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August 31, 2016

Tani G. Cantil-Sakauye, Chief Justice
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-7303

Re: *City and County of San Francisco v. Superior Court*
California Supreme Court Case No. S236551 (A148549)

Amici Curiae Letter Of The League Of California Cities And The California State Association Of Counties In Support Of Petition For Review

Honorable Justices:

The League of California Cities and the California State Association of Counties (collectively, "Amici") urge this Court to grant the petition for review pending in this case. Review is necessary to clarify the proper application of this Court's rulings in *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164 ("*General Dynamics*") and *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725 ("*Costco*") to a lawsuit by an attorney against his or her former client-employer. How the holdings of those cases are applied in such a lawsuit implicates important public policy considerations, especially when the former client-employer is a public entity such as amici's members.

A. Amici's Interest.

The League of California Cities ("League") is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern

to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The California State Association Of Counties ("CSAC") is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California, and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this is a matter with the potential to affect all California counties.

B. Background.

By means of a summary judgment motion, the City of San Francisco ("City") sought dismissal of the wrongful termination claim of its former Chief Trial Attorney in the City Attorney's Office, Joanne Hoeper. It did so pursuant to *General Dynamics*, on the ground that Hoeper could not fully establish her claim without breaching the attorney-client privilege. Hoeper had supervised an investigation reviewing and analyzing records that revealed the City had paid close to $20 million in "legally and factually suspect sewer claims." (See Hoeper's Opposition to Petition for Writ of Mandate, p. 3.) Her "privileged and confidential" report to the City Attorney is the basis of her claim that she was terminated for blowing the whistle on unlawful conduct within the City. (See Petitioner's Appendix ("Appendix"), Vol. 1, pp. 20-21; Vol. 2, pp. 417, 420.)

The trial court denied the City's motion, thus allowing the case to proceed to trial. It found that an "analysis of each individual communication was needed" to determine whether the dominant purpose of each communication was or was not in furtherance of the attorney-client relationship. (Petition for Review ("Petition"), Exh. A, p. 1.) In the court's view, such analysis was necessary because Hoeper was acting as a "reporter/ investigator" in her work and reports to the City Attorney, not as an attorney. (*Ibid*.) The trial court based its ruling on language in *General Dynamics* suggesting trial courts explore various ad hoc measures that might be useful in permitting an attorney to attempt to assemble the necessary proof, while protecting from disclosure client confidences subject to the privilege. (*Id*., p. 2.)

The Court of Appeal summarily denied the City's writ petition seeking to vacate the trial court's ruling. (See Petition, Exh. B.) It did so even though the basis of the trial

court's ruling, on its face, conflicted with the Court of Appeal's own very recent ruling in *City of Petaluma v. Superior Court* (2016) 248 Cal.App.4th 1023 ("*City of Petaluma*") and also with this Court's decision in *Costco*.

C. Review Should Be Granted To Affirm The Continuing Validity Of The Holding In *General Dynamics* And To Clarify Its Procedural Implications In Light Of *Costco*.

1. Dicta in *General Dynamics* regarding "ad hoc measures" supplanted its holding in this case.

In *General Dynamics*, this Court held that "in those instances where the attorney-employee's retaliatory discharge claim is *incapable of complete resolution* without breaching the attorney-client privilege, the suit may not proceed." (*General Dynamics*, *supra*, 7 Cal.4th at p. 1170, emphasis added; see also *id*. at p. 1190, emphasis added [where the claim cannot "for reasons peculiar to the particular case, be *fully established* without breaching the attorney-client privilege, the suit must be dismissed in the interest of preserving the privilege"].) Because of the procedural posture of the case before it, the Court went on to say that dismissal would seldom if ever be appropriate at the demurrer stage; rather, "in the usual case, whether the privilege serves as a bar to the plaintiff's recovery will be litigated and determined in the context of motions for protective orders or to compel further discovery responses, as well as at the time of a motion for summary judgment." (*Ibid*.) The clear procedural import of *General Dynamics* is that the issue of the attorney-employee's ability to proceed with her case should be determined before trial where possible—that is, "in the usual case."

To assist the trial court in making its determination of whether the privilege bars a lawsuit while allowing the plaintiff a chance "to attempt to make the necessary proof" that it does not, the *General Dynamics* court noted that trial courts could resort to "ad hoc measures" such as "[t]he use of sealing and protective orders, limited admissibility of evidence, order restricting the use of testimony in successive proceedings, and, where appropriate, in camera proceedings . . . ." (*Id*. at p. 1191.) In that way "judges can minimize the dangers to the legitimate privilege interests the trial of such cases may present." (*Ibid*.)

The trial court here latched onto the "ad hoc measures" language to compel a case to proceed to trial, which clearly should have been dismissed on the undisputed facts,

including the facts that Hoeper conducted the investigation as part of her job duties as Chief Trial Deputy for the City and the City was her client in that regard; that her government tort claim and complaint alleged she was terminated because her "privileged and confidential" report pointed to alleged employee unlawful conduct uncovered by her investigation. (Appendix, Vol. 2, pp. 414-417, 420-421.) There is no way such a claim could be "fully established" without breaching the attorney-client privilege.

But the trial court, with the imprimatur of the Court of Appeal's inaction, lost sight of the *General Dynamics* holding, stating that the City's notions of privilege (based on that holding) would bar most retaliation claims by an attorney-employee. (Petition, Exh. A, p. 2.) It read *General Dynamics* as requiring most, and probably all, such retaliation claims to proceed to trial where privilege matters could be taken care of with ad hoc measures. The trial court is not alone in this regard. (See, e.g., *Cordero-Sacks v. Housing Authority of City of Los Angeles* (2011) 200 Cal.App.4th 1267 ("*Cordero-Sacks*") [pretrial offer of proof not required by *General Dynamics*].) Such a misunderstanding of the case signals the need for review because *General Dynamics* left no doubt that the attorney-employee's right and ability to state a claim was limited:

> We emphasize the limited scope of our conclusion that in-house counsel may state a cause of action in tort for retaliatory discharge. The lawyer's high duty of fidelity to the interests of the client *works against* a tort remedy that is coextensive with that available to the nonattorney.

(7 Cal.4th at p. 1189, emphasis added.)

In *Cordero-Sacks*, the Second District Court of Appeal, on the facts before it, rejected an argument that an offer of proof that an employee could prove her claim without breaching the attorney-client privilege was required before trial. The court read *General Dynamics* as requiring such a showing only "eventually during the course of the lawsuit. . . . *General Dynamics* did not . . . describe any particular procedure the trial court must employ in putting the attorney" to such a showing. (200 Cal.App.4th at p. 1280.)

The court's observation suggests that there is at least a procedural hole that needs to be filled with respect to the practical application of *General Dynamics*, and underscores the need for review to clarify procedures in a case such as this. Even assuming the *Cordero-Sacks* court's reading of *General Dynamics* is correct and that

General Dynamics does not mandate a pretrial determination in every instance, the present case illustrates that lack of certainty about the procedural implications of *General Dynamics* can too easily result in a trial where it is virtually certain the plaintiff will not be able to fully establish her retaliation claim without breaching the attorney-client privilege.

It is clear that the trial court's refusal to resolve before trial the issue of whether Hoeper can prove her case without breaching the attorney-client privilege elevates the language in *General Dynamics* regarding "ad hoc measures" to a point that obscures the force of its actual holding. That in itself is reason for review.

2. The trial court's ruling, as let stand by the summary denial by the Court of Appeal of the City's writ petition, conflicts with the latter's own opinion in *City of Petaluma* and with this Court's decision in *Costco,* and raises the question of how the *General Dynamics* dicta regarding "ad hoc measures" may be squared with *Costco*, if at all.

The trial court here reasoned that because Hoeper was acting as a reporter/investigator in her investigative work and reports to the City Attorney, it was necessary to analyze each individual communication to determine whether its dominant purpose was to further the attorney-client privilege. (Petition, Exh. A, p. 1.) It justified its ruling by pointing to the language regarding ad hoc measures in *General Dynamics*. It dismissed *Costco*'s relevance in a footnote as involving an obvious case of attorney-client privilege, a lawyer's opinion letter. (*Id*., p. 2, fn. 2.) The trial court's superficial glance at *Costco* misses the point of the case and demonstrates a complete lack of understanding of the law regarding attorney-client privilege. That the Court of Appeal summarily denied a writ petition of this ruling in and of itself sets up a conflict with *Costco* and more astoundingly with its own analysis and conclusions of law in *City of Petaluma*, a conflict that clearly compels granting review.

In *Costco*, this Court expressly disapproved of the procedure which the trial court here ruled the judge presiding over trial is to perform: review each communication between Hoeper and her supervisors to determine its dominant purpose—whether to report results of a factual investigation or to provide legal advice or opinion. (See *Costco, supra,* 47 Cal.4th at pp. 739-740, disapproving *2,022 Ranch v. Superior Court* (2003) 112 Cal.App.4th 1377, 1397.) Based on Evidence Code section 915, *Costco* held that "a

court may not order disclosure of a communication claimed to be privileged to allow a ruling on the claim of privilege." (*Id*. at p. 739.) As the *Costco* court explained, "because the privilege protects a transmission irrespective of its content, there should be no need to examine the content in order to rule on a claim of privilege." (*Ibid*.)

The proper procedure on the question of privilege is "first to determine the dominant purpose *of the relationship*" between in-house attorney and client, rather than the dominant purpose of any particular communication. (*Ibid.*, original emphasis.) Relying on *Costco*, the court in *City of Petaluma* stated:

> In assessing whether a communication is privileged, the initial focus of the inquiry is on the "dominant purpose *of the relationship*" between attorney and client and not on the purpose served by the individual communication. [Citation.] "If a court determines that 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 other means."

(*City of Petaluma*, *supra*, 248 Cal.App.4th at p. 1032, quoting *Costco*, *supra*, 47 Cal.4th at pp. 739-740, original emphasis.)

The trial court in this case did not focus on or determine the dominant purpose of Hoeper's relationship with the City on the basis of the evidence presented; rather it simply deemed her to be acting as a reporter/whistleblower for purposes of her investigation and report presumably because she was investigating and reporting on facts, i.e., doing what any nonattorney could do. (See Petition, Exh. A, p. 1; see Appendix, Vol. 2, pp. 436-437 [Plaintiff's additional facts that Hoeper was acting primarily as fact investigator and her primary purpose was not to provide legal advice].) It is undisputed, however, that Hoeper conducted the investigation, finding and evaluating the evidence, as part of her official duties as an attorney in the City Attorney's Office, presumably with an eye to future prosecution. In *City of Petaluma*, the court held that the defendant City had an attorney-client relationship with outside counsel even though that counsel's role was limited to a factual investigation and did not extend to providing legal advice. (*City of Petaluma*, *supra*, 248 Cal.App.4th at pp. 1033-1034.)

In sum, the trial court's ruling, and the summary denial of writ review conflict with *City of Petaluma* and *Costco* on which it is based. Plainly, courts need guidance on these

issues and review should be granted on that basis to settle these questions once and for all.

3. The law must be clarified because the issue is becoming increasingly common, and *not* clarifying the law has the very real potential of harming the public.

Wrongful termination actions by former attorney employees of public entities, in which they allege retaliation for their legal work, are becoming increasingly frequent. (See, e.g., *Saladino v. County of Los Angeles*, Los Angeles Superior Court Case No. BC627232 [former county counsel claiming retaliatory constructive termination for unpopular legal advice].) The ruling of the trial court, which the Court of Appeal declined to review despite the fact that the attorney-client privilege lies at the heart of the matter, has negative implications for public entities throughout the state:

- If dicta concerning "ad hoc measures," untethered to any particular facts, are permitted to replace the actual holding of *General Dynamics*, cases such as this one will proceed to trial, even though the undisputed facts presented on a summary judgment motion clearly warrant dismissal before trial, and before substantial additional expenses are incurred. The obvious result for public entities is a waste of scarce resources, and for the court system as well.

- At the trial of such a case, the defending public entity will be put to the Hobson's Choice of continuing to assert the privilege thereby compromising its ability to defend, or defending itself and waiving the privilege. The unfairness, with due process implications, is patent.

- Public entities, and specifically offices of the city attorney and district attorney, play an important watchdog role, their attorneys bringing legal expertise to bear in investigating allegations of wrongdoing within the public entity and deciding whether to prosecute. It is critical that this work be protected from premature disclosure because it involves unproven charges against employees who may or may not turn out to be wrongdoers, and because each investigation potentially holds the seed of follow-up investigations that could be compromised by premature disclosure.

- If an attorney-employee may force disclosure of confidential communications relating to his or her last assignment by self-identifying as a nonattorney employee/whistleblower and by alleging his or her work thereon caused the retaliatory termination, then that attorney-employee effectively has a get-out-of-jail free card rendering the attorney virtually immune from discipline or discharge. Under such circumstances the public entity will be hesitant to risk terminating any attorney in whom it has lost confidence. That in turn will dilute the strength of the office and undermine its capacity to perform one of its core functions—to get to the bottom of allegations of misconduct that may be harming the public.

In the interest of avoiding these practical and very negative consequences, review is necessary and should be granted.

D. Conclusion.

Amici urge this Court to grant review to settle the important issues presented by the petition and to clarify the procedural implications of *General Dynamics* in light of *Costco*, or alternatively, to transfer the matter back to the Court of Appeal, First Appellate District, Division Three, to decide the issues on the merits.

Respectfully submitted,

THE LEAGUE OF CALIFORNIA CITIES
THE CALIFORNIA STATE ASSOCIATION OF COUNTIES
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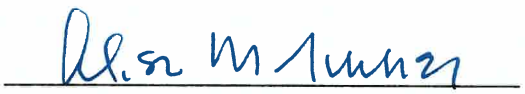
By: 
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PROOF OF SERVICE

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 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On August 31, 2016, I served the foregoing document described as: **AMICI CURIAE LETTER OF THE LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action by serving:

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(✓✓) By U.S. Mail: The envelope was deposited in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

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Executed on August 31, 2016 at Los Angeles, California.

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

Pauletta L. Herndon