs seek class certification with respect to a total of twenty claims on behalf of five statewide classes,[36] to wit:

- New Jersey Class: All persons or entities who purchased or leased a Class Vehicle in New Jersey and (a) who currently own or lease a Class Vehicle with a Sunroof, and/or (b) who previously owned or leased a Class Vehicle with a Sunroof, and can be identified as having incurred out-of-pocket expenses related to a Sunroof Defect.

- California Class: All persons or entities who purchased or leased a Class Vehicle in California and (a) who currently own or lease a Class Vehicle with a Sunroof, and/or (b) who previously owned or leased a Class Vehicle with a Sunroof, and can be identified as having incurred out-of-pocket expenses related to a Sunroof Defect.

- Massachusetts Class: All persons or entities who purchased or leased a Class Vehicle in Massachusetts and (a) who currently own or lease a Class Vehicle with a Sunroof, and/or (b) who previously owned or leased a Class Vehicle with a Sunroof, and can be identified as having incurred out-of-pocket expenses related to a Sunroof Defect.

- Florida Class: All persons or entities who purchased or leased a Class Vehicle in Florida and (a) who currently own or lease a Class Vehicle with a Sunroof, and/or (b) who previously owned or leased a Class Vehicle with a Sunroof, and can be identified as having incurred out-of-pocket expenses related to a Sunroof Defect.

[36] *See* FED. R. CIV. P. 23(c)(5) (permitting a class to be divided into subclasses). Plaintiffs are not proffering Plaintiffs Keri Hay (Maryland) or David Taft (California) as proposed class representatives. As such, Plaintiffs do not seek certification of a Maryland class, as they had in their previous motion. Plaintiff Jeffrey Kruger remains a proposed class representative of the California class. Therefore, Plaintiffs again seek certification of a California class.

- Hawaii Class: All persons or entities who purchased or leased a Class Vehicle in Hawaii and (a) who currently own or lease a Class Vehicle with a Sunroof, and/or (b) who previously owned or leased a Class Vehicle with a Sunroof, and can be identified as having incurred out-of-pocket expenses related to a Sunroof Defect.

As delineated in the Proposed Order submitted herewith, Plaintiffs seek to certify these classes with respect to the following state law claims asserted in the SAC:

- New Jersey Claims Asserted by the New Jersey Class (four): New Jersey Consumer Fraud Act ("NJCFA") (Count I); Breach of Express Warranty (Count II); Breach of the Implied Warranty of Merchantability (Count III); and Breach of the Duty of Good Faith and Fair Dealing (Count V).

- California Claims Asserted by the California Class (five): Breach of Express Warranty (Count II); Breach of the Implied Warranty of Merchantability (Count III); Breach of the Duty of Good Faith and Fair Dealing (Count V); the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et. seq.* (Count IX); and the California Consumer Legal Remedies Act, CAL. CIV. CODE § 1770 (Count X).

- Massachusetts Claims Asserted by the Massachusetts Class (four): Breach of Express Warranty (Count II); Breach of the Implied Warranty of Merchantability (Count III); Breach of the Duty of Good Faith and Fair Dealing (Count V); and the Massachusetts Consumer Protection Act, MASS. GEN. LAWS ch. 93A, §1, *et seq.* (Count VI).

- Florida Claims Asserted by the Florida Class (three): Breach of Express Warranty (Count II); Breach of the Duty of Good Faith and Fair Dealing (Count V); and the Florida Deceptive and Unfair Trade Practices Act, FLA. STAT. § 501.201, *et seq.* (Count VII).[37]

[37] Plaintiffs no longer seek to certify or pursue Plaintiffs' breach of implied warranty of merchantability under Florida law, as they had in their previous motion.

- Hawaii Claims Asserted by the Hawaii Class (four): Breach of Express Warranty (Count II); Breach of the Implied Warranty of Merchantability (Count III); Breach of the Duty of Good Faith and Fair Dealing (Count V); and the Hawaii Uniform Deceptive Trade Practice Act, HAW. REV. STAT. § 481A-1 (Count VIII).

Plaintiffs submit – and Volvo has contended – that the laws of their respective home states govern their claims.

B. APPLICABLE LEGAL STANDARDS.

Class certification is proper only if the district court is satisfied, after conducting a rigorous analysis, that the plaintiff has satisfied all of the prerequisites of FED. R. CIV. P. 23(a), and at least one of the three sub-parts of Rule 23(b). *See, e.g.*, *Schwartz v. Avis Rent a Car Sys., LLC*, No. 11-4052 (JLL), 2014 U.S. Dist. LEXIS 121322, at *6 (D.N.J. Aug. 28, 2014) (citing *In re Hydrogen Peroxide Antitrust Litig.*,552 F.3d 305, 309 (3d Cir. 2008)). The Third Circuit has also "recognized that 'an essential prerequisite of a class action, at least with respect to actions under Rule 23(b)(3), is that the class must be currently and readily ascertainable based on objective criteria.'" *In re Cmty. Bank of N. Virgina Mortg. Lending Practices Litig., PNC Bank NA*, No. 13-4273, 2015 U.S. App. LEXIS 13186, *22 (3d Cir. July 29, 2015) (quoting *Carrera v. Bayer Corp.*, 727 F.3d 300, 305 (3d Cir. 2013)).[38]

[38] The Third Circuit has held that ascertainability is not a requirement for a Rule 23(b)(2) class seeking only injunctive and declaratory relief. *See Shelton v. Bledsoe*, 775 F.3d 554, 562 (3d Cir. 2015).

In deciding a motion for class certification, a court should not inquire into the merits of the case any more than necessary to address the Rule 23 elements. *See In re K-Dur Antitrust Litig.*, No. 10-2077, 2012 U.S. App. LEXIS 14527, at *60-61 (3d Cir. Jul. 16, 2012) (citing *In re Hydrogen Peroxide*, 552 F. 3d at 311-12). That is, while a court may delve beyond the pleadings to determine whether the requirements for class certification are satisfied, *see In re Hydrogen Peroxide*, 552 F.3d at 316, this does not extend to merits inquiries that do not bear on class certification. Indeed, plaintiffs need not actually establish the validity of their claims at the certification stage. *In re Bulk [extruded] Graphite Prods. Antitrust Litig.*, No., 02-6030 (WHW), 2006 U.S. Dist. LEXIS 16619, at *30 (D.N.J. Apr. 4, 2006).

An order granting a motion for class certification "'must define the class and the class claims, issues, or defenses . . . .'" *Wachtel*, 453 F.3d at 184 (quoting FED. R. CIV. P. 23(c)(1)(B)). It must contain a "clear and complete summary" of those issues subject to class treatment, which should be "readily discernable" from the order. *Id.* at 184-185.

C. THE APPLICABLE RULE 23 REQUIREMENTS ARE SATISFIED.

As set forth below, Plaintiffs have satisfied each of the Rule 23 requirements.

i. Class Members are Ascertainable.

"The ascertainability inquiry is two-fold, requiring a plaintiff to show that: (1) the class is 'defined with reference to objective criteria'; and (2) there is 'a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'" *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015) (quoting *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013)). "[A]scertainability only requires the plaintiff to show that class members *can be identified*." *Carrera*, 727 F.3d at 308, n.2 (emphasis supplied). "The ascertainability inquiry is narrow. If defendants intend to challenge ascertainability, they must be exacting in their analysis and not infuse the ascertainability inquiry with other class-certification requirements."[39] *Byrd*, 784 F.3d at 165.

The proposed Classes here are comprised of current and former vehicle owners and lessees who can be ascertained. Members of the first component of the Classes – current owners and current lessees – can be readily identified from

[39] The *Byrd* court went on to state that

> *Carrera* does not suggest that *no* level of inquiry as to the identity of class members can ever be undertaken. If that were the case, no Rule 23(b)(3) class could ever be certified. We are not alone in concluding that "the size of a potential class and the need to review individual files to identify its members are not reasons to deny class certification."

Byrd, 784 F.3d at 171 (citing *Carrera*, 727 F.3d at 307; quoting *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 539-40 (6th Cir. 2012)).

vehicle registration records maintained in all 50 states, and the records of Volvo and Volvo's dealers. Notably, Volvo (and some of the undersigned counsel) recently settled a case on a class-wide basis on behalf of all "current and former owners and lessees of model years 2003-2005 Volvo XC90 T6 vehicles that were sold or leased in the United States." *Henderson v. Volvo Cars of N. Am., LLC*, No. 09-4146 (CCC), 2013 U.S. Dist. LEXIS 46291, at *6 (D.N.J. Mar. 22, 2013). As part of the class notice plan in that case, "Volvo provided to [the claims administrator] a list in electronic format containing the names and addresses of 124,290 unique potential Class Members…[The claims administrator] then mailed Claim Forms to 94,992 unique households on the Class List." *Id.* at *8. *See also, Trew v. Volvo Cars of N. Am., LLC*, No. 05-1379, 2007 U.S. Dist. LEXIS 55305 (E.D. Cal. July 30, 2007) (granting final approval to another class action settlement with Volvo involving approximately 300,000 vehicles, where class members were identified and notified "by first-class mail, using the Class Member address information in [Volvo's] database, refreshed by motor-vehicle registration data maintained by R.L. Polk & Co.") (emphasis supplied). Clearly, this demonstrates that Volvo maintains comprehensive records that can be utilized to identify all current (and former) owners and lessees.

Similarly, members of the second component of the Classes – former owners and former lessees who can be identified as having incurred out-of-pocket

expenses related to the Sunroof Defect – can "substantiate their class membership with documentary evidence." *Doyle v. Chrysler Group LLC*, No. 13-620, 2014 U.S. Dist. LEXIS 181177, at *11 (C.D. Cal. Oct. 9, 2014) (certifying a class of ""[a]ll persons and entities…who own(ed) or lease(d) a model year 2002 through 2007 Jeep Liberty Vehicle and who purchased a [defective window] Replacement Regulator from, or otherwise had a Replacement Regulator installed by, Chrysler or its network of authorized dealers…", where class members would be required to "substantiate" their membership in the class).[40] *See also, Brandon Banks v. Nissan North Am., Inc*., 301 F.R.D. 327, 335 (N.D. Cal. 2013) (rejecting defendant's argument that a class was not ascertainable because it includes former vehicle owners, stating that "any former owners can self-identify.").

The ascertainability, manageability, and proof issues that sometimes arise in cases involving a combination of "small ticket" purchases and the lack of reliable transaction records are simply not present here. *Cf. Carrera*, 727 F.3d at 303 (rejecting proposal to ascertain consumers that bought multivitamins, ranging in price from $8.99 to $16.99, from third parties by using unreliable retailer records

[40] *See also, Schwartz*, 2014 U.S. Dist. LEXIS 121322, at *18 ("…the proposed class members enrolled in Avis's Preferred program, rented a vehicle through Defendants' website, and purchased frequent-flyer miles. As such, Defendants have a record of their contact information and the amount of money they spent on the frequent-flyer mile surcharges.").

and class member affidavits). Plaintiffs have met their burden of showing that both components of the Classes *can* be ascertained.

ii. The Rule 23(a) Requirements are Satisfied.

1. Numerosity.

In order to be certified, the class must "consist of members that are so 'numerous that joinder of all members is impracticable.'" *Schwartz*, 2014 U.S. Dist. LEXIS 121322, at *20 (quoting Fed. R. Civ. P. 23(a)(1)). "Generally, if the named plaintiff demonstrates the potential number of plaintiffs exceeds 40, the numerosity requirement of Rule 23(a) has been met." *Id.* (citations omitted). *See also, Stewart v. Abraham,* 275 F.3d 220, 226-27 (3d Cir. 2001). "Satisfaction of…numerosity, does not require evidence of the exact number or identification of the members of the proposed class..." *Saunders v. Berks Credit & Collections, Inc.*, No. 00-3477, 2002 U.S. Dist. LEXIS 12718, at *16 (E.D.Pa. July 11, 2002).

Volvo cannot credibly contest that the numerosity requirement is met here, The record in this case unambiguously indicates that there are *thousands* of Class Vehicles sold in *each* of the six class states.[41] [redacted] "[42] This element is easily satisfied.

[41] *See* NEALE.VCNA.0010730-35 (Schelkopf Cert., Ex. 7).

[42] *See* Densley Dep. at 55:3-56:17 (Schelkopf Cert., Ex. 6).

2. Commonality.

"Plaintiffs must also demonstrate that there are questions of law or fact common to the class." *In re OSB Antitrust Litig.*, No. 06-826, 2007 U.S. Dist. LEXIS 56584, at *5 (E.D.Pa. Aug. 3, 2007). "Commonality is satisfied when there are classwide answers." *Reyes v. Netdeposit, LLC*, No. 14-1228, 2015 U.S. App. LEXIS 15577, *25 (3d Cir. Sept. 2, 2015) (citations omitted). Even a single common question will do; commonality "does not require perfect identity of questions of law or fact among all class members." *Id.* at *35. Indeed, the Third Circuit has held that the commonality "bar is not high; we have acknowledged commonality to be present even when not all members of the plaintiff class suffered an actual injury; when class members did not have identical claims; and, most dramatically, when some members' claims were arguably not even viable." *In re Cmty. Bank of N. Virgina Mortg. Lending Practices Litig*., 2015 U.S. App. LEXIS 13186, *38 (internal citations omitted). The Supreme Court has stated that the requirement is satisfied where the plaintiffs assert claims that "depend upon a common contention" that is "of such a nature that it is capable of classwide resolution -- which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores*, 131 S. Ct. at 2556.

In this case, there are multiple common questions of law and fact – all of which focus on Volvo's conduct and the alleged uniform defect of the Class Vehicles. These common questions include whether the sunroof drainage systems in the Class Vehicles are defective, whether Volvo knew of the defect but failed to disclose it to the Class, and whether the maintenance instructions were inadequate and/or uniformly deficient.[43] All of the claims for which Plaintiffs seek class treatment are based upon uniform defects contained in the sunroof drainage systems in Class Vehicles designed and/or manufactured by Volvo, and Volvo's uniform omissions about the same. This is sufficient to satisfy commonality.

3. Typicality.

"Plaintiffs must show that the claims of the class representatives are typical of the claims of the class as a whole." *In re OSB Antitrust Litig.*, 2007 U.S. Dist. LEXIS 56584, at *6. "If the claims of the named plaintiffs and class members involve the same conduct by the defendant, typicality is established." *Inmates of the Northumberland County*, No. 08-cv-345, 2009 U.S. Dist. LEXIS 126479, at *71 (M.D. Pa. Mar. 17, 2009) (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 183-84 (3d Cir. 2001)).

[43] A more expansive list of common questions that can be proven with common evidence is set forth in the Proposed Order submitted herewith.

In this case, each of the Plaintiffs purchased or leased a Class Vehicle and suffered economic injuries as a result of the Sunroof Drainage Defect, which is a uniform defect common to all of the Class Vehicles. Plaintiffs and Class members are pursuing the same claims based on the same theories arising from the same alleged misconduct by Volvo. Typicality is, therefore, present here. *See Schwartz*, 2014 U.S. Dist. LEXIS 121322, at *40-41.

4. Adequacy of Representation.

Plaintiffs must also demonstrate that they will "fairly and adequately protect the interests of the class." *In re OSB Antitrust Litig.*, 2007 U.S. Dist. LEXIS 56584 at *6 (*citing* FED. R. CIV. P. 23(a)(4)). "This requirement has two components: 1) adequacy of class counsel, and 2) adequacy of the class representative." *Davis v. Kraft Foods N. Am.*, No. 03-6060, 2006 U.S. Dist. LEXIS 3512, at *27 (E.D. Pa. Jan. 31, 2006) *Hayes*, 2012 U.S. Dist. LEXIS 33329, at *23.

Both requirements are satisfied. "To meet the adequacy requirement, counsel must have the ability and incentive to represent the class vigorously." *Davis*, 2006 U.S. Dist. LEXIS 3512, at *27. Class counsel here consists of Chimicles & Tikellis LLP and Mazie Slater Katz & Freeman, LLC,[44] who Magistrate Judge Dickson initially appointed as interim co-lead counsel for the putative class on

[44] The firm resumes of these firms were previously submitted to the Court in connection with their application for the appointment of interim lead counsel. *See* Docket Entry No. 14.

January 4, 2011. *See* Docket Entry No. 15. In subsequently appointing these firms as lead counsel in connection with the Court's class certification order, Judge Cavanaugh observed that "Plaintiffs' counsel have extensive litigation experience in complex class action cases, are committed to representing Plaintiffs and the class, and are adequate to represent the Class here."[45] Plaintiffs respectfully submit that this remains the case, and they should again be appointed as lead counsel for the class. *See* FED. R. CIV. P. 23(g).

The six named plaintiffs in this case are adequate class representatives. Like members of the Class, they purchased or leased one of the Class Vehicles with an undisclosed Sunroof Drainage Defect. They have actively overseen the prosecution of this case, participated in meetings and worked closely with counsel, responded to the Defendant's discovery requests, and have all been deposed by defense counsel. They have no conflict(s) with members of the Class, and are committed to pursuing this case. *See Szczubelek v. Cendant Mortg. Corp*., 215 F.R.D. 107, 119 (D.N.J. 2003) (noting that the "class representative must not have interests antagonistic to those of the class.") (citations omitted). The adequacy requirement is met.

[45] *Neale*, 2013 U.S. Dist. LEXIS 43235, at *30.

iii. The Rule 23(b)(3) Requirements are Satisfied.

Plaintiffs seek class certification under Rule 23(b)(3), which contains two requirements: predominance and superiority. FED. R. CIV. P. 23(b)(3). These are discussed in turn.

1. **Predominance.**

The first part of Rule 23(b)(3) requires the Court to assess whether "questions of law or fact common to class members predominate over any questions affecting only individual members." FED. R. CIV. P. 23(b)(3). This "'requires a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class.'" *King Drug Co. of Florence v. Cephalon, Inc.*, No. 06-1797, 2015 U.S. Dist. LEXIS 97319, *40 (E.D. Pa. July 27, 2015) (quoting *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013). "Individual questions need not be absent, so long as common questions predominate." *Id.* (citing *Amgen Inc.*, 133 S. Ct. at 1196). As recently noted by the Third Circuit, "[t]he Supreme Court has observed that predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Reyes*, 2015 U.S. App. LEXIS 15577, at *40 (quoting *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 321-22).

The Third Circuit's opinion in this case made clear that a district court's predominance analysis "must examine each element of a legal claim 'through the prism' of Rule 23(b)(3).'" *Neale,* 2015 U.S. App. LEXIS 12629, at *38 (quoting *Marcus*, 687 F.3d at 600). *See also, In re Cmty. Bank of N. Virgina Mortg*, 2015 U.S. App. LEXIS 13186, *44. "A plaintiff must 'demonstrate that the element of [the legal claim] is capable of proof at trial through evidence that is common to the class rather than individual to its members.'" *Schwartz,* 2014 U.S. Dist. LEXIS 121322, at *22 (quoting *Marcus*, 687 F.3d at 600). Accordingly, Plaintiffs' claims are grouped together below for purposes of this analysis.[46] In addition, the elements for each of these claims are set forth in Exhibit 11 submitted herewith.

a. Predominance of plaintiffs' NJCFA claim.

The elements of a NJCFA claim are "(a) an unlawful conduct by the defendant; (b) that the plaintiff suffered an ascertainable loss; and, (c) a causal connection between defendant's unlawful conduct and plaintiff's ascertainable loss." *Schwartz,* 2014 U.S. Dist. LEXIS 121322, at *22-23 (citations omitted). The unlawful conduct in this case consists of Volvo's knowing omission of the existence of the Sunroof Defect in the Class Vehicles. This element can be proven (or disproven) using common evidence, as this alleged conduct was uniform as to

[46] As noted above, Volvo moved for summary judgment with respect to all of these claims, which this Court denied on March 26, 2013.

Plaintiffs and Class Members. *See Schwartz*, 2014 U.S. Dist. LEXIS 121322, at *23-24 ("This Court is satisfied that Plaintiff will be able to prove this element using common evidence given the fact that Avis entered into a standard form contract with millions of customers over the class period and that the surcharge information was presented in similar manner to most Avis customers for that period.").

The second element – ascertainable loss – can consist of "'either out-of-pocket loss or a demonstration of loss in value . . . that it is quantifiable or measurable.'" *Schwartz*, 2014 U.S. Dist. LEXIS 121322, at *23-24 (quoting *Thiedemann v. Mercedes-Benz USA, LLC*, 872 A.2d 783, 792 (N.J. 2005)). Both criteria are readily met here. With respect to the first component of the Classes, Plaintiffs have put forth common evidence that current owners and current lessees have suffered an ascertainable loss by virtue of purchasing a Class Vehicle with a material defect that Volvo concealed from them. But for this omission, Plaintiffs would not have purchased the Class Vehicles (or would have paid less for them). Numerous Circuit courts have certified classes consisting of such class members in substantially similar contexts – including those who bought a product with a defect that has not yet manifested.[47] As for the second component of the Classes, the

[47] *See, e.g., Edwards v. Ford Motor Co.*, 603 Fed. Appx. 538, 540 (9th Cir. 2015) ("In an action alleging consumer protection claims based on a vehicle defect, commonality is satisfied when '[t]he claims of all prospective class members

ascertainable loss suffered by them – actual out of pocket expenditures to remedy the Sunroof Defect – is "easily quantifiable and measurable." *Schwartz*, 2014 U.S. Dist. LEXIS 121322, at *24.

Finally, the NJCFA's causation element will rise or fall based on common evidence. As this Court explained in *Schwartz*, where the alleged unlawful conduct is a knowing omission, the Court must find:

> [E]ither (1) that the alleged [omissions] were not knowable to a significant number of potential class members before they purchased.... [the product], or (2) that, even if the [omissions] were knowable, that class members were nonetheless relatively uniform in their decision-making, which would indicate that, at most, only an insignificant number of class members actually knew of the alleged [omissions] and purchased . . . [the product] at the price they did anyway. These finding cannot be side-stepped. They are necessary to determine whether the predominance requirement is met in this case.

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involve the same alleged defect, covered by the same warranty, and found in vehicles of the same make and model.' In order to satisfy the predominance requirement, the plaintiff need not prove the existence of the defect.") (quoting *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1172 (9th Cir. 2010)); *Glazer v. Whirlpool Corp. (In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.)*, 722 F.3d 838, 857 (6th Cir. 2013), *cert. denied*, 2014 U.S. LEXIS 1484 (Feb. 24, 2014) ("Because *all* Duet owners were injured at the point of sale upon paying a premium price for the Duets as designed, even those owners who have not experienced a mold problem are properly included within the certified class.") (emphasis in original); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 799 (7th Cir. 2013), *cert. denied*, 2014 U.S. LEXIS 1507 (Feb. 24, 2014) (same). The Third Circuit's opinion is consistent with these cases; in fact, it specifically "decline[d] Volvo's invitation to impose a requirement that all class members possess standing." *Neale*, 2015 U.S. App. LEXIS 12629, at *26.

Schwartz, 2014 U.S. Dist. LEXIS 121322, at *24 (quoting *Marcus*, 687 F.3d at 610).

Plaintiffs have satisfied both of these so-called "*Marcus* prongs." The alleged omission in this case relates to a latent defect in an internal component of the Class Vehicles' Sunroof drainage systems. *See* §(II), *supra*. While the defect is present at the time of sale, it is only after dirt and debris are permitted to accumulate in the sound traps over time that the existence of the defect – in the form of water intrusion into the vehicle – becomes evident. Volvo has presented no evidence that this defect was "knowable" (to the contrary, its position is that there is no defect).[48] *See Schwartz*, 2014 U.S. Dist. LEXIS 121322, at *25-26. As such, the existence of the defect "was 'not knowable to a significant number of potential class members.'" [49] *Id.* (quoting *Marcus*, 687 F.3d at 610). It follows that Volvo's

[48] Moreover, Volvo concedes that "owners and lessees [are not] advised that there is a sunroof drainage system within their vehicles." See Bisaccia Dep. 83:23-84:14 (Schelkopf Cert., Ex. 5).

[49] Because Plaintiffs have satisfied the not-knowable, first prong of *Marcus*, it is not necessary that they also satisfy the second. *See Schwartz*, 2014 U.S. Dist. LEXIS 121322, at *33 ("Because this Court finds that the surcharge was not knowable, it is unnecessary to consider the second prong of the *Marcus* test."). Nevertheless, Plaintiffs note that they have also satisfied the second prong (assuming *arguendo* that this is a "knowable defect," which it is not). This prong requires a showing that class members were "relatively uniform in their decision-making" with respect to such knowable defects. *Marcus*, 687 F.3d at 611. In the context of *Marcus*, the Third Circuit explained that it was conceivable that consumers might not react uniformly when presented with information about problems with run-flat tires – some might view the "'defects' to be simply trade-offs" and buy them anyway. *Id.* at 611-612. Here, there is no trade-off that would

failure to disclose this not-knowable, material information was the cause of the Plaintiffs' and Class Members' ascertainable losses. Predominance is therefore satisfied with respect to Plaintiffs' NJCFA claim.

b. Predominance of the other consumer claims.

In addition to New Jersey, Plaintiffs also seek class certification with respect to the consumer protection acts of California, Massachusetts, Florida, and Hawaii. As set forth in Exhibit 11, the elements of these claims are substantially similar to those of the NJCFA. *See also, Johansson v. Cent. Garden & Pet Co.*, 804 F. Supp. 2d 257 (D.N.J. 2011) (noting that the California consumer fraud claims are "similar" to the NJCFA); *Keegan v. Am. Honda Motor Co*, 284 F.R.D. 504 (C.D. Cal. 2012) ("With small differences in wording, [the consumer fraud statutes of Florida and California] appear to employ the same causation and reliance standard."). Each statute requires some sort of deceptive business practice (such as a knowing omission), and a showing that this conduct caused injury to the plaintiff. *See* Schelkopf Cert., Ex. 10. In Exhibit 10, Plaintiffs also have identified cases where courts have certified each of these claims under FED. R. CIV. P. 23. *See id.* Finally, the *Marcus* analysis above is no different for any of these claims. As such, class certification should be granted for these claims.

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have a material effect on consumers' behavior. There is no conceivable benefit to water leaking into, and damaging, the interior of the Class Vehicles.

c. Predominance of the Implied Warranty Claims.

Section 2-314 of the Uniform Commercial Code ("U.C.C.") creates an implied warranty of merchantability.[50] Plaintiffs have alleged – and Volvo has denied in its Answer – that it is a "merchant" within the meaning of the U.C.C.; that the Class Vehicles are "goods"; and that Volvo "impliedly warranted that all of the Class Vehicles were of a merchantable quality." Compare DE # 66 ¶¶ 154-56 with DE # 67, ¶¶ 154-56. Thus, these threshold issues concerning the application of the U.C.C. will need to be determined using the same evidence related to whether Volvo is a "merchant," whether the Class Vehicles are "goods" and, most significantly, whether Volvo impliedly warranted that they were of a merchantable quality.

The remaining elements of – and defenses to – this claim will likewise need to be resolved with the use of common evidence. In order to be "merchantable" within the meaning of § 2-314, goods must be, *inter alia*, "'fit for the ordinary purposes for which such goods are used.'" *Luppino v. Mercedes-Benz USA, LLC*,

[50] The U.C.C. has been adopted in each of the five states at issue. *See Dzielak v. Whirlpool Corp.*, 26 F. Supp. 3d 304, 329 (D.N.J. 2014) (New Jersey); *Advanced Multilevel Concepts, Inc. v. Stalt, Inc.*, No. 11-6679, 2012 U.S. Dist. LEXIS 70617, at *8 n.5 (N.D. Cal. May 21, 2012) (California); *Rothbaum v. Samsung Telecomms. Am., LLC*, 52 F. Supp. 3d 185, 203 (D. Mass. 2014) (Massachusetts); *Dobson Bros. Constr. Co. v. Arr-Maz Prods., L.P.*, No. 8:13-1553, 2013 U.S. Dist. LEXIS 182722, at *9-10 (M.D. Fla. Dec. 9, 2013) (Florida); *Sakala v. BAC Home Loans Servicing, LP*, No. 10-578, 2011 U.S. Dist. LEXIS 17890, at *19 n.6 (D. Haw. Feb. 22, 2011) (Hawaii).

No. 09-cv-5582 (JLL-JAD), 2014 U.S. Dist. LEXIS 123932, at *14 (D.N.J. Sept. 4, 2014) (quoting N.J. Stat. Ann. § 12A:2-314). This inquiry, of course, will turn on an evaluation of the design of the Class Vehicles and the sunroof systems contained therein. It will also involve an inquiry into whether or not the alleged defect rises to the level of preventing the Class Vehicles from serving their "ordinary purpose." *See Luppino*, 2014 U.S. Dist. LEXIS 123932, 14-15 (noting that a vehicle's ordinary purpose is not merely 'transportation' but 'safe and reliable transportation.'"); *Keegan*, 284 F.R.D. at 537 (finding a California breach of implied warranty claim to be "susceptible of common proof" and certifying it for class treatment). All of these issues will turn on common evidence.

d. Predominance of the Express Warranty Claims.

The elements for a breach of express warranty claim are as follows: "(1) a contract between the parties; (2) a breach of that contract; (3) damages flowing therefrom; and (4) that the party stating the claim performed its own contractual obligations." *Dicuio v. Brother Int'l Corp.*, No. 11-1447 (FLW), 2012 U.S. Dist. LEXIS 112047, at *29 (D.N.J. Aug. 9, 2012) (quoting *Cooper v. Samsung Elecs. Am., Inc.*, 374 Fed. Appx. 250, 253 (3d Cir. N.J. 2010)). All of these elements can be proven (or disproven) with common evidence because they arise out of uniform

contracts: Volvo's new vehicle and certified pre-owned limited warranties.[51] *See Schwartz*, 2014 U.S. Dist. LEXIS 121322, at *34; *Keegan*, 284 F.R.D. at 536 (agreeing with the Ninth Circuit's decision in *Wolin*, *supra*, and observing that the "necessary analysis" for a breach of express warranty claim "seems particularly suited to resolution as a class action."). Predominance is, therefore, satisfied with respect to the breach of express warranty claim.[52]

e. Predominance of the Common Law Claims.

Plaintiffs also seek to certify their claims for breach of the covenant of good faith and fair dealing for each of the five states at issue. In addition to making out a claim for breach of contract, a party asserting this claim must also "'must provide evidence sufficient to support a conclusion that the party alleged to have acted in

[51] As the Court noted in *Schwartz*, "whether the class members performed their own contractual obligations can be answered with common evidence by looking at Defendants' rental records." *Schwartz*, 2014 U.S. Dist. LEXIS 121322, at *34.

[52] This Court's decision in *Dewey* is also applicable because, like this case, it involved allegedly defective automobile sunroof drain systems. In finding that predominance was met with respect to the breach of express warranty claim in the context of a settlement class, the Court stated:

> [A]ll class members seek recovery based upon common legal theories for similar damages that each class member sustained or could sustain because the plenum or sunroof drain failed to keep water out or because the maintenance requirements were not clearly conveyed. Accordingly, individual inquiries will not predominate over the common questions of fact and law, at least as to the express warranty claim, that are shared among members of the potential class. Therefore, the predominance factor is satisfied.

Dewey, 728 F. Supp. 2d at 569.

bad faith has engaged in some conduct that denied the benefit of the bargain originally intended by the parties.'" *Schwartz*, 2014 U.S. Dist. LEXIS 121322, at *33 (quoting *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs.*, 864 A.2d 387, 396 (N.J. 2005)). This will be demonstrated through the presentation at trial of uniform evidence of Defendants' misconduct.

2. Superiority.

Plaintiffs have also satisfied the superiority requirement of FED. R. CIV. P. 23(b)(3), which requires a court to consider whether a class action is the superior method of fairly and efficiently adjudicating the controversy. FED. R. CIV. P. 23(b)(3)(A)-(D). A class action is considered to be superior where individual class members have little interest in individually controlling the prosecution or defense of separate actions because each consumer has a very small claim in relation to the cost of prosecuting a lawsuit. *See Remeron*, No. 02-2007, 2005 U.S. Dist. LEXIS 27011, at *12 (D.N.J. Sept. 13, 2005) (internal citations omitted).

Superiority is easily met here. It is not economically feasible for individuals to pursue individual lawsuits against Volvo (indeed, Volvo has identified no such case), thereby leaving aggrieved persons without any effective redress absent the class action device. *See, e.g., Reyes*, 2015 U.S. App. LEXIS 15577, *49-50 ("…class actions have the practical effect of allowing plaintiffs who have suffered relatively *de minimis* loss to nevertheless function as private attorneys general and

thereby deter fraud in the marketplace."). And allowing the claims of Plaintiffs and thousands of Class Members to be resolved in a single case would eliminate any risk of potentially inconsistent rulings, while conserving judicial resources. *See In re Remeron*, 2005 U.S. Dist. LEXIS 27011, at *12.[53]

Notably, Judge Cavanugh previously found that Rule 23(b)(3)'s superiority prong had been readily satisfied:

> This is a classic example of a case that warrants class action. Plaintiffs seek to represent a six statewide classes of Volvo purchasers or lessees whose individual damages may well be small enough to render individual litigation prohibitively expensive. Further, given the amount of Class members, individually litigating these matters could certainly raise the possibility of conflicting outcomes. Thus, the superiority requirement of Rule 23(b)(3) is satisfied.

Neale, 2013 U.S. Dist. LEXIS 43235, at *34. This particular part of the Court's ruling was not reversed by the Third Circuit, and there have been no subsequent events that alter this analysis or conclusion.[54] The classes should be certified.

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[53] *See also, In re Cmty. Bank of N. Virgina Mortg. Lending Practices Litig., PNC Bank NA*, 2015 U.S. App. LEXIS 13186, *71-72 (3d Cir. July 29, 2015) ("…PNC does not consider the tremendous burden that presiding over tens of thousands of nearly identical cases alleging RESPA, TILA, HOEPA, and RICO claims would impose on the courts.").

[54] Also instructive in this regard is an observation by Judge Richard A. Posner in an opinion that upheld class certification in a consumer case involving allegedly defective washing machines. *Butler*, 727 F.3d at 799. Like Volvo does here, the defendant there argued that "most members of the plaintiff class had not experienced any mold problem." *Id.* As Judge Posner aptly stated in response, "[b]ut if so, we pointed out, that was an argument not for refusing to certify the class but for certifying it and then entering a judgment that would largely exonerate

iv. Rule 23(b)(2) is Satisfied.

Plaintiffs also seek certification under Rule 23(b)(2), which is applicable where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2). While a Rule 23(b)(2) class must be cohesive, there are no predominance or superiority requirements as there are under Rule 23(b)(3). *Barnes v. American Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998).

Here, Volvo's sale of Class Vehicles with a uniform defect and its conduct in failing to disclose this material fact satisfies the requirements of FED. R. CIV. P. 23(b)(2). Among other things, Plaintiffs seek an order that requires Volvo to repair or replace this defective component, extend the warranty to a reasonable period of time and, at a minimum, provide Class Members with appropriate notification of the existence of the defect and the necessary maintenance instructions. *See* SAC at pages 61-2. Several courts have certified classes that sought similar class-wide relief pursuant to Rule 23(b)(2).[55] Certification of a Rule 23(b)(2) class is likewise warranted in this case.

Sears—a course it should welcome, as all class members who did not opt out of the class action would be bound by the judgment." *Id.*

[55] *See Fogie v. Thorn Americas, Inc.*, No. 3-94-359, 1997 U.S. Dist. LEXIS 23562, at *8-9 (D.Minn. Feb. 19, 1997) (where letter sent to certain class members

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their renewed motion for class certification so that the parties can move to the trial phase of this five year old case. A suggested trial plan and proposed order granting this relief is submitted herewith.

Dated: December 22, 2015

Respectfully submitted,

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contained misstatements, appropriate remedy was to send them "curative notices"); *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1239, 1245-1247 (N.D.Cal. May 1, 2000) (mailing curative notice is appropriate remedy where party had sent misleading solicitations that asked the potential clients to make decisions "without the benefit of adequate information"); *Self v. TPUSA, Inc.*, No. 08-395, 2008 U.S. Dist. LEXIS 71341, at *14-15 (D. Utah Sept. 19, 2008) (party who maintained website with misleading information required to send curative notice); *Oatman v. United States*, No. 92-0219, 1996 U.S. Dist. LEXIS 2929, at *9-10 (D. Idaho Mar. 4, 1996) (certifying a Rule 23(b)(2) class and requiring defendant to identify class members to whom it had previously sent misleading notices, and to re-send them accurate notification); *In re Netsmart Technologies, Inc. Shareholders Litig.*, 924 A.2d 171, 177-178 (Del. Ch. 2007) (preventing a merger vote from going forward until the corporation's board provided shareholders with "more complete and accurate information," where it had previously distributed a proxy statement that was "materially incomplete").

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EXHIBIT B

NEALE, ET AL v. VOLVO CARS OF NORTH AMERICA, LLC, ET AL

KERI HAY

June 23, 2011

Prepared for you by

it looks like there's another EPA compliance --
A. Um-hmm.
Q. -- charge.
A. Yes.
Q. Which is probably just a way for the State of Maryland to make money.
How much did you pay total on this date?
A. It looks like 130.49.
Q. Okay. Okay. The next record -- we're going to have to flip back -- is the sunroof. But before we do that, I want to talk to you about the sunroof problem, even before we look at the records, if that's okay.
A. Okay.
Q. And I'd like for you to tell me when you first believed there was a problem with the sunroof.
A. About a month before I actually took it in.
Q. Okay. And if we go ahead and look at HAY20, you'll have to flip back a couple pages.
A. Okay.
Q. It looks like you brought it in on or around June 1st, 2009.
A. I -- I believe I brought -- brought it in in May.

Q. Okay. Did they keep --
A. Yeah, a little before then.
Q. Did they keep it for a couple days?
A. Yes, several days.
Q. Okay. So if you brought it in the end of May '09 --
A. Yes.
Q. -- when do you think you first noticed a problem?
A. Beginning of May.
Q. Okay. And tell me what you noticed.
A. Whenever I would open any door in the car, water would pour out.
Q. Okay. When you say "any door," it's a four-door car; right?
A. It's a four-door car.
Q. Okay. If you opened the driver's side door, water would pour out?
A. Yes.
Q. How much water?
A. I don't know the volume. It was significant enough that I would have to change my shoes.
Q. And the water would just dump onto your feet?

A. Yes.
Q. Okay. And what if you opened the passenger door in the front?
A. Same thing.
Q. How about the back of the car?
A. The rear doors were worse.
Q. When you say "worse," there was more water --
A. There was a larger volume of water.
Q. Okay. When was the first time you noticed this?
A. Beginning of May. I don't know the exact date.
Q. Was it a weekday or weekend?
A. It would have been a weekday.
Q. Why do you say "It would have been a weekday"?
A. Because I had dress shoes on for work.
Q. Were you going to work?
A. Yes.
Q. Did it rain the night before?
A. Yes.
Q. Heavy rain?
A. It was -- I think it was a heavy rain.
Q. Did you close the windows and the

sunroof before you went in the house after you drove it the day before?

A. Yeah, I never have opened the sunroof since I purchased the car.

Q. You've never opened the sunroof since you've purchased the car?

A. No.

Q. Okay. Do you know if your husband's ever opened the sunroof?

A. Yeah, he opened it before we purchased it, to test it out.

Q. Okay. So you're not a sunroof person?

A. I -- I don't like the wind in my hair.

Q. Okay. Fair enough.

How about the windows, did you close them that night?

A. Yeah, they were closed.

Q. Okay. Do you always close the windows in your vehicle?

A. Yeah. They're rarely open.

Q. Okay. Not a -- not a weather person, huh?

A. No. I like air-conditioning.

Q. Okay. Have you ever gone back to check to see if the windows were up? Did you ever park the

car, and then later on that day or night, go back to make sure everything was up?

A. No.

Q. Okay. So you believe there was a heavy rain the night before?

A. Yes.

Q. Do you know how much it rained?

A. I don't know how much.

Q. Okay. And you go to your vehicle to get into it for work?

A. Yes.

Q. And you opened up the driver's door, the driver door?

A. I opened up the rear door to place my purse.

Q. And what happened?

A. Water poured out on my feet.

Q. On the left side?

A. No. The driver's side.

Q. Okay. So you went to put your purse on the --

A. Behind the driver's side seat.

Q. Right. On the left side of the car?

A. Yeah.

Q. Is that where you normally put your

purse?
A. Yes.
Q. Okay. Then what did you do?
A. I had to go back in and change my shoes.
Q. Okay. Did you open any other doors before you went and changed your shoes?
A. I opened the front -- the driver's side door and water poured out also.
Q. Okay. Did you see any standing water in the vehicle?
A. No.
Q. Were the floor mats wet, I take it?
A. They were. They were.
Q. Okay. In both the front and the back?
A. They were not wet in the front. They were only wet in the back.
Q. Okay. But water poured out of the front?
A. Yes.
Q. Had the water gotten on the seat?
A. No.
Q. On the brakes?
A. I don't know.
MR. MENDELSOHN: Brake pedal?
MR. MALLEN: Right.

MR. MENDELSOHN: Oh.
Q. Sorry. Brake pedal.
A. I don't know. I don't believe so.
Q. Could you tell what the water had gotten on?
A. No.
Q. Could you tell where the water was contained in the front seat?
A. No.
Q. And you said it splashed over your shoe?
A. Yes.
Q. Okay. If you stepped in three or four inches of water, your foot would be wet; right?
A. Correct.
Q. Was this like similar to that experience, or was it a little bit less?
A. It was similar.
Q. Okay. Did you go around and check the other doors at that time?
A. Not at that time.
Q. Okay. So you went in your house and changed shoes?
A. Yes.
Q. Sounds like something -- the first thing a woman would do would be change her shoes --

A. Yes.
Q. -- whereas I would be panicked.
Did you ask your husband to come look at the problem?
A. He was not home.
Q. Okay. Had he already left for work?
A. Yes.
Q. Did you call him?
A. No.
Q. Okay. What did you -- what did you do next after you went and changed your shoes?
A. I went back in and raced into work.
Q. Okay. Because you were running late?
A. Yes.
Q. Did you notice an odor in the car?
A. Yes.
Q. What did it smell like?
A. Mildew.
Q. Do you know how long the water had been in the car?
A. I don't know.
Q. Did you drive the car the day before?
A. Yes.
Q. And did you see any water at that point?
A. I did not see any, no.

Q. Okay. And you said there was a mildew smell?
A. Yes.
Q. Did you have to open up the windows to get that smell out?
A. I did not open them.
Q. Okay. Did -- was the car drivable?
A. Yes.
Q. Were there any error messages or service lights on?
A. No.
Q. And you were able to drive to work okay?
A. Yes.
Q. And did you -- you parked the car outside that day?
A. In a garage.
Q. Okay. When you went back in the car that night to go home from work, was there any water in there?
A. No.
Q. Okay.
A. I don't know if there was, but none hit my feet.
Q. Okay. Did you call anybody that day about this problem?

A. No.
Q. Did you tell your husband?
A. No.
Q. Okay. Did you get water in your car again?
A. Yes.
Q. Okay. When was the next time?
A. The next time it rained.
Q. Do you know when that was?
A. About a week later.
Q. Was it a heavy rain?
A. Yes.
Q. Had you driven the car the day before?
A. Yes.
Q. Did you put your windows up the day before?
A. The windows were up.
Q. Windows were up.
And when did you see that there was water in the car?
A. When I opened the door again.
Q. And what happened?
A. It hit my feet and I was going into work.
Q. So you were going into work and it

happened again?
A. Yes.
Q. Okay. And did you open the door behind your seat?
A. Yes.
Q. Driver's seat the first time?
A. Yes.
Q. To put your purse there?
A. Yes.
Q. Because that's what you normally do; right?
A. Yes.
Q. Okay. And was it the same amount of water as before?
A. It was the same amount.
Q. Okay. And going back to the first time it happened, did you ever towel off the mats?
A. No, I did not.
Q. Did you ever wet vac the car?
A. No.
Q. Or dry vac or use any kind of vacuum?
A. No.
Q. Okay. Did you -- when you got home after the first time, did you ever clean up the car or anything or try and get the water out?

EXHIBIT C

NEALE, ET AL v. VOLVO CARS OF NORTH AMERICA, LLC, ET AL

DAVID TAFT

June 6, 2012

Prepared for you by

BIENENSTOCK
NATIONWIDE COURT REPORTING & VIDEO

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another steep hill, and not only did we hear water sloshing inside, but also water would come down from the headliner of the car on the inside of the windshield.

Q. Every time or when it was raining?

A. Just when, just when I test drove it -- she said, "We got a problem, I want you to hop in the car." This is after I'd come back probably from Guadalupe, so we'd drive it down and -- actually, I'm back from Guadalupe. This isn't Guadalupe. I'm back from Guadalupe. I'm actually in Menlo Park.

So I know I test drove it because she asked me to, and water's sloshing and water's coming down the inside of the windshield, so that's -- and dripping, you know, it comes down and then just drips on the dash. Gotta get the car in, so that's when we took it in.

Q. Okay. Would it drip on your clothes or just on the dash?

A. On the dash and on the clothes, I mean, because the windshield's, you know -- it just kind of drips.

Q. Okay. Was it every time you were driving down?

A. There was -- I just took it for one test drive. There's two hills coming down. Sloshed down both times.

Q. Okay. So she reports a problem, you test drive it --
A. Yeah.
Q. -- twice, see the issue, and then does it go in for service?
A. Yes.
Q. So it wasn't happening a number of -- it only happened a couple of times, and then you took it right in for service?
A. The only time I knew about it is when Sara said, you know, "We've got water back in the car again, I want you to drive it."
Q. Okay.
A. So that's what I did and then here we are.
Q. Now, the water sloshing type sound from the inside of the car, where were you hearing that, like where did you think it was coming from?
A. When you drive that car -- how do you hear sounds in cars? It just sounds like water gurgling, and it's coming from back to front.
Q. Did you -- you didn't see it, right?
A. No, no, you just hear it.
Q. Okay.
A. You hear it when you put the brakes on. You don't have to be going down a hill. You can just hear it when you put the brakes on.

Q. And the water that was coming from inside the windshield, you described it as dripping?
A. Yeah. Well, this is going just down a hill. Then it would drip off the headliner area into the windshield, and then drip down the pillar and drip on the dash, and drip on you just because you're right up next to the dash.
Q. Almost like when you're outside and there's like drips of rain coming down?
A. Yeah, right.
Q. Okay. So you took it in for service?
A. Right, described the problem.
Q. Okay, described the problem. They found the rear sunroof drains plugged up with external debris. Did they tell you what debris or what kind of debris?
A. No.
Q. Okay.
A. No.
Q. Did they tell you if they found any leaves or anything?
A. No.
Q. Okay. And it says they cleaned out the rear drains, found the front drain tubes dry and shrinking. They replaced them. They cleaned the rears out, as we talked about. It says dried the carpeting and floors

as best as possible. Was the carpeting and the floor wet?

A. Yes. This time it was wet, sloshy wet. I know that they described it, we had -- the way we do it is we take a shop vac and shop vac the water out the best we can. That's the way they do it, and that's what they reported.

Q. Is this water separate from the dripping or is it wet because of the dripping?

A. It's separate from. It's part of the -- there's water buildup in the system, okay?

Q. Okay. Which floor of the carpeting was wet, the front, the back, passenger side, rear side?

A. Passenger side -- excuse me, driver's side, passenger side, and rear left I know were wet, because we still have some mold on the rear left.

Q. Okay, so front, the front of the vehicle, the driver and passenger side was wet?

A. Yeah.

Q. The seat behind the driver, the floor behind the driver's side was wet?

A. Yeah, and I don't recall if the floor behind the other was wet or dry.

Q. Okay. And in terms of it being wet, was it -- was there standing water?

A. There was standing water in the back part, yes.
Q. In the rear behind the driver's side?
A. Yeah, right.
Q. Are you able to quantify how much water?
A. No.
Q. Why not?
A. It's standing water in a carpet, so I, I could, scientifically I could estimate --
MR. SCHELKOPF: As to depth.
MR. MALLEN: Yes.
MR. SCHELKOPF: He's a chemist, he's translating that differently, so ...
BY MR. MALLEN:
Q. So was there three or four inches of water?
A. No, no, no, it's just up to the -- through the carpet, so it's sloshy, okay?
Q. It's not over the carpet?
A. No, no.
Q. Okay. Was that the most wet part of the vehicle compared to the -- compared to the front on the driver's side?
A. I can't, I can't comment to say, yes, that's the most wet. It was just wet in all parts of the lower part of the car.
Q. Did it seem to you that the area behind the driver's

side was the worst of the three spots, or you don't know?

A. I just don't know.

Q. Okay.

A. Also, again, this is February, this is rainy season, so it's going to be wet in the front, anyway, a little bit, because the driver comes in and out on the left passenger side.

Q. Was the front wet because of people getting in and out of the vehicle, or was --

A. No, the front was wet sloshy, too. I mean, there was water.

Q. And you relate it to this issue we're talking about, as opposed to just because people, it's raining and people are --

A. You have a wet pad, because you bring in -- but that pad is placed on the floor, and under that pad it was wet.

Q. Okay. Water had not gotten on the seats, right?

A. No, no.

Q. How about on the well that separates the driver's side from the passenger side, was that wet?

A. That's a big well that's up there. The only way the water would have gotten there is from the dripping that would come off either the -- come off from the

roof and down the windshield or down the window pillars, or if it dripped off, you know, just straight down. That's the only way water would get on that module.

Q. Did you also report that the anti-skid light was on the vehicle?

A. Yes.

Q. Okay. Was it on -- that's correct, the anti-skid light would come on?

A. Yes, but it would come on intermittently, and I was going to report that before we broke last. Between the time it was serviced the year before and the time we brought it in --

Q. And just so we're clear, I think it's two years before, February of '09?

A. Yeah, between that time frame -- excuse me, you're right, the two-year period.

Towards the winter of when we brought this in, the light would come on and then go off. So that seemed a little strange, so what's going on. So we'll take it in, and, of course, when this happened we took it in.

Q. Now, earlier when the anti-skid light would come on, you immediately took the vehicle in for service?

A. That's right.

Q. Now you're telling me that there were times where the skid light would come on, then go off, but you didn't specifically take it in for service?
A. If I would go out and drive the car, which was very seldom, I wouldn't see the light on. Sara said the light was on. Well, it's not on now.
Q. Okay. Between February of '09 and February of 2011, did you personally ever see the anti-skid light come on?
A. No.
Q. Okay. So with respect to it being on, that's what your wife had reported to you?
A. Hmm-hmm.
Q. Did you ever tell your wife the next time it comes on, immediately take it to the dealer or call the dealer for an appointment?
A. No, I told her if it comes on, tell me about it.
Q. Okay.
A. And so she said it was on again. I'd go out, by the time I came home, it wasn't on.
Q. Okay. So the difference between taking it in the first time and this time was, the first time the anti-skid light came on, and it remained on and you saw it, and you took it in for service?
A. Right.

Q. This time the skid light comes on, you don't see it when you go to check, so therefore you didn't think it needed to go in for service?
A. Right, right.
Q. Were you concerned that the anti-skid function was not functioning properly?
A. If the light's off, I'm assuming it's on.
Q. Okay. If the light was on, would you assume that the function was not working or not operating?
A. That's correct.
Q. Okay. Do you know how many times she told you the anti-skid light had come on?
A. Don't recall, probably a couple times.
Q. More than --
A. Oh, probably just a couple times, and we reported the skid light --
Q. Right.
A. -- okay?
Q. Had the water -- had you not heard the water sloshing sound, do you think you would have taken it in for just the skid light?
A. If the skid light came on, yes.
Q. And you had seen it?
A. Yes.
Q. Okay. But the fact that it came on and went off, you

EXHIBIT D

NEALE, ET AL v. VOLVO CARS OF NORTH AMERICA, LLC, ET AL

SVEIN BERG

May 26, 2011

Prepared for you by

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in Hawaii?
A. Yeah, in Oahu.
Q. Would the car have to be shipped to get there?
A. Right.
Q. And there's a fee with that; right?
A. Yes.
Q. Okay. After this work was done, you took the vehicle home, I presume. Did you change where you parked it at all?
A. No.
Q. Did you keep the sunroof taped?
A. No.
Q. Did you experience any other water problems?
A. No.
Q. Did you go back on-line and tell anybody that this cure worked for you?
A. No.
Q. Okay. You eventually sold the vehicle at some point; is that right?
A. Right.
Q. When did you sell the vehicle?
A. May of 2010.
Q. And why did you sell the vehicle?

A. Because we were moving from the island.
Q. To Manhattan?
A. Yes.
Q. Did you consider taking the vehicle with you to Manhattan?
A. We considered it.
Q. Why did you chose not to?
A. Costs. It would be a substantial part of the value of the car just to have it transferred from Hawaii to New York.
Q. Okay. How did you go about selling the car?
A. We listed it on Craigslist.
Q. How much did you list it for?
A. I don't remember what it was. I think we have that in -- 12,000 or something. I don't recall.
Q. Okay. You paid about 21 for it; right?
A. Yeah.
Q. You listed it for more than 10,000?
A. Yes.
Q. But less than 15,000?
A. Yes.
Q. So somewhere around 12,000?
A. Uh-huh.

Q. And how did you -- what did you say in your description about the vehicle?
A. Not -- not much. I said, you know, XC90, seven seats, 2004, T6. I don't know, just a family car. Something like that. I don't remember exactly the wording.
Q. Did you put the number of miles on it?
A. Yes.
Q. Did you say "excellent condition," "good condition," "new condition"?
A. Don't recall. My wife wrote the ad.
Q. Did you help her with it?
A. No.
Q. Did you look at it?
A. I looked at it, yeah.
Q. Okay. So you don't remember if you put the condition of the vehicle on it?
A. No, I don't remember.
Q. Did you put if -- anything about any repairs to the vehicle that you have done on-line?
A. No, did not.
Q. Was it a fairly short post in terms of the information?
A. Yeah, fairly short.
Q. Did you put a contact number like

a phone number on there?
A. Did we put a phone number? Don't remember.
Q. E-mail address?
A. Well, Craigslist, you automatically get a reply address through Craigslist if you post.
Q. Okay. When did you first post this vehicle?
A. Don't remember exact date. It was probably early May.
Q. I'll ask you this way. From the time -- how long did it take you to eventually find a buyer?
A. Maybe a week.
Q. So you were able to sell it within a week?
A. Yeah, I think so.
Q. How many people responded to your ad?
A. Not many. Let's see. I think only -- only one, the person who bought it.
Q. Okay. Did that person come to the house to look at the vehicle?
A. How did that work? You know, it's -- how was it? I think we -- she actually -- we left the car when we left -- we had the car till we left the island, and she actually contacted us when we

left the island.
Q. She actually what? I'm sorry.
A. She contacted us after we leave -- after we left the island.
Q. Where did you leave your car?
A. With some friends, parked outside.
Q. Did you sell your house?
A. Hmm?
Q. Did you sell your house in Maui when you moved?
A. We rented a house.
Q. Okay. So you rented a house, you're now moving to Manhattan, you hadn't sold the car yet?
A. Right.
Q. So the car's staying with friends?
A. Right.
Q. Okay. But yet, somebody's contacting you through Craigslist that they're interested?
A. Right.
Q. Okay. And then tell me what happened. How do you talk to this person or communicate with this person?
A. By phone, talked by the phone. I -- I considered sunroof thing to be fixed since we did the -- so I didn't -- I didn't mention that. I

did mention to the buyer about the issue of the trans -- the transmission issue on this model?

Q. Um-hmm.

A. I made her aware of that. And I said that given what I know, she -- I encouraged her to buy it and extend the warranty on the vehicle. And I said that the -- I think at the time I knew that there was a class action suit and so I told her about that, that might be -- if she had a problem, that might be covered under a lawsuit.

Q. How many conversations do you think you had with the buyer?

A. Three. Two, three.

Q. Was it a he or a she?

A. She.

Q. Did she go look at the vehicle at some point?

A. Yes.

Q. At your friend's house?

A. Yeah.

Q. You made arrangements for that?

A. Yeah.

Q. Did she drive it?

A. Yes.

Q. Did she negotiate the price down

with you?
A. No. No. She accepted the price.
Q. So she paid what you were asking?
A. Yeah.
Q. Okay. So you never mentioned that there was a sunroof problem with the vehicle?
A. No.
Q. Did she ever ask?
A. No.
Q. Did she ask what kind of repairs or maintenance had been done to the vehicle?
A. Did she? No, I don't think she -- she did.
Q. Did she ask to see the service records?
A. No.
Q. In pricing the vehicle, how did you come up with the price you wanted to sell it at?
A. Kind of give it a price so that it would sell. You know, given that we had it for two and a half years and I think that was almost halved in value in those two and a half years, I felt it was still a reasonable deal.
Q. Did you go onto Kelley Blue Book or anything?
A. Yes, it was under the Blue Book value.