IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FAIRSTEAD CAPITAL MANAGEMENT LLC and FCM AFFORDABLE LLC, Plaintiffs, v. WILLIAM BLODGETT, Defendant.	C.A. No. 2022-0673-JTL

OPINION ADDRESSING MOTION TO EXCLUDE

Date Submitted: November 2, 2026
Date Decided: November 18, 2026

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LASTER, V.C.

The defendant has moved for an order precluding the plaintiffs from relying at trial on (i) three experts belatedly swapped in long after the expert disclosure deadline and (ii) documents belatedly produced so the plaintiffs' experts could rely on them. This decision grants the motion.

I. FACTUAL BACKGROUND

The facts are drawn from the submissions in connection with the motion.[1] What follows are not formal factual findings, but rather how the record appears at this stage of the case.

A. Fairstead Terminates Blodgett.

Between 2013 and 2021, Stuart Feldman, Jeffrey Goldberg, and William Blodgett co-owned and operated an affordable housing business under the trade name "Fairstead."[2] Fairstead sponsored affordable housing deals and received a carried interest in those investments.

As part of his compensation, Blodgett received a portion of Fairstead's carried interest. Fairstead allocated its carried interest through two vehicles: plaintiffs

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[1] Citations in the form "Opp. ¶" refer to the plaintiffs' opposition brief. Dkt. 253. Citations in the form "Ex." refer to exhibits submitted in support of the defendant's motion. Dkts. 251, 255. Page references cite internal pagination whenever possible.

[2] The fund complex comprised a variety of entities, including Fairstead Capital Management LLC, FSC Realty Management LLC, FSC EF&F LLC, Fortitude Properties LLC, FSC-JD2 Member LLC, FCM-JD2 LLC, and special purpose vehicles for each project. For simplicity, this decision uses the term "Fairstead" to refer to the business collectively.

Fairstead Capital Management LLC and FCM Affordable LLC (the "LLCs"). Blodgett received member interests in the LLCs.

After the relationship between the parties soured, Fairstead purported to terminate Blodgett for cause and cancel his interests in the LLCs.

B. The Arbitration And This Litigation

Blodgett responded by demanding arbitration under his employment agreement. Blodgett contended that Feldman, Goldberg, and Fairstead breached his employment agreement by (i) terminating him without contractually valid grounds and (ii) canceling his equity interests.

It takes a measure of cooperation to start an arbitration, and Fairstead moved slowly. On the day before the answer was due, Fairstead asked for an extension. Barely one week later, on June 10, 2022, Fairstead served an answer stating that the respondents would be filing suit in Delaware. Between June 16 and July 7, 2022, JAMS personnel repeatedly emailed Fairstead to confirm the status of the case and to collect the initial arbitration fee. JAMS made four separate requests. No one responded. On July 6, Blodgett paid Fairstead's share of the fee.

On July 21, 2022, Fairstead's lawyers notified JAMS that Fairstead had retained new counsel. Blodgett had been preparing to seek to compel arbitration in New York state court. After conferring with Fairstead's new counsel, he agreed to delay his filing by five days. When Fairstead remained recalcitrant, he filed a petition in the New York State Supreme Court for the County of New York to compel arbitration pursuant to C.P.L.R. 7503(a).

On August 1, 2022, Fairstead caused the LLCs to file this action. Among other relief, they sought declarations that they had properly cancelled Blodgett's interests.

The parties disputed whether the claims in this case should be arbitrated. The court held that disputes arising under Blodgett's employment agreement had to be arbitrated but that any claims under the LLCs' governing agreements had to proceed here.[3]

C. The General Scheduling Order

The parties initially planned to litigate this case to trial while simultaneously pursuing the arbitration. In April 2023, Blodgett served requests for production of documents. Knowing the value of his interests would be at issue, Blodgett asked for documents "sufficient to show" (i) "the value of all assets [Fairstead] claim[s] to have cancelled"[4] and (ii) the "assets" and "value" of each plaintiff LLC.[5] Fairstead objected that Blodgett's valuation-related requests were overly broad. Because those requests asked for documents "sufficient to show," those objections were unfounded and should not have been made. Fairstead nevertheless agreed to produce documents subject to those objections and provided some valuation-related discovery.

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[3] *Fairstead Cap. Mgmt. LLC v. Blodgett*, 288 A.3d 729 (Del. Ch. 2023).

[4] Ex. 1, RFP 49 ("the value of all assets Plaintiffs claim to have cancelled").

[5] *Id.* at RFPs 58–59 ("assets" and "value" of "Fairstead Capital Management LLC" and "FCM Affordable LLC").

Blodgett also sought documents "concerning Stuart Feldman's capital contributions to Fairstead."[6] Fairstead refused to produce documents in response to that request, claiming the capital contributions were "not at issue" and therefore the discovery was irrelevant.[7]

The parties agreed to a fact-discovery cutoff of June 14, 2024. On July 25, with fact discovery complete, the parties submitted a proposed schedule designed to bring this action to trial in December 2024 (the "General Scheduling Order"). That order memorialized the already passed fact-discovery cutoff.[8]

The General Scheduling Order called for the identification of expert witnesses on July 26, 2024.[9] It envisioned exchanges of expert reports and the completion of the expert discovery phase by October 2024.

On July 26, 2024, the court granted the General Scheduling Order. That same day, in compliance with the General Scheduling Order, both sides identified their experts. Fairstead identified Scott Drago and Mark Dunec, the same experts Fairstead was relying on in a factually overlapping case involving John C. Tatum, III, a former Fairstead employee who worked with Blodgett.

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[6] *Id.* at RFP 47.

[7] Ex. 2, Response to RFP 47.

[8] Dkt. 169.

[9] *Id.*

In accordance with the deadlines in the General Scheduling Order, Blodgett sought leave to move for summary judgment. Over Fairstead's opposition, the court granted leave on September 19, 2024.

On the same day, the court entered a minute order asking about the prospect of a trial in December 2024. The minute order stated:

> The court is puzzled why it would try this case until after (i) a decision in the arbitration and (ii) a decision in the factually related case involving Tatum. It seems logical that factual findings from the arbitration will be binding on the parties and that factual findings in the Tatum action would have collateral estoppel effect on Fairstead. Within 14 days, the parties will submit a joint letter of up to 3,000 words stating their positions on deferring trial until after both (i) and (ii).[10]

The court thus envisioned deferring *the trial* until after the arbitration and the *Tatum* litigation. The court did not refer to or contemplate modifying any other deadlines in the General Scheduling Order. Nor did the court refer to or contemplate reopening any phases of the litigation that the parties had already completed, such as fact discovery.

In October 2024, the parties submitted a joint letter in which they agreed to defer the trial in this case until after the arbitration and the *Tatum* litigation. The parties also agreed to "extend the schedule for expert discovery consistent with any deferral of the trial date."[11] The parties did not reference any other modifications to

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[10] Dkt. 177.

[11] Dkt. 180 at 4.

the General Scheduling Order. They did not contemplate reopening any already-completed phases of the litigation, such as fact discovery.

From the court's standpoint, this case was informally paused at that point pending the outcome of the arbitration and the *Tatum* action.[12] But the litigation was not formally stayed, and the parties continued with some tasks. Blodgett, for example, followed up on discovery that Fairstead had agreed to provide subject to objections. The parties also briefed and argued the motion for partial summary judgment. After hearing argument, the court held that the LLCs' governing agreements did not authorize the LLCs to cancel Blodgett's interests.[13]

D. The Award And The Cross-Motions For Summary Judgment

On April 2, 2025, the arbitrator issued an award. Based on the arbitrator's rulings, the parties filed cross-motions for summary judgment. As part of its motion, Fairstead asked the court to revisit its earlier grant of summary judgment. Those motions remained pending in October 2025, when the court issued its post-trial decision in the *Tatum* litigation.[14] That decision rejected Dunec's valuation because, among other things, Dunec "did not appraise the properties himself," offered

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[12] *See* Dkt. 239 at 19 ("The court stayed this litigation so that the arbitration could go first.").

[13] *See* Dkts. 198, 199.

[14] *Tatum v. Fairstead Affordable LLC*, 347 A.3d 1221 (Del. Ch. 2025).

"criticisms of [the opposing expert's report that] were often unsupported," and "lacked comparable experience with [relevant types of] partnerships."[15]

Meanwhile, Blodgett continued to follow up on discovery that Fairstead agreed to produce subject to objections. Among other things, Blodgett sought to confirm that Fairstead did not have additional valuation materials relating to a group of assets known as the "NYS8 Portfolio." Fairstead represented that it had conducted a diligent search and that "all documents in Fairstead's possession, custody, or control responsive to these requests have been produced."[16]

E. The Summary Judgment Opinion And The Damages Phase

In May 2026, the court issued an opinion granting Blodgett's motion for summary judgment. In the concluding paragraph, the court stated:

> The court believes that the next step in the litigation involves crafting a remedy for Fairstead's improper forfeiture of Blodgett's interests in non-pending deals. The parties must prepare a joint letter that either proposes a schedule for litigating the remedy or identifies other issues that must be addressed and proposes a schedule for litigating them as well.[17]

When issuing the opinion, the court did not delve into how far the litigation had already progressed. The court expected the parties to cooperate on a path forward.

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[15] *See id.* at 1257.

[16] Ex. 4 at 1.

[17] *Fairstead Cap. Mgmt. LLC v. Blodgett*, 359 A.3d 598, 624 (Del. Ch. 2026), *appeal refused*, 2026 WL 2664355 (Del. Sep. 10, 2026).

Blodgett contacted Fairstead and proposed that the parties accept the valuation findings from the *Tatum* litigation. He offered to confer on any remaining issues and a schedule for resolving them. Fairstead declined to confer.

The parties were scheduled to submit a joint letter to the court on June 12, 2026. Four minutes before the deadline, Fairstead provided Blodgett with its position on the damages phase. In essence, Fairstead proposed staying the damages phase pending an interlocutory appeal from the summary judgment opinion.

The parties submitted their joint letter and outlined their competing views. They also attached competing forms of order to implement the summary judgment opinion.

Blodgett proposed "that the parties confer and identify any remaining issues that need to be resolved in connection with calculating Blodgett's damages, exchange positions on those issues, and—if necessary—submit reports and briefing on those issues followed by a short evidentiary hearing."[18] Fairstead predicted a "costly damages phase."[19] Fairstead stated that it would seek to appeal the summary judgment ruling immediately, but that if the court wished to set a schedule for a damages phase, "it should follow the standard expert discovery process in this Court's

[18] Dkt. 242 at 3.

[19] *Id.* at 4.

sample scheduling stipulation: opening expert reports, rebuttal expert reports, and expert depositions."[20]

Neither party proposed additional fact discovery. Neither party proposed a date for revisiting their prior identification of experts. Both sides implicitly recognized that they had completed fact discovery and identified their experts. When making those tactical choices, Fairstead already had the benefit of the post-trial decision in the *Tatum* litigation and its assessment of Dunec's testimony.

The court adopted Blodgett's proposed form of implementing order for the summary judgment ruling. The parties then negotiated a scheduling order for the damages phase. Believing that fact discovery was complete and that the parties had identified their experts, Blodgett proposed to serve his expert report just two weeks later. Fairstead agreed to that schedule without mentioning any possibility of changing its experts or producing additional documents.

On July 30, 2026, the parties submitted their agreed-upon form of scheduling order. It provided as follows:

(a)	Blodgett to Exchange Opening Expert Report and production of all materials relied upon by Expert and not produced previously by parties	August 14, 2026
(b)	Fairstead to exchange Rebuttal Expert Report and production of all materials relied upon in Rebuttal Expert Report and not produced previously by parties	September 15, 2026

[20] *Id.* at 5.

(c)	Blodgett to Exchange Reply Expert Report and production of all materials relied upon by Expert and not produced previously by parties	October 5, 2026
(d)	Completion of expert discovery, including expert depositions (except for any expert discovery subject to a motion to compel or motion for a protective order pending on this date)	October 26, 2026
(e)	Blodgett to file Opening Brief	November 9, 2026
(f)	Fairstead to file Answering Brief	December 10, 2026
(g)	Blodgett to file Reply Brief	December 23, 2026
(h)	Hearing/Trial on Damages	To be scheduled by the Court

The court entered the schedule as an order (the "Damages-Phase Scheduling Order").[21]

F. Fairstead Produces Additional Documents And Changes Its Experts.

On Saturday, August 8, 2026, four business days before Blodgett's opening expert report was due, Fairstead made a surprise production of approximately 2,400 pages of documents (the "Additional Materials").[22] The documents included (1) governance agreements, (2) income statements and balance sheets from January 2015 to December 2023, (3) membership interest purchase agreements, and (4) tax returns for various entities in the Fairstead complex. Fairstead also produced a

[21] Dkt. 250.

[22] Ex. 7.

spreadsheet identifying expenditures that Feldman claimed were capital contributions. That was precisely the type of documentation that Blodgett sought in fact discovery, more than three years earlier.

To justify its late production, Fairstead described the Additional Materials as information that its "experts intend to rely upon."[23] Blodgett objected to that characterization and the production in its entirety.

On August 14, 2026, Blodgett served his expert report in compliance with the Damages-Phase Scheduling Order. Three days later, Fairstead served an "amended" disclosure that replaced Drago and Dunec with three new experts: Jeffrey W. Kopa, Johnny J. Lee, and Amanda Aaron.

Fairstead offered no explanation for the belated expert swap. After Blodgett objected, Fairstead claimed that the switch was proper because Fairstead had reserved its "right to supplement and amend" its expert designation.[24] Fairstead also provided an additional reason why its late production of the Additional Materials was purportedly proper. According to Fairstead, its experts had identified the Additional Materials as part of "the natural course of rebuttal expert work" and "found documents necessary" to rebut Blodgett's "evolv[ing]" damages theories.[25]

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[23] *Id.*

[24] Ex. 12 at 1.

[25] *Id.* at 2.

On August 26, 2026, Blodgett moved to preclude Fairstead from relying on its new experts or the late production. On September 3, Fairstead amended its expert disclosure a second time. This time, Fairstead replaced Aaron with Blair Kincer.

II. LEGAL ANALYSIS

Blodgett contends that Fairstead failed to comply with the court's scheduling order and seeks preclusion as a consequence. This decision grants the relief sought.

"Parties must be mindful that scheduling orders are not merely guidelines but have the same full force and effect as any other court order."[26] "Deadlines are particularly important when conducting discovery and preparing for trial."[27] The Delaware Supreme Court "has long recognized that the purpose[s] of discovery [are] to advance issue formulation, to assist in fact revelation, and to reduce the element of surprise at trial."[28] Transparency also promotes settlement by enabling parties to assess their claims and defenses more accurately.[29] It therefore conserves party and

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[26] *In re ExamWorks Gp., Inc. S'holder Appraisal Litig.*, 2018 WL 1008439, at *6 (Del. Ch. Feb. 21, 2018) (internal quotation marks omitted).

[27] *Goldstein v. Denner*, 2024 WL 1599501, at *3 (Del. Ch. Apr. 1, 2024) (ORDER).

[28] *Levy v. Stern*, 687 A.2d 573, 1996 WL 742818, at *2 (Del. Dec. 20, 1996) (TABLE).

[29] *See In re Appraisal of Dole Food Co., Inc.*, 114 A.3d 541, 560 (Del. Ch. 2014) ("Discovery into the petitioners' analyses also should help promote settlement."); *see generally Caskey v. Man Roland, Inc.*, 83 F.3d 418, 1996 WL 197370, at *7 (5th Cir. 1996) (Dennis, J., dissenting) ("[O]ne of the purposes of open discovery is to promote settlement."); *Bond v. Dist. Ct., In & For Denver Cty.*, 682 P.2d 33, 40 (Colo. 1984) ("The purposes of pretrial discovery include: . . . the promotion of expeditious

judicial resources and contributes to "the just, speedy, and inexpensive determination of every proceeding."[30]

Scheduling orders and discovery cutoffs further these policies by ensuring that parties provide fact and expert discovery in a timely manner.[31] Rule 6(b), titled "Enlargement," addresses when and how a party can obtain additional time or otherwise modify a deadline. It states:

> (1) *In General*. When an act may or must be done within a specified time, the Court may, for good cause shown, extend the time:
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> (A) with or without motion or notice if the Court acts, or if a request is made, before the time or its extension expires; or
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> (B) on motion made after the time has expired if the party failed to act because of excusable neglect.
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> (2) *Exceptions*. The Court must not extend the time for taking any action under Rule 59(b), (d), or (e), except to the extent and under the conditions stated in them.[32]

Rule 6(b) thus puts the onus to address a deadline on the party who has missed or anticipates missing it. If the deadline has not yet passed, then a party may move to modify the deadline, or the court may act without a motion. If a deadline has already

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settlement of cases."); *Martin v. Long Island R. Co.*, 63 F.R.D. 53, 54 (E.D.N.Y. 1974) ("Meaningful settlement discussions will be facilitated if the . . . parties can evaluate possible evidence. An overwhelming percentage of civil cases are settled. It is as important to have fair procedures for this kind of disposition as it is for trials.").

[30] Ct. Ch. R. 1.

[31] *IQ Hldgs., Inc. v. Am. Com. Lines Inc.*, 2012 WL 3877790, at *2 (Del. Ch. Aug. 30, 2012).

[32] Ct. Ch. R. 6(b).

passed, then a party must move for relief and show excusable neglect.[33] Regardless of when the motion arrives, moving the deadline requires good cause.[34]

Good cause means a legitimate, sufficient, and persuasive reason. It does not require "extraordinary circumstances" or a "highly unusual set of facts."[35] The standard is more burdensome than the "freely given" test but less onerous than a test requiring "manifest injustice."[36] "'[G]ood cause' is likely to be found when the moving party has been generally diligent, the need for more time was neither foreseeable nor its fault, and refusing to grant the continuance would create a substantial risk of unfairness to that party."[37] A court may consider prejudice to the other side, but a lack of prejudice alone does not establish good cause.[38]

A. The New Experts

Blodgett seeks an order precluding Fairstead from relying on the experts it disclosed in August 2026, three days after Blodgett served his opening expert report,

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[33] Of course, parties can modify a court-ordered deadline by submitting a stipulation for the court's approval. That is usually the proper approach.

[34] Ct. Ch. R. 6(b)(1).

[35] *State v. Ponzo*, 302 A.3d 1006, 1028 (Del. Super. 2023).

[36] 3 *Moore's Federal Practice* § 16.14[1][a], Lexis (database updated 2026); *see* Fed. R. Civ. P. 16(b)(4) advisory committee's note to 1983 amendment (describing test).

[37] *Coleman v. PricewaterhouseCoopers, LLC*, 902 A.2d 1102, 1107 (Del. 2006).

[38] 3 *Moore's Federal Practice*, *supra*, § 16.14[1][b].

and in September 2026, after Blodgett filed this motion. That relief is granted. Fairstead may rely on the experts it disclosed in July 2024.

1. Precedent Addressing Late Expert Disclosure

Failing to disclose an expert in timely fashion generally warrants the expert's exclusion. As now-Justice, then-Vice Chancellor Zurn incisively observed when excluding an expert, "[d]eadlines matter."[39] Citing Rule 6, the court faulted the late-disclosing party for failing to "seek an extension" before the deadline or "show excusable neglect" for missing the disclosure deadline by six days.[40] Another decision from this court likewise excluded a belatedly disclosed expert's report and precluded the expert from testifying at trial, relying solely on the party's failure to meet the disclosure deadline.[41]

For a post-deadline modification, this court has required a threshold showing of excusable neglect. In *Encite*, Chancellor Chandler held that counsel's reasonable belief that an oral extension had been given did not support a finding of excusable

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[39] *S'holder Representative Servs., LLC v. Alexion Pharms., Inc.*, 2023 WL 2632477, at *1 (Del. Ch. Mar. 23, 2023) (ORDER).

[40] *Id.*

[41] *Strong v. Chae*, 2024 WL 4583092, at *1 (Del. Ch. Oct. 23, 2024) (noting that the plaintiff failed to timely disclose the identity of an expert, that his "testimony and report should be excluded on that basis alone," and that the expert "will not be permitted to testify at trial, and his report is excluded"); *accord McCulley v. Thornton*, 2023 WL 5310442, at *2 (Del. Super. Aug. 16, 2023) (barring expert disclosed five months late because "the Court cannot allow Plaintiff to ignore clear pretrial scheduling order deadlines in an effort to change his theory of the case").

neglect because "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."[42] Chancellor Chandler noted that plaintiff's counsel "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," yet failed to do so.[43]

In addition to finding that excusable neglect did not exist, Chancellor Chandler held that the plaintiff had not shown good cause for an extension. When evaluating good cause, Chancellor Chandler observed that the plaintiff had gained an unfair advantage by identifying its expert after reviewing the defendants' report and deposing their expert. He also noted that the defendants would be prejudiced because (1) they would have less time to identify a rebuttal expert and prepare a rebuttal report and (2) other case deadlines would have to be modified. The case had already been pending for an extended period of time, and Chancellor Chandler concluded that "any further delay and even mild showing of prejudice to defendants 'weighs against a finding of 'good cause' necessary for a modification.'"[44]

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[42] *Encite LLC v. Soni*, 2011 WL 1565181, at *2 (Del. Ch. Apr. 15, 2011) (emphasis in original) (giving counsel the benefit of the doubt on this dispute of fact).

[43] *Id.* at *3.

[44] *Id.* at *4 (quoting *Candlewood Timber Gp. LLC v. Pan Am. Energy LLC*, 2006 WL 258305, at *5 (Del. Super. Jan. 18, 2006)).

Encite relied on *Candlewood*, a Delaware Superior Court decision. There, the plaintiff moved to amend the scheduling order three months after the deadline for submitting expert reports had passed so that the plaintiff could identify a different expert and submit his report. The plaintiff stated only that the original expert had become "unavailable."[45] The plaintiff did not try to explain why the expert had become unavailable until oral argument.[46]

Under the Superior Court Rules, the only question was whether the plaintiff had shown good cause for the amendment. The plaintiff had not offered any reason why it could not have met the original deadline through diligent efforts.[47] The plaintiff also had not offered any explanation for its expert's unavailability until oral argument, which deprived the defendant of the ability to respond.[48] The court also considered prejudice, concluding that the plaintiff's delay harmed the defendant by limiting the time the defendant had to respond to a new expert report. Finding that the plaintiff had failed to show good cause, the court declined to modify the scheduling order and precluded the plaintiff from relying on the belatedly disclosed expert.[49]

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[45] *Candlewood*, 2006 WL 258305, at *1.

[46] *Id.*

[47] *Id.* at *5.

[48] *Id.*

[49] *Id.*

2. Applying The Precedent

Fairstead's belated disclosure goes beyond the precedents that have granted exclusion. The General Scheduling Order required the disclosure of experts on July 26, 2024. Fairstead met that deadline. The General Scheduling Order did not contemplate that parties could change their experts. The Damages-Phase Scheduling Order did not contemplate that either.

Fairstead's amended disclosure identifying three new experts missed the expert deadline by more than two years. After Blodgett moved to preclude the new experts, Fairstead amended its disclosure again to replace one of its new experts with yet another expert.

Fairstead did not identify its new experts until after seeing Blodgett's report. Fairstead offered no explanation for its actions when serving its amended expert disclosure. It was not until Blodgett objected to the belated identification that Fairstead claimed (1) the belated disclosure was fair because Fairstead had reserved its rights to amend its disclosure, (2) Blodgett's evolving damages theories warranted the expert switch, and (3) Blodgett would not be prejudiced. It was not until oral argument that Fairstead represented that its original expert had grown concerned about testifying in this case after the court questioned his opinions in the *Tatum* litigation. Even during oral argument, Fairstead never said that the original expert would *not* testify, only that he made it known that he preferred not to testify.

Fairstead never moved to amend either the General Scheduling Order, which contained the expert identification deadline, or the Damages-Phase Scheduling

Order, which did not contemplate identifying different experts. When Blodgett moved to preclude Fairstead's new experts, Fairstead did not argue excusable neglect or good cause. Fairstead claimed it acted properly and asserted that Blodgett would not be prejudiced.

Fairstead incorrectly contends that Delaware law permits expert swapping. For that proposition, Fairstead cites *Dole*, where the court permitted the defendants to substitute an expert "to avoid the prejudice that the defendants would suffer if forced to proceed without an expert."[50] In *Dole*, the expert submitted his report in the name of his firm. The court held that an entity could not serve as an expert, only a natural person. The court allowed the human who had prepared the report to adopt it as his own. There was no substantive change in either the identity of the human who would be testifying or the opinions being offered.

Fairstead also quotes *Merion Capital* for the supposed principle that "[g]enerally speaking, an expert can replace another expert who must drop out."[51] That is a misleading partial quotation. What *Merion Capital* actually says is "[g]enerally speaking, an expert can replace another expert who must drop out *as a result of illness*."[52] Setting aside the problems associated with submitting a partial

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[50] *In re Dole Food Co., Inc. S'holder Litig.*, 110 A.3d 1257, 1263–64 (Del. Ch. 2015).

[51] Opp. ¶ 30.

[52] *Merion Cap., L.P. v. 3M Cogent, Inc.*, 2013 WL 3793896, at *10 (Del. Ch. July 8, 2013) (emphasis added).

quotation where the omission changes the meaning of the authority,[53] Fairstead has not suggested that either of its original experts cannot proceed because of illness.

In the parties' pre-motion exchanges, Fairstead's original justification for the expert swap was that it had reserved its right to do so. In *Goldstein*, both sides purported to reserve their rights to list additional fact or expert witnesses, yet the scheduling order provided a set deadline for identifying all witnesses. The defendants identified three new fact witnesses six weeks after the deadline. The court held that the "dual 'reservation of rights'" could not "amend the scheduling order."[54] Instead, the defendants had the burden to show excusable neglect, which they did not try to do. The same is true here. Assuming for the sake of argument that the reservation of rights was mutual, it would not justify Fairstead's tardy expert swap.[55] A unilateral

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[53] *Cf. Leiske v. Kidd*, 2026 WL 3459553, at *3 (Del. Ch. Nov. 13, 2026) (explaining that an attorney who signs a pleading "must ensure that the underlying authorities have been reviewed and support the propositions for which they are cited"); *id.* at *4 ("That existing law may generally support a party's ultimate position does not excuse . . . mischaracterized holdings."). In *Leiske*, counsel fell short after relying on generative AI. The principle applies regardless of the source of error.

[54] *Goldstein*, 2024 WL 1599501, at *4.

[55] *See also Encite*, 2011 WL 1565181, at *2–3 (holding counsel's belief that the other side had agreed to an extension to be insufficient to modify the date for disclosure identified in the scheduling order; concluding the plaintiff failed to show excusable neglect because a reasonably prudent person would have sought to document the agreement in writing and then "would have *submitted that agreement and a proposed revised Scheduling Order to the Court for approval*" (emphasis in original)). In a related argument, Fairstead contends that this case is different because the General Scheduling Order "permits amendment by written agreement, without Court involvement." Opp. ¶ 27 & n.5. There was no written agreement, and

reservation of rights cannot even claim the status of an agreement. It is a purported reservation of the right to violate a court order—a contumacious nullity.

During the parties' pre-motion exchanges, Fairstead next asserted that it switched its experts to address Blodgett's changing damages theories. But Blodgett's theories did not change. Blodgett reduced the scope of the projects for which he sought damages and proposed to rely on collateral estoppel for issues addressed in the *Tatum* litigation. His opening report made it easier for Fairstead to respond, not harder.

When opposing Blodgett's motion, Fairstead suggests that its failure to name its experts earlier was reasonable because the parties treated this action as stayed after the court asked in September 2024 why the parties were proceeding to trial before decisions in the arbitration and the *Tatum* litigation. For expert disclosure, that makes no sense. The General Scheduling Order mandated expert disclosure on July 26, 2024, *and both parties complied with that deadline*. That part of the case was over well before the court's question about deferring trial. In response, the parties agreed to defer trial and address expert discovery at a later date. The parties never said anything about a new expert disclosure deadline, precisely because that disclosure had already been made.

Encite demonstrates that an agreement between counsel has no effect on a court order until the court adopts it. 2011 WL 1565181, at *2–4.

In its opposition, Fairstead also tried to justify switching experts by asserting that one of its experts had a scheduling conflict.[56] At oral argument, Fairstead backed off that representation and would say only that Dunec had cold feet about testifying. As in *Candlewood*, Fairstead's failure to disclose that explanation until oral argument prejudiced Blodgett by preventing him from meaningfully addressing it. Fairstead waived its ability to rely on Dunec's apprehensions by not raising them earlier.[57] Regardless, an expert's vague and indeterminate uneasiness does not establish good cause.

If Fairstead wanted to change an expert, Fairstead needed to raise the issue with Blodgett in early 2026. Fairstead should have mentioned any expert discomfort months before the unilateral expert swap that precipitated the motion.[58] If Blodgett declined to agree to any modification, then Fairstead should have moved promptly for relief under Rule 6(b). At a minimum, Fairstead should have raised the issue when

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[56] *See* Opp. ¶¶ 4, 15.

[57] *See Candlewood*, 2006 WL 258305, at *5 (finding movant failed to show good cause where "Candlewood, in its original motion, merely asserted that Ponisio is 'unavailable' without giving any explanation; it was not until oral argument that Candlewood presented Romero's affidavit purporting to explain the circumstances surrounding Ponisio's 'unavailability' depriving Pan American of the ability to address the 'unavailability' issue in its response to the motion").

[58] The ostensible reason for Dunec's discomfort was this court's *Tatum* decision, which the court issued on October 27, 2025. Fairstead did not switch up its experts until August 17, 2026.

the parties were discussing the Damages-Phase Scheduling Order. Once again, if the parties could not agree, then Fairstead should have moved promptly under Rule 6(b).

Fairstead never made any proactive effort. Fairstead never raised the new-expert issue before serving its amended notice. Fairstead made its decision to swap experts after seeing Blodgett's opening report and provided no explanation when making its swap. Fairstead only offered justifications when Blodgett objected and in response to Blodgett's motion, and those justifications were a moving target. After Blodgett moved to preclude the new experts, Fairstead swapped one of its experts again. Fairstead seems to think that deadlines only apply to Blodgett. Its serial failures warrant preclusion.

Although a lack of prejudice does not establish good cause, a court can consider prejudice when evaluating whether good cause exists. As in *Encite* and *Candlewood*, Fairstead gained an unfair advantage by not acting until after seeing Blodgett's opening expert report. Fairstead argues that its belated expert swap "changed only the name on the report" because its new experts "will testify on the identical subject matter disclosed in July 2024: the value of assets in which Blodgett claims an interest."[59] But that description does not accurately capture the implications of the expert swap. The court heard Dunec testify in the *Tatum* litigation and commented on his opinions in its decision. Blodgett could use the *Tatum* trial record and this

[59] Opp. ¶ 2; *see also id.* ¶ 31 ("Every case Blodgett cites involved adding witnesses on new subject matter or failing to identify them at all—not substituting testifiers on topics already disclosed.").

court's comments when cross-examining Dunec and arguing the merits. By swapping in new experts, Fairstead sought to negate that advantage, wipe the credibility slate clean, and get a second bite at the valuation apple.

Fairstead also argues that Blodgett can simply address the new experts' opinions in expert depositions and a reply report, but those curative steps cannot address the larger implications of Fairstead's machinations. Because of the swap, Blodgett will have to research, evaluate, and seek to undermine entirely new experts. Moreover, as Chancellor Chandler observed in *Encite*, Blodgett will have to scramble to do so in a compressed timeframe. Any additional time would only provide a partial fix, and it would impose further delay on Blodgett, who seeks to bring this case to a conclusion. Fairstead's belated identification has already caused the parties to miss deadlines in the Damages-Phase Scheduling Order. Constructing a new schedule to accommodate Fairstead's last-minute switch would further delay this matter, force Blodgett to incur additional expense, and reward Fairstead's misbehavior.

3. *Concord* And *Drejka*

Doubtless recognizing that the Rule 6(b) framework does not favor its position, Fairstead seeks to change the focus. According to Fairstead, Delaware Supreme Court precedent holds that before a court can preclude the introduction of evidence, including reliance on new experts, the court must conduct a broader balancing test. Fairstead's analysis is too simplistic.

a. *Concord*

Concord is a seminal Delaware Supreme Court decision that does call for balancing when a court decides whether to issue a sanction, including for missing a scheduling deadline.[60] Upon closer examination, however, *Concord* does not call for a balancing meaningfully different from the good cause standard under Rule 6(b).

Concord involved a plaintiff in a personal injury action who provided the defendant on the third day of trial with a previously undisclosed statement from an eyewitness to the accident.[61] The defendant contended that the plaintiff had an obligation under Superior Court Rule 26 to update her interrogatory responses to identify the statement, but never did. The trial court disagreed and admitted the statement.

On appeal, the plaintiff conceded the rule violation but argued that the trial court properly admitted the evidence. The plaintiff argued that the defendant was not prejudiced because the trial court offered the defendant a continuance to deal with the new evidence, which the defendant declined. The Delaware Supreme Court disagreed, cautioning that when deciding whether to exclude evidence, a court "must balance its duty to admit all relevant and material evidence with its duty to enforce standards of fairness and the Rules of Court."[62] Citing the "defendant's timely and

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[60] *Concord Towers, Inc. v. Long*, 348 A.2d 325 (Del. 1975).

[61] *Id.* at 326.

[62] *Id.*

strenuous objection, the time factor, the inexcuseable [sic] withholding of the statement until the third day of trial, and the prejudicial effect of the statement itself when used in cross-examination," the justices held that the trial court erred by admitting the late-produced statement into evidence.[63] The Delaware Supreme Court ultimately ordered a new trial, but did not address whether that error alone would have required it. Instead, that error together with others resulted in an "accumulation" that caused "such prejudice against defendant that a new trial must be granted."[64]

Perhaps because the plaintiff conceded the existence of a rule violation, *Concord* did not address how its balancing concept intersected with potentially applicable civil rules. The *Concord* balancing nevertheless fits within the Rule 6(b) framework by identifying considerations that a court can consider when evaluating whether a party who failed to meet a deadline and who has shown excusable neglect can establish good cause. *Concord* is also a case where that balancing favored exclusion.

Here, this decision has already evaluated good cause. *Concord* does not require a different analysis.

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[63] *Id.*

[64] *Id.* at 327.

b. *Drejka*

Another multi-factor balancing case arrived decades after *Concord*. Between 2010 and 2015, the Delaware Supreme Court issued a series of decisions that appear designed to rein in a then-chronic practice in personal injury cases in Delaware Superior Court.[65] Doubtless seeking to uphold Delaware's tradition of civility, defendants often agreed to extend the plaintiff's deadline for producing a physician's expert report. At some point, however, the defendant would refuse an extension and move to preclude reliance on the expert.

That motion presented the court with a high-stakes question. In a medical malpractice case, a plaintiff cannot prevail without an expert to address the standard of care and causation, with some exceptions.[66] In other types of personal injury cases, a plaintiff generally needs an expert to carry its burden on those issues. When deciding whether to exclude experts or grant a continuance, Delaware Superior Court trial judges had to make case-dispositive decisions. Seeking to restore the importance

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[65] *See Moses v. Drake*, 109 A.3d 562 (Del. 2015); *Christian v. Counseling Res. Assocs., Inc.*, 60 A.3d 1083 (Del. 2013); *Hill v. DuShuttle*, 58 A.3d 403 (Del. 2013); *Drejka v. Hitchens Tire Serv. Inc.*, 15 A.3d 1221 (Del. 2010). Fairstead also relies heavily on *Christian*, which this decision discusses separately. *See infra* Section II.C.

[66] 18 *Del. C.* § 6853; *accord O'Donald v. McConnell*, 858 A.2d 960, 2004 WL 1965034, at *2 (Del. 2004) (TABLE) ("To establish liability for medical negligence, plaintiff must present expert medical testimony on the physician's deviation from the standard of care and as to . . . causation . . . . Without expert medical testimony as to a breach of the standard of care and causation, the plaintiff cannot prevail." (footnote and internal quotation marks omitted)).

of scheduling-order compliance, Delaware Superior Court judges issued rulings precluding plaintiff-side experts from testifying.[67]

Drejka was one such case. The plaintiff produced an expert report from her treating physician months after the court-ordered deadline, and one of the defendants moved to strike it as late. The Delaware Superior Court granted the motion. The defendant subsequently moved for summary judgment. Without a physician's expert report, the plaintiff could not make out a *prima facie* case, so that motion was also granted.[68]

The plaintiff appealed, and the Delaware Supreme Court reversed. Because the preclusion order was fatal to the plaintiff's case, the justices treated the ruling as having granted a default judgment against the plaintiff for violating a scheduling order. To guide its analysis, the Delaware Supreme Court turned to a multi-factor test used to review decisions to grant or not vacate default judgments generally:

> [T]o determine whether the trial court has abused its discretion in dismissing or refusing to lift a default, we will be guided by the manner in which the trial court balanced the following factors, . . . and whether the record supports its findings: (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than

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[67] *E.g.*, *Christian v. Counseling Res. Assocs., Inc.*, 2011 WL 3300166 (Del. Super. July 28, 2011) (Abelman, J.), *rev'd*, 60 A.3d 1083; *Hill v. DuShuttle*, 2011 WL 2623349 (Del. Super. July 5, 2011) (Cooch, R.J.), *rev'd*, 58 A.3d 403; *Drejka v. Hitchens Tire Serv., Inc.*, 2009 WL 1813761 (Del. Super. June 24, 2009) (Abelman, J.), *rev'd*, 15 A.3d 1221.

[68] *Drejka*, 15 A.3d at 1223–24.

> dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.[69]

Applying that test to the scheduling-order violation, the justices regarded the preclusion sanction as "inappropriate."[70] They noted that the client had not been responsible for the delay, that the defendant was not meaningfully prejudiced, that two prior motions to compel had been filed and mooted, that no other sanctions had been imposed during the litigation, and that the plaintiff's counsel had not acted in bad faith. The justices also noted that the plaintiff had suffered permanent soft tissue impairment from the accident, suggesting a meritorious claim, and that a lesser sanction could have been sufficient.[71]

The Delaware Supreme Court acknowledged that in personal injury cases in Delaware Superior Court, "it is not uncommon for litigants to disregard Scheduling Orders."[72] But the justices recommended imposing "monetary penalties to be paid by the attorneys, not their clients," as the principal solution.[73]

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[69] *Id.* at 1224 (quoting *Minna v. Energy Coal S.p.A.*, 984 A.2d 1210, 1215 (Del. 2009)).

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.* ("The Superior Court Rules recognize this problem and provide what is likely to be the most effective sanction—monetary penalties to be paid by the attorneys, not their clients. If monetary sanctions were imposed more frequently, attorneys would be far less likely to delay in obtaining (and thus having to pay) experts. Moreover, if monetary sanctions were imposed several times, and were not effective, the sanction of dismissal would be much more supportable.").

Although it is possible to view *Drejka* as establishing an independent, standalone balancing requirement before a court modifies a scheduling order, the justices engaged in an extended discussion of possible sanctions. *Drejka* seems best understood as identifying considerations that apply when a trial court considers a case-terminating sanction or its equivalent. *Drejka* thus becomes pertinent if the court is considering a case-terminating sanction. *Drejka* is not part of the analysis for purposes of determining whether excusable neglect or good cause exists in the first place. Fairstead's request for relief fails on those elements, before the court ever reaches the question of the appropriate sanction.

Fairstead nevertheless argues that *Drejka* applies because an order excluding its belatedly swapped experts supposedly amounts to a case-terminating sanction. That is hyperbole. First, unlike the plaintiffs in personal injury cases, Fairstead does not bear the burden of proof. Fairstead can prevail by attacking and discrediting Blodgett's expert. Second, excluding Fairstead's late experts does not leave Fairstead without experts. Fairstead can still rely on its timely identified experts. Fairstead has not said that Dunec cannot testify, nor that he will not testify. Fairstead has said only that he has given Fairstead's counsel the impression that he would prefer not to testify.

In terms of the *Drejka* factors, Fairstead also does not resemble the personal injury plaintiff in *Drejka*. That seemingly blameless plaintiff lost her case because of her attorney's inadvertence. Fairstead is a multi-billion-dollar institution run by sophisticated individuals and represented by top law firms. Fairstead did not attempt

to establish any separation between client and counsel that would suggest that Fairstead bore no responsibility for the expert swaps. If anything, Fairstead's failure to raise the expert issue earlier and confer regarding a solution appears tactical. Fairstead did not swap its experts until after seeing Blodgett's opening expert report, then only offered justifications after Blodgett objected. Fairstead did not mention the real reason—its expert's cold feet—until oral argument. The *Drejka* factors cannot save Fairstead.[74]

4. The Conclusion On Expert Preclusion

Fairstead's belated expert disclosures failed to comply with the General Scheduling Order. Fairstead did not establish excusable neglect or good cause, and preclusion is the appropriate consequence. A lesser sanction would not impose a sufficient consequence, because it would reward Fairstead for its tactical silence and delay.[75] Precedent supports preclusion, and Fairstead's behavior in this case has been

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[74] As discussed below, the Delaware Supreme Court's efforts to address scheduling issues in personal injury cases in Delaware Superior Court did not end with *Drejka*. Two years later, the Delaware Supreme Court issued a stronger decision in *Christian* that seemingly adopted a brightline rule regarding the timing of requests to enforce scheduling orders. *See Christian*, 60 A.3d at 1085, 1088. That case seems to have achieved the desired result and changed practice in personal injury actions, because two years later, the Delaware Supreme Court took a more deferential approach. *See Moses*, 109 A.3d at 565–66. This decision discusses *Christian* and *Moses* below. *See infra* Section II.C.

[75] *See Terramar Retail Ctrs. LLC v. Marion #2-Seaport Tr. U/A/D June 21, 2002*, 2018 WL 6331622, at *15 (Del. Ch. Dec. 4, 2018) (explaining that preclusion was warranted).

worse than in prior decisions ordering preclusion. Fairstead therefore may not rely on its belatedly disclosed experts.

B. The Late Production

Blodgett also seeks to preclude Fairstead from relying on the Additional Materials. That relief is also warranted.

"Generally speaking, Delaware courts strictly adhere to discovery cut-off dates."[76] "A party that disregards the provisions in a scheduling order that govern discovery is engaging in discovery abuse."[77] "Late production provides grounds for excluding the evidence."[78] Rule 6(b) again frames the inquiry. A party that has already missed a deadline must file a motion seeking relief, establish excusable neglect, and show good cause for a modification.

Under the General Scheduling Order, fact discovery ended on June 14, 2024.[79] Blodgett had served requests calling for the Additional Materials. Fairstead had an obligation to produce them before the fact discovery cutoff. That failure establishes grounds for exclusion absent a showing of excusable neglect and good cause.

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[76] *IQ Hldgs.*, 2012 WL 3877790, at *2 (internal quotation marks omitted).

[77] *ExamWorks*, 2018 WL 1008439, at *6.

[78] *IQ Hldgs.*, 2012 WL 3877790, at *2.

[79] Dkt. 169 at 1.

Fairstead has not expressly argued either excusable neglect or good cause. Fairstead has therefore implicitly conceded that it cannot satisfy either standard. Relief could be granted on that basis alone.

Instead, Fairstead maintains that it acted properly. In its lead argument, Fairstead argues that the *de facto* stay of the case and the subsequent Damages-Phase Scheduling Order rendered the prior deadline for fact discovery moot. Fairstead did not advance that argument as a basis for excusable neglect. Fairstead claimed that is what happened.

That is not what happened. Neither the parties nor the court ever suggested modifying the fact-discovery deadline that had already passed. When the court deferred trial, the court deferred trial. The court did not set aside the prior phases of the schedule that the parties had completed. The parties had completed fact discovery. That phase was done.

Nor did the parties act as if they had modified the fact-discovery deadline. No one served additional discovery requests. Blodgett followed up on information that Fairstead had said it would produce subject to objection. When the parties submitted the Damages-Phase Scheduling Order, that order picked up with reports. It did not circle back to fact discovery.

That leads to Fairstead's next argument. According to Fairstead, its late production reflected the "natural course" of expert work. Fairstead says that its experts "found" the Additional Materials when addressing Blodgett's damages request, at which point Fairstead properly produced the Additional Materials once

the experts decided to rely on them. Fairstead contends that the Damages-Phase Scheduling Order authorizes additional production by calling for the service of expert reports along with "production of all materials relied upon by Expert and not produced previously by parties."[80]

The reference to materials "relied upon by Expert and not produced previously by parties" does not provide a basis for redoing fact discovery. That language contemplates a party producing materials that it had no obligation to produce previously during fact discovery, typically because no one requested them. An expert can properly rely on those materials, but the party must produce them. The language also calls on a party to produce publicly available documents that the expert relied on so that the receiving party does not have to locate those documents independently.

A party cannot use the expert-reliance concept to redo fact discovery. If the opposing party previously requested information in fact discovery, and if the party proffering the expert refused or otherwise failed to provide those documents during fact discovery, then that information is not part of the case record. The receiving party does not have it and cannot use it. Fairness demands that the producing party that failed to produce the information in a timely fashion cannot use it.

A contrary rule would encourage gamesmanship, restore trial by ambush, and consume party and judicial resources. A responding party could slack off during fact discovery, confident that if it found helpful material later, it could produce it during

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[80] Dkt. 250.

the expert phase. To guard against that risk, requesting parties would have to pursue more motions to compel, because they would not be able to rely on the responding party's objections and representations about production to frame the metes and bounds of the case. Resources would be wasted on prophylactic disputes.

Here, Blodgett served requests that called for the Additional Materials. Fairstead was obligated to produce the Additional Materials during fact discovery. Fairstead cannot redo fact discovery under the guise of expert discovery.

Training its sights on Blodgett's requests, Fairstead argues that because Blodgett only asked for documents "sufficient to show" how the LLCs valued their assets and liabilities, Fairstead could produce a limited set of documents and then provide more information later, after the fact-discovery cutoff and during the expert phase. To the contrary, Blodgett's request for documents "sufficient to show" how Fairstead valued its assets and liabilities put the ball in Fairstead's court to identify documents Fairstead contended affected their valuation. As an alternative to requesting "all documents," Blodgett took a measured and constructive approach that benefitted Fairstead, because it meant that Fairstead did not have to search widely for all responsive materials. Fairstead could determine what it used to value Blodgett's interests and only produce that.

For his part, Blodgett was entitled to rely on Fairstead's production as doing what it claimed: providing documents sufficient to establish the requested points. Fairstead purportedly produced documents sufficient to show the value of the LLCs' assets and liabilities. Blodgett could have chosen to challenge Fairstead's

representation and seek more documents. Or he could choose to take Fairstead at its word, hold Fairstead to its representation, and narrow the scope of the case. Blodgett did the latter.

Fairstead now argues that it could produce the Additional Materials because its experts wanted to use them to "run[] the distribution waterfall[s]" under various investments that the LLCs hold.[81] But if the Additional Materials are needed for that purpose now, then the documents Fairstead previously produced were not "sufficient" to value the LLCs' assets. If the Additional Materials affect valuation, then Fairstead should have produced them years ago, during fact discovery, when Blodgett sought them. That way, Blodgett could have used them during the fact discovery phase and pursued lines of inquiry as warranted, including by asking Fairstead's witnesses about them.

Fairstead also asserts that Blodgett's expert did not need the Additional Materials for his opening report because he did not run any distribution waterfalls.[82] That is no answer for Fairstead's failure to produce information that Blodgett requested more than three years earlier. Fairstead represented in its discovery responses that it was producing documents sufficient to show the value of the LLCs' assets and liabilities. Based on Fairstead's responses and its production, Blodgett

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[81] Opp. ¶ 17; *accord id.* ¶ 22.

[82] *Id.* ¶ 25 (asserting that Blodgett's opening expert report "identifies no opinion affected by the [Additional Materials] and does not run the distribution waterfalls"); *accord id.* ¶ 18.

planned his fact and expert discovery. Lacking the Additional Materials, Blodgett could not use them or test them during the fact discovery phase, nor did his expert have a meaningful opportunity to consider them. Whether Blodgett's expert ran distribution waterfalls is beside the point.

Fairstead similarly takes issue with Blodgett's request for information about Feldman's capital contributions. Fairstead claims that Blodgett made a vague request when he asked for documents "concerning Stuart Feldman's capital contributions to Fairstead" because the requests did not define Feldman and identified examples of capital contributions. Those arguments fall short on multiple grounds.

First, Fairstead refused to produce documents responsive to that request solely because they were "irrelevant to any claim or defense as Feldman's 'capital contributions' are not at issue in this matter."[83] Fairstead did not object on the bases it now raises.

Second, the objections Fairstead now raises to Blodgett's document request are frivolous. Fairstead says it could not understand the term "Feldman" because Blodgett did not define the term, but that position is credibility impairing. A requesting party does not have to define every word. In fact, broad definitions usually draw objections. As proficient English speakers, Fairstead and its counsel were obligated to interpret the request and make a good faith effort to respond. If they in

[83] Ex. 2, Response to RFP 47.

fact believed that "Feldman" was vague or ambiguous—something I doubt—then they were obligated to identify what was vague or ambiguous *and* explain how they interpreted the term for purposes of their response.[84] Fairstead did neither. The same is true for the examples of capital contributions that Blodgett provided. Those examples were helpful, not confusing. It defies belief that Fairstead thought Blodgett's request did not seek information about valuation-related capital contributions.

Third, and most importantly, Blodgett was entitled to rely on Fairstead's response that it viewed Feldman's capital contributions as irrelevant to any claim or defense in the case. Fairstead essentially argues Blodgett should have challenged its objection, moved to compel, and sought production. Fairstead seems to think that it had no obligation to make legitimate objections and act transparently in discovery. According to Fairstead, Blodgett had to suspect and challenge Fairstead's actions at the risk of facing a late production.

That is not how litigation works. Yes, Blodgett could have challenged Fairstead's position and pursued that line of discovery, but he could also choose to accept Fairstead's representation and rely on it to narrow the matters in dispute. Each party is responsible for the tactical decisions it makes. Fairstead could make the tactical decision to assert its relevance objection. By taking that position, however, Fairstead necessarily represented that it would not raise any issues relating

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[84] *See Wright v. SLWM, LLC*, 341 A.3d 551, 562 (Del. Ch. 2025).

to Feldman's capital contributions for purposes of the case. Blodgett could have chosen to challenge the objection, but he was also entitled to rely on it to frame the metes and bounds of the litigation. Both sides must live with their decisions. Just as Blodgett cannot now seek the documents Fairstead withheld, Fairstead cannot now produce the documents that it previously objected to producing, simply because Fairstead has changed its mind and thinks they would be helpful.

Fairstead's late production of the Additional Materials was abusive. "Discovery abuse has no place in [Delaware] courts, and the protection of litigants, the public, and the bar demands nothing less than that [Delaware] trial courts be diligent in promptly and effectively taking corrective action to 'secure the just, speedy and inexpensive determination of *every* proceeding' before them."[85] "Trial courts should be diligent in the imposition of sanctions upon a party who refuses to comply with discovery orders, not just to penalize those whose conduct warrants such sanctions, but to deter those who may be tempted to abuse the legal system by their irresponsible conduct." [86] Precluding Fairstead from relying on the Additional Materials is the logical and natural consequence for its late production.[87]

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[85] *Holt v. Holt*, 472 A.2d 820, 824 (Del. 1984) (emphasis in original) (quoting Super. Ct. Civ. R. 1).

[86] *Hoag v. Amex Assurance Co.*, 953 A.2d 713, 717 (Del. 2008) (internal quotation marks omitted).

[87] Fairstead again calls for a balancing test that it claims would weigh against preclusion. As discussed previously, *Concord* is best understood as identifying factors that a court can consider when evaluating good cause. Fairstead did not meet its

C. *Christian*

As its trump card, Fairstead invokes *Christian*.[88] Fairstead interprets *Christian* as standing for a one-size-fits-all rule that dictates how parties must approach scheduling order violations and how a trial court must respond. That is not a reasonable interpretation of the decision.

Christian represented the Delaware Supreme Court's second attempt (after *Drejka*) to address a problematic custom of ignoring scheduling orders that had developed in personal injury cases in Delaware Superior Court. After the plaintiff in *Christian* failed to comply with a court-ordered deadline for producing its expert report, the defendants moved to preclude reliance on the expert and for summary judgment. The trial judge granted both motions[89] and denied the plaintiff's motion for reargument.[90]

The Delaware Supreme Court reversed. Evidencing some apparent frustration, the justices seemed to rue the need to "again consider how to balance the strong policy

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burdens under Rule 6(b) to show both excusable neglect and good cause. *Concord* does not require more. Also as discussed previously, *Drejka* is best understood as identifying considerations that apply when a court considers a case-terminating sanction. Precluding Fairstead from relying on the Additional Materials is not a case-terminating sanction. *Drejka* does not affect the analysis. *See supra* Section II.A.3.

[88] *Christian*, 60 A.3d 1083.

[89] *Christian*, 2011 WL 3300166, at *1.

[90] *Christian v. Counseling Res. Assocs., Inc.*, 2011 WL 5882275 (Del. Super. Aug. 19, 2011).

in favor of deciding cases on the merits against the need to resolve the trial courts' high volume of cases in a timely manner."[91] Somewhat uniquely, the plaintiff in *Christian* had sought a scheduling conference to request a change to the scheduling order. The Delaware Supreme Court determined that "[w]ithout hearing from either side, the trial court decided that the [plaintiff was exclusively] asking for a new trial date, and that a new trial date would not be granted."[92] Plaintiff's counsel told the justices that there were actually a range of issues to discuss, including grounds for a new schedule.[93] The Delaware Supreme Court held that the trial court abused its discretion by refusing to hold a scheduling conference.[94]

More broadly, the Delaware Supreme Court concluded that the approach it had recommended two years earlier in *Drejka* had not worked.[95] In *Drejka*, the justices had instructed the Delaware Superior Court to prioritize monetary sanctions on counsel as a remedy for scheduling order violations.[96] In *Christian*, the justices observed that "[b]ecause experience has shown that sanctions are not always

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[91] *Christian*, 60 A.3d at 1085.

[92] *Id.* at 1087. The trial court opinion suggests a more complex set of procedural facts. *See Christian,* 2011 WL 3300166, at *3–4.

[93] *Christian*, 60 A.3d at 1087.

[94] *Id.* at 1085.

[95] *Id.* ("For the past two years, the trial courts have been applying the factors set forth in *Drejka*."). The Delaware Supreme Court decided *Drejka* in December 2010 and *Christian* in January 2013, so two years was a fair approximation.

[96] *Drejka*, 15 A.3d at 1224.

effective, to achieve the goal of eliminating this problem, the Court has determined that it is necessary to refine the *Drejka* analysis."[97]

The trial judges and *Drejka* had treated the principal problem as plaintiffs failing to comply with scheduling orders. *Christian* took a different approach and treated the principal problem as defendants failing to enforce scheduling orders. Seemingly attempting to establish a brightline rule, *Christian* stated:

> Henceforth, parties who ignore or extend scheduling deadlines without promptly consulting the trial court, will do so at their own risk. In other words, any party that grants an informal extension to opposing counsel will be precluded from seeking relief from the court with respect to any deadlines in the scheduling order. By the same token, if the trial court is asked to extend any deadlines in the scheduling order, the extension should not alter the trial date. Counsel may face a compressed time period to complete discovery, or the filing of dispositive motions, but the most important aspect of the scheduling order—the trial date—will be preserved. In the unusual circumstance where the trial court does decide to postpone the trial date, litigants should expect that the trial will be rescheduled after all other trials already scheduled on the court's docket.[98]

Later in the decision, the Delaware Supreme Court returned to its new framework, stating that if one party missed a deadline and the other side did not raise it promptly with the court, then "that party will be deemed to have waived the right to contest any late filings by opposing counsel from that time forward."[99] Stressing this point, the justices stated that "[t]here will be no motions to compel, motions for sanctions,

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[97] 60 A.3d at 1085.

[98] *Id.*

[99] *Id.* at 1088.

motions to preclude evidence, or motions to continue the trial," and that while "[i]t is entirely possible, under this scenario, that some vital discovery will not be produced until the day before trial[,] . . . the party prejudiced by the delay accepts that risk by failing to promptly alert the trial court when the first discovery deadline passes."[100] The justices explained that although this framework could lead to more motions, it would address the then-current problem in which one side would offer the other a series of informal extensions that would ultimately jeopardize the trial schedule.[101]

As Fairstead reads it, *Christian* allows parties to ignore scheduling orders. Unless the party aggrieved by the other side's non-compliance promptly contacts the court, "that party will be deemed to have waived the right to contest any late filings by opposing counsel from that time forward."[102]

That is not a reasonable reading of *Christian*. That decision involved a specific category of cases (personal injury actions) in a specific court (the Delaware Superior Court) at a specific time (over a decade ago). It also involved a specific solution (waiver) designed to address the specific problem that the justices perceived to be causing the trouble (the defense bar's practice of granting informal extensions then seeking to enforce scheduling orders and preclude expert testimony). *Christian* cannot be understood outside that context.

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[100] *Id.*

[101] *Id.*

[102] *Id.*

If *Christian* swept more broadly, then its implications would have been dramatic. Court of Chancery Rule 6 follows the Federal Rules of Civil Procedure in putting the burden of seeking relief on the party who anticipates missing a deadline or who has missed it. Other Delaware courts have similar rules. If *Christian* established a one-size-fits-all scheduling rule for all types of scheduling order violations in all types of cases in all Delaware courts, then *Christian* silently abrogated Rule 6.

Equally important, the Delaware Supreme Court has repeatedly emphasized that trial courts have the power to manage their own dockets.[103] The Delaware Supreme Court also stresses that the trial courts have discretion to take case-specific factors into account and reach case-specific results.[104] If *Christian* established a one-size-fits-all rule, then *Christian* silently abrogated those precedents—at least in part—and took an important aspect of trial court discretion away from Delaware's trial court judges.

In terms of *Christian*'s ongoing influence, the decision appears to have solved the problem it targeted, and the Delaware Supreme Court's insistence on a brightline rule for scheduling violations in personal injury cases was short-lived. Two years

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[103] *E.g.*, *Solow v. Aspect Res., LLC*, 46 A.3d 1074, 1075 (Del. 2012) ("Delaware trial courts have inherent power to control their dockets.").

[104] *E.g.*, *Sammons v. Drs. for Emergency Servs., P.A.*, 913 A.2d 519, 528 (Del. 2006) ("[T]he trial court has discretion to resolve scheduling issues and to control its own docket." (alteration in original) (internal quotation marks omitted)); *accord Valentine v. Mark*, 873 A.2d 1099, 2005 WL 1123370, at *1 (Del. 2005) (TABLE).

later, in *Moses,* the justices adopted a noticeably different tone. There, after the plaintiff missed her expert disclosure deadline, the parties submitted a stipulation modifying the scheduling order. The Delaware Superior Court approved it. The plaintiff timely submitted her expert report, but later sought to file supplemental reports after the expert report deadline. She did not move for relief.[105] The Delaware Superior Court refused to consider the late reports. The defendant subsequently moved for summary judgment, which the trial court granted. The Delaware Supreme Court affirmed the Delaware Superior Court's ruling as within its discretion.[106] There was no discussion of *Christian*'s apparent brightline waiver rule or the *Drejka* factors. The only citation to *Christian* in *Moses* quoted the earlier decision's statement that "[t]his Court reviews a trial court's decision refusing to modify a trial scheduling order for abuse of discretion."[107]

The Delaware Supreme Court issued a similar ruling five years later.[108] The plaintiffs in a personal injury action obtained an expedited schedule with an expert report deadline of April 6, 2018. When the plaintiffs ran into problems relating to fact discovery, they asked to extend the expert deadline to May 11, 2018. The defendants

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[105] *Moses*, 109 A.3d at 566 ("Notably, Moses did not seek an extension to file expert disclosures and reports before the January 31, 2014, deadline had passed.").

[106] *Id.*

[107] *See id.* at 566 n.12 (quoting *Christian*, 60 A.3d at 1086–87).

[108] *In re Asbestos Litig.*, 228 A.3d 676 (Del. 2020).

agreed, and the Special Master overseeing the case granted the request. The plaintiffs later asked for a second extension that would push back the trial and the entire schedule by five months. The defendants again agreed, and the Delaware Superior Court granted the request. But when the plaintiffs asked for a third extension, this time for another six months, the defendants refused. The plaintiffs moved to modify the scheduling order, and the Special Master denied the motion. The Delaware Superior Court agreed and eventually dismissed the case. The plaintiffs appealed and challenged the scheduling ruling.

The Delaware Supreme Court again cited *Christian* only for the proposition that a trial court's decision on modifying a scheduling order is reviewed for abuse of discretion; there was no discussion of *Christian*'s seemingly brightline waiver rule.[109] The justices held that good cause was the proper standard for evaluating a request to alter a not-yet-expired scheduling deadline.[110] The justices also explained that to assess good cause, a court should consider whether the moving party has been generally diligent, whether the need for more time was neither foreseeable nor its

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[109] *Id.* at 681 n.22. The plaintiffs did not raise *Drejka* when they initially moved for relief from the scheduling order, relying only on the good cause standard. Before the Delaware Superior Court, they argued that the *Drejka* analysis was equivalent to a good cause analysis. The Delaware Supreme Court did not reach *Drejka*, stating, "We will not fault the Superior Court for applying the good cause standard that the plaintiffs relied on below." *Id.* at 682–83.

[110] *Id.* at 681.

fault, and whether refusing to grant the continuance would create a substantial risk of unfairness to that party.[111]

On the facts presented, the Delaware Supreme Court agreed that the scheduling issues were "entirely foreseeable," yet counsel had failed to proceed diligently with the case.[112] In terms of unfairness, the justices recognized that enforcing the schedule imposed unfairness on the plaintiffs in the sense of the eventual dismissal of the litigation, but that the plaintiffs had also been fairly treated by receiving two prior extensions. Given "two reasonable views of fairness," the Delaware Supreme Court deferred to the trial court's exercise of discretion.[113]

Christian must be read within this larger line of cases as a successful high-court intervention to address a specific issue that arose in a specific type of case in a specific court. *Christian* cannot be read as establishing a one-size-fits-all rule for all types of scheduling order violations in all types of cases in every court.

The Court of Chancery did not face the problem of practitioners in personal injury cases chronically disregarding scheduling orders. Court of Chancery decisions like *Encite* make clear that parties cannot reach informal agreements to modify scheduling orders and expect them invariably to hold up, and that the onus is on the

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[111] *Id.* at 681–82.

[112] *Id.* at 683.

[113] *Id.*

party seeking to depart from the scheduling order to document the agreement and raise it properly with the court.

> If a party cannot meet a deadline, the onus is on that party to be forthcoming and transparent about the situation and the reasons for it. Humans are not psychic. The other side does not know that the production may be late, much less how late or why. When parties are transparent, they can cooperate to address problems without judicial involvement. Acting as officers of the court, attorneys can find solutions to keep a case on track and prepare the matter for decision. Attorneys shirk their obligations to the court and make matters worse when they fail to communicate with the other side, allow problems to escalate, and miss critical deadlines.[114]

Rule 6(b) reflects this allocation of responsibility.

Blodgett acted properly by moving to preclude Fairstead from relying on its belatedly swapped-in experts and tardily produced Additional Materials. He is entitled to that relief.

III. CONCLUSION

Blodgett's motion to preclude is granted. Within ten days, the parties must submit an agreed-upon schedule for bringing this matter to a conclusion. If they cannot agree, they must submit a joint letter of up to 3,000 words that sets forth their positions and provides competing forms of order.

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[114] *ExamWorks*, 2018 WL 1008439, at *6.