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April 23, 2010

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Re: Lola Cars International Limited v. Krohn Racing, LLC, et al.
C.A. No. 4479-VCN
Lola Cars International Limited v. Krohn Racing, LLC, et al.
C.A. No. 4886-VCN
Date Submitted: April 12, 2010

Dear Counsel:

Plaintiff Lola has moved to reopen and supplement the trial record. Trial took place on January 5 and 6, 2010, during which the Court heard the in-court testimony of seven witnesses—four for the plaintiff and three for the defendants.¹ Lola asks that the Court consider additional testimony not presented at trial. This evidence, according to Lola, undermines the credibility of two of Defendant Krohn Racing's key witnesses: Defendant Jeff Hazell and Tracy Krohn.

¹ Several additional witnesses have testified by way of deposition.

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I.

Lola's motion to reopen the record is a matter for the Court's discretion.² The Court will allow the introduction of additional evidence when doing so will serve the interests of fairness and substantial justice.³ A number of factors will inform the Court's decision: the materiality of the evidence to be admitted;⁴ the moving party's ability to have introduced the evidence at trial;⁵ the length of time that has passed between the conclusion of trial and the request to reopen the record;⁶ the need for judicial efficiency;⁷ and prejudice to the opposing party.⁸

² *Fitzgerald v. Cantor*, 2000 WL 128851, at *1 (Del. Ch. Jan. 10, 2000).

³ *El Paso Natural Gas Co. v. Amoco Prod. Co.*, 1992 WL 43925, at *10 n.15 (Del. Ch. Mar. 4, 1992).

⁴ *In re Estate of Surian*, 1990 WL 100794, at *7 n.1 (Del. Ch. July 12, 1990).

⁵ See *Fitzgerald*, 2000 WL 128851, at *1.

⁶ Compare *Daniel D. Rappa, Inc. v. Hanson*, 209 A.2d 163, 166 (Del. 1965) (affirming Court of Chancery's refusal to reopen the record when motion was made seventeen months after hearing) with *El Paso Natural Gas*, 1992 WL 43925, at *10 n.15 (granting motion to reopen the summary judgment record submitted four weeks after oral argument, but noting that the motion "perhaps could have been submitted more rapidly after oral argument").

⁷ *Fitzgerald*, 2000 WL 128851, at *2 (citing the need for post-trial proceedings to reconcile disputes over the relevance of the offered evidence as a critical reason for denying the defendants' motion to reopen the record).

⁸ *Id.*

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II.

Lola's first request relates to Krohn Racing's allegation that Lola had inappropriately interfered with the shipment of a race-car chassis—specifically Chassis # 8—from Multimatic Motorsports in Canada to Proto-Auto at the latter's headquarters in Georgia. Hazell testified that he had emailed his contact at Multimatic to request the chassis's delivery, but that he also spoke to Larry Holt, Multimatic's vice-president and managing director, about the chassis and its shipment to Proto-Auto. Hazell further claimed that Holt had told him that he personally helped load what Hazell believed was Chassis # 8 on a truck for delivery to Georgia.⁹

Lola has tendered an affidavit by Holt, as well as some documentary evidence, that it contends contradicts Hazell's testimony. According to Holt, Hazell instructed Holt's subordinate, Barry McSherry, to deliver the chassis to Proto-Auto in Georgia.¹⁰ A packing slip filed along with Holt's affidavit supports his statement that

⁹ Tr. 479-82. The Court notes that certain pages of the trial transcript have been attached to the parties' respective motions as exhibits. For convenience, the Court cites to the trial transcript.

¹⁰ Pl.'s Mot. to Re-Open & Suppl. the Trial Record, Ex. B (Aff. of Laurence Holt ("Holt Aff.") ¶ 5).

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McSherry processed Hazell's delivery request.¹¹ Holt also states that he did not help load Chassis # 8 onto the truck for shipment to Proto-Auto.¹²

The Court first notes that Holt's affidavit is inadmissible hearsay;¹³ for the information described above to be admitted to the trial record Holt's deposition presumably would have to be taken in Canada, or Holt could travel to Delaware to testify before the Court.¹⁴ In any event, procurement of his testimony in an admissible form would not be worth the effort. Holt's statements do little to impugn Hazell's credibility. At trial, Hazell struggled to remember from whom at Multimatic he ordered the chassis or whether he spoke about the chassis's shipment with a senior Multimatic executive; after several questions, Hazell stated that he "believe[d]" he placed his order by email to his "contact" (who may have been McSherry); he then

¹¹ *Id.*

¹² Holt Aff. ¶ 6. Indeed, Holt explained that he was in the United Kingdom at the time Hazell made his request, and Lola has filed an Air Canada boarding pass along with Holt's affidavit to establish his location within the United Kingdom during the relevant time period. *Id.*

¹³ See D.R.E. 801(c), 802; see also *Atr-King Eng Fin. Corp. v. Araneta*, 2006 WL 4782272, at *8 n.50 (Del. Ch. Dec. 21, 2006) (excluding a post-trial affidavit as inadmissible hearsay because its contents had not been tested by cross-examination).

¹⁴ See Ct. Ch. R. 32(a)(3).

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clarified that he spoke with Holt about the shipment of Chassis # 8.¹⁵ Importantly, Hazell never actually testified that he instructed Holt to ship Chassis # 8; he only claimed that he spoke with Holt about the chassis issue.¹⁶ Moreover, Hazell testified that he “[thought] it was Chassis 8,” which Holt claimed to have helped load onto the truck for delivery to Proto-Auto. Given Hazell’s uncertainty, there is little to be taken from Holt’s affidavit that seriously undermines Hazell’s credibility.¹⁷

Additionally, Lola had the opportunity to depose Holt and acquire his testimony before trial. Lola’s failure to procure Holt’s testimony sooner belies the premium our courts place on the diligent submission of witness testimony at, and not after, trial.¹⁸ Lola claims that it did not anticipate Hazell’s testimony because it

¹⁵ Tr. 479-82.

¹⁶ *Id.* at 480. It appears as though Hazell and Holt talked about the shipment of Chassis # 8 some two months after it was sent to Georgia. Aff. of Jeffrey Hazell (“Hazell Aff.”), Ex. A. In any event, Holt does not dispute that he and Hazell did have a conversation about Chassis # 8 and the Proto-Auto/Multimatic relationship generally after the Chassis # 8 shipping fiasco.

¹⁷ It seems likely that Hazell was mistaken in his testimony about Holt’s efforts to load Chassis # 8; that mistake, however, is of little moment.

¹⁸ See *Kennedy v. Emerald Coal & Coke Co.*, 42 A.2d 398, 406 (Del. 1945) (“No explanation is offered of the failure to produce the testimony of the witness at the trial. Want of diligence is manifest.”); see also *Fitzgerald*, 2000 WL 128851, at *2 (placing great weight on the moving party’s failure either to “vigorously pursue the issue at deposition,” or to “develop the issue at deposition and follow[] up at trial”).

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believed, based on pre-trial deposition testimony offered by Jim Steggar, that it was Steggar and not Hazell who requested shipment of Chassis # 8 from Multimatic. Lola was therefore surprised when Hazell explained at trial that he in fact requested the chassis's delivery. Be that as it may, Proto-Auto's relationship with Multimatic was put at issue by Krohn Racing's counterclaim. Lola therefore had an independent reason to take Holt's deposition apart from simply procuring testimony to contradict Hazell.¹⁹

The relevance of Holt's testimony and supporting documents is outweighed by the inconvenience of acquiring his testimony in an admissible form and Lola's failure to adduce this evidence before, or during trial. Permitting the admission of Holt's testimony would therefore not serve the interests of fairness and substantial justice.

¹⁹ Indeed, Lola suggests in its reply brief that Hazell improperly requested the delivery of Chassis # 8 by ordering it over Holt's objections; this in turn, according to Lola, undermines Krohn Racing's counterclaim that Lola wrongfully prevented Multimatic from shipping Chassis # 8 to Proto-Auto. Pl.'s Reply Mem. in Supp. of its Mot. to Re-Open & Suppl. the Trial Record at 2. Lola cannot have it both ways: it cannot both attempt to excuse itself from failing to procure Holt's testimony before trial while, at the same time, suggesting that this testimony is relevant to the case outside of any impeachment effect. If Multimatic's opposition to the release of Chassis # 8 is that important to the substance of Lola's case, then perhaps Lola should have been prepared to present such evidence at trial.

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III.

Lola next offers evidence that Krohn Racing counterfeited Lola parts or otherwise made its own parts for the Proto-Auto cars that it races in the Grand-Am circuit. At deposition, Tracy Krohn testified that Krohn Racing has never duplicated Lola parts, machined them, or caused them to be machined by someone else.²⁰ Additionally, at trial, Hazell unequivocally denied that Krohn Racing has ever made its own parts for the Proto-Auto vehicles that it drives in the Grand-Am circuit.²¹ When asked whether Krohn Racing has ever made its own brake ducts, he backtracked a bit and stated that the “only parts Krohn Racing makes are parts when they are trying to develop something,” but denied that Krohn Racing had ever made a brake duct modeled after a Lola brake duct.²²

²⁰ Pl.’s Mot. to Re-Open & Suppl. the Trial Record, Ex. D (Krohn Dep. at 82-83). At trial, Krohn denied that Krohn Racing had “made Proto-Auto parts or counterfeited any Proto-Auto parts.” Tr. at 565-66.

²¹ *Id.* at 445 (“Q. Is it true or false? Krohn Racing has made its own parts for the Proto-Auto race care that it drives in the Grand Am circuit; correct? A. *That’s false.* Q. It’s never happened? A. *Never happened.*”).

²² Tr. at 445.

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One week after trial, Stephen Charsley and Ian Moreton, both Lola representatives, visited the Proto-Auto facility. According to Lola, Charsley and Moreton obtained objective evidence of counterfeiting. They found a gearbox suspension plate that had been manufactured by a third party, but onto which Krohn Racing had hand-etched a corresponding Lola part number.²³ Jim Steggar purportedly advised Charsley and Moreton that Proto-Auto possessed at least three additional gearbox suspension plates, also sourced from a third party. Moreton claims that the suspension plate was listed among parts that had previously been purchased from Lola, and he suggests that Krohn Racing intended for the parts to be sold to Proto-Auto customers as Lola parts.²⁴

Charsley and Moreton also found five sets of carbon fiber brake duct assemblies that Proto-Auto had purchased from Lola. According to Moreton, Hazell caused Proto-Auto to deliver these assemblies to Krohn Racing, which then used the carbon fiber models as a template to manufacture counterfeit brake ducts from

²³ Pl.'s Mot. to Re-Open & Suppl. the Trial Record, Ex. E (Aff. of Ian Moreton ¶ 4).

²⁴ *Id.* at ¶¶ 4, 6. Lola sponsors no evidence suggesting that any sales occurred.

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aluminum.²⁵ The aluminum brake ducts are apparently used in the Proto-Auto race cars that Krohn Racing drives on the Grand-Am circuit, while the original carbon fiber models manufactured by Lola (actually manufactured by Multimatic at Lola's request) remain in Proto-Auto's inventory. Lola has offered an affidavit by Moreton attesting to these facts, along with comparative photographs of Lola and Proto-Auto's gearbox suspension plates.

Again, the Court begins by noting that Moreton's affidavit constitutes inadmissible hearsay. As with the evidence that Holt could offer, formal testimony, whether by deposition or in court, would be necessary; however, unlike Holt's testimony, here, the materiality and delay issues are more to Lola's favor. Indeed, Lola has a reasonable excuse for why the information could not be presented at trial. It appears as though the entire issue of counterfeiting arose late in the discovery process, specifically during Jim Steggar's deposition held on November 18, 2009. Moreover, this matter has been on an expedited schedule since its inception; the Court is willing to give Lola more leeway to submit post-trial evidence on an issue

²⁵ *Id.* at ¶ 8.

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that first came to light late in the discovery process than Lola might otherwise have received if this case had been on a more typical schedule.²⁶

Additionally, Lola's evidence of counterfeiting to some extent undermines Hazell's credibility, at least more so than the proffered Holt testimony. Hazell stated unequivocally that Krohn Racing has never made its own parts for the Proto-Auto race cars that it drives in the Grand-Am circuit. That statement was apparently not accurate.²⁷ Hazell stated in a post-trial affidavit that Krohn Racing indeed manufactured the vehicles' aluminum brake duct receptacles to ready the cars for a race in April 2008.²⁸ The materiality of these facts can only fully be assessed in the

²⁶ Lola claims that, once its actions were filed, Hazell denied Charsley access to Proto-Auto's inventory stores. Lola therefore had little, albeit likely sufficient, time between Steggar's deposition on November 18, 2009, and trial held on January 5, 2010, to seek, and to obtain an order compelling, inspection of the premises pursuant to Court of Chancery Rule 34.

²⁷ It appears as though Krohn's statement that Krohn Racing has never "made Proto-Auto parts" was also not accurate, although that comment contains ambiguity not found in Hazell's testimony. Indeed, Krohn also testified at trial that Krohn Racing "has made some of its own parts." Tr. at 565. While Krohn's comments may, in fact, touch upon the issue of whether Krohn Racing had the right to manufacture parts for its Proto-Auto race cars under the Operating Agreement, the Court is not of the view that this testimony materially impairs his credibility.

²⁸ Hazell Aff. at ¶ 15. According to Hazell, Krohn Racing did not copy the aluminum brake ducts from the carbon fiber models shipped from Lola, but instead prototyped the aluminum models itself. Hazell stated that "[t]his action was necessary to overcome a brake overheating problem and to prove out the duct following difficulties at Proto-Auto's first race at Homestead in March 2008."

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context of the merits-based disposition of this action; for the time being, it is sufficient that Lola has presented evidence that Hazell testified inaccurately and that Lola had a reasonable explanation for its failure to acquire this evidence prior to trial.²⁹

With the parts claim, the materiality of the evidence outweighs any inconvenience or prejudice to the nonmoving party; this is especially so when considered in light of Lola's difficulty in procuring this evidence prior to trial. Thus, Lola has demonstrated that the admission of the proffered parts evidence would serve the interests of justice.

IV.

For the reasons stated above, Lola's motion to re-open the trial record is granted in part, and denied in part.³⁰

Id. Although Hazell's explanation may adequately refute Lola's charge that Krohn Racing copied the brake duct design from Lola's carbon fiber models, it does little to soften his testimony at trial, during which he claimed that Krohn Racing *never* made its own parts for the Proto-Auto race car.

²⁹ Given Lola's success on the brake duct assembly issue, the Court will allow in evidence of the outsourced gearbox suspension plates as well.

³⁰ Counsel are requested to confer as to the most efficient means of supplementing the record. It may be that much can be accomplished by way of stipulation.

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IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap

cc: Register in Chancery-K