THE STATE BAR OF CALIFORNIA

– LITIGATION SECTION, JURY INSTRUCTIONS COMMITTEE

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Via E-mail: civiljuryinstructions@jud.ca.gov.

Mr. Bruce Greenlee
Advisory Committee on Civil Jury Instructions
Judicial Council of California
455 Golden Gate Avenue
San Francisco, CA 94102

re: Invitation to Comment—CACI 15-01

Dear Mr. Greenlee:

The Jury Instructions Committee of the State Bar of California's Litigation Section (the committee) has reviewed the proposed revisions to civil jury instructions and verdict forms (CACI 15-01) and appreciates the opportunity to submit these comments.

1. CACI No. 201. Highly Probably—Clear and Convincing Proof

Agree.

2. CACI No. 303. Breach of Contract—Essential Factual Elements

a. The committee agrees with the revisions to element 2.

b. We disagree with the revisions to the first option in element 3. We believe that listing all conditions precedent in element 3 would be onerous and unnecessary. Counsel can specify the conditions at issue in their argument.

c. We agree with the proposed revisions to the second option in element 3, but we suggest that language be added to the Directions for Use stating to include an instruction defining the term "waiver" if "waiver" rather than "excuse" is selected.

3. CACI No. 328. Breach of Implied Duty to Perform with Reasonable Care—Essential Factual Elements

a. We believe that listing all conditions precedent in the first option in element 3 would be onerous and unnecessary. Counsel can specify the conditions at issue in their argument.

b. We suggest that language be added to the Directions for Use stating to include an instruction defining the term "waiver" if "waiver" rather than "excuse" is selected in the second option in element 3.

c. The first two sentences in the Directions for Use may be misconstrued to mean that this proposed new instruction should be given in every breach of contract case. We suggest adding an initial sentence to dispel that impression, stating, "Give this instruction if the plaintiff alleges a failure to perform a contractual obligation with reasonable care."

4. VF-300. Breach of Contract

Agree.

5. VF-303. Breach of Contract—Contract Formation at Issue

a. We suggest adding the words "*waiver or*" before "*excuse*" in the sentence following question 6 because question 7 concerns not only excuse but also waiver.

b. We agree with the other revisions to this verdict form and the Directions for Use.

6. VF-304. Breach of Implied Covenant of Good Faith and Fair Dealing

Agree.

7. CACI No. 456. Defendant Estopped from Asserting Statute of Limitations Defense

a. We believe that element 4 does not accurately state the law and that making it optional as proposed fails to solve this basic problem. Element 4 makes no allowance for the situation where the defendant induces the plaintiff to refrain from filing a lawsuit, and the plaintiff discovers the falsity before the statute has run and proceeds diligently after discovering the facts, but files suit after the statute has run. *Lantzy v. Centex Homes* (2003) 31 Cal.4th 836 did not discuss this possibility. It seems unlikely that *Lantzy* at page 384 ("(3) the representation proves false after the limitations period has expired"), without even discussing this possibility, intended to preclude equitable estoppel in those circumstances. Other language in *Lantzy* suggests to the contrary that equitable estoppel may arise if the defendant induced the plaintiff to refrain from filing suit and the plaintiff acted diligently after he or she learned the true facts. (*Id.* at pp. 384-385.)

Superior Disptach, Inc. v. Insurance Corp. of New York (2010) 181 Cal.App.4th 175, 186 (citing *Lantzy* and other cases), stated the rule in language that does not require the plaintiff to discover the falsity after the limitations period has expired: "A defendant may be equitably estopped from asserting a statutory or contractual limitations period as a defense if the defendant's act or omission caused the plaintiff to refrain from filing a timely suit and the plaintiff's reliance on the defendant's conduct was reasonable." We believe that this is correct and that *Lantzy* did not hold otherwise.

We also believe that element 4 should be mandatory and should state the basic requirement that the defendant's representations by words or conduct were false. Accordingly, we would modify element 4 as follows:

"[That ~~after the limitations period had expired,~~ [*name of defendant*]'s representations by words or conduct ~~proved to not be true~~ were false; and]"

This modification would also require deleting "[and]" at the end of element 3.

b. We would prefer greater specificity in element 5 and consistent use of the term "lawsuit" rather than "suit." We would modify element 5 as follows:

"That [*name of plaintiff*] proceeded to diligently file a lawsuit once [he/she/it] discovered that [*name of defendant*]'s representations were false ~~the need to proceed~~."

c. We would delete the new language added at the end of the Sources and Authority for the reasons stated above in 7.a.

d. We note that a petition for review was filed in *J. P. v. Carlsbad Unified Sch. Dist.* (2014) 232 Cal.App.4th 323 and suggest keeping an eye on that.

8. CACI No. 550. Affirmative Defense—Plaintiff Would Have Consented

Agree.

9. VF-501. Medical Negligence—Informed Consent—Affirmative Defense—Plaintiff Would Have Consented Even if Informed

Agree.

10. CACI No. 601. Damages for Negligent Handling of Legal Matter

Agree.

11. CACI No. 1230. Express Warranty—Essential Factual Elements

Agree, but please note the typo in the reference to Magnuson-Moss in the new first paragraph in the Directions for Use.

12. CACI No. 1500. Former Criminal Proceeding—Essential Factual Elements

Agree.

13. CACI No. 1504. Former Criminal Proceeding—"Actively Involved" Explained

We believe that this proposed new instruction does not clearly express the two requirements for "actively involved" as articulated in the case law: (1) seeking out the police or prosecuting authorities and (2) reporting false information to them. (*Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 720; *Zucchet v. Galardi* (2014) 229 Cal.App.4th 1466, 1481-1482.) We would prefer an instruction clearly enumerating these two requirements using similar language. We also believe that the final sentence in the instruction could be misconstrued to mean that giving false testimony or providing false information to law enforcement cannot support active involvement. If the point is that giving false testimony or providing false information alone is insufficient if the person did not seek out the police or prosecuting authority, that should be stated more clearly.

14. CACI No. 1731. Trade Libel—Essential Factual Elements

a. We believe that this revised instruction does not clearly express the essential elements. *Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277 stated:

"We hold that a claim of disparagement requires a plaintiff to show a false or misleading statement that (1) specifically refers to the plaintiff's product or business and (2) clearly derogates that product or business. Each requirement must be satisfied by express mention or by clear implication." (59 Cal.4th at p. 284.) ". . . the related requirements of derogation and specific reference may be satisfied by implication where the suit alleges that the . . . false and misleading statement necessarily refers to and derogates a competitor's product." (*Id.* at p. 294.) "A 'reasonable implication' in this context means a clear or necessary inference." (*Id.* at p. 295.)

Thus, the plaintiff must prove that the defendant (1) expressly or by clear implication (2) specifically referred to the defendant's product or business and (3) clearly derogated the defendant's product or business. Again, the disparagement must be either express or by clear implication.

The current instruction does not state that the disparagement must be either express or by clear implication. Element 1 states, "That [*name of defendant*] made a statement that disparaged the quality of [*name of plaintiff*]'s [*product/service*]." The other elements also do not state that the disparagement must be express or by clear implication.

The proposed revision adds the optional language "[would be clearly or necessarily understood to have]" describing the disparaging statement. This covers by clear implication, but does not cover expressly. The revised Directions for Use say to give the optional language if the plaintiff alleges clear implication, but there is no provision in the revised instruction or the Directions for Use for an express disparaging statement. Perhaps the thinking was that an

express disparaging statement would be clearly understood as disparaging, but then we so no reason to make the new language optional.

We suggest replacing element 1 with two elements stating:

"1. That [*name of defendant*] made a statement that [expressly] [or] [by clear implication] specifically referred to [*name of plaintiff*]"s [*product/service*].

"2. That [*name of defendant*]"s statement [expressly] [or] [by clear implication] disparaged the quality of [*name of plaintiff*]"s [*product/service*]."

b. We would modify the Directions for Use to state that one of the two alternatives in elements 1 and 2 should be selected, or select both in the disjunctive if the evidence could support either alternative.

c. We suggest adding to the Sources and Authority the language from *Hartford* quoted above.

15. CACI No. 1806. Affirmative Defense to Invasion of Privacy—First Amendment Balancing Test—Public Interest

Agree, but note the typo "defenplaintiff" (should be "plaintiff") in the last line of the first paragraph in the instruction.

16. CACI No. 2308. Affirmative Defense—Misrepresentation or Concealment in Insurance Application

Agree.

17. CACI No. 2432. Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions for Improper Purpose that Violates Public Policy

Agree.

18. CACI No. 2508. Failure to File Timely Administrative Complaint—Plaintiff Alleges Continuing Violation

Agree.

19. CACI No. 2512. Limitation on Remedies—Same Decision

We agree with the revision to the instruction, but note that the citation "(*Harris*, *supra*, 53 Cal.4th at p. 239)" in the second bullet point in the Sources and Authority should state "56 Cal.4th at p. 239."

20. CACI No. 2702. Nonpayment of Overtime Compensation—Essential Factual Elements

Agree.

21. VF-2702. Nonpayment of Overtime Compensation

Agree.

22. CACI No. 3020. Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements

a. The proposed new third paragraph in the Directions for Use states that this instruction can be used without element 3 (stating that the defendant was acting in the performance of official duties) in "a negligence claim under California common law based on the same events and facts." It also distinguishes California's negligence standard in the context of use of excessive force from the Fourth Amendment's reasonableness standard, but says nothing about the need to modify this instruction to reflect that difference.

The two cases cited in the new third paragraph both recognize a negligence claim based on a peace officer's unreasonable use of deadly force. (*Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 628-639 [referred repeatedly to a duty relating to the use of deadly force]; *Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 505-506, 512-514 [plaintiffs alleged unreasonable use of deadly force].) These cases support potential negligence liability in cases involving use of deadly force, but they do not necessarily support negligence liability in other excessive force cases. We would describe the potential negligence claim more specifically as a claim based on the use of deadly force, rather than "a negligence claim under California common law based on the same events and facts." The "same events and facts" as a section 1983 case may or may not involve the use of deadly force. Or, if authority exists supporting negligence liability in excessive force cases not involving deadly force, such authority should be cited.

We also believe the second sentence in the new third paragraph could be clarified by paraphrasing the language in *Hayes*, which stated, ". . . such liability can arise if the tactical conduct and decisions leading up to the use of deadly force show, as part of the totality of circumstances, that the use of deadly force was unreasonable." (57 Cal.4th at p. 626.) And we would note the potential need to modify this instruction in light of the differing state and federal standard. Accordingly, we would modify this paragraph as follows:

"This instruction may be used without element 3 in a negligence claim under California common law based on the ~~same event and facts~~ use of deadly force. The *Graham* factors apply under California negligence law in those circumstances. (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 514 [94 Cal. Rptr. 3d 1, 207 P.3d 506].) Liability under California negligence law can arise if ~~earlier~~ tactical conduct and decisions preceding the use of deadly force show, as part of the totality of circumstances, that the ~~make the~~ ultimate use of deadly force was unreasonable. Federal law under the Fourth Amendment, in contrast, "tends to focus more narrowly on the moment when deadly force is used [citation]." (*Hayes v. County of San Diego*

(2014) 57 Cal. 4th 622, 639 [160 Cal. Rptr. 3d 684, 305 P.3d 252].) In light of this difference, this instruction may be modified if the negligence claim is based in part on tactical conduct and decisions preceding the use of deadly force."

b. We believe that the proposed new eighth bullet point in the Sources and Authority adds nothing of value to the other cases cited, so we would delete it.

23. CACI No. 3040. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm

a. We suggest that the first sentence in the second paragraph of the Directions for Use be modified in the same manner as in the Directions for Use for CACI No. 3020, *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements*: "duties created ~~pursuant to~~ by ~~any~~ state county, or municipal law . . ."

b. The Directions for Use for CACI No. 3043, *Violation of Prisoner's Federal Civil Rights—Eight Amendment—Deprivation of Necessities*, include an introductory paragraph stating when to give the instruction and cross-references to this instruction and CACI No. 3041, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care*. We find this helpful and believe that a similar paragraph should appear in the Directions for Use for this instruction, with an appropriate citation, stating:

"Give this instruction in a case involving conduct that allegedly created a substantial risk of serious harm to an inmate. [Citation.] For an instruction on deprivation of medical care, see CACI No. 3041, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care*. For an instruction involving the deprivation of necessities, see CACI No. 3043, *Violation of Prisoner's Federal Civil Rights—Eight Amendment—Deprivation of Necessities*."

24. CACI No. 3041. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care

a. The Directions for Use for CACI No. 3043, *Violation of Prisoner's Federal Civil Rights—Eight Amendment—Deprivation of Necessities*, include an introductory paragraph stating when to give the instruction and cross-references to this instruction and CACI No. 3040, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Harm*. We find this helpful and believe that a similar paragraph should appear in the Directions for Use for this instruction, with an appropriate citation, stating:

"Give this instruction in a case involving the deprivation of medical care. [Citation.] For an instruction on the creation of a substantial risk of serious harm, see CACI No. 3040, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm*. For an instruction involving the deprivation of necessities, see CACI No. 3043, *Violation of Prisoner's Federal Civil Rights—Eight Amendment—Deprivation of Necessities*."

25. CACI No. 3043. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Deprivation of Necessities

Agree.

26. CACI No. 3071. Retaliation for Refusing to Authorize Disclosure of Medical Information—Essential Factual Elements

a. The reference in the title to Civil Code section 52.20(b) should be changed to Civil Code section 56.20(b).

b. We suggest adding the word "Even" at the beginning of the last paragraph in the instruction.

c. Although the trial court in *Kao v. University of San Francisco* (2014) 229 Cal.App.4th 437, 253, instructed that the refusal to release medical information must be "the motivating reason" for the retaliation and that necessity is a defense, and the Court of Appeal stated that the instruction was consistent with the statute and case authority, the issue in *Kao* was not the causation standard but the necessity defense. *Kao* held that the evidence supported the finding that the defendant"s business necessity justified the plaintiff"s discharge for refusing to release medical information. *Kao* did not hold that "the motivating reason" was the proper causation standard, and we believe that the opinion should not be cited on that point. Accordingly, we would modify the third paragraph of the Directions for use as follows:

"The statute requires that the employer"s retaliatory act be ,,due to" the employee"s refusal to release the medical information. (Civ. Code, § 56.20(b).) ~~One court has instructed the jury that the refusal to release must be ,,a motivating reason" for the retaliation. (See *Kao*, *supra*, 229 Cal.App.4th at p. 452.) With regard to the causation standard under the Fair Employment an dHousing Act, t~~The California Supreme Court has held that the protected activity must have been a *substantial* motivating reason to establish causation under the Fair Employment and Housing Act. (~~See~~ *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49] see also CACI No. 2507, *'Substantial Motivating Reason' Explained*.)"

27. VF-3012. Violation of Prisoner's Federal Civil Rights—Eighth Amendment —Substantial Risk of Serious Harm

Agree.

28. VF-3022. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care

Agree.

29. CACI No. 3700. Introduction to Vicarious Responsibility

Agree.

30. CACI No. 3704. Existence of "Employee" Status Disputed

a. *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 531, stated, "Perhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause." We believe that the words "without cause" are essential in this statement. Discharging a worker for cause does not demonstrate the right to control supporting an employment relationship because any worker, employee or independent contractor, can be discharged for cause. Rather than make the words "without cause" optional, we believe that the entire sentence should be made optional: "[One indication of the right to control is that the hirer can discharge the worker without cause.]"

b. We would delete the second paragraph in the Directions for Use and replace it with a statement that the optional sentence discussed above should be included unless a contract provides that the relationship may only be terminated for cause.

31. CACI No. 4110. Breach of Duty by Real Estate Seller's Agent—Inaccurate Information in Multiple Listing Service—Essential Factual Elements

a. We believe that it is unnecessary to describe the alleged misstatement in the instruction (element 2). The MLS listing presumably will be in evidence, so there is no need to describe what it stated. We would combine elements 2 and 3 into a single element referring to the alleged misstatement generically, as in CACI No. 1903, *Negligent Misrepresentation* and other instructions in the fraud series, as shown below.

b. We believe that actionable reliance under Civil Code section 1088 is not limited a buyer's decision whether to purchase, as suggested by element 5. A buyer could rely on a misstatement by paying more than he or she otherwise would have paid, and perhaps in other ways (e.g., incurring investigation costs or permit fees based on a misrepresentation that the property was suitable for a particular use). Perhaps other persons also could act in reliance on a misstatement and be entitled to damages under the statute. We would revise element 5 to make the required reliance less restrictive and to encompass the requirement of reasonable reliance.

The proposed new instruction does not state that the plaintiff's reliance must be reasonable. Reasonable reliance is an essential element of negligent misrepresentation. (See CACI No. 1903, *Negligent Misrepresentation*, element 5.) *Furla v. Jon Douglas Co.* (1998) 65 Cal.App.4th 1069, 1077-1079, held that triable issues of fact on justifiable or reasonable reliance precluded summary judgment on the plaintiff's claims for negligence and negligent misrepresentation, which were based in part on Civil Code section 1088. We believe that reasonable reliance is an element of a claim under Civil Code section 1088.

Actual and reasonable reliance can be stated in a single element, as in CACI No. 1903, *Negligent Misrepresentation*, element 5 ("That [*name of plaintiff*] reasonably relied on [*name of*

defendant]"s representation"). Accordingly, we would modify element 5 to state that the plaintiff "reasonably relied on [*name of defendant*]"s false or inaccurate information."

c. We believe that the substantial factor element (element 7) is more precisely and better stated in CACI No. 1903, *Negligent Misrepresentation*, element 7 ("That [*name of plaintiff*]"s reliance on [*name of defendant*]"s representation was a substantial factor in causing [his/her/its] harm"). We would use similar language here.

Accordingly, we suggest modifying this instruction as follows:

"[*Name of defendant*], as the real estate [broker/salesperson/appraiser] for [*name of seller*], listed the property for sale in a multiple listing service (MLS). [*Name of plaintiff*] claims that [he/she] was harmed because information in the MLS was false or inaccurate. [*Name of defendant*] is responsible for this harm if [*name of plaintiff*] proves all of the following:
1. That [*name of defendant*] listed the property for sale in a multiple listing service;
2. That information posted by [*name of defendant*] on the multiple listing service was false or inaccurate ~~stated that [specify information alleged to be false or inaccurate]~~;
~~3. That this information was false or inaccurate;~~
43. That [*name of defendant*] knew, or reasonably should have known, that the information was false or inaccurate;
~~5~~4. That ~~had~~ [*name of plaintiff*] reasonably relied on [*name of defendant*]"s false or inaccurate information ~~known the true and accurate information, [he/she] would not have purchased the property~~;
~~6~~5. That [*name of plaintiff*] was harmed; and
~~7~~6. That [*name of ~~defendant~~ plaintiff*]"s ~~conduct~~ reliance on [*name of defendant*]"s information was a substantial factor in causing [*name of plaintiff*]"s harm.

32. CACI No. 4600. False Claims Act. Whistleblower Protection—Essential Factual Elements

a. We believe that it would be helpful to group together instructions on whistleblower protection that are currently included in other series, and agree with the creation of a new series on whistleblower protection.

b. We suggest either adding optional language after the word "discharged" in the first and last sentences in the introductory paragraph in the instruction to allow for other adverse action, or adding language to the Directions for Use stating that the word "discharged" in the introductory paragraph should be replaced by other words specifying the adverse action if some other adverse action is involved.

33. CACI No. 4601. Protected Disclosure by State Employee—California Whistleblower Protection Act—Essential Factual Elements

a. We suggest either adding optional language after the word "discharged" in the introductory paragraph in the instruction to allow for other adverse action, or adding language to

the Directions for Use stating that the word "discharged" in the introductory paragraph should be replaced by other words specifying the adverse action if some other adverse action is involved.

b. We find the statement in the Directions for Use "These elements may be modified to allege constructive discharge" somewhat awkward because jury instructions do not "allege." We would modify this as follows:

""These elements may be modified ~~to allege~~ if constructive discharge is alleged."

34. CACI No. 4602. Affirmative Defense—Government Employee—Same Decision

Agree.

35. CACI No. 4603. Whistleblower Protection—Labor Code—Essential Factual Elements

Agree.

36. CACI No. 4604. Affirmative Defense—Labor Code—Same Decision

We agree with the revision to the instruction. We suggest that a citation to *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 224, be added to the Sources and Authority with the following quotation: "To be clear, when we refer to a same-decision showing, we mean proof that the employer, in the absence of any discrimination, would have made the same decision *at the time it made its actual decision*."

DISCLAIMER

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Very truly yours,

Reuben A. Ginsburg
Chair, Jury Instructions Committee of the
State Bar of California's Litigation Section