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Attorneys for Defendant Volvo Cars of North America, LLC and Volvo Car Corporation

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

JOANNE NEALE, ET AL., Plaintiffs, v. VOLVO CARS OF NORTH AMERICA, LLC, ET AL., Defendants.	Civil Action No. 2:10-CV-04407-JLL-JAD **DEFENDANTS' NOTICE OF MOTION AND MOTION FOR DISCOVERY REGARDING PLAINTIFFS' RENEWED MOTION FOR CLASS CERTIFICATION** **HEARING DATE: FEBRUARY 16, 2016**

To: Plaintiff's Counsel:

PLEASE TAKE NOTICE that, on February 16, 2016, or as soon thereafter as counsel may be heard, Defendants Volvo Cars of North America, LLC and Volvo Car Company ("Volvo") will move, by and through its undersigned counsel, before the Honorable Joseph A. Dickson at the Martin Luther King Building & U.S. Courthouse, Court Room MLK 2D, 50 Walnut Street, Newark, New Jersey, for an Order granting its Motion for Discovery regarding Plaintiffs' Renewed Motion for Class Certification and an Order finding good cause to modify the previous Scheduling Order in this case.

PLEASE TAKE FURTHER NOTICE that in support of this motion, Volvo will rely on the Memorandum in Support and supporting exhibits in the Certification of Joel Neckers.

Dated: January 19, 2016

Respectfully submitted,

/s/ Paul Daly

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CERTIFICATE OF SERVICE

I Paul Daly, certify that the foregoing was electronically filed on January 19, 2016, using the Court's CM/ECF system, and was thereby served upon all registered users in this case.

By: */s/ Paul Daly*

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

JOANNE NEALE, ET AL., Plaintiffs, v. VOLVO CARS OF NORTH AMERICA, LLC, ET AL., Defendants.	Civil Action No. 2:10-CV-04407-JLL-JAD **CERTIFICATION OF JOEL NECKERS IN SUPPORT OF DEFENDANTS' MOTION FOR DISCOVERY REGARDING PLAINTIFFS' RENEWED MOTION FOR CLASS CERTIFICATION** **HEARING DATE: FEBRUARY 16, 2016**

I, Joel Neckers, hereby certify as follows:

1. I am an attorney duly licensed to practice before all courts of the State of Colorado and Illinois and am admitted to practice *pro hac vice* before this Court. I am a partner in the law firm of Wheeler Trigg O'Donnell LLP, counsel of record for Defendants Volvo Cars of North America, LLC and Volvo Car Company ("Volvo") in the above-captioned litigation. I am submitting this declaration in support of Volvo's Motion for Discovery Regarding Plaintiffs' Renewed Motion for Class Certification

2. I have personal knowledge of the matters set forth in this declaration.

3. Attached as **Exhibit A** is a true and correct copy of redacted excerpts from Plaintiffs' Memorandum of Law in Support of Plaintiffs' Renewed Motion for Class Certification that was served upon Volvo on December 22, 2015.

4. Attached as **Exhibit B** is a true and correct copy of excerpts from the transcript of the Deposition of Andrew McCloskey, dated May 15, 2012,

5. Attached as **Exhibit C** is a true and correct copy of excerpts from the transcript of the Deposition of Martin Hanson, dated May 23, 2012

6. Attached as **Exhibit D** is a true and correct copy of Exemplar Document Requests to be served on each Plaintiff other than Mr. Berg.

7. Attached as **Exhibit E** is a true and correct copy of Exemplar Interrogatories to be served on each Plaintiff other than Mr. Berg.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 19th day of January, 2016, in Denver, Colorado.

/s/Joel Neckers
Joel Neckers

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

JOANNE NEALE, ET AL., Plaintiffs, v. VOLVO CARS OF NORTH AMERICA, LLC, ET AL., Defendants.	Civil Action No. 2:10-CV-04407-JLL-JAD **DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR DISCOVERY REGARDING PLAINTIFFS' RENEWED MOTION FOR CLASS CERTIFICATION** **HEARING DATE: FEBRUARY 16, 2016**

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INTRODUCTION

Defendants Volvo Cars of North America, LLC and Volvo Car Corporation (collectively "Volvo") seek narrowly tailored discovery pursuant to the Court's Order of November 19, 2015. The limited discovery Volvo seeks is necessary to allow Volvo to discover and present facts and available evidence that did not exist when the parties briefed class certification in 2012.

For example, some of the named Plaintiffs who are proposed as class representatives have driven their vehicles for nearly five years since they were deposed. If they have not experienced any further instance of a clogged sunroof drain, that evidence would be extremely probative of the purported common defect. This is especially true because all had their vehicles repaired *after* Volvo instructed its dealers to change the sound traps to allow more water to drain. This evidence could show significant variations among vehicles in the proposed classes and is directly relevant to the issues of commonality and predominance.

As another example, we know that two named Plaintiffs have sold their vehicles since they were deposed. The disclosures they made (or failed to make) regarding prior clogged sunroof drains in their vehicles bear directly on the Court's predominance analysis, which the Third Circuit said this Court must "rule on ... in light of the claims asserted and the ***available*** evidence." Plaintiffs contend in this Court that all Volvo vehicles with a sound trap in the sunroof drain are defective

and "***inevitably***" will suffer a clogged drain resulting in a water leak. If the Hay and Taft vehicles were sold to other class plaintiffs without disclosure of the alleged defect, any purported diminished value in the vehicles must be attributed to the seller's failure to disclose the alleged defect, not anything that Volvo did or did not do. This available evidence also would help Volvo explain, and the Court understand, why individual inquiry into each used car purchase is needed.

There is nothing inherently difficult, burdensome, or particularly time consuming about the process of obtaining this information. Indeed, Volvo can obtain the information simply by serving narrowly tailored written discovery on Plaintiffs and by deposing the purchasers of the Taft and Hay vehicles once they are identified in the discovery responses. There is no reason why this discovery cannot be completed in three months.[1]

There also is no legal or logical support for Plaintiffs' artificial attempt to freeze the evidentiary record to what the parties presented to Judge Cavanaugh in 2012. That result is inconsistent with the Third Circuit's directive that the Court conduct its predominance analysis based on "the available evidence," and it is flatly contradicted by settled law holding (1) certification orders are subject to re-evaluation or decertification where subsequent facts call into question the propriety

[1] Volvo likely will offer expert testimony in opposition to Plaintiffs' renewed motion for class certification. If so, Volvo will provide an expert report with its opposition and make any proffered expert available for deposition promptly.

of certification; (2) scheduling orders are not intended to function as inflexible straightjackets on litigation proceedings; and (3) a scheduling order may be modified at any time for good cause, including changes in facts and circumstances. The Court should grant Volvo's request to take limited affirmative discovery.

FACTUAL AND PROCEDURAL BACKGROUND

There are eight Plaintiffs in this case. Volvo deposed five of them in 2011 and three in 2012.[2] The parties briefed Plaintiffs' first motion for class certification after completing the depositions in 2012, and Judge Cavanaugh certified six statewide classes on March 26, 2013. (ECF No. 280.) While the class certification order was on appeal, two Plaintiffs—Taft and Hay—sold their vehicles. The Third Circuit vacated Judge Cavanaugh's Order in July 2015. (*See* ECF No. 311.)

Following remand, the parties submitted letter briefs to this Court on the issue of further discovery. There, Plaintiffs took the unsupported position that the record was "frozen" in place as of 2012 and that the parties should immediately re-brief class certification. (ECF No. 326.) On November 19, 2015, the Court ordered Plaintiffs to serve, but not file, their class certification motion by December 22, 2015, and gave Volvo the option of filing an opposition or asking "for limited discovery based solely on Plaintiffs' motion as read in connection with the Court of Appeals' decision." (ECF No. 332.)

[2] Three Plaintiffs joined the suit in May 2012 when Plaintiffs filed their Second Amended Complaint. (ECF No. 66.)

Plaintiffs served their "renewed" class certification briefing on December 22, 2015. Although the proposed class definitions are no models of clarity, Plaintiffs appear to seek certification of five statewide classes for (a) those who purchased or leased and who currently own a class vehicle in one of the implicated states, and (b) those who formerly owned or leased a class vehicle in one of the implicated states who can be identified as having incurred out-of-pocket expenses "related to the Sunroof Defect." Because they sold their class vehicles, neither Mr. Taft nor Ms. Hay is proposed as a class representative, but both remain in this case as plaintiffs, and Mr. Taft is a member of the putative California class.

Plaintiffs contend that the presence of a sound trap in the sunroof drain "inevitably" causes the drain to clog and water to leak into the vehicle, but they offer no evidence that every vehicle in the proposed class has experienced or will experience a clogged sunroof drain and resulting water leak. (Ex. A (Plaintiffs' Memorandum of Law in Support of Plaintiffs' Renewed Motion for Class Certification ("Plaintiffs' Mem.") at pp. 1 & 5).[3]) The renewed motion is silent, furthermore, about Plaintiffs' experiences with their vehicles since they were deposed in 2011 or 2012, as it is about the Taft and Hay vehicle sales. These facts are an important part of "the available evidence" Volvo seeks to discover.

ARGUMENT

[3] The Exhibits are attached to the Certification of Joel Neckers, filed contemporaneously herewith.

I. THE ADDITIONAL DISCOVERY VOLVO SEEKS BEARS DIRECTLY ON THIS COURT'S RULE 23 ANALYSIS.

The additional limited discovery Volvo seeks bears directly on the Court's class certification analysis. First, the occurrence or non-occurrence of additional water leaks in Plaintiffs' vehicles is probative of whether the risk for a water leak is the same in all vehicles in the proposed classes. That is because Plaintiffs contend the mere existence of a sound trap constitutes a class-wide defect in all class vehicles. (Plaintiffs' Mem. at pp. 1, 5, 6.) But if different sound traps perform differently, that is plainly relevant to the question of whether there is a class-wide defect.[4] (*See* Ex. B (McCloskey Dep. at 250:11-17, 252:12-22, 257:20-258:16, 259:13-260:06, 288:24-290:06, 292:23-293:16, 296:18-297:19) (detailing production changes increasing the size of the opening in sound plugs for different model vehicles in different years); Ex. C (Hansson Dep. at 13:10-14:05, 50:07-51:07, 51:14-17) (same).) These differences matter for all class vehicles, but they are particularly important for the named Plaintiffs' XC90, S40 and V50 vehicles, because each of them had repairs *after* Volvo instructed its dealers to use the modified sound traps with larger openings to allow more water to escape. (*See* ECF No. 66-1 (Ex. A to Plaintiffs' Second Amended Complaint (Tech Note for

[4] Plaintiffs conceded this fact in 2012, when they told Judge Cavanaugh that a jury could find some sound traps defective and others not defective. (ECF No. 87-3 at 6, n.24.) Plaintiffs submitted the same document (and same concession) as Exhibit 8 in support of their renewed motion for class certification.

XC90 vehicles dated 9/2/05) at 6); ECF No. 66-2 (Ex. B to Plaintiffs' Second Amended Complaint (Tech Note for S40 and V50 vehicles dated 10/7/08) at 9).) Accordingly, evidence from the named Plaintiffs who received modified sound traps and experienced no further clogs or leaks is plainly relevant to refute Plaintiffs' claim that every sound trap in every class vehicle is defective. (*See* ECF No. 87-2 (Certification of Charles Benedict) at ¶ 54, filed under seal.[5]) Such "available evidence" also is directly relevant to the questions of whether Plaintiffs can prove their claims with common evidence and whether common issues predominate over individual issues.

Second, the circumstances of the Taft and Hay vehicle sales, and the disclosures Mr. Taft and Ms. Hay made or failed to make, will inform the Court's predominance analysis regardless of whether either is a proposed class representative.[6] Mr. Taft and Ms. Hay both experienced water leaks they claim were caused by a "Sunroof Drainage Defect" in their vehicles.[7] Both also have alleged that the Sunroof Defect was not remedied by Volvo's repair and that the

[5] This certification also was served on Volvo in support of Plaintiffs' renewed motion for class certification. The Court can assess the Benedict Certification from the records previously filed under seal. (ECF No. 87-2 (filed under seal).)

[6] Mr. Taft remains a member of the proposed California class. Although Ms. Hay is no longer a member of a proposed class, evidence related to her disclosures is probative of the types of experiences other class members have had and thus whether the proposed class representatives are typical of the class members they seek to represent.

[7] (*See*, *e.g.*, ECF No. 86 at 1, 27, 32.)

sunroof drain would "inevitably" leak again. If Mr. Taft and Ms. Hay failed to disclose these allegations to their buyers, the purchasers may have legal claims against them, rendering their facts different from other class members. The facts of the Hay and Taft transactions thus constitute "available evidence" that not only is highly probative on the question of whether individual or common questions of fact predominate but also on the merits of Ms. Hay's and Mr. Taft's *individual* claims, since each remains a Plaintiff who seeks damages from Volvo in this case.

II. THE DISCOVERY VOLVO SEEKS IS NEITHER BURDENSOME NOR UNREASONABLY TIME CONSUMING.

Volvo's limited discovery can likely be accomplished with a few document requests and interrogatories to each named Plaintiff and third-party depositions of the individuals who purchased the Taft and Hay vehicles. Depending on the named Plaintiff's responses to written discovery, Volvo could possibly request a brief telephonic follow up deposition regarding the responses. There is nothing difficult, burdensome, or even very time consuming about the discovery requested.

As an initial matter, Volvo is prepared to serve the written discovery as soon as the Court authorizes it. Indeed, Volvo has attached exemplar Document Requests and Interrogatories that—if the Court permits—it intends to serve upon each Plaintiff other than Mr. Berg, who sold his vehicle in 2011.[8] (*See* Exhibits D

[8] Volvo does not seek additional discovery from Plaintiff Berg because he sold his vehicle prior to his deposition and testified regarding the circumstances of his sale.

and E). Assuming Plaintiffs respond timely to these requests, the parties can complete this initial written discovery in one month and conduct limited depositions of certain Plaintiffs (if necessary), subpoena the individuals who purchased the Taft and Hay vehicles, and depose them shortly thereafter. Accordingly, Volvo respectfully asks the Court for a period of three months after service of the written discovery to allow for this additional, limited discovery.

III. THE COURT SHOULD ALLOW VOLVO'S NARROWLY TAILORED DISCOVERY.

A. The 2011 Scheduling Order Does Not Freeze the Evidentiary Record to Evidence Available in 2012.

Plaintiffs previously contended that Volvo cannot offer any new evidence in opposition to their motion for class certification, no matter how probative such evidence is, and even if the evidence did not exist in 2012. (ECF No. 326.) In effect, they contend that the record before this Court in 2016 is limited to the 2012 record before Judge Cavanaugh because of the discovery deadline in the earlier Scheduling Order. (*See id.*) Plaintiffs' position is unsupported and unfair.

Initially, Plaintiffs' frozen-record contention is directly contrary to the plain language of the Third Circuit's opinion in this case:

> Evaluating these arguments in the detail that is required goes beyond what was briefed before the District Court, beyond the District Court's reasoning in its certification opinion, and beyond the briefing the panel has received from the parties. We will not engage in an analysis of predominance in the first instance, and will therefore

> remand these questions to the District Court. Consistent with *Marcus*, 687 F.3d at 600-11, ***the District 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***.

Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 373 (3d Cir. 2015) (emphasis added). Significantly, the Third Circuit did not limit the Court to adjudicating the new motion on the 2012 record. Instead, it directed this Court to "rule on the predominance question in light of the claims asserted and ***the available evidence***," which necessarily includes evidence that arose since the parties last briefed certification. *Id.* (emphasis added).

The previous Scheduling Order also did not contemplate a second motion for class certification, years later, after Judge Cavanaugh's decision was reversed on appeal. That Scheduling Order was appropriate based on the circumstances before the Court in 2011, but circumstances have since changed. Plaintiffs' attempt to use the Scheduling Order to preclude probative evidence is contrary to the Third Circuit's cautionary directive that "'Rule 16 was not intended to function as an inflexible straightjacket on the conduct of litigation.'" *Morton Int'l, Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 684 (3d Cir. 2003) (citation omitted).

If accepted, Plaintiffs' contention would serve only to obscure the search for truth in this case. As we have explained previously, the error in the approach advocated by Plaintiffs is easy to illustrate. Consider a verdict in a product liability

or medical negligence trial that is reversed on appeal and remanded for a new trial where the plaintiff's condition dramatically improved or worsened while the case was on appeal. Under Plaintiffs' approach, that evidence would never be presented to a jury because the discovery deadline in the case expired prior to the first trial. That inflexible approach makes no sense and would impair the search for truth. Not surprisingly, many courts that have addressed similar issues have held precisely the contrary. *Cf. Johns Hopkins Univ. v. CellPro, Inc.*, 152 F.3d 1342, 1357 (Fed. Cir. 1998) ("Nothing in Rule 16(e) indicates that a pretrial order from a first trial controls the range of evidence to be considered in a second trial"); *Rios v. Wal-Mart Stores, Inc.*, 2014 WL 1413639, at *6-7 (D. Nev. Apr. 11, 2014) (finding "good cause" for "reopening of discovery to determine the extent to which [Plaintiff's] lumbar spine condition and symptoms have been exacerbated by her pregnancy and/or childbirth, and the additional medical treatment that Plaintiff has received or will need to receive as a result thereof"); *Adams v. Kroger Ltd. P'ship I*, 2013 WL 6229379, at *1 (E.D. Va. Dec. 2, 2013) (after remand for a new trial, court entered scheduling order with new expert disclosure deadlines).

Plaintiffs' suggested approach makes even less sense here, because unlike a new trial, this Court has a ***continuing*** obligation to ensure that class certification is appropriate at all stages of the litigation. Fed. R. Civ. P. 23(c)(1)(C); *Ellis v. Elgin Riverboat Resort*, 217 F.R.D. 415, 419 (N.D. Ill. 2003) (court "remains under a

continuing obligation to review whether proceeding as a class action is appropriate, and may modify the class or vacate class certification pursuant to evidentiary developments arising during the course of litigation"). Courts "regularly re-evaluate and/or decertify classes where *subsequent facts* call into question whether continued class action treatment is proper" as part of that obligation. *Bayshore Ford Truck v. Ford Motor Co.*, 2010 WL 415329, at *2 (D.N.J. Jan. 29, 2010) (Judge Linares) (emphasis added); *see also Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160 (1982) ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation"); *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 140 (3d Cir. 1998) ("Under Rule 23(c)(1), District Courts are required to reassess their class rulings as the case develops"); *Zenith Labs., Inc. v. Carter-Wallace, Inc.*, 530 F.2d 508, 512 (3d Cir. 1976) (holding that new factual developments "warranted the reevaluation of the original class certification"). What this means is that even if the Third Circuit had affirmed Judge Cavanaugh's decision, the Court would have had an obligation to re-assess the propriety of certification, and Volvo would have the right to present additional or new evidence showing that certification was no longer proper. *See In re Wellbutrin XL Antitrust Litig.*, 308 F.R.D. 134, 138-39 (E.D. Pa. 2015), (appeal filed August 10, 2015) (allowing fact and expert discovery related to motion to decertify class). Judicial economy and the pursuit of truth favor a full evidentiary

record on Plaintiffs' renewed motion for class certification.[9] The Court therefore should reject Plaintiffs' attempt to use the 2011 Scheduling Order as a tactical weapon. *Cf. Rimbert v. Eli Lilly & Co.*, 647 F.3d 1247, 1254 (10th Cir. 2011) ("A scheduling order which results in the exclusion of evidence is ... a drastic sanction").

B. There Is Good Cause to Modify the 2011 Scheduling Order.

The Court can modify the previous Scheduling Order for "good cause." *See* Fed. R. Civ. P. 16(b)(4). Courts generally define "good cause" as a change in law, change in facts, or some other change in circumstances. *See, e.g.*, *Hartis v. Chi. Title Ins. Co.*, 694 F.3d 935, 949 (8th Cir. 2012); *see also Rimbert*, 647 F.3d at 1256 (10th Cir. 2011) ("the unique circumstances presented called for flexibility in the discovery schedule"). The Court should allow Volvo's narrowly tailored discovery because of changed circumstances and new facts that arose during the time that Judge Cavanaugh's now vacated Order was on appeal.

For example, Plaintiffs who still own vehicles have driven them for several years since their depositions, a new fact not available in 2012. As explained above, if they have not experienced any new water leaks, such evidence would be

[9] Plaintiffs have a continuing duty to update their discovery responses pursuant to Fed. R. Civ. P. 26(e). If Plaintiffs' position were a correct statement of the law, it would literally absolve the parties of these obligations, even though the changed circumstances, like the sale of a class vehicle, might have a direct bearing on class certification.

probative on the issue of whether there is a class-wide defect, as Plaintiffs contend. Similarly, the Taft and Hay vehicle sales, and any disclosures they made or failed to make, are new facts related to class certification that were not available in 2012. Plaintiffs implicitly acknowledge these new facts and circumstances by removing Taft and Hay as class representatives and offering a new motion with new and different classes, but they simultaneously—and inconsistently—ask the Court to preclude Volvo from discovering any of these new facts.

Greenawalt v. Sun City W. Fire Dist., 250 F. Supp. 2d 1200, 1207 (D. Ariz. 2003), is instructive. There, the plaintiff contended that the defendant's motion was untimely because it was filed following appeal and after the deadline the district court had set in a scheduling order entered before the appeal. The court rejected that approach and held that"[b]ecause of the interruption in the original scheduling of the litigation caused by the Ninth Circuit appeal and the remand, the Court finds good cause for allowing Defendant's additional summary judgment motions." *Id.* The same analysis applies here because new evidence arose while Judge Cavanaugh's decision was on appeal.

Finally, the discovery is also narrowly tailored to minimize the impact on the parties and the Court. Importantly, the additional time for discovery will have no impact on the trial date because there is none. Under these circumstances, there is no reason to inflexibly enforce the outdated Scheduling Order, as Plaintiffs

advocate. *See Trask v. Olin Corp.*, 298 F.R.D. 244, 270 (W.D. Pa. 2014) ("the Court finds minimal potential prejudice that may arise from reopening fact discovery. Importantly, this case has not been set for trial"); *see also Sabatino v. Union Twp.*, 2013 WL 1622306, at *6 (D.N.J. Apr. 15, 2013) (Judge Linares) ("While 'lack of prejudice to the nonmovant does not show good cause,' the Court finds that, when taken in conjunction with the diligence demonstrated by plaintiff, there is sufficient 'good cause' pursuant to Rule 16(b)(4) for the Court to grant leave for plaintiff to amend'") (citation omitted).

In short, Volvo should have an opportunity to discover and present to the Court all "available evidence" that bears on Plaintiffs' renewed motion for class certification and should not be limited to an artificially constrained record. The Court should allow Volvo's narrowly tailored discovery because changes in circumstances and facts constitute good cause to modify the Court's April 2011 Scheduling Order.

CONCLUSION

For these reasons, the Court should grant Volvo's motion to conduct the limited discovery described above.

Dated: January 19, 2016

Respectfully submitted,

/s/ Paul Daly

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CERTIFICATE OF SERVICE

I Paul Daly, certify that the foregoing was electronically filed on January 19, 2016, using the Court's CM/ECF system, and was thereby served upon all registered users in this case.

By: */s/ Paul Daly*

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**

---UNREDACTED---
MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' RENEWED MOTION FOR CLASS CERTIFICATION

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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).

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]

The evidence has also confirmed that all of the Class Vehicles share this defect. [redacted][12]

[redacted][15]

[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).

UNITED STATE DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

No. 2:10-cv-04407-DMC-JAD

JOANNE NEALE AND KERI HAY, individually and on behalf of all others similarly situated, Plaintiffs, -vs- VOLVO CARS OF NORTH AMERICA, LLC, VOLVO CAR CORPORATION, Defendants.	DEPOSITION OF: ANDREW G. McCLOSKEY VOLUME II

TRANSCRIPT of the proceedings in the above-entitled action, as taken by and before DEBORAH J. TAKACS, a Certified Court Reporter and Notary Public of the State of New Jersey, held at the office of HARDIN, KUNDLA, McKEON & POLETTO, P.C., 673 Morris Avenue, Springfield, New Jersey, on Tuesday, May 15, 2012, commencing at 9:55 a.m.

MR. SCHELKOPF: I'm not sure it is, but you can answer the question.

A Repeat the question, please.

MR. SCHELKOPF: Can you please read that back.

(Reporter read back as requested.)

A We do not tell a customer to maintain this in any, in any documentation or anything. Like many other things on the vehicle, we, you know, it's, we don't see it as necessary.

Q Okay. Number 10, would you please read that and the information that you wrote underneath question number 10.

A When the permanent action was instituted regarding the November 2004 temporary action.

The answer would be week 22 of 2005, and that information was provided by Martin Hansson.

Q And just so we're clear, what is the permanent action that you're referring to that occurred in week 22 of 2005?

A I don't know what the action was. The question is when the permanent action took place and Martin provided the information of week 22.

Q Okay. So you're not -- well, you had a discussion with Martin. Correct?

MR. HERZOG: -- which are not all of the Class vehicles. I don't think you were intending to mislead the witness, but I just want to make sure that the record is clear.

MR. SCHELKOPF: Yeah, that's fair. I appreciate that.

Q Okay. So for clarification, that permanent action referred to the 2003 to present XC90s. Is that your understanding?

A In regards to the temporary action of the document of November 2004, yes.

Q Okay. Number 11, again, please read that for us and the information you wrote.

A Why VCNA or VCC determined there was a need to increase or enlarge the sound trap opening.

To further reduce the incidence of clogged sunroof drains, VCC determined without creating unnecessary noise in the cabin that it would be feasible to enlarge the sound trap opening which would allow for even greater drainage through the sunroof drain. Again, information provided by Martin Hansson.

Q Okay. Did Mr. Hansson tell you anything else related to that question other than what you had written down there?

Q Okay. Mr. McCloskey, what you read may have been completely accurate, but my copy seems to fade, so can you please read the answer to number 13 verbatim how you wrote it.

A We are not aware of any cases or rear -- of rear drains clogged XC90 or other.

Q Okay. And so other refers to other vehicles?

A Correct.

Q Okay. And that information was provided by?

A Myself, Stefan Persson and Darren Bisaccia.

Q Okay. Did Mr. Persson or Mr. Bisaccia tell you anything else other than what you had written under question number 13 relating to question number 13?

A Not that -- nothing specific that I recall, no.

Q Okay. Let's look at number 14. Again, just please read that and then what you had written underneath there.

A The length of the original sound trap in S40 and V50 vehicles.

Front, 51.7 millimeters, rear 21.0

millimeters or 21 millimeters. Later replacement and production are 3 millimeters shorter. That information was provided by Stefan Sandberg.

Q Okay. Do you know the date of that later replacement and production?

A I do not.

Q Do you know the dates when the front sound trap was 51.7 millimeters?

A As I understand it, that was the original length, but I don't know when it was changed. Actually -- I correct that. There was a change made in 2006 to S40 and V50 length of the sound traps, and there was also another change made in 2011.

Q Again, that would have been to S40 and V50 sound traps?

A That's correct.

Q And is that information that was provided in this document, in Exhibit McCloskey-10?

A No, this document does not refer to S40 and V50 vehicles.

Q And I think we're looking at two different documents. I'm referring to this document which was marked as McCloskey exhibit number 10.

MR. HERZOG: He's referring to this document.

A Yeah, repeat the question. I'm sorry.
Q So the answers that you just provided relating to changes that were made and when of the sound traps, what I'm asking is, is that documented in McCloskey exhibit number 10?
A The date, the '06 and '11 references?
Q Correct.
A Yes, it is.
Q Okay. Where is that document?
A It's stated in question 24.
Q Okay.
A In response to question 24.
Q Okay. Both those changes, the 2006 change, that's only regarding the front sound traps. Is that correct?
A The 2006 change is just front sound traps.
Q And what about the 2011 change, also just front sound traps?
A Yes.
Q Okay. Do you know what was changed with those sound traps?
A The length. They were shortened.
Q Okay. Do you know how much shorter they were made in 2006?

A In each case they were shortened by 3 millimeters.

Q Okay. So by -- in the 2011 change, is it fair to say that the change was a total of 6 millimeters shorter than the original sound trap?

A Correct.

Q Then in 15, please read that for me and then also what you had written underneath that.

A The permanent change to sound traps instituted in XC90 vehicles.

This is the same as question 10.

Q Okay. And that refers to McCloskey exhibit number 4. Is that correct?

A No, I'm referring, when I say the same as question 10, I'm referring to this document which I understand is McCloskey-10.

Q And I understand that, but I believe what we're referring to is actually McCloskey number 4 which is the Tech-Net Note.

A Yes.

Q Do you agree with me?

A Yes.

Q Okay. Gets a little confusing with all these exhibits.

A Yes, it does.

that that date should have been what?

A 5/12/2011, so a miswriting on my part.

Q And how did you gather this information?

A Via information provided from VCC to our attorneys to me and also discussions with Martin Hansson.

Q Okay. Do you recall what Mr. Hansson told you regarding question number 23? Was it --

A I don't -- during the discussion, I don't recall specific conversation to any of the questions. As previously stated, we discussed a number of questions and a number of issues, so I can't say that I remember anything specific to this question.

Q But the conclusion, is it fair to say that the conclusion for the, for shortening the sound trap or carrying out the sound trap modification did not result in a significant increase in the interior sound so as to not go forth with the sound trap modification?

A I think the answer addresses that. But yes, it seems that, you know, there was no significant increase or enough of an increase to, to not do this.

Q All right. Let's look at question 24, and please read that and your answer there to it.

A Whether any investigation of sound traps contained in P1 vehicles was conducted at any time.

Changes were made to the sound traps in P1 vehicles in 2006 and 2011. Changes to the sound traps in P1 vehicles were made in 2006. The trap was shortened due to a pinch in production. No additional testing was conducted because it was the same change made for the XC90.

Changes were also made to the sound traps in P1 vehicles in 2011. The trap was shortened. The test conducted -- excuse me, the test concluded that 3 millimeters can be removed from the sound traps at the end of the front sunroof drainage without increasing the interior noise level. Again, information provided by Martin Hansson.

Q Okay. The last paragraph there refers to a change in the P1 vehicle sound traps in 2011.

Was there already a prior change made to those sound traps in the, contained in the P1 vehicles prior to 2011?

A Yes, previously stated in that prior paragraph, there were changes made in 2006.

Q Okay. And so the P1 vehicles, as we discussed, those would be the ones that incurred two modifications to the sound traps where collectively it

equaled the 6-millimeter shortening in the total length. Is that correct?

A That is correct.

Q Okay. And the XC90, how many modifications to that sound trap took place?

A To my knowledge, one.

Q And the shortening of the XC90 sound traps, that was a 3-millimeter shortening. Is that correct?

A That's correct.

Q Do you know why the XC90 was a 3-millimeter -- or shortening the sound trap three millimeters, and the P1 vehicles required a 6-millimeter shortening of the sound traps?

A I'm not --

MR. HERZOG: Object to the form of the question, but you can answer.

A I'm not aware why there would be a difference, no.

Q All right. Are you aware of any investigation surrounding those changes or any investigation that resulted in those changes?

A No.

Q Okay. Do you know why those changes were instituted by Volvo?

Q And what about the change to the front sound trap in the XC90 vehicles, do you know why that change took place?

A Well, based on Tech-Net Note 83-34, also known as McCloskey-4, there were cases where we had reports that there was clogging and that the drainage was shortened to enlarge the opening.

Q So McCloskey-4, is it your understanding McCloskey-4 is the basis for the change, for the change in length of the front sound traps contained in the XC90 vehicles?

A Correct.

MR. HERZOG: Object to the form of the question.

A Correct.

Q Okay. And, again, your answer in 24 pertains to the Class vehicles as we defined earlier in the deposition. Correct?

A Correct.

MR. HERZOG: Object to the form of the question. That's limited to P1 vehicles.

A Excuse me, that's correct.

Q Well, the model years of P1 vehicles as we set out earlier in the deposition. Correct?

A If your question is, is the question

pertaining to P1 vehicles within the Class, the answer is yes.

Q Well, that's kind of my question.

A Okay.

Q But I just want to make sure that we're clear.

We defined the Class vehicles earlier as model year 2004 to present, S40, S60, S80, V70, model year 2003 to present, XC90, and model year 2005 to present, V50.

So your answer in number 24, which of those models does it pertain to?

A S40 and V50.

Q Okay. So it would be 2004 to present S40 and 2005 to present V50?

A Correct.

Q 25, you're incorporating your answer to 24. Correct?

A The answer to 25 is same as 24, yes.

Q 26, can you please read that for me and then your answer.

A Where sound trap design changes -- where sound trap design changes were carried out, i.e., manufacturer or factory.

Decisions regarding sound trap design

There was a generation 1 S40 that's not involved in the action.

Q Okay. So generation 2 S40 was introduced in 2004. Correct?

A Correct.

Q Okay. So you would agree with me that generation 2 S40, there were vehicles that were produced that may have required a modification to the front sound traps. Correct?

A Yes.

Q Okay. What about the S60, when was the S60 introduced, what model year?

A The vehicle involved in the action is generation 1 S60.

Q Okay.

A And I believe that was introduced in 2001.

Q Okay. So my question is, any model year 2004 and later S60 that was produced by Volvo, did any of those vehicles ever require some sort of modification to the front sound traps?

A We have never specified any modification to that vehicle on sound traps, no.

Q S80, when was the S80 introduced?

A 1999.

Q Similar question, which is, from 2004 and later when Volvo produced an S80 2004 and later model year, were any of those vehicles or did any of those vehicles ever require a subsequent modification to the front sound traps?

A For clarification, that would be generation 1 S80.

Q Okay.

A And the answer would be, no, we did not specify any changes to the sound trap for repair in the field or any other modification.

Q Do you understand my question?

A I'm getting there.

Q Okay. What about V70? And if you'd like me to ask those questions, that's fine.

A No, no, V70, I understand.

V70 we never required the retailer or informed the retailer of any modifications that they should make to the V70.

Q Okay. The XC90 we've gone over.

A Yes.

Q And the V50 we've also gone over. Okay.

Changes to the sound traps in, and I'm reading from the answer to number 26, it says: After that changes to the part were made by supplier.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
NEWARK DIVISION
CASE NO. 2:10-cv-04407-DMC-MF

JOANNE NEALE, KERI HAY, KELLY McGARY, SVEIN A. BERG, and GREGORY P. BURNS, individually and on behalf of others similarly situated,

Plaintiffs,

vs.

VOLVO CARS OF NORTH AMERICA, LLC, and VOLVO CAR CORPORATION,

Defendants.

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DEPOSITION OF: MARTIN HANSSON

WEDNESDAY, MAY 23, 2012

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A. Clogged. And I have to go back to the other question when you asked me if I remember who brought that question, it was the PFU team. I think that guy at that time. And here's why I don't know. It could have been two guys. I don't remember which one of them. It is Peter Hardenberg (ph) or Clause Henrik (ph).

Q. With a K?

A. With a C. Nordstrom.

Q. You were told that the front sound plugs in the XC90s were getting clogged with debris. Were you told what remedy that was going to be or did they leave that up to your group to determine?

A. I don't remember. I think there was a discussion and.

Q. Ultimately, was there a decision made about the redesign of the front sound plugs in the XC90s?

A. Ultimately.

Q. Ultimately, was there a decision made as to what changes were going to occur?

A. Yes.

Q. And what decision was made?

A. To cut three millimeters.

Q. And was that based on a recommendation of your group at the time, the SU running changes group?

A. It was based on -- it was based on a test, and yes.

Q. Okay.

A. Part of the decision was based on a test.

Q. Okay. So, there was some sort of testing that was conducted to determine whether this redesign would be effective?

A. It was a test to see that we didn't cause other possible issues.

Q. Okay. Such as what?

A. Noise in the compartment of the car.

Q. Was there any testing performed to determine whether this redesign, this cutting off of the three millimeters, would resolve the issue?

MR. HERZOG: Object to the form of the question.

Q. You could answer.

MR. HERZOG: You could answer.

A. The major test was done from the noise, and from that test the decision was to go only three millimeters.

Q. I want to know if there was anything else that went into the November 2004 technical journal that's not provided in the written response here to question No. 9?

A. I don't know. I wasn't involved in creating the journal.

Q. Okay. In regard to question No. 10, where it says permanent action was instituted regarding the November 2004 temporary action, and the week referenced is week 22 in November 2005.

A. Yes.

Q. Is that information that you provided?

A. Correct.

Q. How is it that you determined when the new part number was began to be placed in the XC90 vehicles?

A. Internal Volvo system.

Q. Volvo's internal systems actually track when the new part began to be installed in the vehicles?

A. Correct.

Q. Question 11 asks why VCNA or VCC determined there was a need to increase (or enlarge) the sound trap opening. And the answer

provided says, to further reduce the incidents of clogged sunroof drains. VCC determined, without creating unnecessary noise in the cabin, it would be feasible to enlarge the sound trap opening which would allow for even greater drainage through the sunroof drain. Do you see that?

A. I see that.

Q. Is that information you provided in response to that question?

A. Also, during discussions.

Q. And again, you didn't have any sort of written response to this question?

A. No.

Q. Do you know who made the final decision to have the enlarged sound trap opening? VCC?

A. VCC.

Q. Do you know who at VCC made the final decision to institute that change?

A. It was a joint decision by that project, the running changes project I mentioned earlier.

Q. Who else was on that with you?

A. It was the team leader at that point, PVT, same as QAT, CMQ. I guess you heard