

**Rules For Noticing Discovery Motions To Be Heard  
After The Discovery Cut Off Date**

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A recent Third District Appellate Court's decision provides guidance in filing discovery motions to be heard after the discovery cut off date.

In *Pelton-Shepherd Indus. v. Delta Pkg. Products, Inc.* (2008) 165 Cal.App.4th 1568. ("*Pelton-Shepherd*"), the parties entered in an oral agreement, pursuant to which Delta Packaging Products, Inc. ("Delta.") served as a distributor of Pelton-Shepherd Industries's ("Pelton") gel packs from January 1997 to May 2003. The agreement terminated in May 2003, however, Delta continued to claim its right to the commissions for gel packs sold by Pelton. In September 2003, Pelton filed a complaint for declaratory relief and monies owed against Delta. Delta answered the complaint and filed a cross complaint for non-payment of commissions owed and future commissions under the written contract executed by the parties in March 2003.

As the case was getting ready for trial various discovery issues arose necessitating judicial intervention by the trial court.

Less than two months before the initial trial date, Pelton propounded a second set of requests for production on Delta. The responses were due three days beyond the discovery cut off date. When no responses were received by the due date, Pelton sent a letter to Delta asking for responses, without objections, within 10 days. At the expiration of that 10-day period, Pelton filed an ex-parte motion to strike Delta's answer and cross-complaint on the ground (among others) that Delta had failed to respond to Pelton's request for production. In its opposition, Delta argued that Pelton could not seek terminating damages since Pelton never obtained a court's order to respond to those demands and that the motion was untimely. Nonetheless, Delta promised to provide the responsive documents as soon as possible. At the ex-parte hearing, the court denied Pelton's motion to strike Delta's answer and cross-complaint but sanctioned Delta in the amount of \$500.00.

Following the hearing, Delta's attorney still failed to forward Pelton any documents, prompting Pelton to file a motion to compel Delta's responses. Delta's attorney claimed he was in preparation for a trial in a different matter and did not have time to look over Delta's documents. Delta's attorney also raised the issue of the untimeliness of Pelton's motion but agreed to waive this objection and overnight the responses by December 13, 2005 if Pelton's attorney took the motion off calendar. Otherwise Delta's attorney would go ex-parte for an order clarifying that the discovery motion was untimely.

Although Pelton did not take its motion off calendar, on December 15<sup>th</sup> Delta served its responses and responsive documents. The responses contained objections to

the last four demands on the grounds of relevancy, financial privilege and business trade secrets. During Delta's ex-parte for an order clarifying that Pelton's discovery motion was untimely, the court ruled: " 'Discovery not to be reopened; however, counsel/court shall work out any pending issues at the hearing on the motion to compel.'" *Id.* at 1576.

Subsequently, opposing the motion to compel, Delta argued that it was untimely. In reply, Pelton argued that Delta's timeliness argument was waived since its responses to discovery requests were untimely. The court ordered Delta to respond.

Soon thereafter, Delta filed a motion for relief from the waiver of its right to object to the last four requests for production, due to an excusable negligent of Delta's attorney. Delta claimed excusable neglect due to the following facts: Delta's attorney received three letters from Pelton's attorney. The first two contained Pelton's supplemental responses to Delta's discovery. Upon opening these, Delta's attorney had gotten his files to compare Pelton's supplemental responses to the initial responses, while the third envelope containing Pelton's requests for production had accidentally remained unopened. Delta's attorney did not know about the pending requests until Pelton's attorney notified him that the responses were overdue. At the hearing Delta's attorney further noted that the last four requests were absolutely irrelevant to the lawsuit. The court denied Delta's motion and ordered production; even though Pelton had only moved the court to compel responses. Delta moved for reconsideration, which was denied.

Finally, Delta agreed to produce responsive documents to the three of the four requests, contending as to the fourth that it was "unable to comply ... because it is not nor has ever been in possession of such documents." Following Delta's responses, Pelton filed a motion for terminating sanctions on the ground that Delta failed to respond fully without objections as mandated by the court's order. The court ordered production within 20 days and also sanctioned Delta for \$2,500.00. Delta responded that after diligent search it was still unable to comply with the fourth request, asking for copies of purchase orders. Delta explained that orders were mostly done by the telephone and thus there were no corresponding documents. Thereafter, Delta filed a notice of compliance with the court order and submitted a check in the amount of \$2,500.00. Nonetheless, Pelton renewed its motion for terminating sanctions on the ground that Delta still failed to comply with the court's order to provide documents without objections. After further discovery and consideration the court granted Pelton's motion and terminated Delta's answer and cross-complaint, dismissing it with prejudice. Subsequently, the trial court granted Pelton default judgment in the amount of \$32,913.76. Delta appealed.

After reviewing the trial records, the Appellate Court called this case a "classic example of how not to conduct discovery (on the part of lawyers) or to manage discovery (on the part of the court)." The Court faced two issues: 1) whether it was abuse of discretion for the trial court to hear Pelton's Motion to Compel and, if so, 2) whether such abuse was prejudicial.

Addressing the first, the Court reasoned that a party does not have a right to have a motion heard that was noticed after discovery cut off date. However, Code of Civil

Procedure §2024.050 (a) provides the court with a power to hear upon a motion for leave to be heard closer to the initial trial date or to reopen discovery after a new trial date has been set. Such motion must be accompanied by a meet and confer declaration, and in exercising its discretion to grant or deny the motion the court must consider various factors, such as “[t]he necessity and the reasons for the discovery” and “[t]he diligence of the party seeking ... the hearing of a discovery motion, and the reasons that ... the discovery motion was not heard earlier.” *Pelton-Shepherd, Supra*, 165 Cal.App.4th at 1586-1587. (Citing Cal. Civ. Code § 2024.050, subd. (a) & (b) (1), (2).)

Pelton did not seek leave from court under Cal. Civ. Code § 2024.050 to reopen discovery so that its motion to compel may be heard and there was no indication that the trial court ever considered any of the above mentioned factors. Thus, the Court concluded, the trial court abused its discretion in hearing the motion to compel not accompanied by motion for leave to be heard closer to the initial trial date or to reopen discovery after a new trial date has been set.

The Court next addressed the issue of whether such abuse of discretion was prejudicial to Delta. The Court stated that to resolve this issue it must answer the following question: “whether it is reasonably probable that a result more favorable to Delta would have been reached in the absence of the error.” *Id* at 1589. (Citing *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800-802)

The Court noted that the trial court’s decision to impose terminating sanction was based, at least partly, on its order entered on the motion to compel. The Court noted, however, that had the trial judge denied the motion to compel on procedural grounds, Pelton could have moved the court for leave to be heard or to reopen discovery. At which point the trial court would have to “consider (among other things) the reasons Pelton believed it needed those documents and Pelton’s diligence or lack of diligence in seeking the documents.” *Id*. The trial court would have looked at why did Pelton waited almost two years to propound the second set of requests for inspection and did so less than two months before the initial trial date. The trial court would also have looked at the reasons why Pelton needed the documents and the trial court would have noted the marginal relevance of the documents demanded by Pelton. Thus, the Court concluded, from the trial record it is reasonably probable that the trial court would not have reopened the discovery and therefore, would also not have imposed monetary and terminating sanctions on Delta. Therefore, the Court concluded trial court’s abuse of discretion was prejudicial to Delta.

The Court reversed the judgment instructing the trial court to vacate the order striking Delta’s answer and cross-complaint and imposition of monetary sanctions.<sup>1</sup> The Court also permitted Delta to recover its costs on appeal.

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<sup>1</sup> In its unpublished opinion, the Court also discussed whether the trial court prejudicially abused its discretion in denying Delta’s motion for relief from the waiver of objections because Delta’s failure to timely respond to the inspection demands was the result of its attorney’s excusable neglect. The Court reasoned that due to the facts discussed above Delta’s attorney failure to respond to document requests was an

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excusable neglect and thus the trial court's denial of Delta's motion for relief from waiver of objections was an abuse of its discretion. Furthermore, the Court concluded that such abuse of discretion was prejudicial as it is reasonably probable that the court would have sustained Delta's objections to document requests and denied the motion to compel.