**CASE NO.**

**SUPREME COURT OF THE STATE OF CALIFORNIA**

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**TIMOTHY KING,**

*Plaintiff and Cross-Appellant,*

**U.S. BANK NATIONAL ASSOCIATION,**

*Defendant and Appellant.*

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Court of Appeal, Third District No. C085276
Sacramento County Superior Court No.
34201300154644CUDFGDS
Hon. Christopher E. Krueger, presiding

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# PETITION FOR REVIEW

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## PETITION FOR REVIEW

U.S. Bank National Association ("USBNA") petitions for review of the decision of the Court of Appeal filed on July 28, 2020, as amended on August 24, 2020.

## ISSUES PRESENTED

USBNA terminated Respondent Timothy King after investigating him for a range of misconduct that included falsifying records and making inappropriate comments about a subordinate's gender and ethnicity. King sued USBNA for defamation, wrongful termination, and breach of the duty of good faith and fair dealing, contending in the latter two claims that USBNA had fired him so that he would not qualify for a bonus.

A jury found for King on all three claims and awarded him approximately $24,000,000 in compensatory and punitive damages, which the trial court remitted to $5,433,392.

In a published decision resolving cross-appeals, the Court of Appeal affirmed compensatory and punitive liability, then substantially reversed the remittitur, increasing the judgment to more than $17,000,000.

The questions presented are:

1. Whether evidence of errors of judgment by human resources ("HR") employees who repeat allegedly false statements during an internal investigation of alleged workplace misconduct is sufficient to defeat the common-interest privilege and sustain a defamation claim.

2. Whether an employer that terminates an employee for misconduct may be held liable for wrongful termination and

breach of the covenant of good faith and fair dealing based on an inference that the employer rushed the termination so that the employee would not qualify for a bonus.

3. Whether evidence that an entry-level HR employee exercised discretion when investigating alleged workplace misconduct is sufficient to support a determination that she was a "managing agent" whose conduct can subject her employer to punitive damages.

4. Whether the decision below misapplied this Court's decision—issued the day before—requiring courts to view the evidence supporting a finding of punitive liability through the lens of the clear-and-convincing-evidence standard.

5. Whether the Court of Appeal accorded legally insufficient deference to the trial court's order granting a new trial or remittitur.

6. Whether the $8,469,696 punitive award approved by the Court of Appeal—six times the maximum permissible punitive award for the more severe conduct and injuries in *Roby v. McKesson Corp*. (2009) 47 Cal.4th 686—is unconstitutionally excessive, given the punitive and deterrent effects of the $5,000,000 in non-economic damages and USBNA's minimal to non-existent ill-gotten gain.

## INTRODUCTION

The Court of Appeal's published decision allowed more than $17,000,000 in compensatory and punitive damages for an isolated instance of—at worst—errors in judgment in investigating allegations of workplace misconduct. In so doing,

the Court of Appeal repeatedly departed from precedent, placing itself in conflict with decisions of this Court and other Court of Appeal decisions, muddying the law in a context that requires predictability. If allowed to stand, the decision below will undermine the strong public policy favoring employers' internal investigations of complaints by employees about improper behavior. Review is warranted both to secure uniformity of decision and to settle important questions of law.

USBNA terminated Respondent King after investigating allegations by his subordinates that he had directed them to falsify records and engaged in other misconduct, including referring to a female subordinate as a "hot Asian chick" and "eye candy for customers," directing her to "use her looks to her advantage" with customers, bullying her, and retaliating against subordinates when they raised concerns with other managers. King sued for defamation based on statements made during the internal investigation, and for wrongful termination in violation of public policy on the ground that USBNA terminated him to avoid paying him an annual bonus. He also asserted that, by terminating him, USBNA unfairly interfered with his ability to receive a bonus and thereby breached its duty of good faith and fair dealing.

After a jury awarded King approximately $24,000,000 in compensatory and punitive damages, the trial court denied a new trial conditioned on King's acceptance of a remittitur of the defamation damages and punitive damages. King accepted the remittitur, resulting in a judgment of $5,433,392. USBNA

appealed, and King cross-appealed.

The Court of Appeal held that the common-interest privilege had been overcome by evidence that Maureen McGovern, the entry-level HR employee who conducted the internal investigation, failed to interview King, and that two of his accusers had motives to lie. That holding squarely conflicts with numerous decisions that hold that a negligent investigation is not a basis for defeating the privilege, and that a person who repeats an allegedly defamatory statement is guilty of malice only if she subjectively doubted the truth of the statement yet repeated it anyway.

The Court of Appeal upheld liability for both wrongful discharge and breach of the covenant of good faith and fair dealing after concluding that there was sufficient evidence from which the jury could infer that USBNA rushed King's termination in order to avoid paying him a bonus. In so doing, the decision below deviated from uniform case law holding that an improper purpose must be a substantial motivating factor for the termination itself, not merely for its timing. That error threatens to hamstring employers from taking necessary disciplinary action any time near when a bonus or commission might otherwise be payable.

In upholding punitive liability, the Court of Appeal both failed to faithfully apply this Court's new guidance regarding the clear-and-convincing-evidence standard and effectively deemed any employee who has any discretion in performing her job duties—here, an entry-level HR employee—to be a managing

agent. These aspects of the decision risk exposing all organizational defendants to punitive damages in virtually any tort case.

Finally, the Court of Appeal compounded these errors by turning the standard for reviewing the trial court's excessiveness finding on its head, reinstating the remitted compensatory damages, and then tripling the punitive damages in order to maintain a rigid 1:1 ratio with the compensatory damages. These rulings are irreconcilable with decisions of the U.S. Supreme Court, this Court, and other panels of the Court of Appeal.

The net result of the Court of Appeal's errors is a $17,179,392 judgment against a company that did no more than terminate an employee after concluding—rightly or wrongly—that the subordinates who complained about his conduct were telling the truth. The *in terrorem* effect of that kind of judgment on other employers is sure to be severe and will make it far less likely that employers will be responsive to complaints about harassment and dishonesty in the workplace. The Court should grant review, resolve the conflicts in authority by correcting the Court of Appeal's legal errors, and reinforce the strong California policy of encouraging internal investigations of complaints of workplace misconduct.

## STATEMENT

King was a Senior Vice President, Regional Manager, and Market President of the Commercial Banking Group in USBNA's Sacramento office—an "at will" position. (7/28/20 Opinion ("Op.") at 3; 2RT357-58; 3RT791-92.) King was highly profitable, turning

the Sacramento region into the most financially successful of USBNA's commercial banking operations. (Op. 3; AA009, 0012.)

In 2012, King supervised three relationship managers. (Op. 3; 2RT430.) In early November 2012, one of those employees, Kim Thakur, contacted McGovern to express concerns about King. (Op. 4; 5R1346-47.) Among other things, she accused King of ordering her to falsify records of required internal and external meetings, known as BDR meetings (but referred to in the opinion as "initiative meetings") (Op. 4, 8-9; 1RT211-12); demeaning her (5RT1323-24, 1332; AA169, 180-81); asking her to "use [her] looks to her advantage" with clients and "drop off donuts" (AA165); and retaliating against her for raising concerns about him in the past (AA181, 283; 5RT1360-64). She also reported several things that others in the office had said about King, including that he had underreported vacation time so that he would be paid out for it (Op. 8-9; AA170; 4RT926; 5RT1337-38).

During the ensuing six weeks, McGovern conducted telephonic interviews with Thakur, the other two relationship managers, two other USBNA employees who worked in Sacramento but did not report to King, and a senior portfolio manager in San Francisco with whom Thakur had shared some of her concerns about King before contacting HR. (Op. 8; AA140-179, 214-223; 4RT950-51.) She also spoke repeatedly with King's supervisor, Michael Walker, who in turn communicated with King. (Op; 10; 6RT1588-90; AA201-12, 278-82.) McGovern did not speak with King directly, however. (Op. 10.) McGovern also reviewed emails that Thakur had provided her and records that

were relevant to Thakur's allegations about King. (AA182-200, 233-35; Op. 9.) Throughout the six-week period, McGovern consulted with her direct supervisor, who in turn consulted with her supervisor. (Op. 13).

At the conclusion of the investigation, on December 19, 2012, USBNA decided to terminate King. (Op 14.) Walker's supervisor Ken Ladd instructed Walker to communicate the decision to King before the end of the calendar year, which Walker did. (Op. 17-18.) Because USBNA's bonus plan provided that employees could receive bonuses only if they were still employed by USBNA on the bonus-payment date in late-February 2013 (6RT1519-22; Op. 15), King did not receive a bonus for 2012.

King sued USBNA, raising three claims: (i) termination in violation of public policy; (ii) breach of the duty of good faith and fair dealing; and (iii) defamation. The premise of the first two claims was that USBNA fired King in part to deprive him of a $200,000 bonus that he likely would have received had he still been employed at the end of February 2013. The premise of the defamation claim was that both Thakur and another relationship manager, John Flinn, made false statements to McGovern in order to get King fired and thereby save their own jobs, which they feared losing since King had been critical of each of them, and that McGovern repeated the defamatory statements to her supervisors and to King's supervisor without adequately evaluating their credibility.

The jury found for King on all three claims. For wrongful discharge, the jury awarded $2,489,696 for lost earnings. (AA295.) For defamation, the jury awarded $1,000,000 for damage to "property, business, trade, profession or occupation"; $4,000,000 for harm to reputation; and $1,000,000 for "[s]hame, mortification, or hurt feelings." (AA294.) For breach of the duty of good faith and fair dealing, the jury awarded $200,000, representing the value of King's 2012 bonus. (AA297.) The jury also found USBNA liable for punitive damages for both wrongful termination and defamation (AA294, 296) and awarded punitive damages of $15,600,000 (AA297).

The trial court denied USBNA's motion for judgment notwithstanding the verdict, but conditionally granted USBNA a new trial unless King agreed to remittiturs of the compensatory and punitive damages. Specifically, the court ordered a remittitur of the damages for harm to reputation and harm to "property, business, trade, profession or occupation" to zero, finding that "[t]he evidence does not indicate the damages extended beyond King's termination" and that "the compensatory damages awarded based on defamation are duplicative of those awarded based on wrongful termination." (AA326.) It ordered a remittitur of the emotional-distress damages to $25,000. (AA327.) And it ordered a remittitur of the punitive damages to $2,716,696, an amount equal to the total compensatory damages. (AA329.) King accepted the remittiturs. (AA332-352)

USBNA appealed, and King cross-appealed. The Court of Appeal affirmed the findings of liability on King's three claims

and reinstated the jury's awards of compensatory damages in full. It held that there was no "substantial basis in the record" for the trial court's finding that the awards for harm to reputation and harm to "property, business, trade, profession or occupation" were duplicative of the damages for wrongful termination (Op. 48-50) and that the trial court failed to state sufficient reasons for reducing the damages for emotional distress (Op. 50-51).

The Court of Appeal also affirmed the jury's findings of punitive liability, holding that McGovern qualified as a managing agent and that there was substantial evidence to support a finding that she repeated the defamatory statements of others with malice. (Op. 38-43.) The Court of Appeal agreed with the trial court's assessment that USBNA's conduct "was at the low end of the range of wrongdoing that can support an award of punitive damages under California law." (Op. 61.) Nevertheless, having increased the compensatory damages by nearly $6,000,000, it increased the punitive damages from $2,689,696 to $8,469,696 to maintain a 1:1 ratio between the punitive and compensatory awards.

USBNA filed a petition for rehearing on August 11, 2020, which the Court of Appeal denied on August 24, 2020. The decision became final on August 27, 2020. (See Cal. R. Ct. 8.264(b).)

## REASONS WHY REVIEW SHOULD BE GRANTED

## I. THE DECISION VASTLY INCREASES THE THREAT OF LIABILITY FOR EMPLOYERS THAT INVESTIGATE AND ACT ON ALLEGATIONS OF EMPLOYEE MISCONDUCT.

### A. The Decision Eviscerates The Common-Interest Privilege.

Under California law, communications made in connection with complaints of workplace misconduct and investigation of such complaints are privileged unless made with malice. Until now, courts have interpreted the common-interest privilege to provide robust protection against defamation claims predicated on statements made in the course of investigations into complaints about employee misconduct. The decision of the Court of Appeal substantially lowers the standard for finding malice in this context, effectively nullifying the common-interest privilege for employers investigating allegations that employees have acted improperly. The decision will open the floodgates to defamation actions against California employers that investigate and respond to internal complaints of harassment or other wrongdoing by employees.[1] It likewise may deter employees from raising complaints for fear that they'll be sued for defamation. The Court should grant review to clarify that the common-interest privilege still has teeth in this context.

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[1] This concern is well-grounded. Counsel for King has actively encouraged counsel for employees to add defamation claims to their legal arsenal and provided them with a roadmap for doing so that tracks the arguments he made in this case. See Christopher H. Whelan, *Defamation in Employment*, Advocate Magazine (Apr. 2016) https://tinyurl.com/y5r96us7.

Under longstanding California law, "communications … on a matter of common interest are privileged"—and cannot give rise to liability for defamation—if the statements are made 'without malice.'" (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203-04 (quoting Civ. Code § 47(c)(1))). Intra-company communications relating to allegations of an employee's misconduct further a common interest and are presumptively privileged. (See, *e.g., Bierbower v. FHP, Inc.* (1999) 70 Cal.App.4th 1, 3; *Cruey v. Gannett Co.* (1998) 64 Cal.App.4th 356, 369; *Kelly v. Gen. Tel. Co.* (1982) 136 Cal.App.3d 278, 285; *Cuenca v. Safeway San Francisco Employees Fed. Credit Union* (1986) 180 Cal.App.3d 985, 995.) For example, because "employers and employees both have a common interest in preventing and correcting sexual harassment" (*Bierbower*, 70 Cal.App.4th at 3), "complaints to employers about workplace harassment" (*Cruey*, 64 Cal.App.4th at 369), and statements made for the purpose of investigating and responding to those complaints (*Bierbower,* 70 Cal.App.4th at 7), are conditionally privileged.

To prove malice and thereby defeat the common-interest privilege, the plaintiff must establish that the defamatory statement "was motivated by hatred or ill will … *or* … that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights." (*Noel v. River Hills Wilsons, Inc.* (2003) 113 Cal.App.4th 1363, 1370.) "Malice" requires "a reckless or wanton

disregard for the truth, so as to reasonably imply a willful disregard for or avoidance of accuracy." (*Id.* at 1371.)

It is well established that "[m]ere negligence in inquiry" is insufficient to establish malice. (*Noel*, 113 Cal.App.4th at 1370-71; accord *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 931; *Fisher v. Larsen* (1982) 138 Cal.App.3d 627, 640; *Rollenhagen v. City of Orange* (1981) 116 Cal.App.3d 414, 423.) A finding of malice is permissible only when the person making the allegedly defamatory statements entertained doubts about the accuracy of the statements but repeated them anyway. (See, *e.g., Reader's Digest Ass'n v. Super. Ct.* (1984) 37 Cal.3d 244, 259 fn.11; *McGrory v. Applied Signal Tech., Inc.* (2013) 212 Cal.App.4th 1510, 1541; *Noel*, 113 Cal.App.4th at 1371; *Widener v. Pac. Gas & Elec. Co.* (1977) 75 Cal.App.3d 415, 434; *Vackar v. Package Mach. Co.* (N.D. Cal. 1993) 841 F. Supp. 310, 314.)

The Court of Appeal held that the jury could reasonably base the defamation verdict on McGovern's repetition of Thakur's and Flinn's allegations to her supervisors in the HR department and to King's supervisor. (Op. 28-30.) That holding deviates from precedent and creates a grave risk of chilling communications during internal investigations.

As the Court of Appeal acknowledged (Op. 39), there was no evidence that McGovern was "motivated by hatred or ill will" (*Noel*, 113 Cal.App.4th at 1370). She was an HR professional who did not know King (7RT1868) and was simply trying to uncover whether the allegations were credible. (Cf. *Rollenhagen*, 116 Cal.App.3d at 423 ("There was no evidence that anyone at CBS

had ever heard who Peter Rollenhagen was before this incident.").) Nor did her actions reflect "a reckless or wanton disregard for the truth." (*Noel*, 113 Cal.App.4th at 1371). McGovern interviewed six people, some more than once. (See AA140-79, 214-223); 4RT950-51.) She obtained a summary of BDR reports. (6RT1672; AA233-35.) She obtained emails from Thakur. (2RT320.) She requested information about King's vacation payouts. (6RT1570-72; AA274-75.) She made meticulous notes summarizing the evidence and identifying areas for further investigation. (AA213-25; 1RT248-49.) She consulted with her supervisor about the evidence and next steps. (1RT204; AA272-73, 276-77.) She kept King's supervisor Walker apprised of her progress. (AA201-12, 278-80.) She took care to distinguish between allegations that had been confirmed by others and allegations that had not been corroborated. (AA224-225.)

Despite the ample record evidence that McGovern took numerous good-faith steps to investigate Thakur's complaint, the Court of Appeal held that a finding of malice could be predicated "on McGovern's failure to investigate and her reliance on sources known to be unreliable or biased against King." (Op. 29.) The court cited evidence that (1) McGovern credited Thakur's and Flinn's complaints despite their disclosure of conflicts with King and the fact that some of Thakur's statements were contradicted by others (*ibid.*)*;* (2) McGovern did not speak directly to King (Op. 30); and (3) McGovern did not do as much as she could have to investigate the allegations that King had not reported all of his vacation time (*ibid.*; 8/24/20 Order Modifying Opinion at 3).

In holding that this evidence supported a finding of malice, the Court of Appeal ignored the case law requiring that the speaker subjectively doubt the accuracy of the statements. *See* page 19, *supra*. In fact, the decision below squarely conflicts with decisions that have rejected defamation claims in the context of investigations of employee misconduct. (See, e.g., *McGrory*, 212 Cal.App.4th at 1541 (to demonstrate malice, the plaintiff had to introduce evidence that HR Vice President "actually believed that Employee was cooperative when [he] said otherwise" or that "no reasonable person could have believed what [the attorney] reported about Employee's lack of cooperation").) As one court observed, "[t]o hold an employer liable for defamation because one employee must pass on a defamatory allegation of sexual harassment to another for investigation flies in the face of all sexual harassment law." (*Bierbower*, 70 Cal.App.4th at 7.)

There was no evidence that, in repeating Thakur's and Flinn's statements to her supervisors and to King's supervisors, McGovern doubted that the statements were true. To the contrary, the evidence was that other employees, as well as internal documents she reviewed, largely confirmed their statements. (Op. 8-10.) At most, the evidence cited by the Court of Appeal shows that McGovern conducted an inadequate investigation—in other words, that she was negligent. In holding that this evidence was sufficient to defeat the privilege, the Court of Appeal created a square conflict with the cases cited above (among others). Saying that each case USBNA cited "turned on the

unique facts of that case" (Op. 28) does nothing to alleviate the conflict with the legal principles those cases enunciated.

Because the decision below holds that statements repeated by HR professionals in good faith in the course of an investigation may give rise to a viable defamation claim, it will impede employers' efforts to address harassment and other misconduct in the workplace. Under the standard applied by the Court of Appeal, even the discussion of allegations by the responsible investigators and managers may be considered defamation. If an employer find an employee's complaints credible, it may be subject to liability because a jury disagrees. Employers would be unable to obtain summary judgment by relying on the common-interest privilege, because any ostensible missteps in the investigation would be taken as sufficient evidence of malice. That would defeat the purpose of the Legislature to allow communications on matters of common interest without fear of defamation liability. And it would inevitably dissuade employers from responding to complaints about workplace misconduct. This Court should grant review to forestall this deleterious outcome.

### B. The Decision Exposes Employers To Liability Whenever They Terminate An Employee In The Months Before Bonuses Are Payable.

Based on "the evidence regarding the questionable timing of King's termination coupled with the conflicting testimony as to who made the decision to terminate King, the apparent rush to terminate him, and the failure to conduct a thorough and objective investigation," the Court of Appeal concluded that the jury reasonably could have inferred that USBNA terminated

King for pretextual reasons and that the desire to deprive him of a bonus "was a reason that actually contributed to the termination." (Op. 32-33.) On that basis, it upheld the verdicts for wrongful termination in violation of public policy and breach of the implied covenant of good faith and fair dealing. In so doing, the court substantially expanded both causes of action, creating even more risk and uncertainty for employers that terminate problematic employees.

California law prohibits an employer from "terminat[ing] employment for a reason that contravenes fundamental public policy as expressed in a constitutional or statutory provision." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1252.) To establish his wrongful-termination claim, King was obliged to show that an impermissible rationale was "a *substantial* motivating factor" ***for the termination***. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232; see also *Mendoza v. Western Med. Ctr. Santa Ana* (2014) 222 Cal.App.4th 1334, 1341-42; *Alamo v. Practice Mgmt. Info. Corp.* (2013) 219 Cal.App.4th 466, 469-70; *King v. United Parcel Serv.* (2007) 152 Cal.App.4th 426, 436 ("The mere fact that UPS found plaintiff had breached its integrity policy shortly after returning to work [from a medical leave of absence] is insufficient to raise an inference that his blood disorder prompted his discharge.").) Because King invoked the public policy that employees must be paid money they have earned, he was required to show that his termination was substantially motivated by the desire to deny him a bonus.

The evidence on which the court below relied in upholding the verdicts (see page 13-14, *supra*) does not show that the termination itself was motivated even in part (much less substantially) by the desire to deprive King of his bonus—which is hardly surprising, given that King was a top producer (Op. 3; AA012) who was worth much more to USBNA than a $200,000 bonus. Instead, at most the evidence raises an inference that the bonus issue affected the ***timing*** of King's termination.[2]

Indeed, King himself argued that "U.S. Bank desired from the beginning to develop pretexts to terminate King, whereas its final decision to terminate him before the end of 2012 was made later." (Respondent's Br. 94 fn.4.) In King's view, the reason why USBNA wanted to deprive him of a bonus was that it "gained nothing by incentivizing King ***because it wanted to fire him anyway***." (*Ibid.* (emphasis added).)

King's theory should have precluded his claim for two reasons. First, even if the jury reasonably could have inferred that USBNA's stated reasons for terminating King were "pretexts," under California law "disbelief of an Employer's stated

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[2] There was, in fact, no ***evidence*** that anyone involved in the termination even thought about the bonus. In this aspect of the decision (among others (e.g., Op. 29-30)), the Court of Appeal invoked a speculative inference, disregarding a long line of authority holding that "inferences that are the result of mere speculation or conjecture cannot support a finding" (*Kuhn v. Dept. of Pub. Servs.* (1994) 22 Cal.App.4th 1627, 1633), and that a plaintiff "cannot recover merely by showing that the inferences … are *consistent* with [his] theory" but instead "must show that the inferences favorable to [him] are *more reasonable or probable* than those against [him]" (*Leslie G. v. Perry & Assocs.* (1996) 43 Cal.App.4th 472, 483).

reason for a termination … does not, without more, reasonably give rise to an inference that the motivation was a prohibited one." (*McGrory*, 212 Cal.App.4th at 1531-32.) Second, King's assertion that USBNA wanted to deprive him of his bonus because it planned to fire him for other reasons confirms that there was no evidence that USBNA had an improper motive for the termination itself.

By endorsing King's theory and conflating the termination with its timing, the Court of Appeal departed from the heretofore consistent line of authority requiring that the prohibited purpose be a substantial motivating factor for the challenged employment decision. Review is warranted to resolve the conflict and forestall the confusion that the decision will otherwise cause.

For similar reasons, the Court should review the Court of Appeal's holding that the evidence supported the verdict for breach of the duty of good faith and fair dealing. The Court of Appeal held that USBNA breached the implied covenant by terminating King in December so that he would not qualify for the bonus payable in February. (Op. 34.) But as with wrongful termination, if depriving an employee of a bonus was the reason for the timing of a termination but not the reason for the termination itself, there is no claim for breach of the duty of good faith and fair dealing. (See *Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 353 fn. 18.) If the decision remains in place, any employer that provides annual bonuses to employees will risk liability whenever it carries out a permissible termination (such as firing an employee for misconduct) within months of the time

bonuses are generally paid. That is not—and should not be—the law.

### C. The Court Of Appeal's Determination That An Entry-Level HR Employee Was A Managing Agent Conflicts With This Court's Precedent And, If Allowed To Stand, Would Render The Managing-Agent Requirement A Dead Letter.

In deeming the evidence sufficient to support punitive liability, the Court of Appeal held that an entry-level HR employee who exercises discretion in investigating complaints of employee misconduct qualifies as a managing agent. That ruling not only will deter employers from investigating complaints of misconduct but also is irreconcilable with this Court's decisions and with the intent of the Legislature in adopting the managing-agent requirement. If a low-level employee may be deemed a managing agent merely because she had discretion in the performance of aspects of her job, then virtually any employee can be a managing agent—rendering an important restriction on punitive damages meaningless.

To establish entitlement to punitive damages under California law, King was required to show that "an officer, director, or managing agent" of USBNA either "authorized or ratified the wrongful conduct for which the damages are awarded" or "was personally guilty of oppression, fraud, or malice." (Civ. Code § 3294(b).) As this Court has explained, "the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy." (*White v.*

*Ultramar, Inc.* (1999) 21 Cal.4th 563, 566-67.) Hence, an employee may be deemed a "managing agent" only if she possesses "substantial discretionary authority" over "formal policies that affect a substantial portion of the company and that are the type likely to come to the attention of corporate leadership." (*Roby*, 47 Cal.4th at 714-15 (internal quotation marks omitted).) Defining the concept in this way "avoids punishing the *corporation* for malice of low-level employees which does not reflect the corporate 'state of mind' or the intentions of corporate leaders" and provides assurance "that punishment is imposed only if the corporation can be fairly … viewed as guilty of the evil intent sought to be punished." (*Cruz v. HomeBase* (2000) 83 Cal.App.4th 160, 167.)

In 2012, McGovern was an entry-level employee in the HR Department. (6RT1503; 7RT1867.) She supervised no one, and there were multiple layers of HR professionals above her. (See 1RT187-88; 6RT1716-19.) McGovern did not operate as a free agent in conducting the investigation: She consulted with her supervisor Kelly Gerlach repeatedly (see 1RT204; AA272-73, 276-77), and Gerlach consulted with her own supervisor (see 6RT1563-64). Both McGovern and Gerlach also consulted frequently with King's supervisor Walker. (AA201-25, 270-73, 276-80.) As the Court of Appeal recognized, moreover, neither McGovern nor anyone else in the HR Department had the authority to order or approve an employee's termination. (See Op. 42; 6RT1721, 1723.)

According to the Court of Appeal, however, "the jury could conclude McGovern was a managing agent" (Op. 40) based on evidence that she exercised discretion in determining the manner in which she performed the investigation (Op. 41.) As the Court of Appeal acknowledged, USBNA had a written policy that suspected misconduct "'w[ould] be investigated in a fair and thorough manner.'" (*Ibid.*) There is no dispute that McGovern had no role in developing that policy (or any other). Nevertheless, the Court of Appeal deemed it decisive that "investigators, like McGovern, were given the discretion and judgment to determine what to do and how to do it, with appropriate support from their managers." (*Ibid.*) For example, McGovern could "determine who to interview [and] how to perform an interview or investigation (e.g., whether to obtain written statements.)." (*Ibid.*) Because McGovern could make specific decisions about the particular steps to take in conducting her investigation, the court concluded that she engaged in "ad hoc formulation of policy" and was therefore "a managing agent." (*Id.* at 42.)

The Court of Appeal's holding conflicts with *Roby*, *White*, and *Cruz* (among other cases), which firmly establish that the kind of day-to-day judgment calls that every employee makes are not enough to turn that employee into a managing agent whose "broad authority … justifies punishing an entire company for an otherwise isolated act of oppression, fraud, or malice" (*Roby*, 47 Cal.4th at 715).

If McGovern qualifies as a managing agent based on the evidence here, then virtually any employee can be deemed a

managing agent whose malice can be imputed to her employer for purposes of imposing punitive liability. That was plainly not the intent of the Legislature when it restricted punitive damages to cases that directly involve an "officer, director, or managing agent." The Court should grant review to bring the Court of Appeal back in line with *Roby* and ensure that employers are not held liable for punitive damages based on isolated acts of misconduct by low-level employees.

### D. The Decision Flouts This Court's Decision In *Conservatorship of O.B.* On The Standard For Reviewing The Sufficiency Of Evidence Supporting A Finding Of Punitive Liability.

To satisfy California's strict punitive-liability standard, King was required to prove that an employee of USBNA whose conduct could be imputed to USBNA was "guilty of oppression, fraud, or malice." (Civ. Code § 3294(a).) This conduct is "of a different dimension" than the conduct required for tort liability. (*Tomaselli v. Transamerica Ins.* (1994) 25 Cal.App.4th 1269, 1286.) The statute requires "despicable" conduct (Civ. Code § 3294(c))—*i.e.*, conduct "'so vile, base, contemptible, miserable, wretched, or loathsome that it would be looked down upon and despised by ordinary decent people.'" (*Tomaselli*, 25 Cal.App.4th at 1287.) These "*heightened* requirements of malice (or oppression) necessary to support an award of punitive damages" exceed the showing of malice necessary to overcome the common-interest privilege. (*Lundquist*, 7 Cal.4th at 1214.)

A plaintiff must prove the requisite despicable conduct by "clear and convincing evidence." (Civ. Code § 3294(a).) Under that

standard, the plaintiff must establish not just that the facts he alleges are probably true, but that their truth is "***highly probable***." (*Conservatorship of O.B.* (July 27, 2020) 9 Cal.5th 989 [2020 WL 4280960, at *1, *3, *12] [emphasis added].) As this Court clarified the day before the Court of Appeal issued its decision, that heightened standard guides appellate review of a finding of punitive liability for sufficiency of the evidence. (*Id.* at *8-12.) Hence, the reviewing court "must make an appropriate adjustment to its analysis" and ask "whether the record, viewed as a whole, contains substantial evidence from which a reasonable trier of fact could have made the finding of high probability demanded by this standard of proof." (*Id.* at *8.)

The natural consequence of the combination of the strict substantive standard of liability and the heightened standard of proof is that a finding of punitive liability may not be upheld when the tortious conduct could have been "the result of a mistake of law or fact, honest error of judgment, over-zealousness, mere negligence or other such noniniquitous human failing." (*Tomaselli*, 25 Cal.App.4th at 1288 n.14.) As another panel of the Court of Appeal recently held, evidence of "carelessness" or "ignorance" does not give rise to punitive liability even when it affects "public safety." (*Pacific Gas & Elec. Co. v. Super. Ct.* (2018) 24 Cal.App.5th 1150, 1170-71.)

In *Tomaselli*, for example, there was evidence that the defendant insurer had "search[ed] for ways to avoid paying" the plaintiffs' large homeowners' insurance claim, had misled them about the purpose of an examination under oath, and had discouraged them from bringing an attorney to the examination to

protect their rights. (25 Cal.App.4th at 1281.) The Fourth District held that, although this behavior might have been "negligent," "overzealous," "legally erroneous," and "callous," it did not constitute "malice, oppression, or despicable conduct." (*Id.* at 1288.)

The court below paid lip service to *O.B.*—making some eleventh-hour cosmetic changes to an opinion that self-evidently had been drafted under the mistaken belief that the clear-and-convincing standard does not apply on appeal.[3] But the court then proceeded to act as if *O.B.* didn't exist.

Specifically, the Court of Appeal did not evaluate whether a reasonable jury could find it "highly probable" that McGovern's conduct was sufficiently blameworthy to justify an award of punitive damages. Instead, without referring to a single piece of evidence (much less the record as a whole), the court stated that "there was substantial evidence supporting the jury's verdict" because the jury "reasonably could have concluded McGovern had reasons to believe the statements she made regarding her findings were false" yet made them anyway despite knowing that "such statements would unjustly tarnish King's reputation and cause both emotional and economic hardship given her termination recommendation." (Op. 39.) Even if the record contained evidence that McGovern had "reasons to believe" that King had not falsified records—and the Court of Appeals identified none—such evidence would not support a finding that

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[3] This is not idle speculation. In a prior unpublished opinion, the author of the decision below rejected application of the clear-and-convincing-evidence standard on appeal. (*Romandia v. Engineered Polymer Solutions, Inc.* (May 11, 2012, C063858) [2012 WL 1651020].)

it was "highly probable" that McGovern's conduct was malicious. At best, such evidence would show that McGovern ***could have*** doubted her conclusions. Evidence raising a mere possibility that McGovern entertained doubts cannot support punitive liability—especially given the lack of any direct evidence that McGovern actually harbored doubts or that she had any reason to make charges against King that she did not believe.

The Court of Appeal acknowledged, but deemed it irrelevant, "that McGovern's 'actions could just as easily have been 'the result of [a]n … error of judgment, over-zealousness, mere negligence, or some other noniniquitous human failing.'" (Op. 40 [quoting *Tomaselli*].) That view conflicts squarely with *O.B.* and *Tomaselli*. If the evidence could "just as easily" have supported a finding that McGovern was negligent or exercised poor judgment, a reasonable jury could not find it "highly probable" that McGovern willfully pressed false charges against King.

This decision risks becoming a brick in the wall of resistance to *O.B.* As a blogger on punitive damages recently observed, "if viewed as a test for how appellate courts will apply the new *O.B.* standard," the Court of Appeal's decision "suggests that *O.B.* may not move [the] needle much in some courts." (*See* Curt Cutting, Horvitz & Levy, California Punitive Damages (Aug. 1, 2020) https://tinyurl.com/y27mj2vt.)

This Court should grant review to resolve the acknowledged conflict with *Tomaselli* and provide lower courts with guidance about how to apply the standard articulated in

*O.B.* This case is an ideal vehicle for doing so, since the outcome would almost surely be different under a correct application of the standard.

## II. THE COURT OF APPEAL'S RESOLUTION OF THE DAMAGES ISSUES WARRANTS REVIEW

### A. The Court Turned The Standard For Reviewing New-Trial Orders On Its Head.

In reinstating the compensatory damages awarded to King for defamation, the Court of Appeal disregarded the well-established standard for reviewing orders granting remittitur or a new trial. Rather than defer to the trial court's assessment of the evidence, the Court of Appeal made its own assessment and reversed. The decision is likely to create confusion regarding the scope of appellate review of orders granting a new trial or remittitur and will encourage cross-appeals challenging such orders.

Until now, the law was clear. "[W]hen a trial court grants a new trial on the issue of excessive damages, … the presumption of correctness normally accorded on appeal to the jury's verdict is replaced by a presumption in favor of the order." (*Neal v. Farmers Ins. Exch.* (1978) 21 Cal.3d 910, 932.) Thus, the order of a trial court "'granting a new trial on the ground of excessive damages, or requiring a reduction of the amount as the condition of denying one … will not be reversed unless it plainly appears that he abused his discretion.'" (*Id.* at 932-33 [citations omitted].)

"The reason for this deference 'is that the trial court, in ruling on [a new trial] motion, sits … as an independent trier of fact.'" (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412

(2000) (quoting *Neal*, 21 Cal.3d at 933).) Thus, "the trial court's factual determinations, reflected in its decision to grant the new trial, are entitled to the same deference that an appellate court would ordinarily accord a jury's factual determinations." (*Ibid.*) Because "[e]ven the most comprehensive study of a trial court record cannot replace the immediacy of being present at the trial," the trial court "is in the best position to assess the reliability of a jury's verdict." (*Ibid.*) For this reason, "the Legislature has granted trial courts broad discretion to order new trials," and "the only relevant limitation on this discretion is that the trial court must state its reasons for granting the new trial, and there must be substantial evidence in the record to support those reasons." (*Ibid.*)

This deferential standard applies not just to the determination that an award is excessive, but also to the court's suggestion of an appropriate remittitur, which is "'reviewed on appeal as if it had been returned in the first instance by the jury in the reduced amount.'" (*West v. Johnson & Johnson Prods., Inc.* (1985) 174 Cal.App.3d 831, 877 [citations omitted].) That is because "section 662.5 of the Code of Civil Procedure, dealing with orders for a new trial conditioned on additur or remittitur, indicates that such orders shall be made unless the affected party consents to the addition to or reduction 'of so much (of the verdict) as the court ***in its independent judgment*** determines from the evidence to be fair and reasonable.'" (*Neal*, 21 Cal.3d at 933 (emphasis added; citations omitted); see also*, e.g., Dell'Oca v.*

*Bank of New York Trust Co., N.A.* (2008) 159 Cal.App.4th 531, 547.)

Here, the trial court, among other things, granted remittiturs of the jury's $1,000,000 award for damage to "property, business, trade, profession or occupation" and $4,000,000 award for harm to reputation to zero. It explained that the "[t]he evidence does not indicate the damages extended beyond King's termination" and that these two awards for defamation "are duplicative of" the $2,489,696 award for wrongful termination. (AA326.)

The Court of Appeal reversed the new-trial order and reinstated the defamation awards in their entirety, holding that there was "no substantial basis in the record for concluding such damages were duplicative of the wrongful termination past and future lost earnings damages." (Op. 49.) It stated that it could not "find, as matter of law, that the jury awarded the same damages for the defamation and wrongful termination claims." (Op. 49). That holding turns the standard of review on its head. Under this Court's decisions, the Court of Appeal was required to affirm the trial court's decision so long as there was substantial evidence in the record to support it. Instead, it reversed on the basis that there was at least some evidence ***to support the verdict***.

For example, with respect to the $1,000,000 award for harm to business, the court emphasized the testimony of King's expert that his damages for lost past and future earnings were $4,826,781 million, which materially exceeded the amount that King was awarded for wrongful termination. (Op. 49.) But the

court ignored flaws in the expert's methodology that USBNA elicited during cross-examination, as well as the testimony of USBNA's expert witness, who explained why King's expert had overstated the damages. (4RT1040-42, 1045-46, 1088; 7RT1798-1802.) It should instead have held that this testimony supported the trial court's decision and therefore upheld the decision.

The court's treatment of the $4,000,000 award for harm to reputation was egregious. The opinion elsewhere recognized that "King introduced no evidence of *actual* damage to his reputation." (Op. 61.) That was precisely why the trial court found this award to be duplicative of the award for lost past and future earnings. Yet the Court of Appeal nonetheless reinstated the entire award because "there was testimony that statements impacting King's reputation were made *after* King had been terminated." (Op. 49.) The trial court acknowledged this evidence (AA326), yet concluded that it did not reflect compensable harm to King's reputation—no doubt because there also was evidence that the people to whom the statements were made didn't believe them (Walker (3RT790)), had no further dealings with King (Marlene Murphy (3RT822)), or already had formed a negative impression of King (Jennifer Neal (AA148-150)).

In ignoring both the evidence that supported the trial court's decision that the two defamation awards were duplicative of the wrongful-termination award and its own conclusion that "King introduced no evidence of *actual* damage to his reputation" (Op. 61), the Court of Appeal departed from the deferential standard that applies to new-trial orders. This published

divergence from the standard will cause confusion in the law and independently warrants review and correction.

### B. The Court of Appeal's Decision Trebling The Punitive Award Conflicts With Precedent Of This Court, The U.S. Supreme Court, And Federal Courts Of Appeals.

Despite recognizing that USBNA's conduct was "at the low end" of the reprehensibility spectrum (Op. 61) and that the massive amount of compensatory damages for harm to reputation and emotional distress included a punitive component (*ibid.*), the Court of Appeal more than trebled the punitive damages to $8,469,696 in order to maintain a 1:1 ratio to the dramatically increased compensatory damages. Its decision to do so—without the slightest regard to whether a lower punishment would have sufficed to serve California's interests in retribution and deterrence—conflicts with decisions of the U.S. Supreme Court, this Court, and federal courts of appeals. This Court's intervention is warranted.

The U.S. Supreme Court repeatedly has emphasized the need to avoid an arbitrary determination of [a punitive] award's amount." (*Philip Morris USA v. Williams* (2007) 549 U.S. 346, 352.) Concerned about "the stark unpredictability of punitive awards" and "penalties that reasonable people would think excessive for the harm caused in the circumstances" (*Exxon Shipping Co. v. Baker* (2008) 554 U.S. 471, 499, 503), the Court has mandated that punitive awards must be no more than reasonably necessary to punish and deter. (*Pac. Mut. Life Ins. v. Haslip* (1991) 499 U.S. 1, 22; see also, *e.g.*, *Saccameno v. U.S.*

*Bank Nat'l Ass'n* (7th Cir. 2019) 943 F.3d 1071, 1086, cert. denied *sub nom. Saccameno v. Ocwen Loan Servicing, LLC* (Apr. 20, 2020) __ U.S. __ [2020 WL 1906596][4]; *Lompe v. Sunridge Partners, LLC* (10th Cir. 2016) 818 F.3d 1041, 1065.) To avoid exceeding this limit, courts must take into account the deterrent and retributive effects of compensatory damages. As the Court has explained:

> It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, ***after having paid compensatory damages***, is so reprehensible as to warrant the imposition of ***further*** sanctions to achieve punishment or deterrence.

(*State Farm Mut. Auto Ins. v. Campbell* (2013) 538 U.S. 408, 419 (emphasis added); see also *Lane*, 22 Cal.4th at 424 (Brown, J., concurring) ("[L]arge compensatory damage awards not based on a defendant's ill-gotten gains have a strong deterrent and punitive effect in themselves. The magnitude of such awards should be considered in deciding whether and to what extent punitive damages should be imposed.").)

A punitive award that is greater than necessary to accomplish California's interest in punishment and deterrence—after accounting for the deterrent and retributive effects of the compensatory damages—"furthers no legitimate purpose and constitutes an arbitrary deprivation of property." (*State Farm*, 538 U.S. at 417.) That is why this Court held that a $50,000

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[4] Although USBNA is identified in the case caption, the decision in *Saccameno* did not involve USBNA.

punitive award was a sufficient deterrent to a large bank holding company, "especially when imposed for conduct that led to no profit for the company" because "even a prosperous company would ordinarily take reasonable measures to prevent the recurrence of a $50,000 net loss." (*Simon v. San Paolo U.S. Holding Co.* (2005) 35 Cal.4th 1159, 1189.)

As federal courts of appeals have recognized, these principles dictate that the ratio guidepost "is not a mechanical rule" that "decide[s] whether the [punitive] award is permissible." (*Saccameno*, 943 F.3d at 1089.) A punitive award might be permissible "despite a high ratio, if the probability of detection [of the misconduct] is low, the harms are primarily dignitary, or if there is a risk that limiting recovery to barely more than compensatory damages would allow a defendant to act with impunity." (*Ibid.*) By the same token, a punitive award might be impermissible "even with a low ratio, if the acts are not reprehensible and the damage is easily or already accounted for." (*Id.* at 1089-90.)

Put another way, "[t]he ratio, without regard to the amounts [of compensatory and punitive damages], tells us little of value … to help answer the question whether the punitive award was excessive." (*Payne v. Jones* (2d Cir. 2010) 711 F.3d 85, 103.) For example, in an excessive-force case, if the jury had awarded $10,000 in compensatory damages and punitive damages of $100,000, the punishment would not be excessive, despite the 10:1 ratio; but if the jury had awarded $300,000 in compensatory damages and $300,000 in punitive damages for

"exactly the same conduct," "the punitive damages would appear … to be very high," even though the ratio was only 1:1. (*Ibid.*)

In increasing the punitive damages from $2,716,696 to $8,469,696 in order to maintain a 1:1 ratio, the Court of Appeal ran badly afoul of these principles.

The court acknowledged that "[t]he torts at issue here were committed with respect to a single employment investigation" and concluded that, though punishable, USBNA's "conduct nevertheless was at the low end of the range of wrongdoing that can support an award of punitive damages under California law." (Op. 60-61.) It also recognized that "King introduced no evidence of *actual* damage to his reputation," that "it appears the jury awarded presumed damages," and that both "[t]he emotional distress and [the] reputation damages 'may have reflected the jury's indignation at [U.S. Bank's] conduct, thus including a punitive component.'" (Op. 61 (quoting *Roby*, 47 Cal.4th at 718) (brackets added by the Court of Appeal).) Indeed, the trial court found that the evidence supported no more than a $25,000 award for King's "garden variety" emotional distress (AA326-27), so in reinstating the full $1,000,000 award on the ground that the trial court had not adequately explained its reasons, the Court of Appeal already had effectively punished USBNA to the tune of $975,000.

Despite all that, the Court of Appeal mechanically increased the punitive damages more than three-fold without so much as considering whether "a more modest punishment" would have sufficed to accomplish California's interests in retribution

and deterrence. (*State Farm*, 538 U.S. at 419.) In doing so, it not only deviated from the U.S. Supreme Court's teachings and created a conflict with *Saccameno* and *Payne*. It also approved an amount of punishment that is entirely irreconcilable with the $1.4 million exaction that this Court deemed to be the constitutional maximum in *Roby*.

As the Court of Appeal recognized, King's "mental distress was not as severe as Roby's mental distress," and USBNA's "indifference and reckless disregard did not rise to the level at issue in *Roby*." (Op. 59.) Yet it nonetheless approved a punitive award that is ***six times*** the maximum permissible exaction in *Roby*—despite the deterrent and retributive effects of the already enormous amount of non-economic damages that the Court of Appeal had reinstated. That is exactly the kind of arbitrariness and unpredictability that the U.S. Supreme Court has consistently condemned. And it is all the more troubling, because it comes in the case of an employer that was simply trying to rid the workplace of what it had concluded was improper conduct. Not only was this not a case of "[a]ction taken or omitted in order to augment profit" (*Exxon Shipping*, 554 U.S. at 494), but USBNA actually acted against its own financial interest by terminating its top producer. In such circumstances, the compensatory damages more than adequately serve the goals of punishment and deterrence, and a multi-million-dollar exaction is not warranted, regardless of the ratio. As in *Simon* and *Roby*, this Court should grant review to provide needed guidance on the

proper analysis of punitive awards that are challenged as excessive.

## CONCLUSION

The Court should grant the petition for review.

Respectfully submitted.

Dated: September 4, 2020

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## CERTIFICATE OF WORD COUNT

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Dated: September 4, 2020

/s/ *Donald M. Falk*
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I, Steffany Amacher, declare as follows:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is: Two Palo Alto Square, Suite 300, 3000 El Camino Real, Palo Alto, California 94306-2112. On September 4, 2020, I served the foregoing document(s) described as:

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

Executed on September 4, 2020, at San Jose, California.

/s/ Steffany Amacher
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