



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

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Submitted: April 22, 2011
Decided: April 26, 2011

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

Dear Counsel:

On April 15, 2011, I issued a letter opinion denying plaintiff Encite, LLC's motion to amend the Scheduling Order regarding expert deadlines in this case. Encite has moved for reargument pursuant to Court of Chancery Rule 59(f). In short, Encite seeks reargument based on this Court's "fail[ure] to apply" *Drejka v. Hitchens Tire Service Inc.*,¹ which Encite submits is dispositive.² For the following reasons, the motion for reargument is denied.

The standard applicable to such a motion is well-settled: "to 'obtain reargument, the moving party must demonstrate that the Court's decision was

¹ 2010 WL 6007845 (Del. Dec. 28, 2010).

² Pl.'s Mot. for Reargument 2.

predicated upon a misunderstanding of a material fact or a misapplication of the law.”³ The misapprehension of law or fact must be such that the outcome of the decision would have been different—that is, the moving party bears the burden to show that the Court’s “misunderstanding of a factual or legal principle is both material and would have changed the outcome of its earlier decision.”⁴ Moreover, “[a] motion for reargument is not a mechanism for litigants to relitigate claims already considered by the [C]ourt.”⁵ Encite has not carried its burden under this standard.

First, Encite relied extensively—indeed, almost exclusively—on *Drejka* in its opening brief in support of its motion to amend the Scheduling Order regarding expert deadlines.⁶ Defendants responded to those arguments,⁷ and Encite then again analyzed the *Drejka* case in its reply brief.⁸ Thus, I had the parties’ arguments on the applicability of *Drejka* before the April 15, 2011 letter opinion was issued. I considered *Drejka* and found it inapplicable to and distinguishable from the present case. There is no basis to grant reargument now to simply rehash the same arguments that have already been made and considered.

Second, reconsidering *Drejka* does not change the outcome of my earlier decision. In *Drejka*, the Delaware Supreme Court reversed a ruling of the Superior Court in which, by excluding plaintiff’s expert report, “the trial court [had in essence] entered a default judgment against Drejka as a sanction for violating the court’s Scheduling Order.”⁹ The issue on appeal, as articulated by the Supreme Court, was “whether the Superior Court abused its discretion in *dismissing appellants’ personal injury claims* as the sanction for discovery violations.”¹⁰

As the Supreme Court noted, “dismissal is the ultimate sanction.”¹¹ Because of the severity of the “ultimate sanction,” the Supreme Court in *Drejka* applied the

³ *Fisk Ventures, LLC v. Segal*, 2008 WL 2721743, at *1 (Del. Ch. July 3, 2008) (quoting *Forsyth v. ESC Mgmt. Co. (U.S.), Inc.*, 2007 WL 3262205, at *1 (Del. Ch. Oct. 31, 2007)) (internal quotation marks omitted).

⁴ *Mickman v. Am. Int’l Processing, L.L.C.*, 2011 WL 809482 (Del. Ch. Feb. 23, 2011) (quoting *Medek v. Medek*, 2009 WL 2225994, at *1 (Del. Ch. July 27, 2009)).

⁵ *Fisk Ventures*, 2008 WL 2721743, at *1.

⁶ Pl.’s Opening Br. 12-13.

⁷ Echelon Answering Br. 16-17.

⁸ Pl.’s Reply Br. 13-14.

⁹ *Drejka*, 2010 WL 6007845, at *2. This was because “without an expert, Drejka could not make out a *prima facie* claim of negligence.” *Id.* at *1.

¹⁰ *Id.* at *1 (emphasis added).

¹¹ *Id.*

six-factor test articulated in *Minna v. Energy Coal S.p.A.*¹² to determine whether the trial court had “abused its discretion in *dismissing or refusing to lift a default [judgment].*”¹³ The Supreme Court in *Drejka* did not, as Encite suggests, apply the “test for reviewing imposition of a default” to simply determine “whether the sanction of excluding plaintiff’s expert was appropriate”¹⁴—the issue in *Drejka* was whether the sanction that amounted to a *default judgment* extinguishing plaintiff’s claims was appropriate.

This is not a case where the Court is entering a dismissal or default judgment against Encite. The letter opinion did not impose monetary or other sanctions against Encite or its counsel. It simply denied a motion to modify the Scheduling Order—a motion made *after* the date in question had already passed and for which delay no good cause was shown. To be clear, though, the April 15 letter opinion does not amount to a default judgment or dismissal of this case. There is still a damage theory available to plaintiff, and plaintiff itself conceded that the exclusion of its expert report will not result in dismissal of its case.¹⁵ Accordingly, the six factors considered in *Drejka* do not apply here.

For the foregoing reasons, the motion for reargument is denied.

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in cursive script that reads "William B. Chandler III". The signature is written in black ink and is positioned above the printed name.

William B. Chandler III

WBCIII:slu

¹² 984 A.2d 1210, 1215 (Del. 2009).

¹³ *Drejka*, 2010 WL 6007845, at *2 (emphasis added).

¹⁴ Pl.’s Mot. for Reargument 3.

¹⁵ Pl.’s Reply Br. 14 (“Encite does not believe that exclusion of its expert report would result in dismissal of its case.”).