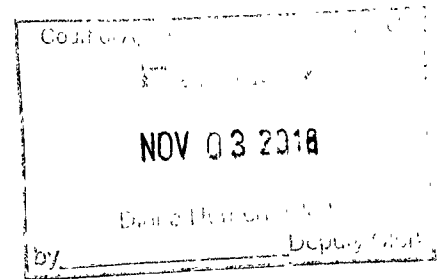


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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR



TOP SHELF MANUFACTURING, LLC,
PACIFIC MEDICAL, INC.,

Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SONOMA,

Respondent;

BREG, INC.,

Real Party in Interest

A148953

(Sonoma Super. Ct.
No. SCV255056)

ORDER ISSUING ALTERNATIVE WRIT OF MANDATE

THE COURT¹:

The court has conducted a detailed review of the petition, preliminary opposition and reply, and the record.

Respondent Superior Court of California, County of Sonoma, granted real party in interest's motion to disqualify petitioners' counsel. The order granting disqualification does not address the issue of laches. Petitioners assert real party unreasonably delayed bringing the motion for disqualification, thus raising the issue of whether the motion was barred by laches. (See *River West, Inc. v. Nickel* (1987) 199 Cal.App.3d 1297 (*River West*)).) Because the analysis of laches under *River West* involves factual issues, the appropriate procedure to be followed is for respondent superior court to make the laches determination in the first instance. In making that determination, we provide the following as guidance:

¹ (Before Reardon, A.P.J., Rivera, J. and Streeter, J.)

If, in addressing the issue of laches, petitioners can “demonstrate prima facie evidence of unreasonable delay in bringing the motion” which caused prejudice to them, then the burden shifts back to real party to justify its delay. (*Ibid*, 199 Cal. App. 3d at p. 1309.) At that point, real party must address (1) how long it has known of the potential conflict; (2) whether it has been represented by counsel since it has known of the potential conflict; (3) whether anyone or anything prevented it from making the motion earlier, and if so, under what circumstances; and (4) whether an earlier motion to disqualify would have been inappropriate or futile and why. (*Id.*)

Having reviewed the record as presented in this Court, we observe that more than fourteen months appear to have elapsed between the time the potential conflict first surfaced and the filing of the motion to disqualify; there appears to have been significant litigation activity during that period; there appears to have been no stay or other impediment to bringing the motion at an earlier time; the record includes nothing from Mr. Hurvitz explaining what he did in connection with the email from Mr. McDonald, and nothing from real party itself as to when it became aware of the conflict or why the motion was not filed more promptly; and, prior to the filing of the motion, some of the email communication between real party’s counsel and petitioners’ counsel suggests that real party may have been using the issue of disqualification to gain tactical advantage in the litigation. By noting these aspects of the record, we are not making factual findings, but simply identifying aspects of the record that the trial court may wish to explore further and take into account in its laches determination.

Therefore, let an alternative writ of mandate issue directing respondent Superior Court to set a briefing schedule and conduct a hearing to resolve the issue as described above. Alternatively, respondent shall show cause before Division Four of this court why it should not be compelled to do so.

The alternative writ is to be issued, served and filed on or before November 3, 2016, and shall be deemed served when copies are sent by the clerk of this court to all parties and to respondent superior court.

On or before November 18, 2016, petitioners shall inform this court in writing whether respondent has complied with the alternative writ, and shall serve and file any new notices, orders or other documents issued or filed by respondent. If respondent complies with the alternative writ, this court will promptly discharge it and summarily deny the petition as moot.

Otherwise, a written return to the alternative writ shall be served and filed on or before December 5, 2016. Petitioner may file a traverse within fifteen days of the filing of the return (Cal. Rules of Court, rule 8.487(b)) and the matter will be heard before Division Four of this court when ordered on calendar.

NOV 03 2016
Date: _____

REARDON, ACTING P.J. _____ A.P.J.

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