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8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN DIEGO

11
12 CITY OF SAN DIEGO, a Municipal
corporation,

13 Plaintiff,

14 v.

15 CCP 1200, LLC, a Delaware limited liability
16 company; WILMINGTON TRUST,
17 NATIONAL ASSOCIATION, an unknown
business entity, as trustee of CGA CAPITAL
18 CREDIT LEASE-BACKED PASS-
THROUGH TRUST, SERIES 2017-CTL-1;
19 CISTERRA PARTNERS, LLC, a California
limited liability company; JASON HUGHES,
20 an individual; and DOES 1 through 40,
inclusive,

21 Defendants.

22
23 AND ALL RELATED CROSS-ACTIONS
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Case No. 37-2021-00028026-CU-FR-CTL

**DEFENDANT JASON HUGHES'S REPLY IN
SUPPORT OF MOTION TO COMPEL
PLAINTIFF'S COMPLIANCE UNDER
CALIFORNIA CODE OF CIVIL PROCEDURE
§ 2031.320**

JURY TRIAL DEMANDED

Hearing Date: April 29, 2022
Time: 1:30 P.M.
Judge: Hon. Timothy Taylor
Dept: C-72

Complaint Filed: June 29, 2021
Trial Date: January 20, 2023

1 **I. INTRODUCTION**

2 The City’s Opposition confirms that this Motion should be granted.¹ The City does not
3 dispute that the documents Mr. Hughes seeks are relevant and responsive to his RFPs. Nor does it
4 dispute that the responsive documents exist and have existed in the City’s possession from the
5 outset of the litigation. And it does not dispute that it nonetheless failed to produce these
6 documents. That is all that is required for the Court to grant this Motion.

7 Instead, the City’s argument seems to be that because it is *now* attempting to comply with
8 its discovery obligations, there is nothing to see here. The City is wrong, and the City is not above
9 the law. It is no more entitled than any other litigant to ignore its discovery obligations for over six
10 months, all the while failing to produce documents that are critical to this case. And the City’s
11 misconduct is not without severe consequences. The City failed to produce these documents in
12 time for defense counsel to make use of them during critical fact depositions. The City’s
13 misconduct threatens an orderly march toward motions for summary judgment and trial.

14 Shockingly, the City hid from Mr. Hughes and other parties “roughly 300,000 pages” of
15 documents in the City’s custody that might never have come to light but for the testimony of former
16 City employees. (Opp. at 9.) While Mr. Hughes welcomes the City’s efforts to begin taking its
17 discovery obligations seriously, that does not change the fact that it took six months of fact
18 discovery, four months of meet-and-confer efforts, and a motion to compel to get the City to
19 produce documents that should have been produced from the outset. Had third parties not testified
20 to the existence of these documents, would the City have ever disclosed them? And what else is
21 the City hiding through feigned ignorance of its own allegations and its document retention
22 policies? Defendants like Mr. Hughes deserve better, but so too does the public, which expects its
23 City Attorney to conduct a diligent investigation before bringing the type of serious allegations it
24 has asserted here.

25 Rather than addressing any of these substantive deficiencies, the City combines an “above
26 the law” attitude with empty proceduralism, suggesting that it cannot be sanctioned despite

27 ¹ Unless otherwise indicated, all acronyms and short-form conventions in this Reply have the same
28 meaning as in Mr. Hughes’s Memorandum of Points and Authorities, ROA 59 (“Memorandum” or
“Memo.”).

1 admitting to withholding hundreds of thousands of pages of relevant documents. Why? Because
2 Mr. Hughes discussed the available sanctions in his Memorandum instead of in his Notice of
3 Motion (“Notice”). (See Opp. at 8.) This argument disregards the statutory language of the
4 mandatory sanctions at issue here and is simply another attempt by the City Attorney to avoid
5 accountability.

6 In short, the City acknowledges it failed to produce documents that are responsive to the
7 RFPs at issue here. That is sufficient to grant the motion, and the City is subject to sanctions for
8 its discovery abuses.

9 **II. ARGUMENT**

10 **A. The Motion Should be Granted.**

11 Because the City’s Opposition fails to engage with the underlying legal standard at all, it is
12 worth reiterating just how straightforward this motion is. To prevail on this motion, Mr. Hughes
13 must only show that the City has failed to produce documents it previously agreed to produce.
14 (Code Civ. Proc., § 2031.320, subd. (a).) In response to the RFPs at issue, which called for emails
15 between six specific City officials and any other person regarding the CCP transaction, the City
16 agreed to produce “all nonprivileged responsive documents in its custody, possession, or control.”
17 (O’Connor Decl. at Ex. B, Responses 5-11, 13.) Prior to this motion being filed, however, the City
18 produced no such responsive documents. (O’Connor Decl., ¶ 8.) That is the beginning and end of
19 the inquiry, and the Court should compel the City to produce any remaining documents and submit
20 a sworn declaration verifying that all such documents have now been produced.

21 The City’s subsequent productions, which were made two days prior to this Reply and well
22 after Mr. Hughes was forced to file this motion, have no bearing on this motion and certainly do
23 not render it moot.² This is true for two reasons. *First*, given the City’s history of withholding
24 documents until forced to disclose them, Mr. Hughes has little confidence that the City has in fact
25 produced all responsive documents in its possession. The Court should require the City to submit
26 a sworn declaration that its recent production is complete and that it has produced all documents in

27 ² As of the date of this Reply, Mr. Hughes is still in the process of uploading these productions and
28 is unable to determine whether they contain responsive documents. (See Declaration of Charles E.
Harrison [“Harrison Decl.”] ¶ 8.)

1 its possession, custody, and control that are responsive to the RFPs at issue here. *Second*, the
2 belated production of documents does not immunize the City from sanctions. (See Cal. Rules of
3 Court, rule 3.1348 [“The court may award sanctions under the Discovery Act in favor of a party
4 who files a motion to compel discovery, even though no opposition to the motion was filed, or
5 opposition to the motion was withdrawn, *or the requested discovery was provided to the moving
6 party after the motion was filed.*”] [emphasis added].)

7 Indeed, the City’s recent productions only serve to underscore the gravity of its discovery
8 abuses here. After six months of fact discovery, four months of meet-and-confer efforts, and the
9 current motion, the City has suddenly discovered more than 300,000 pages of responsive
10 documents. Where were these documents from the outset of the case, and why did it take protracted
11 efforts by Mr. Hughes for the City to produce them? As with all litigants, the City Attorney has a
12 duty to investigate her claims prior to filing a lawsuit, and that requires—at a minimum—
13 conducting a basic document search and interviewing key witnesses. That plainly did not happen
14 here. Had Mr. Villa and Ms. Lewis not testified during their depositions as to the number of
15 documents the City was withholding, (see Memo. at 7-9), Mr. Hughes might never have learned of
16 them, and the City would continue to feign ignorance as to responsive documents in its possession.

17 Mr. Hughes should not be at the mercy of third parties to discover documents the City was
18 obligated to produce months ago. The documents have existed since the beginning of the case,
19 they are responsive, and they were withheld. The Court should grant the motion and require the
20 City to submit a sworn declaration that it has produced all documents in its possession, custody, or
21 control responsive to the RFPs at issue here.

22 **B. Evidence Since This Motion Was Filed Confirms a Pattern of Suppression.**

23 Requiring a sworn declaration from the City is especially warranted given evidence that has
24 been uncovered since Mr. Hughes filed his motion.³ On the night before her deposition on April

25 ³ While new evidence is disfavored in reply papers, “a recognized exception is for points strictly
26 responsive to arguments made for the first time in the opposition.” (*Golden Door Props., LLC v.*
27 *Super. Ct. of San Diego Cnty.* (2020) 53 Cal.App.5th 837, 774 [subsequent history and quotations
28 omitted].) Trial courts have “discretion whether to accept new evidence with the reply papers.”
(*Alliant Ins. Servs., Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1308.) This is especially true here,
where evidence not available to Mr. Hughes at the time of his opening papers directly contradicts
points made by the City in its Opposition. As detailed in this section, this new evidence “strictly

1 15, 2022, Cybele Thompson—the City’s Director of Real Estate Assets from 2014 to 2020—
2 produced over 300 internal City documents related to these transactions, which she claimed to have
3 personally retained when she resigned from her position with the City. (See Harrison Decl. ¶ 3.)
4 In that production, Ms. Thompson disclosed at least 91 separate internal City emails, 28 of which
5 are internal communications that would be responsive to the underlying RFPs at issue here. (*Id.* at
6 ¶ 4.) *None* of those responsive emails were produced by the City prior to Mr. Hughes filing this
7 motion. (*Id.* at ¶ 5.) Defense counsel has continued to meet and confer with counsel for the City
8 on these issues, even while this motion is being briefed. Those efforts included a letter dated April
9 18, 2022, which detailed these specific deficiencies. (*Id.* at ¶ 6; Ex. A.)

10 As with the documents referenced by Ms. Lewis and Mr. Villa during their depositions, (see
11 Memo. at 7-9), the documents produced by Ms. Thompson are more than relevant—they are
12 potentially fatal to the City’s case. Several of the documents produced by Ms. Thompson are
13 communications between Ms. Lewis and other City employees in which those employees discuss
14 an email from Mr. Hughes disclosing he would seek—from parties other than the City—
15 compensation for any alternative lease-to-own transaction, an idea that would solve the City’s
16 inability to purchase the CCP and 101 Ash buildings. (See Harrison Decl. ¶ 7; Exs. B, C.) As
17 discussed at length in Mr. Hughes’s opening briefing, these documents are critical because they
18 indicate the City was aware of Mr. Hughes’s compensation in October 2014, which means the
19 statute of limitations on this action expired nearly three years before it was filed. (See Memo. at
20 10; see also Gov. Code, § 1092(b).) Mr. Hughes requested communications from these six
21 custodians—which included Ms. Thompson, Ms. Lewis, Mr. Villa, and others—specifically
22 *because* they were the City employees most likely to have emails related to Mr. Hughes’s
23 compensation disclosures. The City’s attempts to downplay an issue sanction on this topic as “not
24 tied to any discovery request at issue” is nothing short of disingenuous. (Opp. at 11.)

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27 responds” to the City’s contentions that (1) it “is not withholding responsive, non-privileged
28 documents”, (Opp. at 10), and (2) the issue sanctions are “not tied to any discovery request at issue.”
(Opp. at 11.)

1 Setting aside the ways in which these documents defeat key elements of the City’s claims,
2 Ms. Thompson’s recent production raises a more fundamental question relevant to this discovery
3 dispute. How did Ms. Thompson, a departing employee, have access to relevant internal City
4 emails—many of which she was not copied on—that the City Attorney’s Office apparently could
5 not find after months of searching? (See Harrison Decl., Exs. B, C.) The only possibility is that
6 the City failed to take its discovery obligations seriously, and it never bothered to search for
7 documents until testimony from third parties and this motion from Mr. Hughes forced its hand.
8 That is a misuse of the discovery process and is sanctionable.

9 A former City employee secreting away documents before resigning from her job should
10 not be the best source of key City documents in this case. Producing such documents is a basic
11 obligation required of any litigant; it is certainly not a tall task for the City, with hundreds of
12 attorneys and a small army of outside counsel at its disposal. The Court should grant this motion
13 and award sanctions to deter such behavior going forward.

14 **C. The City’s Attempts to Avoid Sanctions are Baseless.**

15 Instead of meaningfully contesting this motion on the merits, the City shrouds itself in
16 proceduralism, arguing that it is not subject to sanctions for its discovery abuses because Mr.
17 Hughes discussed the City’s sanctionable conduct in his Memorandum instead of “requesting”
18 sanctions in the Notice of Motion. The City is incorrect. As pointed out in the Memorandum,
19 monetary sanctions are not optional in this situation,⁴ and they do not require a “request.” If the
20 Court grants this Motion to Compel Compliance and finds the City did not act with substantial
21 justification, it “*shall* impose a monetary sanction” against that party. (Code Civ. Proc.,
22 § 2031.320, subd. (b) [emphasis added].) In other words, this statute does not require the moving
23 party to “request” sanctions at all, and it therefore does not fall within the plain language of the
24 sanctions provision the City relies on to dodge responsibility here. (See *id.* § 2023.040 [“A *request*

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27 ⁴ While monetary sanctions are mandatory if Hughes prevails on this motion, issue sanctions are
28 permissive and may be imposed following disregard of a Court order. (See Code. Civ. Proc,
§ 2031.320, subd. (c).) Mr. Hughes will revisit issue sanctions if, following the City’s
verification that production is complete, he discovers further withheld documents.

1 *for a sanction* shall, in the notice of motion, identify every person, party, and attorney against
2 whom the sanction is sought, and specify the type of sanction sought.”] [emphasis added].)

3 In any event, the City had notice of the sanctions at issue here and it had the opportunity to
4 explain in its Opposition why sanctions are not warranted. It does not argue that the amount of the
5 monetary sanctions here is unreasonable, nor does it argue that the declaration supporting those
6 sanctions is deficient. It instead relies solely on the argument that because Mr. Hughes’s discussion
7 of sanctions was explained (at length) in his Memorandum rather than in one sentence in the Notice,
8 sanctions are off the table. This is simply another example of the City evading responsibility for
9 its discovery abuses.

10 The City also complains that Mr. Hughes’s counsel never indicated “it would seek issue
11 sanctions or monetary sanctions or make an effort to meet and confer regarding the same.” (Opp.
12 at 10.) This too is incorrect. Mr. Hughes’s formal meet-and-confer letter, which was sent after
13 months of failed attempts to get the City to produce responsive documents, specifically noted that
14 the City’s “failure to produce these documents . . . is grounds for an adverse inference that the
15 contents of these documents would support Hughes’s defense.” (See O’Connor Decl. at Ex. C,
16 p.2.) That letter goes on to reference the relevant sanctions statute, section 2023.030. (*Id.*) There
17 is simply no tenable “notice” argument regarding sanctions here.

18 To the extent the Court finds the notice of sanctions here was insufficient, Mr. Hughes will
19 re-notice his motion for sanctions after the Court rules on this motion. (See Cal. Civ. Ctrm. Hbook.
20 & Desktop Ref. § 25:37 [2022 ed.] [“Although it is advisable to place a request for monetary
21 discovery sanctions within a motion to compel a response or further responses, there is no legal
22 requirement to do so. A motion for monetary discovery sanctions may be filed separately—and
23 after—a motion to compel discovery.”]); *London v Dri-Honing Corp.* (2004) 117 Cal.App.4th 999,
24 1006 [rejecting contention that request for monetary sanctions was untimely because it was not set
25 forth in motion to compel further response].). That motion will also include a request for additional
26 fees incurred in preparing both this Reply and the Motion for Sanctions.

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1 **III. CONCLUSION**

2 This is a simple discovery dispute. The City said it would produce responsive documents,
3 and it failed to do so. As demonstrated by the City's belated production, those documents clearly
4 existed from the outset of the case, they are relevant, and they were withheld. The Court should
5 grant the motion, require the City to submit a sworn declaration that it has now produced all
6 responsive documents, and issue monetary sanctions in the amount of \$10,000.

7
8 Dated: April 22, 2022

9 By: 
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