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JUDGE FINALLY SETS BROBECK TRIAL DATE

As the defunct San Francisco firm fails to win any more delays, it also receives notice of a suit by employees.

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SAN FRANCISCO - Refusing to brook further delay, a trial judge ordered Brobeck Phleger & Harrison's new counsel Tuesday to appear on schedule April 8 to defend the \$40 million accounting and tort action filed against it by Santa Monica's Dickson, Carlson & Campillo.

The ruling by Los Angeles Superior Court Judge Cesar Sarmiento came one day after 60 former Brobeck employees filed suit against the defunct firm seeking between \$3 million and \$4 million in severance pay. That complaint alleges that by acquiring 150 Brobeck lawyers plus management records and client files, Philadelphia-based Morgan Lewis & Bockius acted as Brobeck's alter ego and therefore is on the hook for the employees' damages.

In an interview, a former of counsel to Brobeck described a frantic scene Jan. 31 as attorneys ordered employees to preserve client records on CDs so they could retain copies.

"It was like, whoever had a CD burner was a very popular person," the attorney said. "They were downloading massively because they weren't sure if the doors were going to be locked the next day. I had concerns about things happening without client approval - a really big concern about that."

"That is the assets of a law firm," plaintiffs counsel Mark Thierman said Tuesday of the records. "It's going to Morgan Lewis."

Representatives of Morgan Lewis said Tuesday the firm has a policy against commenting about pending litigation against it.

Regarding the Dickson Carlson case, Sarmiento's ruling means Brobeck's new counsel, San Francisco's Morgenstein & Jubelirer, will have just three weeks to study 7 1/2 years' worth of legal documents. *Campillo v. Pole*, SC039135.

Morgenstein & Jubelirer partner John Worden tried to make the best of the situation. "I guess we'll have to" be ready April 8, he said. "It's not the ideal circumstance."

Brobeck had sought more time to prepare for its defense following the departure of its longtime counsel, John Kecker, of San Francisco's Kecker & Van Nest, from the case last month.

In its motion to postpone, Brobeck explained that litigation with Dickson Carlson involves 4,000 pages of exhibits, 45 volumes of depositions and 50 trial prep binders.

In a responding motion, plaintiffs attorneys at Santa Monica's O'Neill, Lysaght & Sun argued that Brobeck was trying to delay proceedings while working with bankruptcy counsel on methods to avoid paying future judgments.

"We are very pleased" at the ruling, said Brian Lysaght, lead attorney for Dickson Carlson. "We look forward to putting the facts before a jury April 8."

In the employees' case, filed in San Francisco Superior Court, Thierman, of Thierman Law Firm in Reno, Nev., is suing both Brobeck and Morgan Lewis as Brobeck's alter ego and successor because the employees didn't get 60 days notice, or pay in lieu of that notice, before Brobeck closed Jan. 30. *McCaffrey v. Brobeck Phleger & Harrison*, CGC-03-418426.

By the time 200 employees were terminated Feb. 14, Morgan already was entrenched in Brobeck's offices as their employer, Thierman asserted in his complaint.

Thierman's complaint cites the California State Workers Adjustment and Retraining Notification Act.

The employees' lawsuit will turn on when, exactly, Morgan Lewis took control of Brobeck's San Francisco offices, according to Thierman.

When Thierman threatened to sue Morgan Lewis last month, partners at the Philadelphia firm said the firm first sent lawyers to Brobeck's San Francisco offices Feb. 3 to recruit. They later negotiated a temporary lease on the former Brobeck space, commencing operations there Feb. 12. Morgan Lewis bought Brobeck's furniture and licensed its phone and fax systems through a Feb. 18 transition services agreement, the partners said.

However, Thierman's complaint asserts that on or before Jan. 30 - the day Brobeck announced its dissolution - Morgan Lewis took control of Brobeck's management, clients, records and personnel. It says Brobeck partners identified themselves on hotel receipts as working for Morgan Lewis and that Brobeck lawyers asked staff to download client files without clients' permission.

The of counsel interviewed Tuesday said the partner who ordered the client records copied, like many other lawyers who downloaded files, ended up at Morgan Lewis.

"Almost immediately following the [dissolution] announcement on the 30th, Morgan Lewis was all over the place," said the

attorney. "I know that Morgan Lewis was occupying offices even before the announcement on the 30th."

Thierman is attempting to use a novel California case, *Jewel v. Boxer*, 156 Cal.App.3d 171 (1984), to recoup money owed to his clients. Under *Jewel*, when a law firm dissolves, former partners are entitled to a share of any attorney fees received on pending cases based on their respective interests in the former partnership.

If successful, the case will act as a continuing lien on the work Morgan assumed from Brobeck, meaning Thierman could go after Morgan Lewis profits to settle his claims.

"If it's a Brobeck client, and an ongoing matter, those fees all go to Brobeck," Thierman said. Whether it's former Brobeck or longtime Morgan Lewis lawyers working the case, "all those fees belong to the old Brobeck."

Thierman agreed that Morgan Lewis' transition services agreement insulated the firm from claims by Brobeck's other creditors, such as its landlord.

"It was the right thing for them to do tactically," he said. Moving in so quickly, Morgan Lewis understood its exposure to violations of employment laws and took a calculated risk.

"It's a two-edged sword," he said. "You deal with your largest exposure first. If you have some secondary fall-out, well, it's a choice you had to make."

Thierman said he might file a second claim for \$1 million on behalf of former Brobeck lawyers who were not paid deferred compensation in the form of bonuses.

The Dickson Carlson complaint also names former partners Debra Pole and William Fitzgerald, who left for Brobeck in 1995 and took the firm's biggest client, Baxter Healthcare Corp., with them. Dickson Carlson filed suit that year and went out of business several months later.

Dickson Carlson lost both the accounting and tort actions more than four years ago, but the 2nd District Court of Appeal reversed both decisions.

The second accounting trial took place under Sarmiento last fall. He ruled that Brobeck must turn over some Baxter profits to Dickson Carlson, but additional hearings are required to determine the amount.

Keker departed the case last month because of a conflict in representing both Brobeck and Pole and Fitzgerald following the firm's Feb. 14 closure. The legal interests of Brobeck and the two partners are no longer aligned, observers of the case have indicated.

Because of the conflict, Morgenstein & Jubelirer is not representing Pole and Fitzgerald. According to declarations filed by the two partners, they will need "substantial time" to find new counsel.

"Brobeck ... has defaulted on its promise to fund my legal defense in this litigation," Pole explained in a declaration.

Pole and Fitzgerald joined Brobeck on the condition that the firm would defend them in litigation with Dickson Carlson.

According to a declaration filed by Brobeck liquidation committee member James Miller, the firm owes Keker & Van Nest approximately \$300,000 and cannot afford counsel in any ongoing litigation.

Plaintiffs attorneys believe their clients can get up to \$10 million in the accounting action, an estimate Keker has disputed.

Significantly more - approximately \$30 million - is on the line in the tort trial starting next month.

Lysaght has indicated he is willing to discuss a settlement. Worden said he and Brobeck have not had sufficient time to go through all of the firm's options.