Supreme Court Case No. S_____ **REQUEST FOR IMMEDIATE STAY; TRIAL COURT STAY OF DISCOVERY EXPIRES JULY 6, 2015**

Public Entity
~ No Fee Required ~
Gov. Code, § 6103

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

CITY OF PETALUMA, *Defendant and Petitioner,* v. SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF SONOMA, *Respondent.* ANDREA WATERS, *Plaintiff and Real Party in Interest.*	Court of Appeal, First Appellate District, Division 3 Case No. A145437 Sonoma County Superior Court/Empire College Annex Case No. SCV 256309 Hon. Elliot Lee Daum, Judge Courtroom: 16 Telephone: (707) 521-6547

PETITION FOR REVIEW

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QUESTIONS PRESENTED FOR REVIEW

This petition presents two issues of importance not only to petitioner but to employers throughout California who must defend against claims brought pursuant to the Fair Employment and Housing Act (Gov. Code, § 12900, et seq. ("FEHA")).

- Is an investigation conducted by outside counsel, retained for her professional judgment and expertise in employment law to assist the City Attorney in the defense of anticipated litigation by, among other things, obtaining and evaluating relevant evidence, protected from discovery by the attorney-client privilege and/or work product doctrine, where the communications involved did not contain legal advice as to what action should be taken based on the results of the investigation?
- When it is undisputed that the investigation at issue was initiated after plaintiff had left employment, does the assertion of the avoidable consequences defense in an answer to the complaint put the post-employment investigation into issue and constitute a waiver of the attorney-client or work product privileges?

PETITION

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

The City of Petaluma respectfully petitions for review of an order of the Court of Appeal, First Appellate District, Division Three, filed June 25, 2015, summarily denying its petition for writ of mandate commanding respondent Sonoma County Superior Court to vacate its order compelling disclosure of documents and other materials protected from discovery by the attorney-client privilege and work product doctrine. The Court of Appeal's order is attached as an Appendix.

Alternatively, the City of Petaluma asks this Court to grant review and transfer this matter back to the Court of Appeal for a determination on the merits.

INTRODUCTION

A. Background

Plaintiff Andrea Waters has sued her former employer, the City of Petaluma, under FEHA. During discovery, plaintiff moved to compel production of documents and other materials generated in an investigation by outside counsel retained by the City, as well as testimony pertaining to the investigation. The investigation was of charges plaintiff had filed with the Equal Employment Opportunity Commission ("EEOC"). The City

asserted the protections of the attorney-client privilege and work product doctrine based on the attorney-client relationship it had established with outside counsel. Plaintiff had left the City's employ before the investigation was initiated, and the purpose of retaining outside counsel was to assist in the defense of the lawsuit the City had concluded was sure to come.

The trial court rejected the City's assertion of privilege and work product protections on the ground that the attorney was doing what a non-attorney could do — acting as a fact-finder instead of providing legal advice as to what action to take on the basis of the facts. The trial court also found that if the attorney-client or work product privileges attached, the City had waived their protection by asserting an avoidable consequences defense in its answer to the complaint.

B. Why Review And Extraordinary Relief Are Warranted.

The Court of Appeal should have issued a writ of mandate because the trial court had no discretion but to deny plaintiff's motion to compel. The City's relationship with outside counsel was expressly that of attorney and client. Outside counsel was retained because of her expertise in employment law and ability to use professional judgment to obtain and evaluate legally relevant evidence for purposes of determining potential exposure. Thus, the City contends, the report as well as underlying

documents and other communications related to it are protected by the attorney-client privilege and/or work product doctrine.[1/]

Review is warranted because the trial court's content-based ruling directly conflicts with *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725 ("*Costco*"), in which this Court held that communications between attorney and client are privileged, even if the communications include unprivileged material or a report of factual material. (*Id*. at pp. 732, 740.)

Review is also warranted to address the interplay between the assertion of the avoidable consequences defense and preservation of the attorney-client privilege. No case precisely addresses this issue as presented here and guidance is essential, given that employers throughout the state must defend actions under FEHA. The avoidable consequences defense addresses whether an employee could have limited her damages by taking advantage of the employer's policies, procedures, and efforts to remediate her situation. Its focus is on what did or did not happen *during*

[1/] In this petition, the City focuses on the attorney-client privilege protecting its investigative file — the report, supporting documentation and other information transmitted between the City and outside counsel. To the extent the discovery requests target material *not* transmitted between client and attorney, that material is subject to absolute work product protection for an attorney's impressions, conclusions, opinions, or legal research or theories, written and unwritten. (Code Civ. Proc., § 2018.030; *Fireman's Fund Ins. Co. v. Superior Court* (2011) 196 Cal.App.4th 1263, 1278.) It is not clear the trial court actually analyzed the issue of attorney work product and its application since in its view outside counsel was functioning as a fact-finder, not an attorney.

plaintiff's employment to limit damages. The City contends that where, as here, an investigation was initiated *after* the employee had resigned, the investigation is not and cannot be evidence of the adequacy of the remediation efforts on the part of the City, which plaintiff failed to take advantage of for purposes of mitigating her damages. Thus, the City did not place the post-employment investigation into issue by asserting the avoidable consequences defense in its answer, and there was no waiver.

That the trial court found waiver based on *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110 ("*Wellpoint*") underscores the need for review of this issue. *Wellpoint* addressed waiver and the avoidable consequences defense in the context of an investigation that occurred *during* the plaintiff's employment, when it could potentially be coupled with remedial action. Moreover, *Wellpoint* is essentially dicta or an advisory opinion because no operative complaint or answer was on file. Employers need guidance on this issue, as, plainly, do the courts.

Appeal after trial is obviously not an adequate remedy here because once the privileged information is disclosed, there is no way to undo the harm, which is the disclosure itself. (*People ex rel. Lockyer v. Superior Court* (2004) 122 Cal.App.4th 1060, 1071.) As this Court has emphasized, threatened loss of a privilege through a discovery ruling is recognized as an appropriate issue for extraordinary relief: "The need for the availability of the prerogative writs in discovery cases where an order of the trial court

granting discovery allegedly violates a privilege of the party against whom discovery is granted, is obvious. The person seeking to exercise the privilege must either succumb to the court's order and disclose the privileged information, or subject himself to a charge of contempt for his refusal to obey the court's order pending appeal." (*Costco*, *supra*, 47 Cal.4th at p. 741, internal quotations and citations omitted.) Thus, "[e]xtraordinary review of a discovery order will be granted when a ruling threatens immediate harm, such as loss of a privilege against disclosure . . . ." (*Doe v. Superior Court* (2011) 194 Cal.App.4th 750, 754.)

C. An Immediate Stay Is Necessary.

On June 8, 2015, the trial court stayed its discovery order to July 6, 2015, to permit the City to seek relief from this Court. The Court of Appeal denied a stay request when it denied the writ petition. (Appendix.) The City requests that this Court extend the stay of the discovery order pending a final ruling on this petition. While the City could not be properly be sanctioned for failure to comply with a discovery order while it is in good faith seeking review of that order (*Fairfield v. Superior Court* (1966) 246 Cal.App.2d 113, 121), nonetheless, it should not have to risk such proceedings on pain of having to disclose confidential communications. Hence, a further stay pending final disposition of this matter is warranted.

STATEMENT OF THE CASE

A. Background.

Andrea Waters is the plaintiff in an action now pending in respondent Superior Court for the County of Sonoma, entitled *Andrea Waters v. City of Petaluma*, Sonoma County Superior Court Case No. SCV 256309. (Exh. 1, p. 5 [citations are to the exhibits filed in the Court of Appeal].) Petitioner City of Petaluma is the defendant. (*Ibid*.)

Plaintiff was a firefighter/paramedic employed by the City beginning in June 2008. (Exh. 1, p. 7.) On February 28, 2014, she went on leave. (Exh. 8, p. 79.)

On May 19, 2014, the City received notice from the U.S. Equal Employment Opportunity Commission ("EEOC") that plaintiff had filed a charge alleging harassment, sexual harassment, and retaliation pertaining to the terms and conditions of her employment and training. (*Ibid*.) Until receipt of this notice, the City was unaware that plaintiff had complaints in this regard. (*Ibid*.)[2/]

On May 22, 2014, three days after the City received notice from the EEOC, plaintiff voluntarily resigned from City employment. (*Ibid*.)

[2/] The parties dispute this fact.

B. The Investigation.

The fact that plaintiff had filed her EEOC charge and almost simultaneously resigned led City Attorney Eric Danly to conclude plaintiff was not seeking corrective action but was exhausting administrative remedies prior to filing a lawsuit. (*Id*. at pp. 79-80.)

On June 11, 2014, Danly retained outside counsel, the law offices of Amy Oppenheimer, to investigate plaintiff's EEOC charge and to assist him in preparing to defend the City in the anticipated lawsuit. (*Id*. at pp. 80, 83-84.)

Danly retained Oppenheimer and her firm because of her legal expertise and over 30 years of experience in employment law as an attorney, investigator, arbitrator, mediator, and trainer. (*Id*. at p. 80.) He also wanted to ensure the investigation would be impartial. (*Ibid*.) Specifically, he wanted to ensure the firefighters to be interviewed were properly noticed and admonished in accordance with the Fire Fighters' Bill of Rights, City policy, and applicable law; to ensure all facts relevant to plaintiff's allegations and the City's potential liability under applicable federal and state law were gathered; and to ensure the investigation report, and related notes and analysis would be subject to the attorney-client privilege and work product doctrine, as they would be if the City Attorney's Office had conducted the investigation itself. (*Ibid*.)

The retention agreement provided that it created an attorney-client relationship between the City and the law offices of Amy Oppenheimer. (*Id*. at p. 83.) It also provided that Oppenheimer would "use [her] employment law and investigation expertise to assist [Danly] in determining the issues to be investigated and to conduct an impartial fact-finding." (*Ibid*.) The investigation would be subject to the attorney-client privilege until and unless the City waived the privilege or a court determined it was not privileged. (*Ibid*.) Oppenheimer would interview witnesses, collect and review pertinent information, and report "what we believe happened, and the basis for that conclusion." (*Ibid*.) Findings would be based on an "impartial and professional evaluation of the evidence." (*Ibid*.)

The retention agreement also provided that "[i]t is understood that in this engagement we will not render legal advice as to what action to take as a result of the findings of the investigation." (*Ibid*.)

C. The Lawsuit And Discovery.

Plaintiff sued the City on November 6, 2014 under FEHA on various theories, including the failure to prevent harassment, discrimination and retaliation. (Exh. 1, pp. 5-11.) Specifically, she alleged, among other things, "Defendant failed to take all reasonable steps necessary to prevent harassment, discrimination and retaliation from occurring in violation of Government Code section 12940(k) . . . [¶] As a proximate result . . . Plaintiff has been harmed . . . ." (*Id*. at p. 10.)

The City filed its answer on December 19, 2014. (Exh. 2, pp. 14-21; see Exh. 18, p. 172.) The Eighteenth Affirmative Defense asserted that "Defendant exercised reasonable care, and properly took all steps necessary to prevent and correct any violations of any . . . state statute . . . and Plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities or to otherwise avoid harm." (Exh. 2, p. 19.) The Twenty-First Affirmative Defense asserted plaintiff "fail[ed] to take reasonable and necessary steps to avoid the harm and/or consequences [she] allegedly suffered." (*Ibid*.)

Plaintiff served discovery requests on December 2, 2014 and the City responded on February 2, 2015. (Exh. 4, pp. 27-28.) In its responses, the City objected to every request seeking production of Oppenheimer's report and other materials bearing on the investigation on the ground such were protected by the attorney-client privilege and work product doctrine. (Exh. 5, pp. 37-56; Exh. 10, pp. 93-98.)

D. Plaintiff's Motion To Compel.

On March 6, 2015, plaintiff moved to compel documents and testimony relating to the City's investigation on the ground they were relevant to her "failure to prevent" cause of action and two of the City's affirmative defenses. (Exh. 3, pp. 23-24.) Plaintiff sought all the documents Oppenheimer created or referred to in the course of her investigation, including the final report, as well as notes, witness

interviews, and audio tapes, and she also sought to depose Oppenheimer regarding the investigation. (Exh. 5.)[3/] In her supporting memorandum, she contended that no attorney-client privilege attached to the investigation and, even if the privilege did attach, the City had waived the privilege by asserting an avoidable consequences defense by the Eighteenth and Twenty-First Affirmative Defenses. (Exh. 4, pp. 30-33.)

The City opposed the motion. (Exhs. 7-10.)

On April 22, 2015, the trial court heard argument on plaintiff's motion. (Exh. 12.) In an order filed and served on May 19, 2015, the trial court granted the motion, finding the investigation was not protected from discovery by either the attorney-client privilege or the work product doctrine because outside counsel had stated she would not render legal advice as to what action should be taken as a result of her findings. (Exh 13, p. 139; see Exh. 8, p. 83.) Neither documents nor testimony were protected "just because the mechanics of the investigation . . . reflect an attorney's evaluation on interpretation of the law or the facts." (Exh. 13, p. 139.) Moreover, even if the privilege or work product doctrine attached to any of the information, the City had waived the protection by asserting the avoidable consequences doctrine as an affirmative defense. (Exh. 13.)

[3/] The City refers herein to the documents and other information sought collectively as "the investigation."

On June 8, 2015, the trial court ordered a stay of disclosure until July 6, 2015. (Exh. 17.)

E. Court Of Appeal Proceedings.

The City timely filed a petition for writ of mandate in the Court of Appeal, First Appellate District, on June 19, 2015. It was assigned to Division Three. On June 25, 2015, the Court of Appeal summarily denied the petition. Its order reads: "The petition for a writ of mandate and/or prohibition and the related request for a stay are denied." (Appendix.)

WHY REVIEW SHOULD BE GRANTED

I. THIS COURT SHOULD GRANT REVIEW TO SECURE UNIFORMITY OF DECISION: THE TRIAL COURT'S CONTENT-BASED RULING CONFLICTS WITH *COSTCO* WHICH REQUIRES THAT FOCUS BE ON THE ATTORNEY-CLIENT RELATIONSHIP AND WHICH BARS DISCOVERY OF CONFIDENTIAL COMMUNICATIONS EVEN IF FACTUAL IN NATURE.

A. Pursuant to *Costco*, The Report And Related Materials At Issue Here Are Protected By The Attorney-Client Privilege And/Or Work Product Doctrine.

The attorney-client privilege is set forth in Evidence Code section 954, and permits a client "to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer" made in the course of an attorney-client relationship. "Confidential communication" means "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence" by confidential means, and "includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." (Evid. Code, § 952.) "The attorney-client privilege attaches to a confidential communication between the attorney and the client and bars discovery of the communication *irrespective of whether it includes unprivileged material*." (*Costco*, *supra*, 47 Cal.4th at p. 734, emphasis added.)

The fundamental purpose of the attorney-client privilege "'is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters. . . .' [Citation.]" (*Costco*, *supra*, 47 Cal.4th at pp. 732, 740-741.) The focus of the inquiry as to whether a communication is privileged is "the dominant purpose *of the relationship*," here between the City and outside counsel. (*Id*. at p. 739, original emphasis.) If it is determined that "the communications were made during the course of an attorney-client relationship, the communications, *including any reports of factual material*, would be privileged, even though the factual material might be discoverable by some other means." (*Id*. at p. 740, emphasis added.)

1. The City and Oppenheimer's law firm were indisputably in an attorney-client relationship, with Oppenheimer to provide legal services in the form of an investigation.

Oppenheimer's firm and the City were in an attorney-client relationship because, as a threshold matter, that is the only way Oppenheimer could lawfully conduct the investigation for the City without being licensed as a private investigator. (See Bus. & Prof. Code, § 7520 [those acting as private investigators must be licensed as such]; see *id.* at § 7521 [defining private investigator by activity]; see *id.* at § 7522, subd. (e)

[exempting from private investigator licensing requirement "[a]n attorney at law in performing his or her duties as an attorney at law"].)

Moreover, the retention agreement expressly states: "This agreement creates an attorney/client relationship between the City, and the law offices of Amy Oppenheimer." (Exh. 8, p. 83; see also *id*. at p. 80 [the retention agreement "expressly creates an attorney/client relationship between the City and the law offices of Amy Oppenheimer"].)

The evidence proffered by the City in opposing the motion to compel established that the relationship between Oppenheimer's law firm and the City was a confidential one for obtaining legal services from Oppenheimer. Oppenheimer's firm was "to assist [the City Attorney] in preparing to defend the City in the anticipated lawsuit . . . [¶] . . . to assist [him] in determin[ing] the issues to be investigated and to conduct impartial fact finding regarding Plaintiff's EEOC Charge." (Exh. 8, p. 80.) In other words, the City Attorney's Office and Oppenheimer's firm were a legal team.

Critical to this relationship was Oppenheimer's "over 30 years' experience in employment law as an attorney, investigator, arbitrator, mediator and trainer." (*Ibid*.) Eric Danly, the City Attorney, declared he retained her "*to benefit from her legal expertise and experience* and to ensure the investigation would be objective and impartial." (*Ibid.*, emphasis added.) He wanted to ensure the investigation "would gather all facts

relevant to the allegations and potential . . . City liability under applicable federal and state law." (*Ibid*.) Moreover, the relationship was intended to be confidential: "I wanted to ensure that the investigation report, and related notes, analysis and other records, would be subject to the attorney-client and work product privileges just the same as they would be if the investigation were conducted by my office." (*Ibid*.) Oppenheimer's declaration described in detail the steps she took to maintain the confidentiality of her investigation. (Exh. 9, p. 86.)

The retainer agreement attached to Danly's declaration reflects the same intention of confidential relationship within which Oppenheimer would provide legal services: "As attorneys, we will use our employment law and investigation expertise to assist you in determining the issues to be investigated and to conduct impartial fact-finding." (Exh. 8, p. 83.) In that regard, "[w]e will tell you what we believe happened, and *the basis for that conclusion*. We are not guaranteeing any particular result and we will reach our findings based on an impartial and *professional evaluation of the evidence*." (*Ibid*., emphasis added.)

In the face of this indisputable evidence, the trial court's ruling is wrong under *Cotsco*. That the Court of Appeal summarily denied the writ petition signals the need for review to make clear to courts and employers alike exactly what the law requires.

The fact that Oppenheimer was not to render legal advice as to what action to take with the results of the investigation does not defeat the privilege, because it does not defeat the reality that an attorney-client relationship was established between the City and Oppenheimer, and that the investigation, including the report and all other related materials, was intended to be confidential information for the City Attorney so that he, in turn, could properly advise the City.[4/] As the *Costco* court made clear, the privilege protects a "*transmission* irrespective of its content." (*Costco*, *supra*, 47 Cal.4th at p. 739, original emphasis.) The court emphasized "'[n]either the statutes articulating the attorney-client privilege nor the cases which have interpreted it make any differentiation between "factual" and "legal" information.'" (*Costco*, *supra*, 47 Cal.4th at p. 734, quoting *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 601 ("*Mitchell*").) Thus, for example, in *Mitchell*, an attorney's warnings to his client about the effects of chemical exposure were privileged even though they involved factual information, not legal advice. (37 Cal.3d at p. 601.) Legal advice or opinion in Evidence Code section 952 defining "confidential" is just one type of information protected. (*People v. Bolden* (1979) 99 Cal.App.3d

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[4/] The Government Code assigns to the city attorney the role of advising city officials. (See Gov. Code, § 41801 ["The city attorney shall advise the city officials in all legal matters pertaining to city business"].) That there is a division of labor so that other legal services are performed by other attorneys in anticipation of litigation does not mean the other attorneys are not functioning as attorneys, i.e., as part of the City's legal team.

375, 379; see also 2 Witkin, Cal. Evidence (5th ed. 2012) Witnesses, § 111, p. 409 ["[t]he protected communication may be either 'information transmitted between a client and his or her lawyer' or 'advice given by the lawyer'" or "'a legal opinion formed' even though not communicated to the client"].)

Under *Costco*, the proper focus in the analysis of privilege is whether there is an attorney-client relationship and whether the communication was transmitted confidentially in the course of that relationship, not whether an attorney's legal advice was part of the communication. *County of Los Angeles Board of Supervisors v. Superior Court* (2015) 235 Cal.App.4th 1154, 1174; see also *Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 51 [after *Costco*, "the focus of the inquiry is the dominant purpose of the relationship between the parties to the communication. . . . [W]hen the party claiming the privilege shows the dominant purpose of the relationship between the parties to the communication was one of attorney-client, the communication is protected by the privilege"]; see *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 371 ["[t]he attorney-client privilege applies to communications in the course of professional employment that are intended to be confidential"]; *City & County of San Francisco v. Superior Court* (1951) 37 Cal.2d 227, 236 [if "'the communication is intended to be confidential . . . , the privilege comes into play' (citation)"].)

Contrary to the trial court's suggestion, there is more to providing legal services than providing legal advice. Identifying the factual issues to be investigated in light of the law, and knowing what questions to ask to obtain legally relevant facts for determining potential exposure are tasks that call for the professional judgment and expertise in employment law that an attorney can provide. Oppenheimer was retained for exactly that professional judgment and expertise to assist the City Attorney in defending the City in the anticipated lawsuit.[5/] The fact that it was not within the scope of her retention to provide legal advice to city officials as to what they should do with the results of her investigation, as it could not be under the Government Code, does not defeat the attorney-client privilege or the protection of the work product doctrine.

Review should be granted to dispel any doubt that an investigation such as undertaken here is subject to the attorney-client privilege and/or work product doctrine.

[5/] See Exh. 8, pp. 80, 83 (retention agreement providing that Oppenheimer would "use [her] employment law and investigation expertise to assist [City Attorney] in determining the issues to be investigated" and that her findings would be based on a "professional evaluation of the evidence").

II. THIS COURT SHOULD GRANT REVIEW TO PROVIDE GUIDANCE ON AN IMPORTANT QUESTION OF LAW — WHETHER AN AVOIDABLE CONSEQUENCES DEFENSE CONSTITUTES WAIVER OF THE PROTECTIONS OF THE ATTORNEY-CLIENT PRIVILEGE OR WORK PRODUCT DOCTRINE AS TO A POST-EMPLOYMENT INVESTIGATION TO PREPARE A DEFENSE.

An implied waiver of the attorney-client privilege is established when the person seeking disclosure of privileged information demonstrates "that the client has put the otherwise privileged communication directly at issue and that disclosure is essential for a fair adjudication of the action." (*Southern California Gas Co. v. Public Utilities Comm.* (1990) 50 Cal.3d 31, 40 ("*Southern California Gas Co.*"); *Mitchell*, *supra*, 37 Cal.3d at p. 609.) There is no "waiver of the attorney-client privilege where the substance of the protected communication is not itself tendered in issue, but instead simply represents one of several forms of indirect evidence in the matter." (*Id*. at p. 606; *Southern California Gas Co.*, *supra*, 50 Cal.3d at p. 41.)

As to the avoidable consequences defense, it requires an employer to prove "(1) the employer took reasonable steps to prevent and correct workplace sexual harassment; (2) the employee unreasonably failed to use the preventive and corrective measures that the employer provided; and (3) reasonable use of the employer's procedures would have prevented at

least some of the harm that the employee suffered." (*State Department of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1044 ("*State Department of Health Services*").)

The trial court found that the City had waived any protection for the investigation by asserting the avoidable consequences defense in its answer to the complaint. (Exh. 13, pp. 141-142; Exh. 7, p. 64.) In so doing, it relied on *Wellpoint*. (Exh. 13, p. 142.) But *Wellpoint* involved an investigation conducted during the plaintiff's employment—in 1994 before his May 1995 layoff—when remediation was still conceivable. (*Wellpoint*, *supra*, 59 Cal.App.4th at pp. 115, 117.) And even *Wellpoint* is merely an advisory opinion on the waiver issue whenever the investigation occurred, because no operative complaint or answer, was on file. (*Id*. at p. 129.)

Besides relying on Wellpoint, the trial court offered a unique proposition—that the City's post-employment investigation for purposes of defending in the anticipated litigation was the "best evidence" of what the City would have done before plaintiff's resignation. (Exh. 13, p. 142.) This makes no sense given the very different purposes of investigations during employment (remediation) and post-employment (defense). Review is necessary because if the trial court is correct, then it would appear that in cases under FEHA an employer will never have the right to invoke the privilege for confidential communications as it prepares to litigate, because in preparing to litigate, one must always investigate and assess the facts.

Courts, employers, and employees plainly need the law to be clarified on this issue. The trial court's ruling simply does not square with the law of waiver or avoidable consequences. The substance of the post-employment investigation is not "directly at issue" (*Southern California Gas Co.*, *supra*, 50 Cal.3d at p. 40), because the avoidable consequences defense functions to allow an employer "to escape liability for those damages, and only those damages, that the employee more likely than not could have prevented with reasonable effort and without undue risk, expense, or humiliation, by taking advantage of the employer's internal complaint procedures appropriately designed to prevent and eliminate sexual harassment." (*State Department of Health Services*, *supra*, 31 Cal.4th at p. 1044.)

If, for example, an employee complained during her employment about unlawful treatment, the employer asserting an avoidable consequences defense would be required to show that it promptly investigated such a complaint and took action to remediate the situation and prevent any further violative conduct, but that plaintiff failed to take advantage of the opportunities to avoid further harm. (Cf. *id*. at p. 1046 [if employer failed to investigate complaints or otherwise act on them, future

victims would have a strong argument the employer's policies and procedures were inadequate].)[6/]

In other words, as the law now stands, the avoidable consequences defense addresses conduct *during* a plaintiff-employee's term of employment. Accordingly, it does not put directly in issue an investigation instituted *after* the plaintiff has left employment when no remediation is possible and when the purpose of the investigation at that point is simply to prepare for anticipated litigation by finding out what happened.

Such investigations that call on an attorney's professional judgment and expertise in employment law are routine. Employers need clear guidelines so they can know in advance whether or not they will waive the protection of the attorney-client privilege and work product doctrine if they choose to assert the avoidable consequences defense. Review is warranted to determine this critical issue.

[6/] If a *future* claimant directed discovery to *past* complaints and investigations, such as the one at issue here, the City might well be put to the choice of continuing to assert the privilege *or* asserting an avoidable consequences defense as to that future claimant. For purposes of the damages allegedly incurred by plaintiff in *this* case, the avoidable consequences defense simply does not put in issue the post-employment investigation.

CONCLUSION

For the reasons stated above, this is a case where extraordinary relief is critical and warranted. The City asks this Court to grant review and resolve the important issues presented or, alternatively, to transfer the matter back to the Court of Appeal, First Appellate District, Division Three, to decide the issues on the merits.

DATED: July 1, 2015

Respectfully submitted,

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Attorneys for Defendant and Petitioner CITY OF PETALUMA

CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies that pursuant to rules 8.204(c)(1) and 8.486(a)(6) of the California Rules of Court, the **PETITION FOR REVIEW** contains 4,816 words, not including the tables of contents and authorities, the caption page, the verification page, signature blocks, or this certification page.

DATED: July 1, 2015

Alison M. Turner

APPENDIX

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

CITY OF PETALUMA, Petitioner, v. THE SUPERIOR COURT OF SONOMA COUNTY, Respondent; ANDREA WATERS, Real Party in Interest.	A145437 (Sonoma County Super. Ct. No. SCV 256309)

THE COURT:*

The petition for a writ of mandate and/or prohibition and the related request for a stay are denied.

Dated: _____ _____P.J.

* McGuiness, P.J., Pollak, J. & Jenkins, J.

PROOF OF SERVICE

1. At the time of service i was over 18 years of age and not a party to this action

2. My business address is: Nationwide Legal, LLC, 1609 James M. Wood Blvd., 2nd Fl., Los Angeles, CA 90015

3. On July 1, 2015, I served a true and correct copy of the following document(s):

PETITION FOR REVIEW

4. To the addressee as follows:

Honorable Elliot Lee Daum
Judge of the Sonoma County Superior Court
Courtroon 16
3035 Cleveland Avenue, Suite 200
Santa Rosa, California 95403
Telephone: (707) 521-6547
[Respondent / Case No. SCV-256309]

Service was made by delivering to the business office; or by leaving the document(s) with his clerk over the age of 18 therein; or with a person having charge thereof; by leaving them during business hours.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct

Aaron Basharain

PROOF OF SERVICE

1. At the time of service i was over 18 years of age and not a party to this action

2. My business address is: Nationwide Legal, LLC, 1609 James M. Wood Blvd., 2nd Fl., Los Angeles, CA 90015

3. On July 1, 2015, I served a true and correct copy of the following document(s):

PETITION FOR REVIEW

4. To the addressee as follows:

Deborah Kochan, Esq.
Mathew Stephenson, Esq.
KOCHAN & STEPHENSON
1680 Shattuck Avenue
Berkeley, California 94709
Telephone: (510) 649-1130~ Facsimile: (510) 649-1131
Attorneys for Plaintiff and Real Party-In-Interest ANDREA WATERS

Service was made by delivering to the business office; or by leaving the document(s) with his clerk over the age of 18 therein; or with a person having charge thereof; by leaving them during business hours.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct

Manuel Martinez

PROOF OF SERVICE

1. At the time of service i was over 18 years of age and not a party to this action

2. My business address is: Nationwide Legal, LLC, 1609 James M. Wood Blvd., 2nd Fl., Los Angeles, CA 90015

3. On July 1, 2015, I served a true and correct copy of the following document(s):

   PETITION FOR REVIEW

4. To the addressee as follows:

   California Court of Appeal, First Appellate district
   Division Three
   350 McAllister Street
   San Francisco, California 94102
   Telephone: (415) 865-7300
   [Case No. A145437]

Service was made by delivering to the business office; or by leaving the document(s) with his clerk over the age of 18 therein; or with a person having charge thereof; by leaving them during business hours.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct

Esteban Luna