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CASE NO. C085276

COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

TIMOTHY KING,
Plaintiff and Cross-Appellant,

U.S. BANK NATIONAL ASSOCIATION,

Defendant and Appellant.

Sacramento County Superior Court No. 34201300154644CUDFGDS
Hon. Christopher E. Krueger, presiding

PETITION FOR REHEARING

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PETITION FOR REHEARING

Appellant/cross-appellee U.S. Bank National Association ("USBNA") respectfully petitions for rehearing of the Court's opinion of July 28, 2020. For the reasons below, the Court should reconsider and amend its decision.

I. THE OPINION CONTAINS FACTUAL ERRORS RELATING TO USBNA'S INVESTIGATION OF KING, UNDERMINING THE COURT'S HOLDING THAT THE EVIDENCE SUPPORTS KING'S DEFAMATION CLAIM.

The Court's decision to uphold the jury's verdict on defamation rested in large part on deficiencies it found in USBNA's investigation of the allegations against King. But the Court's discussion of the evidence relating to the investigation contains significant factual errors and omissions. The Court should correct these errors and reconsider its conclusion that the record contains sufficient evidence of malice to negate the common-interest privilege.

A. The Opinion Misstates The Evidence Concerning The Nature Of BDR Meetings.

King was terminated because USBNA concluded that he had directed his subordinates Kim Thakur and John Flinn to input into the Bank's tracking system records of "Building Deeper Relationship" ("BDR") meetings that had not occurred. The Court's discussion of the evidence concerning BDR meetings—which the opinion refers to as "initiative meetings"—is inconsistent with the evidence.

For example, the opinion states that Maureen McGovern, who investigated the claims against King, "at the time of her deposition, … did not have an understanding of what internal and external initiative meetings were." (Op. 8.) That is incorrect. McGovern said that she did not have "a ***thorough*** understanding" of internal and external BDR meetings (1RT212 (emphasis added))—not that she lacked ***any*** understanding of them. She testified without contradiction that she "had a general understanding of the BDR program and that it was a framework for having meetings with partners and to track that those meetings occurred and when they occurred and who was present." (1RT214.) Moreover, the opinion overlooks McGovern's detailed testimony about her understanding of BDR meetings. (See, *e.g.,* 1RT239 (McGovern understood that the purpose of the BDR initiative "was to cross-sell the bank's products and services, and that would include introducing the customer to the appropriate product partners" and that, accordingly, "it was the preferred practice to include others, such as product partners," at external BDR meetings); 1RT233 (McGovern was "aware" that an "internal BDR meeting" involved "multiple product partners and multiple relationship managers who "met all at once").)

The opinion states that "it was not necessary to have more than one person at an initiative meeting" and that "[a]lthough it was preferable to include product partners at such meetings, it was not required." (Op. 8.)

That characterization of BDR meetings disregards the evidence that all of the employees whom McGovern interviewed except the most recent hire (Ed Gill) shared the understanding that internal BDR meetings were supposed to include multiple relationship managers and product partners and that external BDR meetings had to include, at minimum, a relationship manager and a product partner.[1]

Thakur testified that in an internal BDR meeting, a group of USBNA employees would meet and discuss cross-selling opportunities for a list of clients. (3RT823; 5RT1338.) An "external BDR meeting" was the "next step" in the process and involved bringing "business partners" to clients to explore the opportunities that had been identified. (5RT1339.)

Flinn likewise testified that internal BDR meetings involved "sit[ting] down with all your product partners" to "go over each client and figure out [what] we could cross-sell them" and that external meetings involved "you, your products, would have a meeting with" the client. (4RT1163.) He also knew that he was "supposed to input if any product partners are there … who joined you." (4RT1165.)

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[1] Although the testimony of King's most recent hire might in other contexts constitute substantial evidence to support a verdict—notwithstanding the conflicting testimony of seven other employees (Thakur, Flinn, Hom, Neal, Guy, Jackson, and Theuma)—it is not sufficient when the issue is whether McGovern repeated Thakur's and Flinn's statements about BDRs while entertaining doubt about their accuracy. See page 17, *infra*.

Senior Portfolio Manager Peter Hom explained that an internal BDR meeting is "a coming together of all critical product partners that might be able to add value to a relationship either from products or services the bank offers" and that an external BDR "generally required more than one banker to be at the meeting with the client" though product partners in distant offices could participate by phone. (4RT1059-60.)

Portfolio Manager Oksana Guy testified that internal BDR meetings are all-day affairs involving multiple product partners during which the attendees discuss multiple clients. (4RT958-59; 5RT1237-39, 1240-45.)

Portfolio Manager Jennifer Neal said that "[a] BDR meeting is a formal meeting where the bankers"—meaning the "relationship managers and their managers"—"get together with the product partners … and review specific [clients] to see if there is potential there to build revenue via the sale of bank products that they could possibly need or use." (5RT1491). The opinion states that "Neal did not have an understanding of what an internal or external initiative meeting was" (Op. 22), but that misstates her testimony. Neal testified that she did not have an understanding of "what an external BDR meeting was" (3RT851)—no doubt because she had never been in one—but her description of internal BDR meetings was confirmed by other witnesses, and her statements to McGovern therefore corroborated Thakur's testimony that such meetings were not occurring in Sacramento.

Likewise, McGovern's supervisor Kelly Gerlach stated that, under the BDR initiative, "our relationship managers were supposed to be getting together with a deal team or product partners internally … to talk about the relationship and see what else they could do to cross-sell into it." (6RT1574.) "And then, externally, they were to do a meeting that would also include product partners and the client to talk about what else we can do for you." (*Ibid.*) Her understanding is highly relevant, because it is undisputed that McGovern consulted Gerlach regularly throughout the investigation and that Gerlach was aware of McGovern's interviews with the employees.

Other USBNA employees who were not interviewed during the investigation but testified at trial had a similar understanding of BDR meetings. Jean Jackson said that it was not possible to have an internal BDR meeting with just one product partner. (6RT1744-45.) She further testified that an external BDR meeting involves "deliver[ing] the presentation to the customer along with the appropriate product partners that were offering some opportunities to them." (6RT1747.)

Finally, Amy Theuma, the head of USBNA's BDR Relationship Review Initiative, stated that internal BDR meetings involved five to ten people who met in person. (6RT1655-60.) External BDR meetings were formal presentations to clients by at least two bank employees. (6RT1660-61.) She said that email exchanges could never be considered external BDR

meetings. (6RT1661.) She also testified that calls with clients did not count as external BDR meetings except in "extraordinarily rare" cases, such as when a client is in a very remote location. (*Ibid.*)

USBNA requests that the Court amend its opinion to reflect the witnesses' substantial consensus about the nature of BDR meetings.

B. The Opinion Misstates The Evidence Relating To McGovern's Assessment Of Witness Credibility.

The Court concluded that, in crediting statements made by Thakur, McGovern "relied on a source known to be unreliable or biased against King." (Op. 29.) The Court based that conclusion in large part on an erroneous reading of the record.

The opinion first posits that "McGovern knew Thakur was an unreliable source" because "Gill denied the statement regarding King falsifying his vacation records." (*Ibid.*) Despite Gill's denial, however, Thakur's statement was corroborated. Neal (whose credibility was never questioned) reported to McGovern that she too had heard from Gill that King had underreported his vacation time. (AA150; 3RT846; 6RT1493.) And while Gill denied having told Thakur that King falsified vacation records, he told McGovern that Flinn had made that accusation (4RT989, 994). Thus, at worst, Gill's denial may have suggested that Thakur was confused about which co-worker had made the accusation, but it did not show that Thakur was dishonest or biased. Accordingly, the evidence does

not support the conclusion that McGovern knew that Thakur was an unreliable source.

The opinion also states that McGovern knew that Thakur was unreliable because "Gill and Flinn said initiative meetings were occurring in 2012." (Op. 29.) As McGovern explained, however, "the significant issue was that [Thakur] had not done BDR meetings" and that King had directed her to report that she had. (1RT220.) Flinn's statements to McGovern strongly corroborated this claim: He independently told McGovern that, before Thakur was hired, King would periodically give him lists of clients and ask him to record BDR meetings for those clients. (AA158; 1RT262 (McGovern).) Flinn said that King "would say, hey, we got to check the box. We don't want to be on the radar. We don't want flags." (4RT1162.) King told Flinn to "[p]ut in there that you and I did a BDR with these guys" notwithstanding the fact that "some of them weren't even [Flinn's] customers." (*Ibid.*) In view of what Flinn told McGovern, there is thus no basis for concluding that anything Flinn said about BDR meetings should have caused McGovern to regard Thakur as not credible.

Contrary to the Court's statement, moreover, Gill's and Flinn's accounts of their BDR activities were entirely consistent with Thakur's contentions. Thakur told McGovern that internal BDR meetings were not occurring in the Sacramento office and that she had not participated in any external BDR meetings. (5RT1340-41.) Gill said that they had had "very

few" BDR meetings, that "pipeline discussions are one-off," and that they "rarely have [meetings] from a team stand point to talk about [opportunities]." (AA144.) And while Flinn did record BDR meetings in 2012, that does not mean that he actually performed such meetings as Thakur (correctly) understood the concept. Indeed, he admitted that during an earlier period, at King's direction, he falsely recorded BDR meetings that never occurred. (4RT1155-56, 1162; 6RT1568-69.) That is why McGovern's contemporaneous notes reflect that both Thakur and Flinn were to be given a "strong verbal warning" and told that any future similar behavior "could result in immediate termination." (AA211; 1RT262.)

Other witnesses affirmatively corroborated Thakur's statements that internal BDR meetings were not occurring in Sacramento. Neal and Oksana Guy both told McGovern that there were "no BDR meetings" in Sacramento. Indeed, Guy further testified that King asked her to tell Vice Chairman Joseph Otting, who was visiting the office, that BDR meetings were taking place and that she refused to do so because it wasn't true. (4RT962-63, 966-67; 5RT1240.) Peter Hom said that he "[wasn't] aware of BDR meetings happening." (1RT229.) And two other employees who were not interviewed by McGovern confirmed at trial that King's group was not doing BDRs in 2012. (6RT1688-89 (Michael Edwards), 1746-47 (Jean Jackson).)

Accordingly, McGovern's decision to treat Thakur as a credible witness is not evidence of malice.

C. The Opinion Misstates The Evidence Relating To McGovern's Alleged Failure To Investigate.

The opinion also states that there was "substantial evidence McGovern made a deliberate decision not to investigate facts that could have confirmed the falsity of the allegations, supporting a finding of malice." (Op. 29.) The Court's factual statements in support of this conclusion are inconsistent with the record.

According to the opinion, McGovern made a "deliberate decision not to seek any information from King" about the BDR issue. (Op. 30.) As discussed further below, however, ***Walker*** spoke to King about his BDR reports and reported back to McGovern and Gerlach. Although McGovern and Gerlach then decided that Walker's report obviated the need to hear King's side of the story directly, that was because they had concluded that King's denials were not credible in light of the information they had already received from the six employees whom McGovern had interviewed. (6RT1632-33.) That information included, but was not limited to, Thakur's and Flinn's ***independent*** reports that King had asked them to record in the Bank's tracking system meetings that had not occurred. (1RT211-12;

1RT262; 4RT1162; 5RT1339; 5RT1341-42.)[2] King has never contended that Thakur and Flinn conspired to provide McGovern with such remarkably consistent reports—and for good reason. There is no evidence that they did.

The opinion also states that "McGovern's investigation into the vacation allegation also demonstrates a deliberate failure to investigate" (Op. 30), but McGovern did not claim to have proof that King had failed to report all of his vacation. Instead, McGovern's notes of her anticipated meeting with Walker reported accurately that "a couple of people said they heard second hand that Tim deliberatively doesn't report vacation so it will be paid out to him," but made clear that she had "not been able to confirm" the allegation. (AA2245.) That critical qualification precludes a finding that she deliberately failed to investigate the allegations and recklessly repeated them anyway.

The opinion notes that King was faulted "for telling employees … that it was appropriate to get paid out for vacation" (Op. 7) and states that "it was not wrong or contrary to the bank's policy for an employee to be paid out his or her unused vacation" (Op. 10), but that misses the point. It was USBNA's policy that employees in states requiring payment for

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[2] The opinion states that "Flinn told McGovern he (Flinn) did not participate in those meetings but Flinn did not know if King had." (Op. 30.) The fact that Flinn did not attend the meetings, however, is enough to render the reports false and in violation of USBNA policy.

unused vacation, including California, should take all vacation in the year it is earned. (1RT272-73.) McGovern's investigation reflected that all but one other employee whose records were checked adhered to that policy. (AA205, 274.)[3] Accordingly, King's practice of receiving a "nice check" for vacation each year—and encouraging his subordinates to do the same—represented a stark departure from USBNA's policies.

D. The Opinion Misstates The Evidence Regarding McGovern's Communications With Walker.

The opinion states that "McGovern relayed the findings of her investigation to Gerlach and Walker on December 19," telling them during that call that King "'had instructed two members of his staff to put false information regarding [initiative] meetings into the tracking system,' made inappropriate references to Thakur being eye candy, and said a client liked 'hot Asian chicks.'" (Op. 11.) That passage—which is drawn from a question by King's counsel that does not refer to any particular meeting (2RT309)—conflicts with the evidence regarding the meetings among McGovern, Gerlach, and Walker.

As the opinion acknowledges (at 14), McGovern described the allegations against King during a meeting with Walker and McGovern on ***December 6.*** (AA278-79.) At that meeting, McGovern recounted the statements that Thakur, Flinn, and others had made about King. (AA224-

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[3] The exception again was King's most recent hire, Ed Gill.

225.) McGovern, Gerlach, and Walker spoke again on December 12 (AA281) and December 19 (AA282). At the December 12 meeting, Walker stated that the "false and misleading info[rmation] [King] is providing" was "unacceptable" and expressed the view that King should be "remove[d] from position" and "term[inated]." (AA281). He also said that he would have his "standard quarterly BDR review" with King. (*Ibid.*). By the December 19 meeting, Walker had spoken to King about the BDR reports. (AA282.) He reported that King said that the BDR reports were "accurate [and] up to date." (*Ibid.*) McGovern's notes indicate that they were "prepared for him to deny" any inaccuracy in the BDR reports and expressed the view that a "manager told us false info." (*Ibid.*) Walker stated that there was "no room in the org[anization] for that" and that the matter was "disturbing, unacceptable." (*Ibid.*).

The opinion states that McGovern "did not ask Walker to speak to anyone or gather any documents," but that is inaccurate. (Op. 11.) In fact, as noted above, Walker spoke to King about the BDR issue at McGovern's request and reported back to McGovern and Gerlach about the conversation. (See 1RT172, 249-51; 3RT604-05, 688, 748-49, 801-02, AA207-209; see also Op. 15 n.6 (describing McGovern's deposition testimony that "she recalled asking Walker to address … two issues with King: the initiative reports and a scorecard issue").) Walker testified that he was not "formally interviewed" (3RT748), but he said that he had multiple

"discussions … with Ms. McGovern" about the allegations against King (*ibid.*).

* * *

The Court's conclusion that the evidence supports a finding of malice on the part of McGovern's statements depends heavily on the errors described above. The Court should correct these errors and reconsider its conclusion that the defamation verdict is supported by substantial evidence. In so doing, it should bear in mind the uniform case law holding that 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; *Noel v. River Hills Wilsons, Inc.* (2003) 113 Cal.App.4th 1363, 1371; *Widener v. Pac. Gas & Elec. Co.* (1977) 75 Cal.App.3d 415, 434.

II. THE COURT ERRED IN HOLDING THAT THE EVIDENCE REGARDING THE TIMING OF KING'S TERMINATION WAS SUFFICIENT TO SUPPORT THE WRONGFUL-TERMINATION VERDICT

The Court's holding that the evidence is sufficient to support King's wrongful-termination claim rests on an error of law. To support that claim, King was required to show that his termination was substantially motivated by the desire to deny him a 2012 bonus. In deeming the evidence sufficient to support the verdict, the Court relied heavily on evidence "tending to

show U.S. Bank rushed King's termination to ensure it was completed before year's end." (Op. 32). That evidence does not support King's claim because it does not show that denying King a bonus was a ***reason for his firing***. At most, it shows that the bonus affected the ***timing*** of King's termination. Under California law, there is no cause of action for rushing a permissible termination. The plaintiff must show that the reasons for the termination—not merely its timing—were impermissible.

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—in this case, the desire to deny him a performance bonus for the year 2012—was a substantial motivating reason ***for the termination***. *Mendoza v. Western Med. Ctr. Santa Ana* (2014) 222 Cal.App.4th 1334, 1341.

In holding that the wrongful-termination verdict was supported by substantial evidence, the Court pointed to evidence that "Walker testified Ladd said King had to be terminated before the end of the year"; that "the timing of King's termination was purportedly important because Ladd said someone else would do it if Walker did not"; and that "U.S. Bank did not follow its normal termination protocols." (Op. 32.) That evidence does not

show that the termination itself was motivated even in part (much less substantially so) by the desire to deprive King of his bonus. Instead, assuming for the sake of argument that this evidence reveals anything about USBNA's motives, it proves at most that the bonus issue affected the ***timing*** of King's termination. That is insufficient, because King was required to show that the desire to deprive King of a bonus was a substantial motivating reason ***for the termination itself***. (*Mendoza* 222 Cal.App.4th at 1341). Evidence that the termination was "rushed" once USBNA decided to go ahead with it does not show that the termination itself was motivated by the desire to deprive King of a bonus.

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.) He speculated that the reason why USBNA developed pretexts to terminate him was that it feared that Thakur would have a miscarriage and blame him for it. (*Id.* at 86 fn.3.) In King's view, USBNA wanted to deprive him of a bonus because it "gained nothing by incentivizing King ***because it wanted to fire him anyway***." (*Id.* at 94 fn.4 (emphasis added).) That concession is fatal to King's claim because King had to prove that the motive for the ***termination***—not merely the timing of the separation—violated public policy. (*Mendoza*, 222 Cal.App.4th at 1341.)

Accordingly, the Court should hold that King failed to introduce sufficient evidence to support his wrongful-termination claim.

III. THE COURT ERRED IN STATING THAT USBNA RAISED A NEW ARGUMENT CONCERNING THE IMPLIED-COVENANT CLAIM IN ITS REPLY BRIEF.

The Court stated in connection with the implied-covenant claim that USBNA argued for the first time in its reply brief that King "had not earned the bonus at the time of his termination." (Op. 35 fn.10.) The Court stated further that "[w]e do not consider arguments raised for the first time in a reply brief." (*Ibid.*) That criticism was unwarranted because USBNA made the same point in its opening brief.

USBNA argued in its opening brief that King was not entitled to prevail on this claim because "[t]he implied covenant cannot impose a duty to pay a bonus that contradicts the plan's express terms." (USBNA Opening Br. 32.) USBNA pointed out that "under [its] bonus program bonuses were payable only to persons still employed at the end of the February following the bonus year; even then, the bonus was discretionary." (*Ibid.*) USBNA referred back to the prior section of the brief in which it cited the relevant terms of the bonus plan. (*Id.* at 28 ("Bonuses were paid at the end of February, and only employees who were still employed and in good standing on the payout date were eligible. (See AA261-263.)"). Because "King undisputedly became ineligible to receive a bonus when he was terminated in December," USBNA argued, the failure to pay him a bonus

did not breach the implied covenant of good faith and fair dealing. (USBNA Opening Br. 32.)

In response to USBNA's argument, King contended that USBNA violated the implied covenant because it terminated him in order "to deprive him of his substantial earned bonus." (Respondent's Br. 97.) King relied on the California Supreme Court's statement that "the covenant might be violated if termination of an at-will employee was a mere pretext to cheat the worker out of another contract benefit to which the employee was clearly entitled, such as ***compensation already earned***." *Guz v. Bechtel Nat'l Inc.* (2000) 24 Cal.4th 317, 353 fn.18 (emphasis added). USBNA argued in reply that the bonus was not equivalent to "compensation already earned" because "it was an express 'condition precedent to earning' an award that employees had to be 'actively at work in an eligible position' on the bonus payment date in the following year. (AA262.)." (USBNA Reply Br. 65.) This was not a new argument. Instead, USBNA was reiterating the principal argument it made in its opening brief—that King was not entitled to a bonus under the terms of the bonus plan, distinguishing *Guz*, and replying to King's assertion that he had "earned" a bonus under the plan.

We therefore ask the Court to omit the footnote stating that USBNA raised a new argument in its reply brief. We further ask the Court to consider all of the arguments made in this section of the reply brief.

IV. THE COURT ERRED IN OVERTURNING THE REMITTITUR OF THE DAMAGES FOR HARM TO REPUTATION

The trial court conditionally granted USBNA's motion for a new trial unless King accepted a remittitur of the damages for reputational harm to zero, holding 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.) This Court reversed the new trial order and reinstated the $4 million award for reputation damages, holding that, although the trial court satisfied section 657's procedural requirements, 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.) The Court pointed to evidence that USBNA employees discussed King after his termination, including Marlene Murphy's testimony that she heard that King was fired for an ethical issue. (Op. 49-50.)

That ruling runs afoul of the deferential standard that applies to trial-court orders granting or denying new trials. See, *e.g.*, *Neal v. Farmers Ins. Exch.* (1978) 21 Cal.3d 910, 933 ("when there is a material conflict of evidence regarding the extent of damage," a trial court's new-trial order must be affirmed).

Here, contrary to this Court's premise, the trial court's finding that the reputational damages were wholly duplicative of the economic damages awarded for wrongful termination did not turn on whether any statements were made about King after his termination. Indeed, it acknowledged King's evidence that Murphy had heard that King had been fired for an ethical issue and that Gerlach had repeated the Mafia comment. (AA326.) The court instead determined, after exercising its "independent judgment" and "in consideration of the entire record"—including the evidence concerning post-termination statements—that "[t]he evidence does not indicate the ***damages*** extended beyond [King'] termination." (*Ibid*.)

It is well established that, when the trial court has required a remittitur as a condition to denying a new trial, "'a verdict 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).) Given this Court's own recognition that "King introduced no evidence of *actual* damage to his reputation" (Op. 61), this deferential standard required affirming—not reversing—the remittitur.

The Court accordingly should reconsider its decision and affirm the remittitur of the reputational damages to zero.

V. THE COURT SHOULD REMAND FOR THE TRIAL COURT TO CONSIDER USBNA'S ARGUMENT THAT THE DAMAGES FOR REPUTATIONAL HARM ARE EXCESSIVE.

Because the trial court held that King was not entitled to a separate award for harm to his reputation, it did not reach USBNA's independent argument that the $4 million award, even if not "purely duplicative" of the damages resulting from his termination, was "excessive." (AA325; *see* USBNA's Mem. in Support of Motion for JNOV or New Trial, ROA 334, at 31-33.) If the Court does not reconsider its holding that the trial court abused its discretion in ruling that King was not entitled to ***any*** award for reputational harm, the correct remedy is for the Court to remand with directions to the trial court to consider USBNA's argument that the damages for harm to King's reputation, even if not entirely duplicative, were excessive—an argument that the trial court did not reach and that this court implicitly agreed would have merit by noting that "King introduced no evidence of *actual* damage to his reputation" (Op. 61). See *Teitel v. First Los Angeles Bank* (1991) 231 Cal.App.3d 1593, 1606-97 (reversing j.n.o.v. on excessive amount of punitive damages and remanding with directions to consider motion for new trial on excessiveness); *Barrese v. Murray* (2011)

198 Cal.App.4th 494, 497 (remanding for consideration of new-trial arguments not reached).[4]

VI. THE COURT ERRED IN SUGGESTING THAT USBNA FORFEITED ITS CHALLENGE TO PUNITIVE LIABILITY WITH RESPECT TO THE WRONGFUL-TERMINATION CLAIM.

As the Court expressly recognized, USBNA argued that the evidence was insufficient to support punitive liability on either of King's tort claims because "there was no clear and convincing evidence" that any USBNA employee "could qualify as a managing agent who personally engaged in, authorized, or ratified outrageous conduct giving rise to such liability." (Op. 36.) The Court stated, however, that USBNA made a "general and broad" argument rather than "arguing with appropriate headings that the evidence does not support each of the jury's specific punitive liability findings for wrongful termination and defamation." (Op. 37.) Quoting cases holding that "[f]ailure to provide proper headings" or to "raise a point separately or support with argument and authority" may result in the forfeiture of an argument (*ibid.* (internal quotation marks omitted)), the Court then held that "there was substantial evidence supporting punitive liability based on defamation" (*ibid.*), but failed to address whether the evidence supported punitive liability on wrongful termination. The opinion

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[4] Because excessiveness is for the trial court to address in the first instance, it is not an alternative basis for affirmance, and therefore USBNA was not required to raise it in its cross-appeal response brief.

thus appears to suggest that because of the manner in which USBNA organized its briefing of the punitive-liability issue, it has either (1) forfeited its right to challenge punitive liability for wrongful termination; or (2) forfeited its right to have the Court separately analyze punitive liability for wrongful termination and defamation. We submit that neither holding would be justified.

King argued that a single course of conduct supported both of his claims. (*See* Respondent's Br. 19 ("[M]ultiple persons at U.S. Bank engaged in a scheme to generate pretexts for King to be terminated, repeatedly and maliciously defamed King in the process, rushed to terminate him before the end of the year in order to deprive him of his large earned bonus, and knowingly destroyed the outstanding accomplishments, reputation and career that King dedicated his entire adult life to build.").) Indeed, he presented the defamation as a means toward accomplishing the termination.

The analysis under Civil Code section 3294 as applied to a corporate employer requires examination of the mental state and duties of the person asserted to be "an officer, director, or managing director of the corporation," not the type of tort. (Civ. Code § 3294(b).) In keeping with the legal standard and his theory of intertwined conduct, King accordingly targeted a single set individuals at USBNA with the culpable mental state, without differentiating between conduct relating to defamation and conduct

relating to wrongful termination. USBNA therefore believed that it could most efficiently address the issue of punitive liability on both claims by analyzing whether each person involved in the so-called "scheme" was a managing agent and demonstrating that none of them was proven to have engaged in despicable conduct with respect to either defamation or wrongful termination. USBNA carefully discussed the law and the evidence on these points in its opening brief (see USBNA Opening Br. 55-60) and responded in detail to King's arguments in its reply brief (see USBNA Reply Br. 88-103).

Given that the conduct alleged to support both claims was intertwined and that USBNA had already discussed the evidence relating to each claim separately in prior sections of the brief, it was reasonable for USBNA to address punitive liability for both claims by discussing whether each participant qualified as a managing agent and whether each engaged in, authorized, or ratified outrageous conduct. In doing so, USBNA addressed the facts relevant to both claims. (See, *e.g.*, USBNA Opening Br. 67-68 (arguing that Ladd is not a managing agent and discussing the evidence relating to his conduct relevant to both the defamation claim and the wrongful-termination claim).) USBNA included numerous subheadings so that the Court would be able to pinpoint the discussion of each relevant participant and his or her conduct with ease.

Because USBNA addressed liability for punitive damages for both torts within this structure—and taking into account the word limit and the number of issues presented by the appeal—the two cases cited by the Court do not support its conclusion that USBNA forfeited any argument.

In one of the cases, the appellant's brief "jump[ed] around, criticizing the order but never providing a solid foundation for an argument [that the court] must reverse it." *Pizaro v. Reynoso* (2017) 10 Cal.App.5th 172, 179. The headings in the part of the brief enumerating the appellants' arguments on appeal were as follows: (1) "Argument And Summary of Argument" (with subheadings "Summary of Argument," "Standard of Review," and "Statement of Decision of Argument"), (2) "Bad Faith Litigation," and (3) "Conclusion." *Id.* at 180-81. Moreover, the Court found it "entirely unclear what specific argument [the appellant] believe[d] [would] establish the order must be reversed." *Id.* at 179.

In the second case—*Badie v. Bank of America* (1998) 67 Cal.App.4th 779—the appellants failed to make ***any*** arguments relating to certain of their claims. As the Court explained, "nowhere in either their opening brief or their reply brief" did the appellants "directly address the statutory causes of action they brought under Business and Professions Code section 17200 et seq. or Civil Code section 1770, subdivision (a)(14) and (19)." *Id.* at 784. The brief "[did] not even so much as cite" the relevant statutory provisions, "much less discuss their provisions or their application

to the evidence presented at trial and to the causes of action framed under them." *Ibid.*

The ostensible failing that the Court identified here—not teasing apart the evidence and addressing punitive liability for the two underlying torts in separate subsections of the brief—is not remotely similar to the failures identified in those cases. Unlike the appellants in *Pizaro* and *Badie*, USBNA challenged punitive liability in a clearly labeled, 15-page section of its brief that first stated the relevant law and then systematically reviewed the evidence, using multiple subheadings. (See USBNA Opening Br. 55-60.) USBNA did the same in a 16-page section of its reply brief, systematically discussing King's legal arguments and responding to each of King's factual assertions relating to both claims. (See, *e.g.*, USBNA Reply Br. 93-96 (responding to King's arguments that McGovern was a managing agent and that she engaged in outrageous conduct relating to both the defamation claim and the wrongful-termination claim).)

USBNBA clearly met the standard for briefing an issue on appeal. Accordingly, USBNA requests that the Court amend the opinion to delete its suggestion that USBNA forfeited any argument relating to punitive liability.

VII. THE INCREASED PUNITIVE AWARD IS UNCONSTITUTIONALLY EXCESSIVE.

The Court agreed with the trial court 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, the Court increased the punitive damages by nearly $6 million because it deemed a 1:1 ratio of punitive to compensatory damages appropriate, and it had increased the compensatory damages for defamation by approximately $6 million. This increase in the punitive damages renders the award grossly and unconstitutionally excessive because the reinstated compensatory award for defamation is, in itself, largely punitive. Indeed, because the defamation damages serve both a punitive and a deterrent function, the reinstatement of those damages warrants a further ***reduction*** of the punitive damages, not a tripling of USBNA's punishment.

The U.S. Supreme Court repeatedly has held that the deterrent and retributive effects of compensatory damages must be taken into account in determining both whether and in what amount punitive damages are appropriate. 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, *e.g.*, *Memphis Cmty. Sch. Dist. v. Stachura* (1986), 477 U.S. 299, 307 ("Deterrence … operates through the mechanism of damages that are compensatory.").

The California courts likewise have recognized that "large 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." *Lane v. Hughes Aircraft Co*. (2000) 22 Cal.4th 405, 424 (Brown, J., concurring); see also, *e.g.*, *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 718 (2009) (recognizing that "compensatory damages … awarded solely for [plaintiff's] physical and emotional distress … may have reflected the jury's indignation at [defendant's] conduct, thus including a punitive component"); *Walker v. Farmers Ins. Exch.* (2007) 153 Cal.App.4th 965, 974 (affirming reduction of punitive award because, *inter alia*, "substantial" compensatory damages were "quite a handsome recovery" and included a "punitive element").

A punitive award greater than necessary to accomplish California's interest in punishment and deterrence—after the compensatory award has been paid—"furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *State Farm*, 538 U.S. at 417. That is why the California Supreme Court held that a $50,000 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.

Here, the $4 million compensatory award for harm to King's reputation and $1 million compensatory award for emotional distress undeniably contain a substantial punitive element. Indeed, these awards represent a windfall to King, far exceeding what is justified for any non-economic harm he suffered. Even assuming that King incurred a cognizable injury to his reputation that caused damages apart from those stemming from his termination, there is no evidence that he endured the kind of general social condemnation or ostracism that might warrant a seven-figure award for damage to reputation. *E.g.*, *Weller v. Am. Broadcasting Cos.* (1991) 232 Cal.App.3d 991, 1012-14 (holding that $1,000,000 for harm to reputation was "high" but not excessive where defamatory statements in television broadcast left silver dealer "besieged" with inquiries about statements and "permanently tarnished" his reputation "because he could never identify most of [those who saw the broadcast] and negate the effects of the broadcasts through personal contact"). Likewise, the $1 million award that King received for his admittedly "garden-variety" emotional distress is disproportionate to the evidence of King's temporary moderate

embarrassment and frustration based on the allegedly defamatory statements.

Importantly, neither this Court nor the trial court found that the compensatory damages reasonably reflect harm suffered by King, as opposed to the jury's outrage. On the contrary, the trial court held that "reducing compensatory damages [for harm to King's reputation] to $0 would be fair and reasonable based on the evidence at trial." (AA445.) This Court reversed the trial court's holding that King had not proven reputational harm warranting an award of non-economic damages and reinstated the $4 million award for harm to reputation under Section 657, but it "[did] not independently determine whether the reputation damages award was excessive or unsupported by evidence." (Op. 50.) Likewise, the Court held that the trial court failed sufficiently to explain its reduction of the emotional-distress damages, requiring reinstatement of the award under Section 657 (Op. 50-51), but it expressed no disagreement with the merits of the trial court's assessment that "$25,000 would be fair and reasonable based on the evidence at trial" (AA446).

Indeed, elsewhere in its opinion the Court recognized that "King introduced no evidence of *actual* damage to his reputation" and that "it appears the jury awarded presumed damages"—meaning that "[t]he emotional distress and 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).)

The Court's reinstatement of the outsize awards for non-economic damages resulted from Section 657's creation of "a procedural minefield for trial judges who issue new trial orders." (Op. 44 (quoting *Oakland Raiders v. Nat'l Football League* (2007) 41 Cal.4th 624, 635).) Indeed, this case poignantly exemplifies the "'unfairness to the successful moving party when the trial court's failure to file an adequate statement of reasons renders the order defective.'" (Op. 45 (quoting *Oakland Raiders*, 41 Cal.4th at 635).) Even if reinstatement of the full amount of the jury's compensatory awards was appropriate under Section 657, however, that harsh result does not justify a parallel increase in the punitive damages.

Section 657 has no bearing on the Court's independent review of punitive damages to ensure the award's consistency with due process. Whatever the fate of the new-trial order, the Court has an independent obligation to ensure that the punitive damages do not exceed constitutional limitations. Under the circumstances here—in which there was no ill-gotten gain and the compensatory damages dwarf King's economic harm and are disproportionate to the evidence of King's non-economic harm—an $8,489,696 punitive award is monstrously excessive. Indeed, given the magnitude and nature of the compensatory damages, no more than a

nominal amount of punitive damages is necessary to accomplish California's interests in deterrence and punishment.

If, however, the Court remains of the view that a 1:1 ratio of punitive to compensatory damages should be maintained, it should treat the "presumed" damages for harm to reputation as punitive and include them in the numerator of the ratio. That would dictate a reduction of the remaining punitive damages to $489,696, which is equal to $2,489,696 for the economic damages, plus $1,000,000 for the loss of business, plus $1,000,000 for emotional distress, minus $4,000,000 in presumed damages. At minimum, the presumed damages should be excluded from both the numerator and the denominator, which would dictate reducing the punitive damages to $4,489,696 in order to maintain a 1:1 ratio.

CONCLUSION

The Court should grant rehearing and correct the legal and factual errors identified above.

Respectfully submitted.

Dated: August 11, 2020

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CERTIFICATE OF WORD COUNT

The text of this brief consists of 6888 words, as counted by the Microsoft Word 2007 version word-processing program used to generate this brief.

Dated: August 11, 2020

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I, Gail Meggison, 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 August 11, 2020, I served the foregoing document(s) described as:

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