

**SUPERIOR COURT, STATE OF CALIFORNIA  
COUNTY OF SANTA CLARA**

**Department 10**

**Honorable Frederick S. Chung**

Rachel Tien, Courtroom Clerk  
191 North First Street, San Jose, CA 95113  
Telephone: 408-882-2210

**DATE: October 19, 2023**

**TIME: 9:00 A.M.**

**To contest the ruling, call (408) 808-6856 before 4:00 P.M.**

Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling,  
in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

**The courthouse is open:** Department 10 is now fully open for in-person hearings, as of April 18, 2023. The court strongly prefers **in-person** appearances for all contested law-and-motion matters. For all other hearings (*e.g.*, case management conferences), the court strongly prefers either **in-person or video** appearances. Audio-only appearances are permitted but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort.

**\*New information\* (please read):** To set future motion hearings, you no longer need to file your motion before receiving a hearing date. Phone lines are now open for you to call and reserve a hearing date before filing and serving your motion. Please call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve your date. This will obviate the need to file and serve a separate amended notice at a later time. Please note: if your motion papers are not filed within five business days of reserving the hearing date, the date will be released to other cases.

**CourtCall is no longer available:** Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: [https://www.scsccourt.org/general\\_info/ra\\_teams/video\\_hearings\\_teams.shtml](https://www.scsccourt.org/general_info/ra_teams/video_hearings_teams.shtml).

**Recording is prohibited:** As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

**Court reporters:** Unfortunately, the court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If any party wishes to have a court reporter, the appropriate form must be submitted. See [https://www.scsccourt.org/general\\_info/court\\_reporters.shtml](https://www.scsccourt.org/general_info/court_reporters.shtml).

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LINE #	CASE #	CASE TITLE	RULING
<a href="#">LINE 1</a>	22CV395989	Sisi Xu et al. v. Bethany Liou et al.	Order of examination of Monterey Dynasty, LLC: parties to appear.
<a href="#">LINE 2</a>	22CV395989	Sisi Xu et al. v. Bethany Liou et al.	Order of examination of Bethany Liou: parties to appear.
<a href="#">LINE 3</a>	22CV395989	Sisi Xu et al. v. Bethany Liou et al.	Order of examination of Golden California Regional Center, LLC: parties to appear.
<a href="#">LINE 4</a>	22CV396170	Christian Humanitarian Aid v. AM Star Construction, Inc. et al.	Demurrer to Shultz & Associates' cross-complaint: although Christian Humanitarian Aid has failed to take this matter off calendar, it is clearly moot, in light of Shultz & Associates' filing of an amended cross-complaint. OFF CALENDAR.
<a href="#">LINE 5</a>	22CV396170	Christian Humanitarian Aid v. AM Star Construction, Inc. et al.	Motion to strike Shultz & Associates' cross-complaint: although Christian Humanitarian Aid has failed to take this motion off calendar, it is clearly moot, in light of Shultz & Associates' filing of an amended cross-complaint. OFF CALENDAR.
<a href="#">LINE 6</a>	20CV373696	Jerry Ivy, Jr. v. Jerry Ivy, Sr. et al.	Per the court's September 11, 2023 ex parte order, this motion was continued to <b>November 2, 2023</b> at 9:00 a.m. (It is still on the October 19, 2023 calendar by mistake.)
<a href="#">LINE 7</a>	19CV341058	Michael Jadali et al. v. Cigna Health and Life Insurance Company et al.	OFF CALENDAR
<a href="#">LINE 8</a>	23CV412936	Rancho El Camino L.P. v. Henry J. Rabbitt & Sons, Inc.	Click on <a href="#">LINE 8</a> or scroll down for ruling.

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<a href="#">LINE 9</a>	20CV363735	City of San Jose v. Sacramental Native American Church et al.	Click on <a href="#">LINE 9</a> or scroll down for ruling.
<a href="#">LINE 10</a>	21CV387110	Michael W. Meredith v. Donald Williams et al.	This case is assigned to Department 20, and the present motion was mistakenly calendared in Department 10. Please check with Department 20 regarding this motion.
<a href="#">LINE 11</a>	23CV415839	In re: C.H.	OFF CALENDAR

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## Calendar Line 8

**Case Name:** *Rancho El Camino L.P. v. Henry J. Rabbitt & Sons, Inc.*

**Case No.:** 23CV412936

This is a motion to quash a deposition subpoena for business records, filed by defendant Henry J. Rabbitt & Sons, Inc. (“HJR”) against plaintiff Rancho El Camino L.P. (“REC”). HJR argues that REC’s subpoena to Blackstone Development, Inc. (“Blackstone”) violates the attorney work product doctrine and attorney-client privilege, because HJR’s counsel hired Blackstone as a consulting expert, and no decision has yet been made as to whether anyone from Blackstone will be a testifying witness at the trial in this case (the date of which has not been set). In response, REC argues that Blackstone waived any privilege when its structural engineer, Corey Wageman, allegedly told plaintiff’s superintendent, Robert Webster, that he did not see any evidence of a sinking foundation at the construction site at issue. In addition, REC argues that “Blackstone was retained by Defendant, not defense counsel.” (Opposition at p. 6:12.)

The court is not persuaded that there was any waiver of attorney-client privilege or attorney work product here. First, the court agrees with HJR that Blackstone is not the holder of any privilege or work product protection, so Wageman was not capable of waiving anything. In addition, the court finds that the isolated comment attributed to Wageman is not tantamount to a waiver of privilege, even if he were authorized to make such a waiver.

The court also does not see how REC could possibly know that “Blackstone was retained by Defendant, not defense counsel.” Nevertheless, the court agrees with REC that HJR’s declarations in support of this motion (by Wageman and by HJR’s counsel, Nathaniel Lucey) are oddly vague as to *exactly when* HJR’s counsel retained Blackstone (or began taking steps to retain Blackstone) and exactly when litigation was anticipated between the parties. Was it before or after the site visit on February 23, 2023? Was it before or after Wageman made his alleged comment to Webster on March 16, 2023?<sup>1</sup> To the extent that Blackstone did work for HJR before HJR anticipated litigation or before HJR’s counsel took steps to retain Blackstone, then that is likely not privileged, and REC is entitled to more information about it. The court needs more information about exact dates—this information is absent from the papers—and it invites the parties to address those dates at oral argument.

In the absence of any facts to clarify the current information before the court, the court will grant the motion to quash, but only to the extent that the information sought via subpoena comes after Blackstone’s retention *by counsel* in this case. Thus, rather than documents “from January 2021 to present,” the court would limit the scope of any valid subpoena document requests to documents “that predate any efforts by counsel to retain Blackstone in this case.” If there are no such documents, then the motion to quash will be granted in its entirety, as any effort to obtain discovery from HJR’s consulting experts in this case would be premature, until they have been identified as testifying experts.

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<sup>1</sup> REC filed its complaint in this case on March 15, 2023, but the court does not have any information in the file about when REC served HJR with the summons and complaint.

## **Calendar Line 9**

**Case Name:** *City of San Jose v. Sacramental Native American Church et al.*

**Case No.:** 20CV363735

Plaintiff City of San Jose (the “City”) moves for terminating sanctions against defendants Sacramental Native American Church, Corinna Reyes, and Davide Berti (collectively, “Defendants”), based on Defendants’ failure to respond to discovery, notwithstanding this court’s (Judge Kirwan’s) October 3, 2022 order compelling them to do so. The court DENIES the motion. Although Defendants have blatantly disobeyed the court’s prior order and have not provided necessary discovery, the City has not shown that a terminating sanction is the appropriate remedy here, given its failure to seek issue sanctions and failure to seek an order deeming admitted its requests for admissions.

### **1. Recent Procedural History**

The City filed this motion on January 18, 2023, with an original hearing date of May 9, 2023. At a case management conference on April 11, 2023, after it was revealed that Defendants’ counsel had been temporarily suspended from the practice of law (until June 2023), the court continued the hearing on this motion to July 13, 2023. On July 13, Defendants Reyes and Berti appeared, but their attorney did not, as he was “unavailable for health reasons.” The court decided to continue this hearing again to October 19, 2023. In addition, the court expressed skepticism that terminating sanctions were appropriate, in the absence of any showing that an intermediate remedy such as an evidence or issue sanction was insufficient. The court ordered the City to submit a supplemental brief on this issue, due on August 14, 2023. The court also set a deadline for Defendants’ opposition (September 14) and the City’s reply, if any (September 28).

At a case management conference on August 15, 2023, new counsel appeared for Defendant Berti (Damian Nassiri), and he indicated that he had just submitted a substitution of counsel the day before. The City filed its supplemental brief the day before, as well, and it served a copy on Mr. Nassiri and on counsel for the other Defendants.

Nevertheless, the court has received no opposition from any of the Defendants. On September 27, 2023, the City filed a notice of non-opposition to this motion in lieu of a reply.

### **2. Discussion**

Despite the absence of any opposition, the court concludes that terminating sanctions should be denied. The City convincingly demonstrates that further monetary sanctions would be ineffective against Defendants, given the \$13,150 that has already been awarded against them, which they have ignored. In addition, the court is persuaded that an evidence sanction would also be of minimal value, given that such a sanction generally operates to preclude a party “from introducing designated matters in evidence,” and it is unclear whether Defendants will actually seek to introduce anything into evidence at trial. (Code Civ. Proc., § 2023.030, subd. (c).) Such a sanction would not be helpful to the City, which bears the overall burden of proof as the plaintiff in this case, and which has been prevented from obtaining relevant evidence in the first place.

At the same time, the City fails to demonstrate that issue sanctions, focused on the subject matter of the discovery that it has been denied, would not be adequate to cure any

problems of proof that it may have encountered as a result of the lack of relevant discovery. In addition, an order deeming RFAs admitted under Code of Civil Procedure section 2033.280, subdivision (b), is commonly used as a remedy for a failure to provide any responses to RFAs, but the City has not even tried to seek such an order here for the RFAs that it propounded. An order establishing the truth of matters specified in the City's RFAs would go a long way toward establishing issues that the City would need to prove at trial.

The City argues that intermediate sanctions, such as issue sanctions, "will likely be ineffective to obtain compliance." (Supplemental Brief at p. 4:20.) That is the wrong standard. The purpose of discovery sanctions is not to "obtain compliance"—the purpose of discovery sanctions is to remedy any harm that may have been suffered by the moving party as a result of the lack of discovery. It is axiomatic that this court must consider "whether a sanction short of dismissal or default would be appropriate to the dereliction." (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 796-797.) In this case, the City has gone straight for the "nuclear option" of default, without properly considering whether issue sanctions, coupled with an order deeming RFAs admitted, would be enough to place it in the same position it would have been in if it had obtained the requested discovery in the first place.

The court concludes that sanctions short of default "would be appropriate to the dereliction" here and therefore denies the City's motion.

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