UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Chambers of
Joseph A. Dickson
United States Magistrate Judge

Martin Luther King, Jr. Federal Bldg.
& U.S. Courthouse
50 Walnut Street
Newark, New Jersey 07102
(973-645-2580)

LETTER ORDER

April 20, 2016

To counsel of record via ECF

Re: Neale, et al. v. Volvo Cars of North America, LLC, et al.
Civil Action No.: 10-4407 (JLL) (JAD)

Counsel:

This will address Defendants' Motion for Discovery Regarding Plaintiffs' Renewed Motion for Class Certification. (ECF No. 335). The Court conducted oral argument on Defendants' application on March 28, 2016. As discussed in greater detail below, Defendants' motion is **GRANTED IN PART AND DENIED IN PART**.

RELEVANT PROCEDURAL HISTORY

By Order dated March 26, 2013, former District Judge Dennis Cavanaugh resolved several pending motions in this case, including Plaintiffs' motion for class certification. (See ECF No. 280). Specifically, Judge Cavanaugh certified six separate statewide sub-classes, but found that it would be inappropriate to certify a national class. (See id.; see also March 26, 2013 Opinion, ECF No. 279). Defendants thereafter sought leave to file an interlocutory appeal, which the United States Court of Appeals for the Third Circuit granted. (ECF No. 297).

The Court of Appeals resolved Defendants' appeal on or about July 22, 2015, and vacated Judge Cavanaugh's March 26, 2013 Order in its entirety. (ECF No. 302). The Court of Appeals

transmitted its Mandate (and the Opinion underlying its decision) on August 13, 2015, (ECF No. 309), and filed a corrected Opinion on August 26, 2015. (ECF No. 311-2).

The Court of Appeals vacated Judge Cavanaugh's March 23, 2013 Order on two grounds. First, the Court found that Judge Cavanaugh erred in failing to specify which specific claims and defenses would be subject to class treatment. (Id. at 31-34). In describing the scope of its remand on this issue, the Court of Appeals wrote: "We will vacate and remand 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 [Watchel v. Guardian Life Ins. Co. of America, 453 F.3d 179 (3d Cir. 2006)] requires." (Id. at 34). Second, the Court of Appeals found that Judge Cavanaugh "erred . . . by failing to analyze predominance in the context of Plaintiff's actual claims." (Id. at 39). In defining the scope of its remand on this point, the Court wrote: "[t]he 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." Finally, the Court of Appeals rejected Defendants' argument that, based on the Supreme Court's holding in Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013), class plaintiffs must demonstrate that their "damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." (ECF No. 44). The Court of Appeals noted that the Supreme Court's decision in Comcast was specific to antitrust cases, and found that claims may be resolved on a class-wide basis even if the Court needs to make individual damage calculations for the various members. (Id. at 45-47).

Following remand, the parties filed several submissions addressing how the District Court should implement the Court of Appeals' decision, including whether Defendant would be permitted to engage in additional discovery before Plaintiffs renewed their application for class

certification. (ECF Nos. 319-322, 324-26, 328-29). By Order dated November 19, 2015, this Court issued an Order intended to address the parties' concerns and move this case forward. (ECF No. 332). Specifically, this Court required Plaintiffs to serve (but not file) their renewed motion for class certification by December 22, 2015. (Id. at 1). On or before January 22, 2016, Defendants were required to either serve an opposition to Plaintiffs' motion or, alternatively, to make an application "for limited discovery based solely on Plaintiffs' motion as read in connection with the Court of Appeals' decision." (Id.). The point of that exercise was to ensure that neither the Court nor Defendants had to make any decisions regarding potential, additional discovery in a vacuum. Rather, the Court gave Defendants an opportunity to evaluate Plaintiffs' arguments and to determine exactly what additional discovery they believed might be necessary.

On January 19, 2016, Defendants filed a motion seeking two categories of additional discovery. (ECF No. 335). That motion is now fully briefed. (ECF Nos. 338, 339). The Court held oral argument on Defendants' motion on March 28, 2016. (ECF No. 342).

DISCUSSION

Defendants' request for additional fact discovery is fairly narrow, in that they only seek discovery on two general areas. First, Defendants want discovery regarding the named plaintiffs' experiences with their class vehicles during the period since Judge Cavanaugh initially ruled on Plaintiffs' application for class certification. (Def. Br. at 5-6, ECF No. 335-2). Second, Defendants seek discovery concerning the circumstances of certain named Plaintiffs' sales of their class vehicles (i.e., whether they disclosed the alleged defects in question to the secondhand purchasers). (Id. at 6-7). Defendants believe that they can finish the requested discovery in approximately three months. (Id. at 8). Plaintiffs contend that estimate is unrealistic because, if the Court permits Defendants to take additional discovery, Plaintiffs "must do the same so as not

to be prejudiced." (Pl. Br. at 14, ECF No. 338). Plaintiffs suggest that they would "need to take depositions and could not do so until Defendant updated its previous document production", (id.), a process that might take months. Plaintiffs provide no explanation, however, for their contention that they will need additional documents and depositions from Defendants for class certification purposes if and only if Defendants are permitted to seek the limited discovery at issue here. Plaintiffs also argue that, if the Court permits the parties to reopen expert discovery, that decision will almost certainly "set this case back at least a year," as the parties will want to re-inspect the vehicles in question and engage in "extensive Daubert briefing and other tasks." (Id.). The Court will address both categories of discovery Defendants have proposed in turn.

a. Discovery Concerning the Named Plaintiffs' Recent Experiences

Defendants first request leave to conduct discovery on "Plaintiffs' experiences with their vehicles since they were deposed in 2011 or 2012." (Def. Br. at 4, ECF No. 335-2). Essentially, Defendants seek to learn whether Plaintiffs experienced additional sound trap-related water leaks in the interim. They argue that "the occurrence or non-occurrence of additional water leaks is probative of whether the risk for a water leak is the same in all vehicles in the proposed class," noting Plaintiffs' position (in their renewed motion for class certification) that "the mere existence of a sound trap constitutes a class-wide defect in all class vehicles." (Id. at 5). Defendants contend that "if different sounds traps perform differently, that is plainly relevant to the question of whether there is a class-wide defect." (Id.). Defendants also note that this information is particularly crucial 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." (Id.). In essence, Defendants argue that, if a Plaintiff received a modified sound trap, and did not experience any clogs or leaks thereafter, that cuts against Plaintiffs' claim

that every sound trap is defective, and is also "directly relevant to the questions of whether Plaintiffs can prove their claims with common evidence and whether common issues predominate over individual issues." (Id. at 6). Defendants seek to obtain this discovery through "a few document requests and interrogatories to each named Plaintiff",[1] but note that they may also need "brief telephonic follow up deposition[s] regarding [Plaintiffs'] responses." (Id. at 7).

Plaintiffs first argue that Defendants' proposed discovery "has no relevance to the standing, typicality or adequacy of any of the proposed class representatives." (Pl. Br. at 7, ECF No. 338). Defendants do not suggest that it does. (Def. Reply at 3, ECF no. 339). Instead, Defendants rely on the "common evidence" / predominance argument noted above. Defendants also note that Volvo modified the sound traps in each of the named Plaintiffs' cars, and argue that "Plaintiffs' class definitions include vehicles with and without modified sound traps, meaning that the occurrence or non-occurrence of additional water leaks in Plaintiffs' and class members' vehicles that contain these modified sound traps bears directly on whether there is a common defect in all class vehicles." (Id. at 2-3). In essence, Defendants want to examine whether the original sound traps and modified sound traps have performed differently, as Plaintiffs allege that they are all similarly defective.

Plaintiffs also contend that that "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." (Pl. Br. at 7, ECF No. 338). The Court notes that Defendants have not made such a claim.

[1] Defendants have, in fact, submitted four proposed supplemental interrogatories and three proposed supplemental document requests for the Court's consideration. (ECF Nos. 336, 336-1).

Upon careful consideration of the parties' arguments, the Court finds that Defendants' proposed discovery regarding the named Plaintiffs' recent experiences with their class vehicles is relevant to the issues raised in Plaintiffs' renewed motion for class certification and discoverable under the broad scope of Federal Rule of Civil Procedure 26. Defendants may therefore serve their proposed interrogatories and document requests on Plaintiffs' counsel on or before April 26, 2016. Plaintiffs shall respond to that supplemental, written discovery on or before May 24, 2016. Defendants may conduct supplemental, telephonic depositions of the named Plaintiffs, limited to two hours in duration and the topics set forth in Defendants' supplemental interrogatories and document requests, on or before July 15, 2016.

b. Discovery Concerning the Named Plaintiffs' Sales of their Class Vehicles

Defendants note that named Plaintiffs Taft and Hay have sold their vehicles in the years since they were last deposed and are, therefore, no longer held out as class representatives. Defendants seek leave to depose the individuals who purchased the vehicles from Taft and Hay (and potentially other named Plaintiffs) so as to probe whether those Plaintiffs disclosed the alleged defect in their class vehicles prior to selling them. (Def. Br. at 6-7, ECF No. 335-2). Defendants contend that such discovery is necessary because those Plaintiffs had both previously alleged that Volvo's efforts to repair the defect were unsuccessful and that their vehicles would "inevitably" leak again. (Id.). Defendants argue that, if Hay and Taft failed to disclose the alleged defect, then the purchasers might have legal claims against them, thereby "rendering their facts different from other class members." (Id. at 7).

Plaintiffs argue that, even if Taft and Hay's disclosure / non-disclosure might put them in slightly different circumstances than other class members, such "atypical circumstances" only bear on whether a potential class representative meets Rule 23's typicality and adequacy requirements.

(Pl. Br. at 10, ECF No. 338). Plaintiffs further contend that, because neither Taft nor Hay remains a class representative, such considerations are irrelevant. (Id. at 10-11). Defendants argue that information from the individuals who purchased the Taft/Hay vehicles is critical, not because it bears of considerations of adequacy or typicality, but because it may establish a lack of cohesion within the class (i.e., if some owners who resold vehicles to other members of the class without disclosing the alleged defects in question, it is possible that some members of the class will have claims against other members of the class), "a factual variation that, when combined with others, defeats predominance." (Def. Reply Br. at 5, ECF No. 339). Defendants have not cited any case law demonstrating that potential intra-class claims may defeat predominance. (See generally ECF Nos. 335-2, 338). Indeed, it would seem that the discovery Defendants seek here is more properly addressed to the merits of Plaintiffs' claims and, more specifically, whether Plaintiffs will ultimately be able to establish that Defendants' alleged conduct caused the injuries in question for all class members.[2] (See Def. Reply Br. at 5, ECF No. 339) ("Whether Plaintiffs Taft and Hay disclosed the water leaks in their vehicles and their belief that future leaks are inevitable is relevant to 'predominance' because any purported damages the purchasers (who may be class members) incurred would be caused by Hay or Taft's conduct rather than Volvo's.").[3]

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[2] In considering Defendants' intentions for this discovery, the Court must acknowledge that Defendants were previously on notice that named Plaintiff Svein Berg admittedly sold his class vehicle without disclosing the alleged defect to the secondhand purchaser, and that Defendants did not utilize that information in opposing Plaintiffs' original motion for class certification. (Pl. Br. at 12-13, ECF No. 338; Tr. of March 28, 2016 Arg. at 29:10-31:3, ECF No. 342).

[3] Defendants have not adequately explained how the named Plaintiffs' potential lack of disclosure to secondhand purchasers might impact the causation analysis in this case. Such a discussion is important in light of Plaintiffs' allegations that Defendants had a duty to make a public disclosure of the purported defect sufficient to put all prospective purchasers (including secondhand purchasers) on notice of those defects.

In any case, to the extent Defendants' proposed inquiries regarding the named Plaintiffs' disclosures of the alleged defects in their class vehicles does carry some probative value in connection with Plaintiffs' motion for class certification, the Court notes that Defendants can obtain the information they seek (i.e., whether the named Plaintiffs disclosed the alleged defects to secondhand purchasers) through supplemental written discovery requests to the named Plaintiffs themselves. Indeed, Defendants' proposed discovery requests to the named Plaintiffs, which, as noted above, the Court has now authorized Defendants to serve, includes both interrogatories and a document request addressed to this specific issue. (See ECF Nos. 336, 336-1). To the extent Defendants require additional information, the Court has also permitted them to conduct limited, follow-up depositions of the named Plaintiffs by telephone, if necessary. Defendants do not suggest what additional, relevant information they might obtain exclusively from the purchasers. Permitting such depositions would therefore be out of proportion to the current needs of this case and, therefore, would run afoul of Federal Rule of Civil Procedure 26. The Court therefore denies Defendants' request to depose those purchasers.

CONCLUSION

Based on the foregoing, Defendants' Motion for Discovery Regarding Plaintiffs' Renewed Motion for Class Certification, (ECF No. 335), is **GRANTED IN PART AND DENIED IN PART** as follows:

1. Defendants may serve their proposed interrogatories and document requests, (ECF Nos. 336 and 336-1), on Plaintiffs' counsel on or before April 26, 2016;

2. Plaintiffs shall respond to those supplemental interrogatories and document requests on or before May 24, 2016;

3. Defendants may conduct supplemental, telephonic depositions of the named Plaintiffs, each limited to two hours in duration and the topics set forth in Defendants' supplemental interrogatories and document requests, on or before July 15, 2016;

4. Defendants' request to depose secondhand purchasers of the named Plaintiffs' class vehicles is **DENIED**; and

5. Defendants shall file a status report regarding this supplemental discovery on or before July 8, 2016.

SO ORDERED

4/20/16

JOSEPH A. DICKSON, U.S.M.J.

cc: Hon. Jose L. Linares, U.S.D.J.