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September 28, 2020

Via TrueFiling

Chief Justice Cantil-Sakauye
& Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Letter of Amicus Curiae the Chamber of Commerce of the United States of America Supporting Review in *King v. U.S. Bank National Association*, No. S264308

Dear Chief Justice Cantil-Sakauye and Honorable Associate Justices:

The Chamber of Commerce of the United States of America respectfully submits this letter pursuant to California Rules of Court, rule 8.500(g), in support of the Petition for Review filed by U.S. Bank National Association.

The Chamber urges this court to grant review. The published opinion of the Court of Appeal greatly expands the potential liability of companies that take seriously allegations of gender discrimination, sexual harassment, and other misconduct by supervisors and impose consequences for such misconduct. This will discourage companies from investigating such allegations and imposing sanctions to protect lower level employees. The Chamber urges this court to grant review to clarify the standards for defamation claims to ensure that such claims do not become a serious impediment to rooting out and punishing sexual harassment and other misconduct.

The Court of Appeal's affirmance of punitive damages is especially troublesome, as it treated the "managing agent" standard for corporate liability as being almost entirely open-ended, and then purports to apply this court's recent decision in *Conservatorship of O.B.* (2020) 9 Cal.5th 989, in a manner that deprives that decision of any practical effect. This court should grant review and demonstrate how to properly apply the standard of review

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to a claim of insufficient evidence to support a finding requiring clear and convincing proof.

Identification and Interests of Amicus Curiae[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country – including throughout California. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae letters in cases, like this one, that raise issues of concern to the nation's business community.

Argument

I. The decision of the court below will discourage companies from investigating claims of sexual harassment and other misconduct by supervisors.

In a published decision, the Court of Appeal awarded more than $17 million in compensatory and punitive damages to a former senior vice president regional manager, Timothy King. U.S. Bank had terminated King after its department of human resources (HR) investigated claims of gender discrimination, sexual harassment, and falsification of records (among other things) brought by an employee King had supervised. (Opn., pp. 3-4.) The message the Court of Appeal's decision sends to companies is clear: There is a serious risk in investigating claims of discrimination and harassment.

This is the wrong message. Employees should be encouraged to bring claims of misconduct to the attention of HR and the HR department should feel free to investigate those claims.

[1] No party or counsel for a party authored this amicus letter in any part. No person or entity made any monetary contribution intended to fund the preparation or submission of this letter, other than the amicus curiae, its members, or its counsel.

The court below ruled that U.S. Bank's HR department defamed King by republishing to other employees the complaints made by King's subordinates. (Opn., p. 26.) The Court of Appeal recognized that "[u]nder Civil Code section 47, an employer's republication of defamatory statements is generally privileged 'because an employer and its employees have a common interest in protecting the workplace from abuse.' " (Opn., p. 27.) But the court ruled that this privilege did not apply because the republication was made with malice. (Opn., pp. 30-31.) That ruling was based on findings that will discourage future investigations.

The court's ruling that the jury could have found malice was based, in large part, on inferences that the employees who had complained about King "were biased and hostile toward King" and "may have [had] a motive to lie." (Opn., p. 29.) All employees who complain to HR about their bosses could be said to be biased and hostile and might have a motive to lie. Thus, every company that finds such complaints credible and terminates the supervisor runs the risk that a jury later will disagree and, on that basis, find the company acted with malice and defamed the supervisor by repeating the allegations within the company. A finding of malice, and the resulting loss of the common-interest privilege, should not be based on a difference of opinion about the credibility of the employees who lodged the complaints.

II. Review is necessary to clarify the definition of a managing agent for purposes of awarding punitive damages.

The Court of Appeal upheld the jury's finding that U.S. Bank was liable for punitive damages because the human resources generalist who conducted the HR investigation was a "managing agent" under Civil Code section 3294, subdivision (b). (Opn., pp. 42-43.) The court below reached this conclusion despite the fact that " '[t]he term "managing agent" includes "only those corporate employees who exercise substantial independent authority and judgment in their corporate decision-making so that their decisions ultimately determine corporate policy." ' " (Opn., p. 40.)

The Court of Appeal's interpretation of the test for determining whether a corporate employee is a managing agent is so expansive that nearly any employee could expose a company to punitive liability. The finding of malice in this case was based on the actions of a human resources generalist whose relevant discretion involved determining the manner in which she investigated King's conduct (e.g., who she spoke with and what she said to them). From this the court held that the jury could have reasonably

concluded that the human resources generalist "was the managing agent in the role she performed for the corporation when she made the defamatory statements." (Opn, pp. 42.) Under that test, nearly any employee who exercises discretion in performing her duties could expose a company to punitive liability. This not only grossly expands punitive damage liability, it also discourages companies from giving employees reasonable discretion to perform important duties, like investigating harmful conduct within the company, given the countervailing threat of punitive liability for their errors.

Punitive damages should be restricted to cases that involve the actions of persons whose discretionary authority determines corporate policy. Basing punitive damages on an exercise of discretion that is far below this threshold creates all the wrong incentives. Citing this opinion, litigants will be encouraged to seek punitive damages based on the actions of lower level employees. And that will discourage companies from giving employees the discretion to perform important functions, like investigating alleged abusive behavior.

III. The Court of Appeal's application of this court's decision in *Conservatorship of O.B.* deprives it of any practical effect.

The jury awarded punitive damages pursuant to Civil Code section 3294, which permits such an award "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice . . . ." U.S. Bank argued that the jury's finding was not supported by clear and convincing evidence.

This court held in *Conservatorship of O.B.*: "[W]hen reviewing a finding that a fact has been proved by clear and convincing evidence, the question before the appellate court is whether the record as a whole contains substantial evidence from which a reasonable factfinder could have found it highly probable that the fact was true." (9 Cal.5th at pp. 995-996.) *O.B.* was decided on July 27, 2020. The opinion below was filed the following day, on July 28, 2020, and quotes *O.B.* in stating the standard of review. (Opn., pp. 37-38.) But the remainder of the court's discussion of substantial evidence does not appear to apply that standard. By failing to give any effect to the clear-and-convincing-evidence standard, the published decision will at best cause confusion in the lower courts and at worst establish a precedent negating that standard.

The sentence following the quotation of *O.B.* concludes "there was substantial evidence from which the jury could have found McGovern . . . made the defamatory statements with malice . . . ." (Opn., p. 38.) But under *O.B.*, the question should have been whether the jury "could have found it highly probable that the fact was true." (9 Cal.5th at p. 996.) Although the Court of Appeal quoted this court's brand new "highly probable" standard, it does not appear that the court actually applied it.

The Court of Appeal again failed to apply the *O.B.* standard three paragraphs later. It quoted the correct language from *O.B.*, concluding that there was substantial evidence from which the jury could have found it "highly probable" that McGovern acted with malice. But the court below then explained its conclusion by stating that "[t]he jury reasonably could have concluded McGovern had reasons to believe the statements she made regarding her findings were false, she made them anyway . . . ." (Opn., p. 39.) The standard under *O.B.* is not that the jury reasonably could have concluded there was malice, but that the jury reasonably could have concluded it was highly probable there was malice. The court purported to apply the correct standard, but it does not appear that it did so.

The Court of Appeal repeated this pattern in the next paragraph, stating: "The jury reasonably could have inferred McGovern made the defamatory statements willfully and intentionally . . . ." (Opn., p. 39.) The correct question, however, is whether the jury reasonably could have found it was highly probable that McGovern made the defamatory statement willfully and intentionally.

Consistently, the court below concluded "there was substantial evidence from which the jury could conclude McGovern was a managing agent." (Opn., p. 40.) The Court of Appeal did not explain whether there was substantial evidence from which the jury could have concluded it was highly probable that McGovern was a managing agent.

The published opinion in this case says one thing and then does another. This case presents an excellent opportunity for this court to demonstrate how to apply the newly stated standard of review in *O.B.*

Conclusion

The Chamber of Commerce of the United States of America urges this court to grant review.

Respectfully Submitted,
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