SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 18b
Honorable Shella Deen, Presiding
Farris Bryant, Courtroom Clerk
191 North First Street, San Jose, CA 95113

DATE: July 11, 2024 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

****Please specify the issue to be contested when calling the Court and Counsel****

LAW AND MOTION TENTATIVE RULINGS

FOR APPEARANCES: Department 18 is fully open for in-person hearings. The Court strongly prefers **in-person** appearances for all contested law and motion matters. For all other hearings, the Court strongly prefers either **in-person or video** appearances. If you must appear virtually, you must use video. 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. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 18:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

SCHEDULING MOTION HEARINGS: Please go to https://reservations.scscourt.org or call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion before you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

FOR COURT REPORTERS: The Court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If you want to have a court reporter to report your hearing, you must submit the appropriate form, which can be found here:
https://www.scscourt.org/general_info/court_reporters.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.

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LAW AND MOTION TENTATIVE RULINGS

LINE #	CASE #	CASE TITLE	RULING
LINE 1	19CV357031	Chun Lu vs Rabindra Chakraborty et al	**Order of Examination** (Rabindra N. Chakraborty). No Proof of service on file. If there is no appearance, the matter will be ordered OFF CALENDAR.
LINE 2	23CV428147	Dwayne Harris vs Ben Yadegar	**Motion to Strike.** This motion brought by Plaintiff Dwayne Harris is MOOT. Plaintiff's motion to strike portions of Defendant's demurrer to Plaintiff's First Amended Complaint was DENIED by order filed June 7, 2024.

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LAW AND MOTION TENTATIVE RULINGS

LINE 3	23CV415947	James Fok et al vs Peter Wong et al	**Motion to Compel (Discovery)**. Defendants Tung Kuen Lau and Peter Wong's motion to compel responses to demand for identification and inspection of documents from Plaintiff Mabel Fok and request for sanctions in the amount of $572. Defendants' document request (set one) was served on Plaintiff on February 29, 2024. Defendant wrote a meet and confer letter on April 23, 2024, to which no response was received. The motion to compel was filed and served on May 15, 2024 to Plaintiff's counsel's email address, eric@gruberlawgroup.com, the same email address listed by Plaintiff's counsel on the Complaint. No opposition to this motion was filed by Defendant. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Plaintiff has no meritorious arguments. (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) There is also good cause to grant this motion. Plaintiff should have served a response and produced documents within 30 days of service of the document request (Code Civ. Proc., §2031.260 (a)). Moving party meets its burden of proof. Good cause appearing, the Motion is GRANTED and sanctions of $572 are awarded to Defendants. (Code Civ. Proc., §§2031.300 (b) and (c)). Plaintiff Mabel Fok shall serve verified, code-compliant responses and responsive documents to the document request and shall pay the sanctions awarded – all within 10 days of service of this order. Defendants shall prepare a formal order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 4	23CV427505	Steve McHarris vs City of Milpitas	**Motion to Compel (Discovery).** Scroll down to Line 4 for Tentative Ruling.
LINE 5	20CV368367	Martha Cavero et al vs GEORGE CHIALA FARMS, INC. et al	**Motion to Continue Trial**. This motion is MOOT. Trial was continued to April 21, 2025, by *ex parte* order filed June 3, 2024.
LINE 6	20CV369138	Chicago Title Company vs. 28th ST Villa Apts LLC	**Motion to Substitute**. Defendant/Cross-Complainant Green Villa Apartments, LP's motion to substitute Green Villa Apartments, LLC for Green Villa Apartments, LP, pursuant to Code Civ. Proc., §473. The motion is CONTINUED to July 18, 2024 at 9 a.m. in Department 18b (*ex parte* order continuing motion signed on July 1, 2024).

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LAW AND MOTION TENTATIVE RULINGS

LINE 7	20CV369925	CHUN LU et al vs FREMONT HILLS DEVELOPEMENT CORPORTATION et al	**Motion for Entry of Judgment**. Motion by Defendant Peter Xu Zhong for judgment pursuant to Code Civ. Proc., §438. On April 30, 2024, the Court issued an order granting judgment on the pleadings and gave Plaintiff 10 days' leave to amend. For unknown reasons the order on the motion for judgment on the pleadings was never filed. However, Defendant was ordered to file a notice of entry of the order and did so on May 1, 2024. Plaintiff duly attempted to file a Second Amended Complaint on May 8, 2024. However, the clerk mistakenly rejected the filing stating that Plaintiff needed a court order to file such a pleading. The Second Amended Complaint was re submitted for filing, and was filed, on May 30, 2024, at 11:51 a.m. Defendant filed this motion for entry of judgment the next day, on May 31, 2024, at 4:21p.m. arguing that the time within which Plaintiff was ordered to file a Second Amended Complaint had expired and Plaintiff had not filed any such pleading. Given the error in rejecting Plaintiff's first attempt to file a Second Amended Complaint, which was submitted for filing within the ordered time period, and that Plaintiff filed a Second Amended Complaint the day before this motion was filed, this motion for entry of judgment is DENIED. An order permitting the filing of the Second Amended Complaint was in place at the time Plaintiff initially submitted a Second Amended Complaint for filing – a filing that should not have been rejected. Plaintiff to prepare a formal order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 8	21CV383740	Eric Figueroa et al vs City of Palo Alto et al	**Motion for Leave to Amend**. This motion is rendered MOOT, as the court granted Defendants motion for summary judgment on July 8, 2024.
LINE 9	23CV416720	CREDITORS ADJUSTMENT BUREAU, INC., vs MOO KAE et al	**Motion to Set Aside Default/Judgment**. Defendants Moo Yung Kae, Aka Moo Yong Kae aka Christopher Y Kae dba Western Construction Company, Western Construction & Co., Inc. aka Western Construction & Co Inc's motion to set aside and vacate the judgment of dismissal in the above-entitled action. The motion is made on the grounds of mistake, inadvertence, and excusable neglect, pursuant to Code of Civil Procedure, Section 473. The request for entry of Default was filed on March 22, 2024. A default judgment was filed on April 30, 2024. Defendants failed to submit a proposed responsive pleading with their motion to set aside and vacate judgment after default as required when seeking relief under Code Civ. Proc., § 473(b). Good cause appearing, the Court finds a plausible showing of mistake, inadvertence, and excusable neglect and GRANTS the motion. The default, judgment and dismissal entered in this case are VACATED and the case is reinstated. Defendants shall file a responsive pleading to the Complaint within 15 court days of the service of the order on this motion. The Court sets this matter for a Case Management Conference on October 15, 2024 at 10 a.m. in Department 18b. Moving party to prepare a formal order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 10	24CV429757	ANTONIO NIEVES vs ABRAHAM LOYA	**Motion to Set Aside Default/Judgment**. Defendant Abraham Nieves Loya's motion to set aside the default and default judgment entered in this action, pursuant to Code of Civil Procedure sections 473(b), 473(d), and 128(a)(8) on the grounds that the default and default judgment were entered due to Defendant's surprise, inadvertence, and excusable neglect. Defendant submitted a proposed demurrer to be filed if the motion is granted. No default judgment has been entered in this case. Only a default was entered on March 19, 2024. Good cause appearing, the Court finds a plausible showing of mistake, inadvertence, and excusable neglect and GRANTS the motion. The default that was entered on March 19, 2024, is VACATED and the case is reinstated. Defendant shall file his demurrer within 5 court days of the service of the order on this motion; the demurrer is set for hearing on September 5, 2024 at 9a.m. in Department 18b. Moving party to prepare a formal order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 11	23CV410259	John Doe vs Gelareh Homayounfar et al	**Motion to Vacate Judgment (Order).** Plaintiff John Doe filed this motion to vacate judgment (order) and enter new and different judgment (order) pursuant to Code Civ. Proc., § 663 on May 3, 2024– the motion relates to the April 18, 2024 order granting special motion to strike portions of the Complaint (anti-SLAPP). No opposition has been filed to the motion by Defendants. However, there is no good cause to grant the motion. This motion is DENIED as Plaintiff later filed an appeal of the *same* April 18, 2024 order. Notice of the appeal to the Sixth District of the April 18, 2024 order was served on June 10, 2024. Further, a First Amended Complaint was filed and a motion to strike that pleading has also been granted. Defendant to prepare a formal order.

Calendar Line 4
Case Name: *Steve McHarris vs City of Milpitas*
Case No.: 23CV427505

Before the Court is Plaintiff Steve McHarris' motion to compel production of documents and a request for sanctions against Defendant City of Milpitas. The motion to compel relates to two out of fifteen requests that were identified in Plaintiff's notice of deposition that was served on Defendant City clerk on March 28, 2024 (Request numbers 6 and 14). Plaintiff argues that Defendant's objections are without merit and moves to compel compliance and also seeks monetary sanctions pursuant to Code Civ. Proc., § 2025.450 subdivisions (a) and (g) (1). Plaintiff acknowledges that Defendant serve timely objections to the discovery being sought.

Request No. 6 sought "All documents of City Counsel Closed Sessions held on January 19, 2022 [actually Jan 18], February 1, 2022, March 1, 2022, April 5, 2022, and July 11, 2022, which relate ... to performance evaluations of plaintiff". Defendant asserted several general objections, and specifically objected that the request was "vague, ambiguous, overbroad, unintelligible, not limited in scope as to time, author or recipient, and as failing to describe the document or category of documents with reasonable particularity". Defendant reiterated objections based on the attorney/client privilege.

Request No. 14 sought documents relating to the investigation of Plaintiff's 2023 civil claim against the City conducted by Oppenheimer Investigations Group LLP. Defendant objected that the request was overbroad, sought information covered by the attorney/client privilege and related doctrines and was harassing, and overbroad.

Plaintiff argues that the objections should be overruled as, *inter alia*:

Request No. 6: the request seeks audio recordings for specific dates, two City council members have testified that the recordings are in the care, custody and control of Defendant City and further that the mere presence of atty does not establish validity of attorney/client privilege and talking about Plaintiff's job performance and whether and how to fire him are not covered by attorney/client privilege. Plaintiff also argues that there is no work product and that no attorney/client relationship was established.

Request No. 14: Plaintiff argues that there is no attorney/client relationship with Oppenheimer.

Plaintiff also states that the City has not produced any documents to any of the requests and seeks sanctions in the amount of $10, 350 and cost to file $16.75.

In opposition, Defendant argues that the required separate statement is missing, Defendant did timely serve objections to the deposition notice and document request therein on April 12, 2024 and seeks sanctions in the amount of $9800. As to the specific requests in dispute, Defendant argues:

> Request No. 6: These were closed sessions, which are privileged and protected, based on the attorney/client privilege and Government Code § 54957 (performance reviews are protected from disclosure and are part of closed session--unless the employee

requests a public session), Govt code section 54963 and *Kleitman v. Superior Court* (1999) 74 Cal.App.4th 327. Defendant argues that each of the sessions that are sought were closed sessions that were adjourned for a discussion of public employee performance evaluation, pursuant to California Government Codes Section 54957. Defendant seeks judicial notice of exhibits 1-5 pursuant to Evidence Code sections 452 and 453, and California rules of Court, Rules 3.1113(l) and 3.1306(c).

Request No. 14: Defendant argues that this investigation was conducted by attorneys retained by the Defendant City Manager Thomas, to conduct an investigation. Defendant submitted a fee agreement in support that "creates an attorney-client relationship between the City and Oppenheimer.." *City of Petaluma v. Superior Court* (2016) 248 Cal.App 4th 1023, 1032-36, and therefore the investigation protected by the attorney/client privilege and work product doctrine.

Analysis

Request 6

Government Code section 54963, subdivision (a) provides, "A person may not disclose confidential information that has been acquired by being present in a closed session authorized by Section 54956.7, 54956.8, 54956.86, 54956.87, 54956.9, 54957, 54957.6, 54957.8, or 54957.10 to a person not entitled to receive it, unless the legislative body authorizes disclosure of that confidential information." "For purposes of this section, 'confidential information' means a communication made in a closed session that is specifically related to the basis for the legislative body of a local agency to meet lawfully in closed session under this chapter." (Gov. Code, § 54963, subd. (b).) Subdivision (c) of that same section provides for remedies for violations of its provisions.

Courts have held that both closed session meeting minutes and city council members' recollections are confidential and not subject to discovery in a civil lawsuit. (*Kleitman v. Superior Court* (1999) 74 Cal.App.4th 324, 326 [recollections]; *County of Los Angeles v. Superior Court* (2005) 130 Cal.App.4th 1099, 1106 [minutes].) However, these cases did not consider whether waiver occurred based on placing the contents of the materials at issue by raising them as a defense.

Plaintiff argues that Government Code section 54963 contains "carve out" provisions that would allow disclosure even if the Brown Act applies. The portion of Government Code section 54963, subdivision (e) Plaintiff relies on provides, "A local agency may not take any action authorized by subdivision (c) against a person, nor shall it be deemed a violation of this section, for doing any of the following: . . .(2) Expressing an opinion concerning the propriety or legality of actions taken by a legislative body of a local agency in closed session, including disclosure of the nature and extent of the illegal or potentially illegal action." But, this provision is clearly inapplicable to the material requested in Request No. 6., which seeks, "All documents, audio files, recordings or other stored electronic information, audio files, documents, of City Council Closed Sessions held on January 19, 2022, February 1, 2022, March 1, 2022, April 5, 2022, and July 11, 2022, which relate, in any manner whatsoever, to performance evaluations of the plaintiff."

Plaintiff also relies on Government Code section 54963, subdivision (f), which provides, "Nothing in this section shall be construed to prohibit disclosures under the whistleblower statutes contained in Section 1102.5 of the Labor Code or Article 4.5 (commencing with Section 53296) of Chapter 2 of this code." Plaintiff contends that because he has raised a claim of retaliation under section 1102.5 of the Labor Code, the requested items may be disclosed under this exception to the Brown Act's confidentiality provisions. This argument is rejected. Labor Code section 1102.5 refers to employees disclosing information the employee believes establishes a violation of the law to government or law enforcement agencies, it does not provide for discovery.

The City did object on the grounds of attorney-client and work product privilege. Plaintiff argues that these privileges and any privilege under the Brown Act have been waived under *Wellpoint Health Networks v. Superior Court* (1997) 59 Cal.App.4th 110 (Wellpoint) and *People v. Superior Court (Jones)* (2021) 12 Cal.5th 348 (Jones) because the City has tended fact-based affirmative defenses. These cases cannot be read as broadly as Plaintiff suggests. It is not the mere tendering of fact-based defenses that waives the privileges, it is the reliance on the content of the documents at issue that waives the privileges.

In *Wellpoint*, the Court of Appeal agreed with the proposition that "the employer's injection into the lawsuit of an issue concerning the adequacy of the investigation where the investigation was undertaken by an attorney or law firm must result in waiver of the attorney-client privilege and work product doctrine." (*Wellpoint, supra,* 59 Cal.App.4th at p. 128.) The Court of Appeal concluded that contemporaneous pre-termination investigation into the employee's claims could be discoverable because the employer relied on the investigation as a defense. (Id. at pp. 117 [describing the investigation as occurring before the plaintiff was laid off]; 129 ["only if defendants' answer or discovery responses indicate the possibility of a defense based on thorough investigation and appropriate corrective response, can a finding of waiver be made."].) The court did not hold that any fact-based defense would result in a waiver of the attorney-client and work product privileges.

Plaintiff also relies on *People v. Superior Court (Jones)* (2021) 12 Cal.5th 348, a criminal case in which the Supreme Court determined that a prosecutor's notes regarding jury selection were discoverable because the work product privilege had been waived by the prosecutor putting the information at issue in the context of a Batson/Wheeler challenge. The court explained that "the prosecutor invoked an undisclosed juror rating system in justifying his use of peremptory challenges at the second step of the *Batson/Wheeler* inquiry. Had the prosecutor instead relied solely on a straightforward listing of juror characteristics, the prosecutor's reasons could have been questioned by the defense and judged against the trial court's own observations. But the defense and trial court had no way of confirming or evaluating the prosecutor's claims that he used a race-neutral rating system they had never seen. Unlike an attorney who simply glances at her or his notes to recall a particular answer provided during *voir dire*, for example, a striking attorney who makes this sort of 'testimonial use' of undisclosed writings gains an unfair adversarial advantage by doing so. [Citation.] Effectively the striking attorney has placed in issue information that goes to the heart of the question before the court, whether there has been discrimination in jury selection. Under our cases, that choice is one that constitutes waiver of any claim that the information may be withheld as protected work product." (*Id*. at pp. 364-365.)

Again, the court did not hold that raising any fact-based defense will waive the privileges. The court did state, "The cases recognize that allowing one party to rely on a document to establish key facts while simultaneously shielding that same document from the other side works an unfair adversarial advantage. Considerations of basic fairness accordingly 'may require disclosure of otherwise privileged information or communications where [a party] has placed in issue a communication which goes to the heart of the claim in controversy.' [Citation.]" (*People v. Superior Court (Jones)* (2021) 12 Cal.5th 348, 363.) Here, Plaintiff contends that 11 of the affirmative defenses raised by the City are "fact-based" defenses, which require disclosure. But, in describing those causes of action, the closest Plaintiff comes to arguing that the City is basing its defenses on what occurred at the closed sessions is to state that he requires the information as to what occurred at the closed sessions to disprove the City's affirmative defenses. The affirmative defenses themselves are boilerplate defenses and it is not clear that the City will rely on what occurred at the closed sessions to establish the affirmative defenses. In *Wellpoint* and *Jones*, the privileges were waived because the privilege holder relied on the items sought in proving their cases. Here, on the contrary, it is not apparent from the affirmative defenses that the privileges are waived for the same reason. Accordingly, the privileges have not been waived.

Defendant City relies strongly on the Brown Act. The minutes, which are attached to the City's request for judicial notice (which is GRANTED), appear to indicate that the City Attorney was present at the closed session because they indicate that the City Attorney reported that there was no reportable action from the closed session. In the motion, Plaintiff contends that the mere presence of an attorney at the meeting would not render all communications made at the meeting privileged. In its opposition, the City contends that communications with the City Attorney made at the closed session are privileged. The Court agrees. The motion to compel with regard to this request is DENIED without prejudice to seeking the closed session information, if becomes clear that the City will rely on it in proving its defenses.

Request 14

In *City of Petaluma v. Superior Court* (*Petaluma*) (2016) 248 Cal.App.4th 1023 the Court of Appeal concluded that an attorney-client relationship was created when an employer hired Oppenheimer, the same entity hired by the City here, to investigate the employee's claims. Even though the agreement expressly stated that no legal advice would be given and Oppenheimer was hired to investigate the facts of the employee's claims, the Court of Appeal concluded that Oppenheimer would provide legal services, rendering her report privileged. The Court of Appeal reasoned, “She was not merely a fact finder whose sole task was to gather information and transmit it to the City, as Waters suggests. Instead, she was expected to use her legal expertise to identify the pertinent facts, synthesize the evidence, and come to a conclusion as to what actually happened. The dominant purpose of Oppenheimer's representation was to provide professional legal services to the City Attorney so that he, in turn, could advise the City on the appropriate course of action.” (*City of Petaluma v. Superior Court* (2016) 248 Cal.App.4th 1023, 1034-1035.)

Here, similarly, an attorney-client relationship has been created. The agreement specifically provides that such a relationship exists and that communications are covered by the privilege, unless it is waived. Plaintiff makes no effort to distinguish *Petaluma* on this point. Accordingly, the court finds that the attorney-client and work product privileges apply.

Plaintiff also argues that, even if these privileges apply, they have been waived by the City placing them at issue by raising its affirmative defenses. In *Wellpoint*, supra, 59 Cal.App.4th at pp. 125-128, on which Plaintiff relies, the court concluded that an employer could waive any attorney-client and work product protections associated with a prelitigation investigation by raising that same investigation as a defense to harassment claims. As mentioned above, the court explained that "the employer's injection into the lawsuit of an issue concerning the adequacy of the investigation where the investigation was undertaken by an attorney or law firm must result in waiver of the attorney-client privilege and work product doctrine." (*Id.* at p. 128.) "If a defendant employer hopes to prevail by showing that it investigated an employee's complaint and took action appropriate to the findings of the investigation, then it will have put the adequacy of the investigation directly at issue, and cannot stand on the attorney-client privilege or work product doctrine to preclude a thorough examination of its adequacy." (*Ibid.*)

In *Petaluma,* the court distinguished *Wellpoint* in concluding that the privileges were not waived as to the post-employment investigation report created by Oppenheimer merely because the City in that case had raised an avoidable consequences defense. (*City of Petaluma v. Superior Court* (2016) 248 Cal.App.4th 1023, 1036.) The court explained, "The avoidable consequence defense focuses upon what the employer and employee did or did not do while the employee was employed. The assertion of the avoidable consequences defense may put the adequacy of an investigation into issue if the person was still employed and able to take advantage of any corrective measures the employer undertook as a result of the investigation. The investigation may also be relied upon to show that the employer took reasonable steps to prevent and correct workplace sexual harassment while the employee was employed. But the assertion of an avoidable consequences defense does not put a postemployment investigation directly at issue in the litigation. The employee necessarily could not have taken advantage of any corrective measures adopted in response to a postemployment investigation. Further, a postemployment investigation would not itself demonstrate that the employer took reasonable steps to prevent and correct workplace harassment while the employee was still employed. [¶] Here, the City does not seek to rely on the post-employment investigation itself as a defense, nor could it. Accordingly, the City's assertion of the avoidable consequences doctrine does not constitute a waiver of any attorney-client or work product protection afforded to the postemployment investigation conducted by Oppenheimer." (Id. at pp. 1036-1037.)

Here, the report at issue is a post-employment investigation report. Thus, this case is more similar to *Petaluma* than *Wellpoint,* which involved a defense that the employer's contemporaneous investigation into the employee's complaint was sufficient. Although Plaintiff is correct that the City has raised fact-based defenses, the City raises no defenses based on the report. Thus, *Petaluma* compels the conclusion that the report is not discoverable.

However, in *Petaluma*, the court remanded the case to the trial court to determine if any materials, such as taped interviews, might not be covered by the attorney-client privilege. (*Petaluma*, supra, 248 Cal.App.4th at pp. 1037-1038.) Here, the parties do not distinguish between the report itself and the other material requested in Request No. 14. As such, the Court orders that Defendant City provide a privilege log to determine if similar items exist in this case. That privilege log shall be provided within 25 days of the service of the formal order on this motion. The Court will address any privilege log issues at a hearing on **September 12, 2024 at 9 a.m. in Department 18b.** The parties may submit supplemental briefing on the

content of the privilege log, to be filed no later than **August 30, 2024**. If there are no issues with the privilege log, the parties shall advise the Court by **August 30, 2024**, and the September 12 hearing date will be vacated.

Documents that have not been objected to by Defendant City shall be produced to Plaintiff within 15 days of the formal order on this motion. Both requests for sanctions are DENIED.

Defendant City to prepare a formal order.

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