



1 **FACTUAL AND PROCEDURAL BACKGROUND**

2 The facts pertaining to Plaintiff's ex parte application are as follows:

3 **a. Courts Order Requiring Richard McWilliam sit for Deposition**

4 Plaintiff served Defendant McWilliam with a Notice of Taking Deposition and Production of  
5 Documents Thereat on February 10, 2012. The deposition was to take place on February 24, 2012 as  
6 agreed upon by counsel for both parties. On February 20, 2012, Mr. Skilling contacted Plaintiffs counsel  
7 asking whether Mr. McWilliam could reschedule his deposition due to unexpected circumstances that  
8 required Mr. McWilliam to be out of the country. Plaintiff's counsel agreed and rescheduled the  
9 deposition for March 1, 2012. However, due to unforeseen circumstances on March 1, 2012, Mr.  
10 McWilliam was unable to attend his deposition. Plaintiff's counsel then moved the court to compel Mr.  
11 McWilliam to attend his deposition. The Court ordered McWilliam to attend his deposition on March 8,  
12 2012.  
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15 On March 8, 2012, Mr. McWilliam was unable to sit for his deposition once more due to health  
16 reasons. The Court ordered Mr. McWilliam to attend his deposition once more on March 14, 2012. Mr.  
17 McWilliam attended this deposition and sat for seven hours of testimony. There is no evidence of any  
18 sobriety issues or problems. In fact, any assertion to the contrary is irresponsible, speculative, and without  
19 foundation.  
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21 **b. Disposition of Previous Requests for Production of Documents**

22 On August 24, 2011, Plaintiff served Requests for Production of Documents, Set Four on  
23 Defendants attached to the deposition notice of Mr. McWilliam. On October 20, 2011, Plaintiff filed  
24 Motions Compelling Further Responses to Plaintiff's Requests for Production of Documents, Set Four on  
25 Defendants. The Court ordered the parties to meet and confer regarding the request. After meeting and  
26 conferring, counsel was able to cut down the requests to those which were to be answered. Plaintiff's  
27 counsel filed a declaration with the court in regards to which requests would be answered and when they  
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1 were due. On November 21, 2011, Defendants produced documents which were in their custody and  
2 control to Plaintiff. To date, the Court has made no order as to the deficiency of Defendant's responses to  
3 these requests and has not compelled Defendants to provide any additional documentation.

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5 However, Plaintiff has attached the Requests for Production of Documents, Set Four to Defendant  
6 Richard McWilliams' deposition notice each time the notice has been served. Defendant's counsel served  
7 Plaintiff with objections to each and every request as they are duplicative, cumulative, and an attempt to  
8 circumvent previously litigated (and ruled upon) discovery matters.

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10 **ARGUMENT**

11 The Court should deny this Application because it has the authority to do so and because Plaintiff  
12 has failed to provide proper notice. Further, Plaintiff seeks a motion to strike the Defendant's answers  
13 when his proper relief is a Motion to Compel. Accordingly, Plaintiff's motion should be denied.

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15 **I. THE COURT SHOULD DENY THE EX PARTE APPLICATION BECAUSE THE  
16 RELIEF SOUGHT MUST BE BROUGHT ON A NOTICED MOTION**

17 Any party, within the time allowed to respond to a pleading may serve and file a notice of motion  
18 to strike, or a portion thereof, and shall specify a hearing date set in accordance with Section 1005 of the  
19 California Code of Civil Procedure. Cal. Code Civ. Pro § 435. Unless otherwise ordered or specifically  
20 provided by law, all moving and supporting papers shall be served and filed at least 16 court days before  
21 the hearing. Cal. Code Civ. Pro § 1005. All papers opposing a motion so noticed shall be filed with the  
22 court and a copy served on each party at least nine court days, and all reply papers at least five court days  
23 before the hearing. Cal. Code Civ. Pro § 1005.

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25 Here, Plaintiff has attempted to take a shortcut by bringing a Motion to Strike on an ex parte basis.  
26 Thus, Plaintiff failed to set a hearing date and to provide notice as required under Section 1005 of the  
27 California Code of Civil Procedure. Further, there are numerous practical reasons why, aside from Section  
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1 1005, Plaintiff should be required to bring this application by a noticed motion. First, Plaintiff's motion  
2 consists of 33 pages of substantive material and over 100 pages of exhibits. Defendants have not been  
3 provided adequate time to review and respond to all of Plaintiff's contentions made within his moving  
4 papers. Second, Plaintiff's proper remedy is a motion to compel, not a motion to strike. Accordingly,  
5 Plaintiff's Motion to Strike should be denied.  
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8 **II. THE COURT SHOULD DENY THE EX PARTE APPLICATION BECAUSE THE  
RELIEF SOUGHT IS IMPROPER**

9 California Code of Civil Procedure provides for terminating sanctions only in extreme situations  
10 where a motion to compel has already been brought *and* the party is violating a Court order.  
11

12 The California Code of Civil Procedure states that if a deponent fails to answer any question or to  
13 produce any document or tangible thing under the deponent's control that is specified in the deposition  
14 notice or a deposition subpoena, the party seeking discovery may move the court for an order compelling  
15 that answer or production. Cal. Code Civ. Pro § 2025.480(a). Further, if the court determines that the  
16 answer or production sought is subject to discovery, it shall order that the answer be given or the  
17 production be made on the resumption of the deposition. Cal. Code Civ. Pro § 2025.480(e). Thus, the  
18 remedy available to a party seeking further deposition testimony in such a situation is a motion to compel.  
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20 In addition to the above described code, Plaintiff also relies on California Code of Civil Procedure,  
21 Section 2025.450 which states that if a party or party-affiliated deponent fails to obey an order compelling  
22 attendance, testimony, and production, the court may make those orders that are just, including the  
23 imposition of an issue sanction, an evidence sanction, or a terminating sanction under Chapter 7  
24 (commencing with Section 2023.010). Code Civ. Pro § 2025.450(d). However, Plaintiff has confused the  
25 timing requirement of when each code governs. Section 2025.450 governs situations when a party needs  
26 to compel the deponent to *actually* appear and/or produce items at a deposition. 2025.480 governs the  
27 answers and/or documents given *at* the deposition. Thus, if a deponent appears and is sworn as a witness,  
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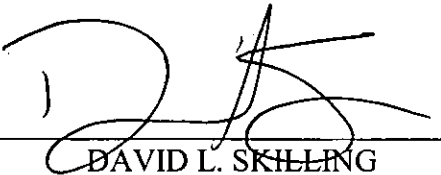
1 but thereafter refuses to answer any questions or to produce documents designated in the deposition notice  
2 or subpoena, the deposing party's remedy is a motion to compel. Further, the only sanction authorized on  
3 a motion to compel is a monetary sanction. Cal. Code Civ. Pro § 2023.030.  
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5 Here, Mr. McWilliam was ordered by this Court to sit for a deposition. This Court made no ruling  
6 on the sufficiency of any document requests or questions to be asked during the deposition. On March 14,  
7 2012, Mr. McWilliam had his deposition taken for seven hours. As such, he complied with the Court's  
8 order. Plaintiff is now seeking to be his own trier of fact in making determinations regarding the  
9 sufficiency of both the questions and answers that were provided at the deposition. Each of the questions  
10 and answers Plaintiff is unhappy with should be subjected to the normal protocol of a meet and confer,  
11 followed by any necessary motion to compel. Within the context of that motion to compel, Defendant will  
12 have the opportunity to fully brief the issues so that the Court can make a determination if further answers  
13 are necessary. As with the many other occasions throughout this litigation where Plaintiffs have sought a  
14 motion to strike, this motion should be denied.  
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17 **CONCLUSION**

18 For the reasons mentioned above, the Court should DENY Plaintiff's ex parte application for an  
19 order strike Defendants answers to the Complaint.  
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25 DATED: March 28, 2012

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BY:   
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