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By ECF

Honorable Joseph A. Dickson
United States Magistrate Judge
United States District Court
U.S. Post Office & Courthouse
50 Walnut Street
Newark, NJ 07102

Re: *Neale, et al. v. Volvo Cars of North America, LLC, et al.*
Civil Action No.: 2:10-cv-04407-JLL-JAD

Dear Judge Dickson:

Together with Hardin, Kundla, McKeon & Poletto, we represent the Defendants in this matter. We write to reply to the contentions in Plaintiffs' letter to you dated October 2, 2015. (ECF No. 326.) The Court should reject Plaintiffs' proposed approach to the conduct of this litigation on remand for the reasons explained below.[1]

First, Plaintiffs devote much of their brief recounting the previous discovery in this case and then conclude that the record for their new class certification motion should be frozen or limited to that which existed in 2012. Critically, Plaintiffs fail to cite a single case in support of this novel position and Volvo's research disclosed none.

Instead, Plaintiffs ask the Court to turn a blind eye to key facts (some known already, some that may be disclosed in discovery) bearing on class certification because a scheduling order was adopted years ago under far different circumstances. But as previously explained, under Plaintiffs' misguided view, they could not even file a new class certification motion because the deadline has expired. Plaintiffs provide no rationale for using only portions of the scheduling order to constrain the pursuit of truth in this case. As the Third Circuit has cautioned, "Rule 16 was not intended to function as an inflexible straightjacket on the conduct of litigation."

[1] We understand the Court may decline to consider this letter if it denies Volvo's request to file a reply, but Volvo is filing this letter as soon as practicable after receiving Plaintiffs' October 2 letter due to Plaintiffs' disingenuous claim that Volvo is attempting to delay these proceedings.

Morton Int'l, Inc. v. A.E. Staley Mfg. Co., 343 F.3d 669, 684 (3d Cir. 2003). Yet that is precisely what Plaintiffs seek by contending that the record must be frozen and no discovery can take place.

Plaintiffs' position is both unsupported and unfair. By way of example, 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 expired prior to the first trial. That approach makes no sense, would impair the search for truth, and is contrary to experience as well as precedent. *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 from Fourth Circuit 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, the district court has a continuing obligation to ensure that class certification is appropriate at all stages of the litigation. As part of that obligation, courts "regularly re-evaluate and/or decertify classes where subsequent facts call into question whether continued class action treatment is proper." *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"). Even though the Third Circuit vacated Judge Cavanaugh's class certification decision, Plaintiffs seek to preclude evidence of subsequent facts occurring since the vacated decision. Under settled Third Circuit authority cited above, this Court had and has a continuing obligation to re-assess class certification on the basis of factual developments in the case. What this means is that even if the Third Circuit had affirmed the class certification decision, the Court would have had an obligation to re-assess the propriety of certification and Volvo necessarily would have the right to obtain new evidence and to present other evidence showing that

certification was no longer proper.[2] *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 complete evidentiary record on the motion for class certification, and creating a complete evidentiary record necessitates rejecting Plaintiffs' position.[3]

Second, Plaintiffs ignore an important aspect of the Third Circuit's standing analysis in *Neale*. Although the Third Circuit held that only the named Plaintiffs must establish Article III standing, *see Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 359 (3d Cir. 2015), as Judge Smith noted, the Supreme Court has granted certiorari on the issue of whether a class can be certified if "the class contains hundreds of members who were not injured and have no legal right to any damages." *Id.* at 360 n.2. The Supreme Court likely will decide that issue this term. Plaintiffs' approach improperly seeks to prejudice Volvo's right to make a complete record on this issue by freezing the record that existed three years ago.

But even if the Supreme Court adopts Judge Smith's view of Article III standing in the context of class actions, the fact that two of the named Plaintiffs sold their vehicles since Judge Cavanaugh's now-vacated ruling, and the circumstances of the sales, present key evidence on the question of whether a class should be certified. Plaintiffs cannot secrete this key evidence from the case merely by withdrawing Taft or Hay as class representatives. The evidence is relevant regardless of their status, because their claims have not been dismissed—indeed, they remain Plaintiffs as well as putative class members. These two Plaintiffs, like the other named Plaintiffs, claim they experienced water leaks caused by a sunroof drain allegedly clogged by debris. They

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[2] Plaintiffs' position also flatly contradicts what they said in 2011, when they agreed that there would be additional discovery following class certification. (*See* ECF No. 42 at 11 ("Following the adjudication of Plaintiffs' Motion for Class Certification, the parties will meet and confer and submit a joint submission regarding, *inter alia*, the amount of time necessary to complete merits discovery and a proposed pre-trial and trial schedule").) In other words, the parties recognized four years ago the need for additional discovery following the initial class certification proceedings. As explained in this letter brief, the passage of time and changed posture following appeal mandates that the parties be given an opportunity to explore any new or different evidence that was not available previously in response to a new class definition that has never been presented before.

[3] 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.

seek damages for their out-of-pocket costs and for the hypothetical cost of repair that purportedly will eliminate any possibility of a water leak from a clogged sunroof drain. Yet, since they no longer own a vehicle, they have no need for this repair, just like the thousands of vehicles in the proposed class that have been retired to the junkyard. If they experienced no further instances of a clogged sunroof drain, or if they did not disclose the purported defect to the subsequent purchaser of their vehicles, those facts are directly relevant to Plaintiffs' claims of a classwide defect. There is no basis for withholding this highly relevant evidence from Volvo and the Court.

Similarly, the experiences of the other named Plaintiffs since their last depositions were taken is directly relevant to the claim of a classwide defect. A number of the named Plaintiffs received modified sound traps from Volvo dealers after experiencing a water leak. These sound traps had openings that were slightly larger than the sound trap openings used as original equipment in some model Volvos owned by some named Plaintiffs. These modified sound traps also were incorporated as running production changes in later Volvo models. If the named Plaintiffs who received modified sound traps experienced no further instances of clogged sunroof drains or leaks, the evidence is clearly relevant and probative on the issue of defect and refutes the opinion of Plaintiffs' engineering expert that all sound traps in all Volvo vehicles are defective. There is no basis for withholding this evidence from the Court either.

Third, Plaintiffs' representation that they intend to "narrow" the class definition in the new motion does not help them in their quest to prevent any new evidence from being introduced in opposition to class certification. The Third Circuit is the first Circuit Court to rule that the inclusion of uninjured class members should be evaluated under Rule 23's typicality and adequacy prongs:

> Rather than shoehorn these questions into an Article III analysis, we will continue to employ Rule 23 to ensure that classes are properly certified. In this case, certification requires the District Court to determine what differing factual and legal circumstances might mean for the class: Can the named plaintiffs adequately represent the class if they owned or leased vehicles that did not suffer water damage pursuant Fed. R. Civ. P. 23(a)(4)? Are the claims of the representatives typical of the class pursuant to Fed. R. Civ. P. 23(a)(3)? And do any relevant distinctions affect the commonality and predominance analyses pursuant to Fed. R. Civ. P. 23(a)(2) and (b)(3)?

Neale, 794 F.3d at 368; *see also Vista Healthplan, Inc. v. Cephalon, Inc.*, 2015 WL 4737288, at *4 (E.D. Pa. Aug. 4, 2015) ("*Neale* recognized that the presence of uninjured class members may raise Rule 23 issues"). Volvo made its decisions on experts and evidence in light of the state of

the law in 2012, at a time when it could not have known that the Third Circuit would state expressly that Rule 23 requires an evaluation of evidence (necessarily including expert evidence) regarding the typicality and adequacy of named Plaintiffs when evaluating the impact of uninjured class members on class certification.

Freezing the record, however, holds Volvo to a state of legal knowledge that could not be acquired until the Third Circuit Court ruled this summer. That is fundamentally unfair and contrary to any rational purpose of a scheduling order. Regardless of the content of Plaintiffs' new, "narrowed" class definition, this change in class certification law must allow Volvo to introduce, among other things, statistical evidence that bears on the typicality and adequacy prongs. *See Hartis v. Chicago Title Ins. Co.*, 694 F.3d 935, 948 (8th Cir. 2012) (change in the law, newly discovered facts, or any other changed circumstance constitute good cause to modify scheduling order); *see also Blair v. Scott Specialty Gases*, 283 F.3d 595, 610 (3d Cir. 2002) (ordering district court to allow limited discovery to determine whether party could meet new legal standard); *Pumpco, Inc. v. Schenker Int'l, Inc.*, 204 F.R.D. 667, 668 (D. Colo. 2001) (finding good cause to modify scheduling order based on new information and a recent change in the law); *cf. United States v. Sci. Applications Int'l Corp.*, 301 F.R.D. 1, 2, 4-5 (D.D.C. 2013) (holding that contractor established good cause for reopening discovery regarding government's continued use of contractor's work product after appellate court held that damages instruction in first trial was flawed and established different measurement of damages for new trial).

Fourth, Plaintiffs ignore the content of Mr. Bratic's opinion and their decision to abandon him before Judge Cavanaugh. Volvo did not designate an expert on the issue of classwide injury or damages because Mr. Bratic did not offer testimony supporting classwide injury and damages. He admitted in his report that his opinion did not apply to all proposed class members. Volvo therefore had no need to disclose a damages expert to rebut an expert who did not meet Plaintiffs' burden on class certification. *See In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316 n.14 (3d Cir. 2008) ("'The party seeking certification bears the burden of establishing that *all* requirements of Rule 23 have been satisfied'") (citation omitted). Plaintiffs apparently recognized this by abandoning Mr. Bratic before Judge Cavanaugh. (*See* ECF No. 270 at 5.) Had Plaintiffs defined the class differently, or had Mr. Bratic offered a different expert report, Volvo would have made a different decision. And if Plaintiffs now propose a "narrower" class definition that eliminates, for example, scrapped vehicles and those without sunroofs, that new class definition will require different evidence, particularly if Plaintiffs rely on Mr. Bratic's opinions as purported evidence of classwide injury and damages. Although we do not know for certain because Plaintiffs refuse to tell us their newly minted class definition, it appears that Plaintiffs may well seek to narrow the class to fit Mr. Bratic's opinion that they previously disclaimed, while precluding Volvo from offering expert and other evidence in opposition to the new class definition. A scheduling order, however, is not a litigant's tool for obscuring the truth. *See Morton Int'l*, 343 F.3d at 684; *cf. Gillum v. United States*, 309 F. App'x 267, 270 (10th Cir.

2009) ("The parties to a litigation are not merely players in a game, trying to catch each other out. Rather, litigation should promote the finding of the truth, and, wherever possible, the resolution of cases on their merits").

Fifth, Plaintiffs' frozen-record contention is contrary to the Third Circuit's opinion in support of the decision to vacate and remand Judge Cavanaugh's Order:

> 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, 794 F.3d at 373. 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." *Id.* (emphasis added).

Sixth, Plaintiffs oddly suggest that the Circuit Court's denial of Volvo's petition for a writ of mandamus and Judge Cavanaugh's interlocutory rulings on *Daubert* motions preclude additional discovery in this case. But it is well settled that an unsuccessful petition for a writ of mandamus without an opinion on the merits is neither preclusive nor law of the case. The mandamus petition thus has no bearing on these proceedings. *FOCUS v. Allegheny Cnty. Court of Common Pleas*, 75 F.3d 834, 842 (3d Cir. 1996) ("Where the extraordinary jurisdiction of a court is unsuccessfully invoked and the court does not expressly adjudicate the tendered merits issue, the general rule is that there is no preclusive effect"); *United States v. Dean*, 752 F.2d 535, 541-42 (11th Cir. 1985) (denial of petition for mandamus is neither *res judicata* nor law of the case because of the writ's extraordinary nature and the denial was without statement of reasons). Judge Cavanaugh's *Daubert* rulings likewise are irrelevant because Volvo had no appeal as of right regarding those interlocutory rulings. *See* 28 U.S.C. § 1292; *see also Oliver v. Orange Cnty., Fla.*, 456 F. App'x 815, 819 n.2 (11th Cir. 2012) ("the district court's original *Daubert* ruling was a non-appealable interlocutory order, which the district court had not primed for interlocutory appeal"). Even further, Judge Linares can re-examine Judge Cavanaugh's rulings if there are changes in the facts or law, or if they are clearly erroneous. *See Pub. Interest Research Grp. of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 117 (3d Cir. 1997) (Court can consider issues previously decided if "(1) new evidence is available; (2) a supervening new

law has been announced; or (3) the earlier decision was clearly erroneous and would create manifest injustice"); *see also Florham Park Chevron, Inc. v. Chevron U.S.A., Inc.*, 1990 WL 61787, at *3 (D.N.J. May 9, 1990) ("'denial of a motion for summary judgment by one judge does not foreclose grant of summary judgment by another judge'") (quoting 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4478, at 794 (1981)); *Aero Servs. Int'l, Inc. v. Panfile*, 1990 WL 66191, at *2 (D.N.J. May 15, 1990) ("courts have held that denial of a motion for summary judgment by one judge does not foreclose grant of summary judgment by another judge") (citing cases). The mandamus petition and *Daubert* decisions only distract from the core issue presented—whether the 2012 scheduling order should artificially restrict the evidentiary record before the Court on the new class certification motion that will be based on a definition that Plaintiffs have never proposed before.

Finally, Plaintiffs contend that Volvo's proposed schedule is unrealistic because they will need additional discovery. Putting aside the fact this argument flies in the face of their contention that the record is frozen as of two years ago, Volvo will happily work with Plaintiffs on a schedule that advances this case expeditiously and fairly. But when Volvo tried to engage Plaintiffs on precisely this type of schedule, Plaintiffs refused.

Volvo's goal all along has been to work to present to the Court a full and accurate record with respect to whatever new class certification motion Plaintiffs ultimately present. Although Volvo, like Plaintiffs, is interested in moving this case forward as expeditiously as possible, speed should not be elevated at the expense of a complete factual record.[4]

[4] An example of Plaintiffs' irrational effort to prevent any additional evidence in opposition to class certification is their claim that Volvo could have presented expert evidence on the issue of ascertainability in connection with Plaintiffs' first motion for certification. (ECF No. 326, at n.13.) However, because the issue of ascertainability arises from the criteria for membership in Plaintiffs' proposed statewide classes—criteria that Plaintiffs have *never* before provided—Volvo will be able to offer the expert evidence only when (or if) Plaintiffs ever decide to specify those criteria.

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For these reasons Volvo respectfully requests the Court enter the scheduling order Volvo proposed in its opening brief or, alternatively, order that the parties meet and confer on a schedule that allows a reasonable period of discovery for all parties, including any additional expert discovery, followed by briefing on the merits of Plaintiffs' new class definition and certification motion.

Respectfully,

Peter W. Herzog

PWH:sek
cc: Counsel of Record (by ECF)