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VICE CHANCELLOR

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

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December 13, 2011

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Re: *Encite LLC v. Soni, et al.*,
Civil Action No. 2476-VCG

Dear Counsel:

I have Encite's Motion to Allow Expert Testimony, together with the Director Defendants' Response. In its Motion, the Plaintiff asked me to set aside prior rulings in this case by then-Chancellor Chandler, the presiding judicial officer, that preclude Plaintiff's use of an expert to testify on damages at trial. For the reasons stated below, I deny the Plaintiff's Motion.

The facts of this case are stated at length in my Memorandum Opinion of November 28, 2011,[1] and I provide here only a factual timeline necessary to address the instant Motion. Consistent with the original Scheduling Order in this matter, Encite was to file its expert report by December 17, 2010. Trial was scheduled for September 12, 2011. Encite failed to file its expert report by the time specified in the Order, and the Defendants sought exclusion of the Plaintiff's expert testimony as to damages as a result. On March 2, 2011, Encite filed a Motion to Modify the Scheduling Order to permit it to file its delinquent expert report. This Motion was filed two and one-half months after the deadline set forth in the Scheduling Order.

In considering that Motion, the then-Chancellor analyzed it under Court of Chancery Rule 6(b): "If a motion to extend a deadline is made *after* the expiration of the prescribed period, the Court may grant the extension 'where the failure to act was a result of excusable neglect'."[2] The Chancellor carefully examined the question of excusable neglect and found that the Plaintiff's neglect had not been excusable. The Chancellor gave six reasons supporting his decision that an equitable finding of excusable neglect was not appropriate, the last and least of which was that "allowing Encite to submit its expert report now would 'work some prejudice' to the

[1] *See Encite LLC v. Soni*, 2011 WL 5920896, at *3-*18 (Del. Ch. Nov. 28, 2011).
[2] *Id.* at *2; *see also* Ch. Ct. R. 6(b).

defendants."[3] The sole and minor prejudice cited is that the Defendants would suffer a compressed time within which to submit case-dispositive motions. While the Defendants had cited a number of other instances of prejudice they believed would follow from granting the Plaintiff's Motion, the Court found such prejudice, whether it existed or not, *immaterial*:

> [I]n light of the time this case has been pending and the amount of time the Plaintiff has had to address this expert deadline and request modification of the July 10, 2010 Scheduling Order by the Court, any further delay and even a mild showing of prejudice to Defendants "weighs against a finding of 'good cause' necessary for a modification."[4]

The Plaintiff sought reargument of the April 15 Letter Opinion, arguing that the Court had failed to properly apply *Drejka v. Hitchens Tire Service Inc.*[5] The *Drejka* decision held that effective dismissal as a sanction for violating a scheduling order was, in that case, an abuse of discretion.[6] In

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[3] The reader is referred to the Letter Opinion of April 15, 2011, for a full statement of the Chancellor's rationale. Briefly, the Chancellor found the Plaintiff's actions to be not excusable because (1) despite Plaintiff's counsels' stated belief that they had reached an agreement with the Defendants to extend the expert deadline, no such agreement had in fact been reached; (2) Plaintiff's counsels' prior insistence on written agreements on discovery issues and written confirmation of scheduling issues contradicted their assertions that an oral agreement had been reached; (3) Encite had not notified opposing counsel or the Court of this alleged oral agreement or its request for modification of the Scheduling Order, despite "plenty of time and multiple opportunities" to do so; (4) any agreement reached between counsel would not have been effective without Court approval of the modification; (5) "Encite's counsel missed their own unilaterally extended deadline" for production of the expert report; and (6) "some prejudice" was worked on the Defendants. *Encite*, 2011 WL 1565181, at *3-*4.

[4] *Id.* at *4 (citation omitted).

[5] *Drejka v. Hitchens Tire Svc. Inc.*, 15 A.3d 1221 (Del. 2010).

[6] *Id.* at 1224.

considering the Plaintiff's motion for reargument in this action, however, the Court found that, because a damage theory remained available to the Plaintiff, the imposed sanction—disallowing expert testimony—was not the equivalent of dismissal, and thus the doctrine announced in *Drejka* did not apply.[7]

After the Chancellor retired, this case was reassigned to me. Several parties filed motions for summary judgment, all of which I have denied by Memorandum Opinion of November 28, 2011. In that Opinion, I found that the Chancellor's denial of Encite's ability to rely on an expert for damages at trial, as announced in the April 15 and 26 Letter Opinions of this Court, was law of the case.[8] The Plaintiff has now asked me to set aside this finding and the two prior decisions of the Court.

A prior ruling becomes the law of the case and controls subsequent progress of the litigation except where (1) the prior ruling was clearly wrong; (2) there has been an important change of circumstances; or (3) equitable concerns render application of the law of the case doctrine inappropriate.[9] The Plaintiff argues that circumstances have changed sufficiently to require the prior opinions to be set aside. The Plaintiff points

[7] *Encite LLC v. Soni*, 2011 WL 1709850, at *2 (Del. Ch. Apr. 26, 2011).
[8] *Encite*, 2011 WL 5920896, at *25.
[9] *Sullivan v. Mayor of Elsmere*, 23 A.3d 128, 134 (Del. 2011).

to the fact that the Chancellor noted that granting the Plaintiff's Motion might cause the Defendants to suffer "some" prejudice, given the compressed pretrial schedule, and that such compression has now been relieved since this matter has not yet been rescheduled for trial.

As pointed out above, however, in his detailed Opinion, the Chancellor set out six reasons why the behavior of the Plaintiff warranted the exclusion of expert testimony. The changed circumstance the Plaintiff notes goes only to the last and least important of these. The Plaintiff has not attempted to argue that changed circumstances exist with respect to the remaining five grounds for the Chancellor's finding that the Plaintiff's behavior was not entitled to a finding of "excusable neglect."

For the foregoing reason, the Plaintiff's Motion to Allow Expert Testimony is denied. The parties should contact chambers to schedule a five day trial in this matter.

To the extent that the foregoing requires an order to take effect,

IT IS SO ORDERED.

Sincerely,

/s/ Sam Glasscock III

Sam Glasscock III