WILLIAM B. CHANDLER III
CHANCELLOR

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

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

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David A. Jenkins
Michele C. Gott
Kathleen M. Miller
Smith, Katzenstein & Jenkins LLP
800 Delaware Ave., 10th Floor
P.O. Box 410
Wilmington, DE 19899

Gregory B. Williams
Sheldon K. Rennie
Nicholas G. Kondraschow
Fox Rothschild LLP
Citizens Bank Center
919 North Market Street, Suite 1300
Wilmington, DE 19899

Kurt M. Heyman
Patricia L. Enerio
Proctor Heyman LLP
1116 North West Street
Wilmington, DE 19801

Mary F. Caloway
Buchanan Ingersoll & Rooney
1000 West Street
Suite 1400
Wilmington, DE 19801

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

Dear Counsel:

I have considered your submissions on plaintiff's motion to amend the Scheduling Order regarding expert deadlines in this case.[1] Specifically, plaintiff Encite, LLC has moved to modify the Scheduling Order—after the deadline in question had already passed—so as to be permitted to submit its expert report after the specified date provided in the Order. Because no good cause exists for Encite's failure to submit its expert report in a timely manner and failure to request an extension before the deadline had already passed, the motion is denied.

[1] Briefing was completed on April 6, 2011. On April 7, 2011, plaintiff requested oral argument on the motion, but that request is denied as no additional argument is necessary. The parties have adequately set forth the factual and legal issues and argued their respective positions in their submissions. Oral argument would not aid the decisional process.

BACKGROUND AND PROCEDURAL HISTORY

This case involves the wind-down and asset sale of a company called Integrated Fuel Cell Technologies, Inc. ("IFCT"). Encite filed its initial complaint in October 2006 against Rob Soni, James Dow, Rick Hess and Franklin Weigold (collectively, "Director defendants") and Echelon Ventures, L.P., Echelon Ventures Special Limited Partners I, L.P., and Echelon Ventures II, L.P. (collectively "Echelon," and together with Director defendants "defendants"). An amended complaint was filed in March 2007. Defendants' motion to dismiss was denied (in part) in September 2007 based on the allegations of the Amended Complaint, and discovery began in 2008. In July 2010, depositions were still ongoing and so, at the request of the parties, this Court entered a Scheduling Order on July 30, 2010. The Scheduling Order provided for fact discovery to be completed by November 15, 2010. The Order further provided for opening expert reports of plaintiff (Encite) and defendants and third party plaintiffs (Echelon) to be submitted by December 17, 2010. Answering expert reports were due by February 18, 2011; expert depositions were to be completed by March 31, 2010; dispositive motions and submissions are due by May 15, 2011; and a five-day trial in this matter is scheduled to begin September 12, 2011.

The parties ran into some scheduling difficulties which made completing fact discovery by the November deadline problematic (witnesses were from the Boston area requiring Delaware counsel to travel to Boston for depositions, and coordinating the schedules of four different counsel made finding dates that worked for everyone problematic). By early November, counsel all agreed that fact depositions would not be completed by the November 15 deadline, so they proceeded to schedule depositions into December and January.

Recognizing that fact discovery would not be completed before December 17, 2010—when Encite and Echelon were to submit their expert reports—counsel for Encite (Ms. Miller) allegedly told counsel for Director defendants (Mr. Williams) and counsel for Echelon (Mr. Leonetti) that Encite would be unable to produce its expert report before the end of fact discovery.[2] According to Ms. Miller, Mr. Williams indicated that that was fine so long as the dispositive motion deadline was unaffected, and Echelon's counsel "asserted no objection."[3] Based on this "conversation," Encite's counsel believed that there was an agreement with defendants to extend the expert deadlines in the Scheduling Order.

[2] Pl.'s Opening Br. Ex. 12 (Miller Aff.), at ¶ 3.
[3] *Id.*

Mr. Williams and Mr. Leonetti, on the other hand, had "absolutely no recollection of this conversation" ever occurring.[4] Ms. Miller did not follow up or confirm the agreement in writing, and the parties did not request a modification to the Scheduling Order.

ANALYSIS

When an act is required to be done within a specified period of time, the Court may, in its discretion, grant an extension or enlarge the time period for good cause shown. Court of Chancery Rule 6(b) is very clear: 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 the result of excusable neglect."[5] Although not defined in the rule, "excusable neglect" has been interpreted by the Delaware Supreme Court in other circumstances to mean "neglect which might have been the act of a reasonably prudent person under the circumstances."[6] For the reasons explained below, plaintiff's failure to meet the specified deadline here was *not* the result of excusable neglect. I therefore deny plaintiff's motion to belatedly amend the Scheduling Order regarding expert deadlines.

A Scheduling Order is an order of the Court. In this case, the Scheduling Order in question began as follows: "[I]t is hereby ORDERED that the following Scheduling Order shall govern further proceedings in this action, *unless modified by further Order of the Court*."[7] That language is crystal clear on its face. There is no question that the only way for the parties to modify the Scheduling Order is to request such modification be made by Order of the Court; absent any such action, the Scheduling Order remains in full effect—it *shall* govern. A reasonably prudent person, therefore, should know that regardless of an agreement (real or imaginary) with opposing counsel to extend a deadline in the Order, such agreement by itself is of no effect; the extension is, quite simply, not recognized unless submitted to the Court for approval and granted by the Court. If counsel mutually agrees, independently (i.e., without Court approval), to an extension of a deadline, and both sides amicably work the timing out and stick to the agreement, it may be that the Court would be unaware of the modification—so long as it does not affect trial dates or submission dates to the Court, there would be no issue for the Court to address. If that is not the case, though, simply because counsel might

[4] Pl.'s Opening Br. Ex. 11.
[5] Ch. Ct. R. 6(b).
[6] *Dolan v. Williams*, 707 A.2d 34, 36 (Del. 1998) (quoting *Cohen v. Brandywine Raceway Assoc.*, 238 A.2d 320, 325 (Del. 1968)).
[7] Scheduling Order at 1 (July 30, 2010) (emphasis added).

independently agree to extend a deadline does not formally modify the Scheduling Order, and any informal agreement—particularly one that is not in writing and that the parties dispute—is unenforceable. Modification would have required Court approval, which the parties did not seek.[8] Informal agreements among counsel do not operate, *ex proprio vigore*, to modify a Court's order.

Accordingly, whether or not Encite's counsel actually believed that an agreement with defendants' counsel had been reached (on this point, I give Encite's counsel the benefit of the doubt that they did in fact believe it), a reasonably prudent person would have made sure—in writing—that such agreement was, in fact, reached, and then counsel would have *submitted that agreement and a proposed revised Scheduling Order to the Court for approval*, ideally all before the expiration of the specified time period.

Encite's counsel did not confirm the agreement with opposing counsel, though. They did not submit a revised Scheduling Order reflecting any agreed-upon extension to the Court for approval. They sat by and said nothing when Echelon filed *it's* opening expert report by the original Scheduling Order deadline. They said nothing when they attended the deposition of Alfred Woodworth, Echelon's managing partner, who had prepared Echelon's expert report. Finally, they missed their own self-imposed extension and submitted their expert report a full week after that, in a rather brazen example of chutzpah.

The course of action taken by plaintiff's counsel does not come close to the "reasonably prudent person" standard in this situation and, thus, their actions are not in any way "excusable" within the meaning of excusable neglect under Rule 6(b)(2). Accordingly, plaintiff's thirteenth-hour attempt to modify the Scheduling Order is denied. There are numerous reasons for this outcome.

First, I find that no agreement had in fact been reached with defendants' counsel to extend the expert deadline, despite plaintiff's counsel's belief that one had. As noted above, plaintiff's counsel allegedly made a comment to defendants' counsel, off the record, at the end of a long day of depositions, that Encite would not be able to produce its expert report until after fact discovery. From this alleged conversation, "Encite's counsel understood that the parties had reached an informal

[8] Encite's counsel "understands that the more appropriate method" to request a deadline extension would have been to seek relief from the Court. Pl.'s Opening Br. 9. That is not only the "more appropriate" method, though—it *is* the method to formally modify the Scheduling Order. Thus, having not taken that step, Encite's counsel now must show that its failure to do so was a result of excusable neglect, which it cannot do.

agreement on expert deadlines, just as they had done with the fact discovery deadline."[9] Then, Encite's counsel simply "forgot" to follow up that conversation in writing. Neither counsel for defendants nor counsel for Echelon had any recollection whatsoever of the conversation ever taking place.

Second, Encite's counsel's behavior throughout the discovery period contradicts their behavior here. Encite's counsel has insisted that Director defendants and Echelon put all agreements on discovery issues in writing. Any reasonably prudent person who has engaged in that course of action all along would no doubt insist that defendants agree to this alleged agreement in writing as well. Furthermore, Encite's counsel asked for and confirmed in writing other scheduling issues in this case, including a request for an extension of time to respond to Echelon's outstanding discovery requests *the same week* that counsel allegedly reached agreement on the issue of expert deadlines.[10] Surely when Encite's counsel confirmed one request in writing, a reasonably prudent person would have confirmed in writing the other, arguably more important, extension as well. It defies belief and logic that they would not do so.

Third, Encite's counsel has had plenty of time and multiple opportunities to notify opposing counsel and the Court about this alleged agreement and their request for modification of the Scheduling Order. First, when the parties initially "agreed" to extend the deadline; next, when Echelon submitted *it's* expert report by the Scheduling Order's deadline; and then, during the following month after the December 17 deadline had passed, when numerous emails were exchanged regarding the deposition of Mr. Woodworth, who had prepared Echelon's expert report (again, which was submitted on December 17, 2010). Despite all of these opportunities to clarify an agreement in writing and request Court approval to modify the Scheduling Order over the last several months, at no point did Encite confirm its agreement in writing or request an extension by Court order.

Fourth, had an agreement actually been reached, it would have made no difference anyway—for the reasons explained above, without Court approval of any modification, the Scheduling Order would still be in effect and the December 17, 2010 deadline, as far as the Court is concerned, would remain the governing deadline for opening expert reports.

Fifth, Encite's counsel missed their own unilaterally extended deadline. The reason for this, according to plaintiff, was because Mr. Jenkins, who was taking the

[9] Pl.'s Opening Br. 2.
[10] Leonetti Decl. ¶ 6 and Ex. B.

lead on working with Encite's expert, apparently was "pulled into an expedited matter the week the report was to be submitted and unfortunately, there was not sufficient time to complete the report by March 11."[11] This is unpersuasive for three reasons. One, while the Court certainly understands that counsel represent several clients and work on multiple cases at once, Mr. Jenkins could have gotten assistance in preparing the expert report or on his other matter—the presence of another matter does not change the "sufficient time" Encite had to know that its expert report was due. Two, the parties have not submitted the report to the Court, but according to Echelon, the report submitted on March 18 was dated March 1, 2011.[12] Encite does not address the date discrepancy in its reply brief. Accordingly, Encite provides no reason why the expedited matter Mr. Jenkins was pulled into had any impact on his ability to submit the expert report by March 11 in this matter. Three, when Encite was unable to meet its March 11 deadline, it should have notified the Court and again requested extension of the deadline.[13]

Sixth, "although perhaps not to the degree claimed" by defendants, allowing Encite to submit its expert report now would "work some prejudice" to defendants.[14] The expert reports of both Encite and Echelon relate to the value of IFCT's assets as of April 2006; the opening expert reports were to be exchanged simultaneously. Encite now has had the benefit of reviewing Echelon's expert report and questioning Echelon in deposition concerning that report. Moreover, although technically Encite does not request to modify the deadline for submitting dispositive motions, allowing Encite to submit its expert report now would prejudice Echelon—only nine days would separate the deadline to depose Encite's expert and the deadline to submit dispositive motions and, thus, Echelon argues that it would in effect require an extension of the dispositive motion deadline.

Director defendants claim that they would also be prejudiced by Encite's late expert report submission, because (1) they will not have the time originally allotted

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[11] Pl.'s Reply Br. 11. Mr. Jenkins informed defendants that Encite would not be submitting the report by its extended deadline of March 11 in an email dated that same day, at 6:30 p.m., writing that he had "been unexpectedly involved in an expedited action this week, and cannot get the report to you today. We will provide it before the end of next week." Leonetti Decl., Ex. H.

[12] Echelon's Answering Br. 11 (citing Leonetti Decl. ¶ 13).

[13] *See Jackson v. Hopkins Trucking Co., Inc.*, 2010 WL 3397478, at *3 (Del. Aug. 30, 2010) (finding no abuse of discretion by the trial court in excluding an expert report submitted after the deadline, when "the Report was late pursuant to the original scheduling order and late even under the parties' agreed-upon extension . . . . 'Parties must be mindful that scheduling orders are not merely guidelines but have full force and effect as any other order of the [] Court.'").

[14] *See Candlewood Timber Group LLC v. Pan Am. Energy LLC*, 2006 WL 258305, at *5 (Del. Super. Jan. 18, 2006).

between opening expert reports and submission of dispositive motions to analyze the issues and prepare for trial, (2) they will have to incur additional attorneys' fees to address the motion, (3) because when Encite did not produce its opening report on December 17, Director defendants allegedly stopped all activity related to potential experts and "the pool of potential experts that existed as of December 17, 2010 is likely much narrower" at this time.[15] While Encite contests whether and to what degree any of these arguments actually prejudice defendants,[16] in light of the amount of time this case has been pending and the amount of time 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 mild showing of prejudice to defendants "weighs against a finding of 'good cause' necessary for a modification."[17]

For all the foregoing reasons, plaintiff has failed to demonstrate "excusable neglect," and the record does not support a finding of good cause to modify the Scheduling Order.

Finally, as an "alternative" argument, Director defendants have requested that Encite be ordered to immediately produce copies of certain documents. In short, Director defendants made a discovery request during a deposition, and Encite's counsel took the position that the request had to be put in writing. I agree with Encite that Director defendants' request relating to those documents is unrelated to the pending motion, and I thus do not address that request here.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

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[15] Director Defs.' Answering Br. 7-8.
[16] Pl.'s Reply Br. 11-13.
[17] *Candlewood Timber Group*, 2006 WL 258305, at *5.