SUPERIOR COURT

OF THE

STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

(302) 255-0664

NEW CASTLE COUNTY COURTHOUSE
500 N. KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801

Joel Friedlander, Esquire
John M. Seaman, Esquire
Bouchard, Margules & Friedlander, P.A.
222 Delaware Avenue
Wilmington, Delaware 19801
Attorneys for Plaintiffs

Thomas R. Hunt, Jr., Esquire
Jon E. Abramczyk, Esquire
David J. Teklits, Esquire
Thomas W. Briggs, Jr., Esquire
Morris, Nichols, Arsht & Tunnell
1201 North Market Street
P.O. Box 1347
Wilmington, Delaware 19899
Attorneys for Defendant

By facsimile and U.S. Mail

Re: **Candlewood Timber Group LLC and Forestal Santa Barbara SRL v. Pan American Energy LLC**
C.A. No. 04C-12-139 RRC

Submitted: January 17, 2006
Decided: January 18, 2006

On Plaintiffs Candlewood Timber Group LLC and Forestal Santa Barbara SRL's "Motion for Leave to Serve the Expert Report of Sergio Ibarra, Engineer."
DENIED.

Dear Counsel:

Currently before this Court is a motion filed by Plaintiffs Candlewood Timber Group LLC and Forestal Santa Barbara SRL (collectively "Candlewood"). It is styled a "Motion for Leave to Serve the Expert Report of Sergio Ibarra, Engineer" and essentially seeks to modify this Court's August 22, 2005, scheduling order.

I. FACTS AND PROCEDURAL HISTORY

This motion, filed December 21, 2005, arises out of complex multinational litigation, the background and history of which was summarized in a recent opinion by the Supreme Court of Delaware.[1] In essence, Candlewood seeks monetary damages for losses that Candlewood attributes to various breaches of oil and gas extraction permits in Argentina by Pan American, which resulted in Candlewood's alleged inability to obtain certain environmental certifications necessary for their continuing business.[2] The location of certain oil and gas well sites is one of many issues in this case.

Pursuant to the Court's August 22, 2005, Amended Trial Scheduling Order, the deadline for Candlewood to submit expert reports was September 20, 2005. On May 16, 2005, prior to the subsequently-established deadline, Candlewood had submitted a report by their original Argentine surveyor expert, Daniel Ponisio, which, according to Pan American, concluded that "60% of the Spe-3 well site was determined to lie *outside* of Plaintiffs' property."[3] Candlewood states that Ponisio's report found that approximately 40% of the Spe-3 well site is on Candlewood's property.[4] According to Candlewood, Ponisio, before his deposition was able to be taken in early August 2005, became "unavailable" and has not responded to Candlewood's recent attempts to contact him. In its motion, Candlewood merely said that Ponisio was "unavailable," without giving any reason.[5]

---

[1] *Candlewood Timber Group, LLC, et al. v. Pan Am. Energy LLC,* 859 A.2d 989 (Del. 2004) (affirming the Court of Chancery's dismissal of the case based on lack of subject matter jurisdiction, but reversing the dismissal on *forum non conveniens* grounds and remanding with instructions to transfer the case to the Superior Court).

[2] *Id.* at 992.

[3] Def.'s Resp. 3.

[4] Letter to the Court from Joel Friedlander, Esq. (Jan. 17, 2006).

[5] Pls.' Mot. 1, 3 ("Mr. Ibarra's report has become necessary because Plaintiffs' previous surveyor expert has become unavailable."; "Mr. Ponisio, however, has proven unavailable for deposition of trial testimony."; "Plaintiffs have diligently attempted to

At the January 10, 2006, oral argument, Candlewood submitted an affidavit by Miguel Romero, the General Manager of Plaintiff Forestal Santa Barbara SRL, concerning his contact with Ponisio.[6] According to Romero, Ponisio first indicated that he would be "unavailable" for his deposition on August 10, 2005.[7] Then, on September 19, 2005, Romero again spoke with Ponisio, who recommended another surveyor to Romero who could serve as an expert.[8] Romero claims in the affidavit that he has had no further contact with Ponisio.[9]

At oral argument, Candlewood explained why it had waited more than 3 months after its expert report was initially due to seek modification of the August 22 Amended Trial Scheduling Order. Candlewood, in essence, said that it delayed filing the motion because it had hoped to reestablish contact with Ponisio, but ultimately Candlewood acknowledged that they did not "have a good explanation as to why [Ponisio is] unavailable."[10] Candlewood further explained that because they did not have a new expert report, and, therefore, no new expert, Candlewood "[was not] ready to bring [the matter] to [the Court's] attention …"[11]

Candlewood subsequently retained a second surveyor expert who submitted a new expert report, which was completed by the expert on December 2, 2005, and, presumably was produced to Pan American at some point between December 2 and 21, 2005. According to Pan American, this new report "concludes that all of the Spe-3 well site is on Plaintiffs' property."[12] Candlewood, on the other hand, interprets Ibarra's report as finding that approximately 80% of the well site is on Candlewood's property.[13] Further, Candlewood conceded at oral argument that Ibarra's

---

communicate with Mr. Ponisio and … reluctantly [came] to the conclusion that Mr. Ponisio would not be able to serve as an expert…").

[6] Romero Aff. ¶ 1. Although this affidavit was produced by Candlewood at oral argument, it should have been prepared earlier and filed with the instant motion to allow Pan American opportunity to respond to it.

[7] *Id*. at ¶ 3.

[8] *Id.* at ¶ 4.

[9] *Id.* at ¶ 5.

[10] Tr. at 18 (Jan. 10, 2006).

[11] *Id.* at 24.

[12] Def.'s Resp. 3.

[13] Letter to the Court from Joel Friedlander, Esq. (Jan. 17, 2006).

report is an original report and does not supplement Ponisio's report.[14] Ibarra will be available for deposition.[15]

This case had originally been scheduled for trial on November 28, 2005. Upon request by both parties in August 2005, this Court convened a scheduling conference, entered an Amended Trial Scheduling Order and rescheduled this trial to May 22, 2006. On August 22, 2005, the Court also set new deadlines for the submission of Plaintiffs' expert reports (September 20, 2005), submission of Defendant's expert reports (October 28, 2005), discovery cut-off (December 21, 2005), dispositive motions and responses thereto (January 13, 2006 and February 13, 2006), motions in limine, responses and replies thereto (January 13, 2006, February 3, 2006 and February 13, 2006), as well as the date for the pretrial conference (April 21, 2006). A full day of hearings was expected for argument on at least some of the anticipated motions. On December 16, 2005, Pan American sent a letter to the Court on behalf of both parties stating that both parties agreed to extend the discovery cut-off date to January 27, 2006. The Court approved that amendment.

Further, due to the assigned judge being newly assigned in December to criminal rotation duties during the week of May 22, the Court wrote to the parties on December 20, 2005, and suggested that the trial date be moved forward two weeks to May 8, 2006. A scheduling conference was convened on January 10, 2006, to consider the feasibility of a May 8 trial date in addition to oral argument on the instant motion. Candlewood, at that time, stated its confidence that all discovery could be completed by the January 27 deadline and that the trial could, in fact, realistically be moved up two weeks to May 8, 2006. Candlewood has consistently pressed for an early trial date from the beginning of this case. Pan American disagreed with Candlewood's assessment and conveyed to the Court at the January 10 scheduling conference that discovery was far from completion, pointing out that a number of important and lengthy depositions have yet to be taken. The Court nevertheless rescheduled the trial to May 8 over the objection of Pan American, but stated that, if in the coming weeks Pan American continued to believe that any May 2006 trial date was not feasible, given the complexity of the numerous pre-trial issues, Pan American may renew its application to reschedule the case.

---

[14] Tr. at 25-26 (Jan. 10, 2006) ("THE COURT: [Ibarra's report] is not a supplement[al] report then. This would just be an original report from the surveying expert. MR. ABUHOFF: That's right.").

[15] Pls.' Mot. 1.

II. CONTENTIONS OF THE PARTIES

Candlewood argues that the Court should grant "relief from the Court's scheduling order for the limited purpose"[16] of producing Sergio Ibarra's newly created expert report even though Candlewood's deadline for submitting expert reports was September 20. Candlewood contends that their original expert has become "unavailable" and that the introduction of a new expert will not be prejudicial to Pan American because the discovery cut-off deadline has been extended and there is still time to depose Ibarra before the May 2006 trial date. Candlewood does not contend that the Ibarra report is a "supplemental" report. Additionally, Candlewood asserts that inadequate production of documents by Pan American was one of the main reasons why the discovery deadline needed to be extended to January 27 and that "[b]ecause discovery has been extended … the substitution of Mr. Ibarra as expert will not prejudice Defendant …"[17]

After oral argument, Candlewood felt that it was necessary to respond to statements made by Pan American at the conference. Candlewood subsequently argued that "Defendant contended for the first time that other experts relied significantly on Plaintiff's initial survey report."[18] Candlewood contends such claims by Pan American are not accurate in that there is no "significant connection between Mr. Ibarra's findings and Defendant's experts …"[19] Thus, concludes Candlewood, Pan American "has the time and information to effectively respond to Mr. Ibarra's findings … [and] will not be prejudiced by the admission of his report…"[20]

Pan American responds that it will be prejudiced if the scheduling order is now modified to allow the production of Ibarra's expert report. Pan American claims that it would not have enough time before trial to respond to a new expert report nor would it be able to adequately prepare any defenses applicable to the survey. At oral argument, Pan American stressed that this prejudice is compounded by the new May 8 trial date and the already tight schedule in this case. Pan American elaborated on the issue of prejudice at oral argument, explaining that the issues in the Ibarra report

---

[16] Pls.' Mot. 1.
[17] *Id.* at 2.
[18] Letter to the Court from Joel Friedlander, Esq., at 1 (Jan. 11, 2006)
[19] *Id.*
[20] *Id.* at 2.

"play[] into the testimony of nearly every other expert witness here…"[21] On that note, Pan American also contended in a later letter, that "[a]dditional discovery will be required [if Ibarra's report is admitted], and it cannot be completed before Pan American has the opportunity to prepare a rebuttal to Plaintiffs' new surveyor's theory."[22] Further, Pan American additionally points out that Ibarra's expert report is not a mere supplement to Ponisio's original report, but rather is an entirely new report "that completely changes the methodology and the result of Plaintiffs' survey."[23]

In response to Candlewood's letter submitted after oral argument, Pan American counters that Candlewood has continued to fail "to offer any explanation as to why their original expert surveyor, Mr. Ponisio, became 'unavailable.'"[24] Pan American continues to stress that Ibarra's report is not "supplemental," but rather is "intended to address a deficiency in the original expert's report."[25] More specifically, this "new report [is] from a surveyor that now claims that all of the Spe-3 well site is ***on Plaintiffs' land***, when Mr. Ponisio's report conceded that most of that well site is ***outside of Plaintiffs' land***."[26] Pan American also contends that the only basis for "good cause" put forth by Candlewood is that Pan American will not be unfairly prejudiced, which Pan American refutes.

III. DISCUSSION

The issue is whether Candlewood has made the requisite showing of "good cause" to modify this Court's August 22, 2005, Amended Trial Scheduling Order for the purpose of serving a new surveying expert report upon Pan American almost three months after the deadline for submission of expert reports has passed.

The standard to be applied upon a motion to amend a scheduling order is set forth in Superior Court Civil Rule 16: "A schedule shall not be modified except by leave of the Court upon a showing of good cause."[27]

---

[21] Tr. at 29 (Jan. 10, 2006).
[22] Letter to the Court from Jon E. Abramczyk, Esq., at 4 (Jan. 13, 2006).
[23] Def.'s Resp. 2.
[24] Letter to the Court from Jon E. Abramczyk, Esq., at 1 (Jan. 13, 2006).
[25] *Id.* at 2.
[26] *Id.*
[27] Super. Ct. Civ. R. 16(b).

This language parallels that of the corresponding Federal Rule.[28] The construction of the Federal Rules of Civil Procedure is highly persuasive in the construction of Superior Court Civil Rules.[29]

It has been stated that "[p]roperly construed, 'good cause' means that scheduling deadlines cannot be met despite a party's diligent efforts."[30] One leading treatise quotes language from two federal cases describing the rationale underlying the "good cause" requirement for modification of scheduling orders:

> Such orders and their enforcement are regarded as the essential mechanism for cases becoming trial-ready in an efficient, just and certain manner. The control of these schedules is deliberately reposed in the court, and not in counsel, so that this end may be achieved.[31]

This commentator further expounds on the competing interests that the "good cause" standard attempts to balance:

> [I]f changes could be secured too easily in scheduling orders they would not provide the discipline and pressure to prepare that is deemed essential to timely case development and effective docket management. On the other hand, imposing too demanding a standard for changing those orders would be unrealistic and could be counterproductive.[32]

---

[28] Fed. R. Civ. P. 16(b) (using "good cause" standard for modification of scheduling orders).

[29] *Wolhar v. General Motors Corp.*, 712 A.2d 464, 468 (Del. Super. Ct. 1997).

[30] *Gonzalez, et al. v. Comcast Corp., et al.*, 2004 WL 2009366, *1 (D. Del. 2004) (denying motion to amend scheduling order under "good cause" standard where plaintiff focused on why they believed that defendant would not be prejudiced instead of focusing on why the deadlines could not be met despite diligent efforts) (citations omitted). *See also* 6A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure*, § 1522.1 (2nd ed. 1990) ("[A showing of 'good cause'] would require the party seeking relief to show that the deadlines cannot be reasonably met despite the diligence of the party needing the extension.").

[31] 3 James Wm. Moore et al., Moore's Federal Practice § 16.14(1)(a) (1997) (quoting *Rouse v. Farmers State Bank*, 866 F. Supp. 1191, 1198 (N.D. Iowa 1994) (quoting *Kramer v. The Boeing Co.*, 126 F.R.D. 690, 692 (D. Minn. 1989))).

[32] Moore's Federal Practice § 16.14(1)(a).

Delaware courts that have considered applications to modify a Trial Scheduling Order have uniformly used the "good cause" standard.[33] Such adherence to the language of the rule advances the rationale described in case law and treatises.

Candlewood, relying on a case from United States District Court for the District of Delaware, argues that "[t]he touchstone for determining whether to exclude untimely expert reports is whether the party opposing their admission is prejudiced."[34] The Court agrees that lack of prejudice to another party can, in appropriate cases, be a factor in the Court's determination of whether "good cause" exists, but the Court's inquiry does not end with consideration of that one factor.

In *Chase Manhattan*, the moving party sought to exclude untimely supplemental reports to otherwise timely expert reports; the supplemental reports were submitted only a few weeks after the deadline had passed and more than seven months before trial was scheduled to begin.[35] Those circumstances, the court said in denying the motion to exclude, gave the moving party ample opportunity to depose the experts about their supplemental reports.[36] First, the report sought to be served here will be a few months past the deadline, not a few weeks as in *Chase Manhattan*. Second, Candlewood does not contend that Ibarra's report is a supplemental report. It appears to be a new report, seemingly different at least to some degree in both methodology and result from Ponisio's original report. While

---

[33] *Caniford v. Wilson*, 2005 WL 1950901 (Del. Super.) (denying plaintiff's request to extend the discovery deadline by at least three months to introduce an "entirely new claim of permanent damages," after the Court had already moved the discovery cut-off date twice, citing a high degree of prejudice to defendant); *Harrington Raceway, Inc. v. Self Funding Administrators Corp., et al.*, 2004 WL 2830906, *1 (Del. Super.) (denying a request to file an untimely motion for summary judgment two months before trial by refusing to "jam [m]otions for [s]ummary [j]udgment, briefing, and a decision" into an already busy court calendar and stating that this is the sort of problem that scheduling orders are meant to prevent); *Horne v. Kent General Hospital, Inc.*, 1990 WL 127840, *1 (Del. Super.) (using the "good cause" standard to modify the scheduling order to allow a defense expert, who had not been identified in the scheduling order, to testify at trial based on the agreement of the parties).

[34] *Chase Manhattan Mort. Corp. v. Advanta Corp.*, 2004 U.S. Dist. LEXIS 3933, *36 (D. Del. 2004) (denying a motion to exclude untimely supplemental expert reports where the moving party argued only that the reports should be excluded as untimely and did not show any prejudice).

[35] *Id.*

[36] *Id.*

the Court recognizes that both parties have differing interpretations of Ibarra's report, the Court declines to reach a conclusion as to which party's interpretation is correct, but notes that there are apparently fundamental differences between Ponisio's report and Ibarra's report. Although the *Chase Manhattan* court did not explicitly address the "good cause" requirement of Federal Rule of Civil Procedure 16, the court did seem to implicitly find "good cause" under the particular circumstances of that case. For those reasons, the *Chase Manhattan* case is distinguishable.

The record does not support a finding of "good cause" for Plaintiffs' requested modification of the scheduling order. 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. Further, Candlewood has not demonstrated that the scheduling order could not be met despite Candlewood's "diligent" efforts. Nor has Candlewood shown how Pan American's non-compliance with other discovery deadlines is connected to Candlewood's delay in bringing this instant motion. Ponisio's potential "unavailability" was known to Candlewood at least by early August 2005 when Ponisio first informed Romero that he would be "unavailable" for deposition in this case.[37] The actions of Pan American relating to the subject property in this litigation in Argentina took place beginning in 1999. Candlewood has known for years of its need for a surveying expert. Pan American's surveyor expert's report was produced on or before the October 28, 2005, deadline for submission of Pan American's expert reports. It appears to the Court that allowance of Ibarra as a new expert witness would work some prejudice to Pan American for the reasons asserted by Pan American, although perhaps not to the degree claimed by it. Any delay in bringing this application, in the face of the amount of time that Candlewood had to prepare for and remedy a situation like this one, weighs against a finding of "good cause" necessary for a modification of this Court's August 22, 2006, scheduling order.

For the foregoing reasons, Candlewood's "Motion for Leave to Serve the Expert Report of Sergio Ibarra, Engineer" is **DENIED.**

IT IS SO ORDERED.

[37] Romero Aff. ¶ 3.

_____

oc: Prothonotary