VIA TRUEFILING

Chief Justice Tani Cantil-Sakauye
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783

Re: Timothy King ("Plaintiff and Cross-Appellant"),
v. U.S. Bank National Association
(“Defendant and Appellant”)
CA Supreme Court Case No. S264308
Court of Appeal Case No. C085276
Superior Ct. No. 34201300154644CUDFGDS

Amicus Letter in Support of Petition for Review

To the Honorable Chief Justice and Associate Justices
of the Supreme Court of California:

I. INTEREST OF CELC.

The California Employment Law Council (CELC) is an organization of approximately 70 major employers. Since the mid-1980’s, CELC has filed amicus briefs in important California cases such as this one. CELC strives to ensure that California employment laws are fair to employer and employer alike. This case is especially important to CELC members. As this Court reads this amicus letter, hundreds of HR representatives employed by CELC member companies are carrying out instructions to investigate possible wrongdoing and report back to the HR and general management chain of command with their findings and recommendations. If a jury disagrees with those findings and recommendations, under this opinion such a disagreement could lead to a finding that the low level HR representative is a managing agent guilty of fraud and/or defamation subjecting the employer to virtually automatic tort and punitive damage liability. That was not the law before this opinion, and should not be the law after it.
II. SUMMARY OF REASONS TO GRANT REVIEW.

The main reason to grant review is to rescue from oblivion the Legislature’s salutary requirement that punitive damages cannot be awarded against a corporation unless the bad actor was a “managing agent” motivated by malice or its equivalent. The second most important reason to grant review is to rescue from oblivion this Court’s important holding in Guz v. Bechtel\(^1\) that discharges found by a jury to be unfair are not torts because of the covenant of good faith and fair dealing absent unusual facts.\(^2\) The third most important reason to grant review is to reaffirm the principle that a common interest privilege protects against defamation when an HR representative investigates alleged wrongdoing and internally communicates the results. The fourth reason, in order of importance, is for this Court to reaffirm its holding in Lane v. Hughes Aircraft\(^3\) about the relative role, competence and burden of proof of trial courts and appellate courts with respect to new trial orders.\(^4\)

III. A FEW RELEVANT FACTS AND HOLDINGS FROM THE COURT OF APPEAL DECISION.

- The HR hierarchy was: (1) McGovern; (2) McGovern reported to Kelly Gerlach; (3) Gerlach reported to Arno Ellis; (4) Ellis reported to Brian Bebel. Slip Op., p. 6.
- Bebel was “director of human resources”. Slip Op., p. 15. Although the opinion does not describe his reporting relationship to higher management, the record reflects that he reported to Jenny Carlson, the Executive Vice President of Human Resources See USBNA’s Opening Brief at 66 (citing 6RT1716-17).

\(^2\) I represented Bechtel in Guz and along with my partner Paul Cane argued the case before this Court.
\(^3\) Lane v. Hughes Aircraft Co., 22 Cal. 4th 405 (2000)
\(^4\) I represented Hughes Aircraft in the Hughes case and argued it before this Court.
The punitive damage “managing agent” holding was based entirely on the conclusion that McGovern, a junior member of the HR department, met this Court’s definition of a “managing agent”. Slip Op., pp. 40-43. The Court of Appeal’s reasoning? It is as follows:

There was no evidence suggesting McGovern’s ability to determine who to interview or how to perform an interview or investigation (e.g., whether to obtain written statements) was limited in any respect. Given the breadth of the discretion delegated to her in determining how to fairly and thoroughly investigate suspected acts of dishonesty or unethical conduct (i.e., a corporate policy) and what constituted a fair and thorough investigation – the results of which would determine (and in this case did determine) whether an employee would be terminated or disciplined – the jury could have reasonably inferred she had that authority and discretion to interpret and apply the investigative policies for U.S. Bank’s commercial banking division as she saw fit, such that her decisions ultimately determined corporate policy.

_Id._ at p. 41.

- As part of her duties, McGovern investigated multiple allegations of wrongdoing initiated by a subordinate of Timothy King. Slip Op., p. 4.

- McGovern did not have authority to terminate anyone. Slip Op., p. 42.

- McGovern, as far as the opinion shows, had no prior relationship with King and bore him “no personal animus”. Slip Op., p. 39.

- McGovern interviewed multiple witnesses, but did not personally interview or confront King. Slip Op., p. 10.
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- As far as the opinion reveals, McGovern communicated the results of her multiple interviews and her discharge recommendation only to persons in her HR chain of command and/or in King’s chain of command. Slip Op., p. 11.

- The opinion does not say that McGovern was aware of and/or was influenced in her discharge recommendation by the fact that, if not terminated before the end of February, 2013, King was likely to receive a bonus. Slip Op., pp. 6-12.

IV. THE MOST IMPORTANT REASON TO GRANT REVIEW:
IF HR GENERALIST MCGOVERN IS A MANAGING AGENT FOR PURPOSES OF PUNITIVE DAMAGE LIABILITY, THIS COURT’S CASES DEFINING MANAGING AGENT HAVE BEEN RELEGATED TO OBLIVION.

To recover punitive damages, a plaintiff must prove by clear and convincing evidence that the defendant’s “managing agent” has been guilty of “oppression, fraud, or malice.” CAL. CIV. CODE § 3294.

A. The Legislature Set A Rigorous Test For “Managing Agent.”

The Legislature enacted Civil Code section 3294 to punish a corporation only when its leaders are at fault. “[T]he law does not impute every employee’s malice to the corporation. Instead, the punitive damage statute requires proof of malice among corporate leaders.” Cruz v. HomeBase, 83 Cal. App. 4th 160, 167 (2000). “This is the group whose intentions guide corporate conduct. By so confining liability, the statute 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.” Id. “[T]his assures that punishment is imposed

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5 Especially puzzling is the Court of Appeal’s holding that U.S. Bank’s desire to finalize a decision about King before the end of the calendar year constituted substantial evidence that the decision to terminate was motivated at least in part by a desire to deny King an earned bonus. As we understand the facts, the unvested potential bonus could not have been paid before the end of February, and a termination in January or February would also have resulted in no bonus.
only if the corporation can be fairly viewed as guilty of the evil intent sought to be punished.” *Id.* (citations omitted; emphasis in original).

This Court since then has twice explained who the corporate leaders—“managing agents”—are. A managing agent “exercise[es] substantial independent authority and judgment over decisions that ultimately determine corporate policy.” *White v. Ultramar, Inc.*, 21 Cal. 4th 563, 573 (1999) (citation omitted; emphasis added). A managing agent exercises control—not just day-to-day judgment calls, but policymaking control—over the corporation’s overall business: “In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business.” *Id.* at 577 (emphasis added).

*White* adopted the rule in *Kelly-Zurian v. Wohl Shoe Co.*, 22 Cal. App. 4th 397 (1994), a sexual harassment case, the seminal court of appeal decision on this issue. In *Kelly-Zurian*, the harassing manager was the company’s highest-ranking official in Southern California. He clearly had much more than the day-to-day discretion of McGovern. But he was not a “managing agent.” Said that court: “[T]he critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.” *Id.* at 421 (emphasis added; citation omitted; alteration in original).

This Court returned to the issue in *Roby v. McKesson Corp.*, 47 Cal. 4th 686 (2009). In *Roby*, a distribution-center manager harassed an employee she supervised, but this Court held that she was not a managing agent; her misconduct did not justify punishing the entire company. She was a manager, and as such could hire, fire, and take other actions that could produce discrimination or harassment liability. But she was not a managing agent who could subject the corporation to punitive damages. *Id.* at 715. The crucial distinction, this Court explained, is between company decisions and corporate policy. Any supervisor has the authority to make company decisions, but only managing agents set corporate policy. *Roby* restated the language in *White* in a critical way. “When we spoke in *White* about persons having ‘discretionary authority over . . . corporate policy,’ we were referring to *formal* policies that affect a substantial portion of the company and that are the type likely to come to the attention of corporate leadership.” *Id.* at 714-15 (emphasis added). *Roby* thus made clear that discrete decisions by their very nature are not corporate policy. See id.; accord,
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e.g., *Cruz*, 83 Cal. App. 4th at 167-68 (the authority to make decisions that “could have significant consequences” is insufficient; the employee must set policies that determine “the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations”).

B. **If HR Generalist McGovern Is A “Managing Agent”, The Concept Has No Meaning.**

When one or more subordinates inform their corporate employer of allegations against their supervisor, the employer has a duty to investigate. In companies of any size, it is normally done through an employee of the corporation’s HR department, usually a first level HR generalist. The generalist normally investigates and reports back everything she was told. This normally includes her factual conclusions and her recommendations, including whether or not to impose discipline or discharge. If there is a discharge recommendation which is followed by management, and a jury later disagrees with the competence of the investigation and/or the recommendation, the question is whether this lies in contract or tort. If a jury after the fact disagrees, this recurring situation, absent unusual facts, should not be a candidate for punitive damages. This factual situation – a first level HR generalist investigating complaints from subordinates about a superior – and reporting upwards, happens all the time with CELC companies. Until now, absent unusual facts, there has been no judicial basis for finding a first level HR generalist to meet the legislature’s definition of “managing agent”.

C. **Separately, An HR Generalist’s Communications About What She Has Been Told, Her Findings and Her Recommendation Is Not “Oppression, Fraud or Malice”.**

The Court is requested to review Slip Op., pp. 38-40. In essence, while conceding an absence of actual malice by HR representative McGovern (p. 39), the Court of Appeal finds that malice can be inferred from McGovern’s supposed failure to investigate thoroughly plus her knowledge that her recommendation could harm King. But that was McGovern’s job – to report on her findings and recommend discharge if appropriate. Of course she knew that a discharge would injure. Review should be granted to clarify that HR recommendations do not meet the definition of malice simply because a jury has concluded that the investigation leading to the termination was insufficient.
V. **THIS COURT SHOULD GRANT REVIEW TO RESCUE FROM OBLIVION THIS COURT’S COVENANT OF GOOD FAITH AND FAIR DEALING HOLDING IN **Guz v. Bechtel**.

*Guz* dramatically reformed California discharge law. Prior to *Guz*, discharges found to be unfair constituted a tort under the covenant of good faith and fair dealing. *Guz* interpreted the covenant of good faith and fair dealing to normally sound in contract and not tort. The Court of Appeal first quoted this Court’s important *Guz* holding at page 34 of its Slip Opinion, acknowledging that *Guz* bars a covenant action by an at-will employee from becoming a tort merely because of an “arbitrary dismissal”. But quoting a *Guz* footnote, the Court of Appeal found that the jury could reasonably believe that the real reason for King’s termination was the bonus which he would receive if not terminated before the end of February 2013.

What the Court of Appeal ignores is the total lack of evidence that alleged managing agent McGovern, the low-level HR representative, was even aware of a potential bonus or, in any case, was motivated by it when she made her discharge recommendation.⁶ In short, the Court of Appeal conflated an automatic result of discharge – loss of an unvested bonus – with motivation without any apparent record evidence. This Court should grant review to reaffirm that the incidental loss of benefits always present in a discharge does not change an unfair discharge into a tort.

VI. **THIS COURT SHOULD GRANT REVIEW TO RESCUE FROM OBLIVION THE COMMON INTEREST PRIVILEGE.**

From a daily operations point of view, this is the CELC’s greatest concern with the Court of Appeal opinion. CELC member companies regularly assign HR representatives to investigate claims of wrongdoing and report all they are told and their recommendations to more senior HR representatives and to the alleged wrongdoer’s superiors. When it is undisputed that this is done without actual malice, the common interest privilege becomes absolute.

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⁶ See *supra* note 5.
However, here, although the Court of Appeal conceded no actual malice by McGovern, the HR representative (Opinion, p. 39), it held that the insufficiencies in the investigation raised an inference of malice and nullified the common-interest privilege. The Court ignored a consistent line of California cases set forth in the petition for review that hold that in this context the common interest privilege protects against defamation. CELC member companies’ HR representatives regularly do exactly what McGovern did (they do this all the time). That is their job. And, they should not subject their employers to unlimited liability for defamation – including liability for punitive damages – simply for doing their job, if a jury later disagrees with their judgment and finds fault with the thoroughness of their investigation.

VII. THIS COURT’S HUGHES AIRCRAFT Decision Establishes That the Court of Appeal Erred When It Substituted Its Judgment For That of the Trial Court As to the Maximum Amount of Damages.

In Hughes Aircraft, a two-plaintiff discrimination/retaliation/wrongful discharge case, the jury awarded $89.5 million. The trial court granted a JNOV and, alternatively, a new trial. The Court of Appeal overturned both, and decided on a cold record that the evidence at trial warranted damages of $17.35 million. Hughes Aircraft asked this Court to review only the reversal of the new trial order. This Court granted review and immediately remanded with directions to the Court of Appeal to reconsider the reversal of the new trial in light of Neal and Jones stating that these two cases were “decisions in which we articulated a highly deferential standard under which new trial orders are reviewed.” 22 Cal. 4th at 411.

The Court of Appeal simply reissued its prior decision. This Court again granted review and held that the Court of Appeal erred in applying JNOV standards to a new trial order.

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The standards for reviewing an order granting a new trial are well settled. After authorizing trial courts to grant a new trial on the grounds of excessive … damages or insufficiency of the evidence, section 657 provides: On appeal from an order granting a new trial upon the ground of the insufficiency of the evidence … or upon the ground of excessive or inadequate damages, … such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons. (Italics added.)

Thus, we have held that an order granting a new trial under section 657 must be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on the trial court’s theory. Moreover, an abuse of discretion cannot be found in cases in which the evidence is in conflict and a verdict for the moving party could have been reached. In other words, the presumption of correctness normally accorded on appeal to the jury’s verdict is replaced by a presumption in favor of the new trial order.

The reason for this deference is that the trial court, in ruling on a new trial motion, sits … as an independent trier of fact. Therefore, 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.

The trial court sits much closer to the evidence than an appellate court. Even the most comprehensive study of a trial court record cannot replace the immediacy of being present at the trial, watching and hearing as the evidence unfolds. The trial court, therefore, is in the best position to assess the reliability of a jury’s verdict.
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and, to this end, the Legislature has granted trial courts broad discretion to order new trials.

*Id.* at 411-412 (citations and internal quotation marks omitted). The opinion concluded:

The judgment of the Court of Appeal is reversed with instructions to affirm the new trial order.

*Id.* at 416.

In all material respects, the Court of Appeal made the same error here. The jury awarded $24.3 million. The trial court granted a new trial unless plaintiff accepted a remittitur of $5.4 million. The plaintiff accepted the remittitur. But, as in *Hughes Aircraft*, the Court of Appeal, despite working from a cold record, decided to substitute its judgment as to the appropriate damage amount, reversing the conditional new trial and reinstating $17.2 million in damages. The trial court, as this Court held in *Hughes*, was entitled to decide that based on the evidence the highest allowable award was $5.4 million.

**VIII. CONCLUSION**

If a first level HR representative assigned to investigate assertions of wrongdoing and report back is a managing agent, the concept has lost all meaning. If that report, made without actual malice, is not protected by the common interest privilege, that salutary and commonsense doctrine has also lost all meaning. The Court of Appeal’s refusal to follow *Guz* on the covenant is typical of the pre-*Guz* era – any unfair discharge is a tort. The Court of Appeal’s failure to be guided by long-recognized differences summarized in *Hughes* between the competence of trial courts and Courts of Appeal with respect to the
point at which damages become so excessive as to justify a new trial by itself warrants review. Taken separately or together, these four issues cry out for review and the provision of needed guidance to the bench and bar.

Respectfully submitted,

CALIFORNIA EMPLOYMENT LAW COUNCIL

By: Paul Grossman

PAUL GROSSMAN (SB# 035959)
CELC General Counsel

See attached Certificate of Service
CERTIFICATE OF SERVICE

Timothy King v. U.S. Bank National Association
CA Supreme Court Case No. S264308
Court of Appeal Case No. C085276
Superior Ct. No. 34201300154644CUDEFDS

STATE OF CALIFORNIA
CITY OF LOS ANGELES AND COUNTY OF LOS ANGELES

I am employed in the City of Los Angeles and 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 515 South Flower Street, Twenty-Fifth Floor, Los Angeles, California 90071-2228.

On September 10, 2020, I served the foregoing document described as:

Amicus Letter in Support of Petition for Review
(Timothy King v. U.S. Bank National Association)

VIA TRUEFILING ELECTRONIC SERVICE: On September 10, 2020, based on a court order or an agreement of the parties to accept service by email or electronic transmission via Court’s Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling), I electronically provided the document listed above for filing with the California Supreme Court on the TrueFiling Website and to the parties on the Service List maintained on the TrueFiling Website for this case, or on the attached Service List. TrueFiling is the on-line e-service provider designated in this case. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules. Per the California Supreme Court’s Electronic Filing/Submissions guidance, “submission of a petition for review through TrueFiling that is accepted for filing by the Supreme Court constitutes service on the Court of Appeal.”

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*Timothy King v. U.S. Bank National Association*
CA Supreme Court Case No. S264308
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**VIA U.S. MAIL:** On September 10, 2020, I placed a true copy in a sealed envelope addressed as indicated below. I am familiar with the firm’s practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing set forth in this declaration.

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CA Supreme Court Case No. S264308
Court of Appeal Case No. C085276
Superior Ct. No. 34201300154644CUDFGDS

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

Executed on September 10, 2020, at Los Angeles, California.

__________________________
Cathy Smith-Joo
Cathy Smith-Joo