A·D·C VERITAS
Association of Defense Counsel of Northern California and Nevada

ASCDC
Association of Southern California Defense Counsel

August 25, 2017

Acting Presiding Justice Douglas P. Miller
Associate Justice Carol D. Codrington
Associate Justice Richard T. Fields
Court of Appeal of the State of California
Fourth Appellate District, Division Two
3389 12th Street
Riverside, CA 92501

Re: Request for Publication of *Rivera v. Costco Wholesale Corp.* (August 9, 2017, E062893)

Honorable Justices:

Pursuant to Rules 8.1105 and 8.1120 of the California Rules of Court, the Association of Defense Counsel of Northern California and Nevada ("ADCNCN") and Association of Southern California Defense Counsel ("ASCDC") write jointly to urge the Court to order publication of its opinion in this case.

Interest of the Requesting Organizations

ADCNCN is an association of approximately 900 attorneys primarily engaged in the defense of civil actions. ADCNCN members have a strong interest in the development of substantive and procedural law in California, and extensive experience with civil matters generally, including employment matters. The Association's Nevada members are also interested in the development of California law because Nevada courts often follow the law and rules adopted in California.

ASCDC is the nation's largest and preeminent regional organization of lawyers who specialize in defending civil actions. It has over 1,100 attorneys in Central and Southern California, among whom are some of the leading trial and appellate lawyers of California's civil defense bar. The ASCDC is actively involved in assisting courts on issues of interest to its members. In addition to representation in appellate matters, the ASCDC provides its members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multifaceted support, including a forum for the exchange of information and ideas. It has appeared as *amicus curiae* in numerous cases before both the California Supreme Court (e.g., *Perry v. Bakewell* (2017) 2 Cal.5th 536; *Howell v. Hamilton Meats & Provisions* (2011) 52

Cal.4th 541; *Village Northridge Homeowners Assn. v. State Farm Fire & Casualty Co.* (2010) 50 Cal.4th 913; *Reid v. Google, Inc.* (2010) 50 Cal.4th 512) and the Courts of Appeal (e.g., *Burlage v. Superior Court* (2009) 178 Cal.App.4th 524).

ASCDC and ADCNCN are separate organizations that coordinate from time to time on matters of shared interest, such as this letter in support of publication of the *Rivera* opinion. Together and separately, they have appeared as *amicus curiae* in numerous cases before both the California Supreme Court and Courts of Appeal across the state to express the interests and concerns of the civil litigation attorneys who are the members of the Associations and their clients, a broad cross-section of California businesses and organizations.

Why the opinion deserves publication

Publication of this opinion would be appropriate and helpful in the development of jury trial-related employment law. The Court's opinion readily meets the standards for publication in multiple ways.

The decision "[e]stablishes a new rule of law" (Cal. Rules of Court, rule 8.1105(c)(1)), that CACI 2513 is incomplete and inadequate. This in and of itself merits publication so that proper CACI and/or special instructions are applied, and to provide notice to the Judicial Council Advisory Committee on Civil Jury Instructions ("Committee") that a revision to CACI 2513 is necessary. The Committee is currently seeking comment on instructions and has a September 1, 2017 submission deadline. Publication of this opinion is very important to address the deficiency in CACI 2513 forthwith.

The decision "[a]dvances a new … criticism, or construction of" a standard jury instruction. (Cal. Rules of Court, rule 8.1105(c)(4).) While this rule does not expressly include jury instructions, the Associations submit that decisions addressing jury instructions are just as significant for practice, and rarer, than decisions addressing "a provision of a constitution, statute, or court rule."

The decision "[i]nvolves a legal issue of continuing public interest" (Cal. Rules of Court, rule 8.1105(c)(6)) because most all Californians are either an employer or an employee or both.

The decision "reaffirms a principle of law not applied in a recently reported decision" (Cal. Rules of Court, rule 8.1105(c)(8)), in fact several, including: "The laws that prohibit discrimination and retaliation do not require the employer to have good cause for its decisions; " "An employer's reason does not have to be a reason that the judge or jurors would act upon or approve;" and that CACI instructions are not necessarily complete or accurate, so trial courts

should give special instructions when proper ones are proposed. All too often, trial courts are inclined to simply refuse all special instructions from all parties, regardless of the content or importance, and over rely upon CACIs.

In many employment cases plaintiffs' counsel try to steer the inquiry away from what the employee did that justified termination, and towards attacking the employer's expressed reasons. Sometimes this is done under the stratagem of looking for "pretext" in the employer's decision-making process. It often becomes a central focus of trial.

In reality, however, whether a jury credits an employer's reasons or proffered reasons for the adverse action should be legally inconsequential. The only issue is whether an adverse employment action was taken for an improper or illegal reason, not an unwise or ill-advised one. Existing CACI instructions are inadequate to convey this to the jury.

Rivera v Costco properly ruled that CACI 2513 is an incomplete statement of the law, and needs augmentation by special instruction to the effect that disbelieving an employer's proffered reasons for an adverse action does not equate to liability. Trial courts are often reluctant to give any but approved CACI instructions. If this decision is published, it will provide precedent for other courts to allow the augmentation of CACI 2513 by proper special instruction.

The special instruction proposed in this case is, as the opinion recognizes, a correct statement of the law. Moreover, it is necessary in many cases. As the opinion states, "The trial court reasonably concluded Special Instruction No. 9 was necessary because no instruction informed the jury that, even if it disbelieved Bell's reasons for termination, it did not have to hold Costco liable." No CACI so informs any jury, and thus the special instruction could be proper in almost every wrongful termination case.

Publication may also help embolden courts to allow special instructions in other proper circumstances as well. Although use of standard Judicial Council instructions is encouraged (Cal. Rules of Court, rule 2.1050, subd. (e)), it is not mandatory, and standard instructions have been declared to have incorrectly stated the law. (See, e.g., *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1045 [rejecting BAJI No. 3.75, even though its "proximate cause" test had been in use for 50 years]; *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [rejecting language of CACI No. 2500 whether discrimination was "a motivating factor/reason" for termination; should say "a substantial motivating factor/reason"]; see also *People v. Thomas* (2007) 150 Cal.App.4th 461, 465-466 ["adoption of the CALCRIM instructions did not render any of the CALJIC instructions invalid or 'outdated'"].)

The Associations believe that there has been no published decision addressing employment CACIs since *Harris*. The time is ripe for another.

There are other aspects of the decision that would make useful precedent. That grabbing a co-worker's arm can be proper cause for termination. That an employer need not contact an employee on a medical leave of absence to complete investigating the arm grabbing incident, but may instead wait. The decision also addresses increasingly common defamation claims arising out of privileged internal communications dispenses with a common, but specious, theory: that a former employee is defamed when "forced" to tell prospective employers the employee was fired for misconduct, where the (former) employer has the common and beneficial policy "not to comment on the reason for a termination but only to confirm the dates of employment." Self-compelled defamation cases are few and far between and this opinion clarifies that such a claim is narrowly proscribed in scope and is the exceptional situation, not the rule.

For these reasons, ASCDC and ADCNCN urge this Court to certify its *Rivera* opinion for publication.

Respectfully submitted,

GORDON & REES LLP

By: _____
Don Willenburg
On Behalf of the Association of Defense Counsel of Northern California and Nevada

BALLARD ROSENBERG GOLPER & SAVITT LLP

By: _____
Eric C. Schwettmann
On Behalf of the Association of Southern California Defense Counsel

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 15760 Ventura Boulevard, Eighteenth Floor, Encino, CA 91436, USA.

On August 25, 2017, I served true copies of the following document(s) described as **REQUEST FOR PUBLICATION** on the interested parties in this action as follows:

SERVICE LIST

Jose A. Rivera: Attorneys for Plaintiff and Appellant

Tracy lee Fehr, Esq.
Alexander Krakow + Glick
401 Wilshire Boulevard, Suite 1000
Santa Monica, CA 90401

Leonard Henry Sansanowicz, Esq.
Feldman Brown Olivares, APC
12400 Wilshire Boulevard, Suite 1100
Los Angeles, CA 90025

Costco Wholesale Corporation: Defendant and Appellant

Kiran Aftab Seldon, Esq.
Seyfarth Shaw LLP
2029 Century Park East, Suite 3500
Los Angeles, CA 90067-3021

☒ **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List. I am "readily familiar" with Ballard Rosenberg Golper & Savitt, LLP's practice for collecting and processing correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the United States Postal Service that same day in the ordinary course of business. Such envelope(s) were placed for collection and mailing with postage thereon fully prepaid at Encino, California, on that same day following ordinary business practices.

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

Executed on August 25, 2017, at Encino, California.

Karen Thomson

Karen Thomson

BALLARD ROSENBERG GOLPER & SAVITT, LLP
15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
ENCINO, CALIFORNIA 91436