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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

DAIRY AMERICA, INC.,

CASE NO. CV F 07-0537 LJO SMS

Plaintiff,

**SUMMARY ADJUDICATION DECISION  
ON PUNITIVE DAMAGES**

vs.

(Docs. 177, 178.)

NEW YORK MARINE AND GENERAL  
INSURANCE COMPANY, et. al,

Defendants.

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**INTRODUCTION**

Defendant Hartford Casualty Insurance Company (“Hartford”) seeks summary adjudication on plaintiff Dairy America, Inc.’s (“Dairy America’s”) punitive damages claim in the absence of clear and convincing evidence that a Hartford officer, director or managing agent denied in bad faith Dairy America’s cargo loss claim. Dairy America responds that Hartford inadequately investigated Dairy America’s claim and concealed information to invoke coverage for Dairy America’s loss to constitute bad faith. Dairy America further claims that the Hartford adjuster responsible to investigate and deny Dairy America’s claim is a Hartford managing agent. This Court considered Hartford’s summary adjudication motion on the record without oral argument.<sup>1</sup> For the reasons discussed below, this Court DENIES Hartford summary adjudication on Dairy America’s punitive damages claim.

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<sup>1</sup> This Court carefully reviewed and considered all arguments, points and authorities, declarations, testimony, statements of undisputed facts and responses thereto, objections and other papers filed by the parties. Omission of reference to an argument, document, objection or paper is not to be construed to the effect that this Court did not consider the argument, document, objection or paper. This Court thoroughly reviewed, considered and applied the evidence it deemed admissible, material and appropriate for summary adjudication. Unless otherwise noted, this Court does not rule on objections in a summary adjudication context.

1 **BACKGROUND**

2 **The Parties**

3 Dairy America, a Fresno corporation, markets and sells powder milk products for shipment  
4 throughout the United States and foreign countries.

5 In late summer or early fall 2004, Hartford issued a Special Multi-Flex Policy (“Hartford policy”)  
6 to Dairy America with an October 1, 2004 to October 1, 2005 policy period. Dairy America  
7 characterizes the Hartford policy as “general commercial, all-risk” to have insured its powder milk  
8 product in transit.

9 **Denial Of Hurricane Katrina Loss**

10 On August 29, 2005, Hurricane Katrina destroyed 59 loads of Dairy America’s powder milk  
11 product at a Gulfport, Mississippi warehouse (“warehouse”). On August 31, 2005, Dairy America  
12 presented its claim to Hartford for the 59 loads. Dairy America also presented a claim to its ocean cargo  
13 insurer New York Marine and General Insurance Company (“NY Marine”).<sup>2</sup>

14 Dairy America’s claim was assigned to Hartford Senior General Adjuster Michael Spetz (“Mr.  
15 Spetz”). Dairy America characterizes Mr. Spetz as “responsible for investigating the claim and  
16 determining coverage.” Hartford retained Matthews, Matson & Kelley, Ltd. (“MMK”), and MMK  
17 marine surveyor Stan Kays to investigate Dairy America’s loss. Mr. Spetz’ October 2, 2005 email to  
18 MMK senior adjuster Paul McSweeney (“Mr. McSweeney”) stated:

19 I spoke to Stan Kay[s] today. He indicated to me that he had sent you some preliminary  
20 information related to the loss. Could you please forward this to me. It does not look  
like our policy will cover the loss.<sup>3</sup>

21 Mr. Spetz also sent an October 2, 2005 email to Hartford home office claims consultant  
22 Theodore Dombrowski (“Mr. Dombrowski”) regarding expected denial of Dairy America’s claim:

23 I have put together a denial letter on this loss. Let me know if you have any comments.  
24 It appears to me that we would not have any coverage for the loss as we have discussed

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25 <sup>2</sup> NY Marine, a former defendant who was granted summary judgment on Dairy America’s breach of  
26 insurance contract claim, paid for the loss of 36 loads which initiated transit after the inception of NY Marine’s ocean cargo  
27 policy. NY Marine denied coverage for the 23 loads which were in transit prior to inception of the NY Marine policy. In  
this action, Dairy America seeks payment for the 23 loads.

28 <sup>3</sup> Dairy America notes that Mr. Spetz’ email preceded Hartford’s receipt of Mr. Kays’ preliminary written  
report.

1 previously. . . I **still do not have a report from the surveyor**, but have spoken to him  
2 and it looks like the 6 containers that were loaded are submerged in the gulf and that the  
3 stock that was not loaded into containers and just sitting in the warehouse, was washed  
4 out into the gulf. (Bold added.)

5 By his October 13, 2005 email, Mr. McSweeney provided Mr. Spetz with Mr. Kays' preliminary  
6 report, dated September 25, 2005. Mr. McSweeney had been on vacation to explain delay to provide  
7 Mr. Kays' preliminary report, which explained:

8 . . . the P & O sheds, located on the West Pier, including the shed where the milk product  
9 was stored, were struck by a 25' tidal wave (surge wave) which completely blew out all  
10 shed building sides, doors, etc., and/or caused sheds to parially [sic] or completely  
11 collapse and fall apart. All cargoes within these sheds including the Milk Powder was  
12 swept/carried away by the aforesaid [sic] storm surge.

13 By an October 15, 2005 email, Mr. Spetz forwarded Mr. Kay's preliminary report to Mr.  
14 Dombrowski and noted "no questions about the flood issue as I see it." Mr. Dombrowski's October 17,  
15 2005 email to Mr. Spetz responded: "From your comments this does appear to flood related and is your  
16 call."

17 Mr. Spetz' October 19, 2005 letter ("first denial letter") to Dairy America Comptroller Jean  
18 McAbee ("Ms. McAbee") denied Dairy America's claim based on the Hartford policy's "Flood, Water  
19 Under the Ground" exclusion ("flood exclusion").<sup>4</sup> The first denial letter stated that "[w]e have  
20 determined that there would be no coverage for this loss."

#### 21 Further Investigation Into Loss

22 In an October 24, 2005 email to Mr. Spetz, Michael Head ("Mr. Head"), a claims executive of  
23 Dairy America's insurance broker Arthur J. Gallagher, Inc. ("Gallagher"),<sup>5</sup> raised wind damage as a

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24 <sup>4</sup> The flood exclusion provides:

25 a. We will not pay for loss or damage caused by, resulting from, arising out of, or in any way related to:

26 (1) Flood which means:

27 (a) Surface water, waves, tidal water, tidal waves, tsunamis, or overflow of any natural  
28 or man made body of water from its boundaries, all whether driven by wind or not.

29 . . .  
<sup>5</sup> This Court granted Gallagher, a former defendant, summary judgment on Dairy America's professional  
negligence and related claims against Gallagher

1 cause of Dairy America's loss:

2 If The Hartford intends to argue that flood was the sole cause of the insured's loss, I  
3 assume that the carrier can provide documentation confirming. Given the magnitude of  
4 the storm, it is our position that the warehouse would have first been damaged by wind  
long before any alleged flood, resulting in a covered loss. . . . Any wind damage to the  
insured's warehouse would certainly have resulted in damage to the insured's product.

5 Mr. Spetz forwarded Mr. Head's email to Mr. Dombrowski to keep Mr. Dombrowski "advised as the  
6 stock was valued at \$2,000,000."

7 Mr. Spetz followed up with an October 25, 2005 email to surveyor Mr. Kays to ask:

8 Did you take any photos of the warehouse area where the insured's product was located?  
9 I [sic] there is any chance that the warehouse was damaged by wind and our insured's  
product or a portion of it was damaged before the storm surge?

10 On October 25, 2005, Mr. Kays went to the warehouse and took photographs. Prior to that date,  
11 Mr. Kays had not determined where Dairy America's product was stored in the warehouse.<sup>6</sup>

12 Mr. Kays prepared an October 28, 2005 final report regarding his October 25, 2005 follow-up  
13 survey. As to the cause of Dairy America's loss, Mr. Kays' final report provided:

14 It is our belief and opinion that the extensive water damages sustained to the captioned  
15 shipment reportedly stowed in eight (8) ocean containers as well as the greater portion  
16 of the shipment stored/staged in stuffing Warehouse No. 16, West Pier, Port Gulfport,  
17 Mississippi, resulted from a reported 25' tidal wave (surge wave) associated with  
Hurricane Katrina passing by and making landfall to the West of Gulfport, Mississippi,  
on August 29, 2005. In our opinion the reported 25' tidal wave (surge wave) caused the  
sides of Warehouse No. 16 to be blown out and Powdered Dry Milk cargo to be  
swept/carried away and damaged.

18  
19 Dairy America notes that the report neither mentioned investigation into wind damage nor acknowledged  
20 Mr. Spetz' October 25, 2005 email inquiry as to wind damage.

21 Twenty photos were attached to Mr. Kays' October 28, 2005 report. Eight photos depicted the  
22 warehouse and 12 photos depicted damaged shipping containers. Dairy America notes that one photo  
23 depicts "a large patch of sunlight shining down into the warehouse storing Dairy America's lost

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24  
25 <sup>6</sup> In his deposition, Mr. Kays explained the difficulty to inspect the scene:

26 . . . When you go into a situation like this and you can't find your cargo, you can't find other cargos, there's  
27 complete and total devastation, I don't even know what building my cargo was in or the different cargos  
were in.

28 There was nobody there to talk to. There was nobody there to point me in a direction and say,  
This is where it was. This is what happened. You know, you're just put in a situation . . .

1 product.” Dairy America further notes that one of Mr. Kays’ two photos of the warehouse interior  
2 “shows sunlight shining through the roof” and that Mr. Kays October 28, 2005 report did not note roof  
3 damage.

4 Pictometry International took a September 9, 2005 aerial photo of the warehouse which stored  
5 Dairy America’s powder milk product. According to Dairy America, the photo depicts “an  
6 approximately 2,000 square foot hole in the roof of the warehouse in the area where Dairy America’s  
7 product was stored.” Dairy America notes that Mr. Kays did not take “any direct pictures” of the  
8 warehouse roof’s large hole and did not note the hole in his reports.

9 In his deposition, Mr. Spetz explained that Hartford did not “insure the building so I wouldn’t  
10 be concerned with the roof”:

11 Q. But considering that Gallagher had suggested that the wind came up and caused  
12 the damage to the product, wouldn’t you be then concerned whether the roof was  
intact?

13 A. We went back and spoke to Stan Kays and his conclusion was the same, that  
14 there was a storm surge and it was not caused from wind.

15 Q. And you testified in your first deposition that the roof was intact, correct?

16 A. As far as I know yes, the roof was intact.

17 . . .

18 Q. And did you see any damage in the photographs sent to you by Mr. Kays that was  
consistent, in your experience, with damage to a structure caused by wind?

19 A. I did not.<sup>7</sup>

20 In his deposition, Mr. Kays noted that he “didn’t see the damage to the roof” and “didn’t do an  
21 investigation of it.” When asked if he did “a visual inspection of inside the building,” Mr. Kays  
22 responded:

23 I really wasn’t there for the building. I was there looking for the cargo or  
24 evidence that the cargo was there. I was looking for damaged cargo. The building was  
25 incidental, in that this is where the cargo was housed. I didn’t know it would be an issue  
later.

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26 <sup>7</sup> In a prior deposition, Mr. Spetz testified that based on photographs “there’s not any wind damage, the roof  
27 is totally intact. The sides are intact. All the side lights are intact. And you’ve got damage where the siding is taken out on  
28 this building. It was all shoved in and it all tore off approximately . . . 10, 18 feet up in the air, which is basically indicative  
of the surge coming in and going through the building.”

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. . .

. . . Everything was flushed, in my opinion, out of the warehouse due to wave and surge action.

Mr. Kays further testified that “the roof was intact” and “[i]f it wasn’t intact, I would have made mention of it in my report.” Mr. Kays testified that he did not investigate light shining through the warehouse roof. Dairy America points to the absence in Mr. Kays’ report of photos of “the approximately 2000 square foot hole in the warehouse roof,” although his photos showed light shining through the warehouse’s roof and the hole existed when he inspected the warehouse.

Dairy America notes the opinion of Hartford expert engineer David Vanderostyne (“Mr. Vanderostyne”) that the warehouse roof “failed due to wind . . . during the peak of the storm.” Mr. Vanderostyne noted that peak winds hit the warehouse after “a significant amount of water penetrated the warehouse . . . to start damaging the product.”

In response to Gallagher claims executive Mr. Head’s telephone request, Mr. Spetz, on November 28, 2005, emailed Mr. Head three photos of the warehouse, none of which, using Dairy America’s words, “showing sunlight shining through the roof.”

With his December 2, 2005 email, Gallagher vice president Dennis Olsen (“Mr. Olsen”) requested Mr. Spetz to provide “additional photos of the building including interior pictures.” Mr. Spetz responded with a December 19, 2005 email attaching 11 photos of shipping containers and noting that Mr. Spetz “did not have any photos of the interior of the building.”<sup>8</sup>

**Reconsideration Of Denial**

With his March 3, 2006 letter to Mr. Spetz, Dairy America’s counsel Glenn Holder (“Mr. Holder”) requested reconsideration of denial in that wind prior to flooding may have contributed to the loss. Mr. Holder’s letter further requested “an explanation of Hartford’s denial of coverage, including a report of any [sic] how the investigation was conducted and how the conclusion was reached that the storm surge was entirely responsible for the damage.”

Mr. Spetz’ April 24, 2006 letter (“reopening letter”) to Mr. Holder stated that “[a]lthough we are

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<sup>8</sup> Dairy America characterizes the statement as untrue given that Mr. Kays’ October 28, 2005 report included two warehouse interior photos.

1 reopening our investigation, at the present time, our position remains as stated in our October 19, 2005  
2 letter.” Mr. Spetz’ letter explained:

3 In response to your questions, the photographs of the loss location were provided  
4 by a surveyor jointly retained by us and Dairy America’s other insurer. The surveyor did  
5 personally inspect the location and report that the damage was caused by tidal  
6 surge/waves (i.e., flood). Although you speculate that some damage may have been  
7 caused by wind prior to the flood, we have no information supporting that scenario.  
8 Please provide us with any such information.

9 Mr. Spetz’ September 13, 2006 letter (“second denial letter”) to Mr. Holder reconfirmed  
10 Hartford’s “position that the flood exclusion applies” to “again decline payment of this claim” in that  
11 the damage is “consistent with the scenario of tidal (surge) waves impacting the building.” The second  
12 denial letter concluded:

13 The surveyor provided us with several photographs of the building, showing that after  
14 the hurricane, the lower portions of the building were missing, but the upper portions and  
15 the roof were intact. We find the damage to be consistent with the scenario of tidal  
16 (surge) waves impacting the building.

17 In your letter of March 13, 2006, you asserted that some of the damage might have been  
18 caused by wind prior to the flood. **We have no evidence** to support that scenario. In our  
19 letter of April 24, 2006, we invited you to submit such evidence, but we have received  
20 no response. Based on the information provided by our surveyor and the absence of any  
21 contrary information, we must reaffirm our position that the flood exclusion bars  
22 coverage for Dairy America’s loss. (Bold added.)

### 23 Dairy America’s Claims

24 Dairy America proceeds on its operative third amended complaint (“TAC”) to allege that  
25 Hartford’s failure to pay Dairy America’s claim breached the Hartford policy and its implied covenant  
26 of good faith and fair dealing and that Hartford failed to “conduct a reasonable investigation into the  
27 cause of Plaintiff’s claim.” The TAC seeks to recover \$971,980 for Dairy America’s remaining unpaid  
28 loss and punitive damages for Hartford’s bad faith claim denial.

### 29 Dairy America’s Expert Opinion On Hartford’s Bad Faith

30 To support its punitive damages claim, Dairy America relies on former claims executive and  
31 current consultant James O’Malley (“Mr. O’Malley”), whom Dairy America retained to address  
32 “whether Hartford’s [sic] or its agents acted in bad faith according to industry standards” and whether  
33 the record reveals “conduct which is dishonest, fraudulent or oppressive in the context of industry  
34 standards.” In his declaration, Mr. O’Malley opines that Hartford “investigated and handled Dairy

1 America's claim in bad faith with intentional disregard for the rights of Dairy America under their [sic]  
2 policy with Hartford." Mr. O'Malley further opines that Hartford "acted in a dishonest, fraudulent and  
3 oppressive manner in investigating and handling Dairy America's claim" "to keep Dairy America from  
4 knowing that there was damage to the roof of the warehouse in order to prevent Dairy America from  
5 knowing that they had a valid insurance claim."

6 Mr. O'Malley bases his opinions on his following observations:

- 7 1. Mr. Spetz' October 25, 2005 email to Mr. Kays shows that Mr. Spetz "did not consider  
8 or investigate the possibility that Dairy America's product may have been damaged prior  
9 to the storm surge or discuss this possibility with Stan Kays before denying Dairy  
10 America's claim";
- 11 2. When Mr. Spetz sent his April 24, 2006 reopening letter to claim Hartford lacked  
12 "information supporting the position that the damage may have been caused by wind  
13 prior to the storm surge[,] he was in possession of photographic evidence of the fact that  
14 the warehouse had been damaged by wind as well as the storm surge";
- 15 3. An experienced insurance surveyor "could not have conducted an inspection of this  
16 warehouse and not seen the large hole in the roof of the warehouse and not known that  
17 this roof damage was evidence of wind damage" and would have conducted "an  
18 investigation of the building where the insured product was located to insure that there  
19 was no wind related damage to the building";
- 20 4. Mr. Kays "intentionally chose" to exclude his failure "to take photographs of the large  
21 hole in the warehouse roof where Dairy America's product was located" and "to disclose  
22 the existence of this hole in the roof in his final report" because such evidence "was  
23 contrary to his previously stated opinion that the sole cause of the damage to Dairy  
24 America's product was from storm surge";
- 25 5. Mr. Spetz failed to provide Mr. Head all warehouse photos to prevent Dairy America  
26 from seeing "evidence of wind damage" to the warehouse roof;
- 27 6. Mr. Spetz denied he possessed photos of the warehouse interior "because one of those  
28 photographs showed damage to the roof of the warehouse" although Mr. Kays' October



1 28, 2005 final report included warehouse photos;

2 7. In response to Mr. Head's October 24, 2005 email to consider wind damage prior to  
3 storm surge, Hartford "did nothing but send an email to the surveyor asking him if it was  
4 possible the warehouse was damaged prior to the storm surge";

5 8. After reopening investigation, Hartford "conducted no further investigation whatsoever  
6 into the possibility of wind damage" prior to the storm surge;

7 9. Hartford failed to confirm whether Stan Kays investigated wind as contributing to  
8 damage as requested in the October 25, 2005 email and claimed to lack "information  
9 supporting the position that damage may have been caused by wind prior to the flood  
10 when Hartford was already in possession of sufficient evidence to know that there was  
11 wind damage to the warehouse" and failed to investigate "if this damage was done prior  
12 to the storm surge"; and

13 10. Mr. Spetz and Mr. Kays' testimony of no wind damage to the warehouse and that its roof  
14 was intact demonstrates that "Hartford did not conduct an investigation into the  
15 possibility that the wind had damaged the warehouse prior to the storm surge."

16 **Absence Of Wrongful Conduct Of An Officer, Director Or Managing Agent**

17 Hartford challenges Dairy America's punitive damages claim in the absence of clear and  
18 convincing evidence that a Hartford officer, director or managing agent engaged in wrongful conduct  
19 to warrant punitive damages. Hartford points to the roles within Hartford of Mr. Spetz and home office  
20 claims consultant Mr. Dombrowski, whom Hartford identifies as the persons chiefly responsible to deny  
21 Dairy America's claim.

22 In his deposition, Mr. Spetz described his responsibilities:

23 . . . I work for the large loss organization part of the Hartford – so as a general adjustor  
24 or senior general adjustor, we actually handle any loss that's a hundred thousand dollars  
25 or more. So I could get an assignment for a hundred thousand dollar loss or one for \$10  
million. And my job is to go out and inspect the loss and determine what the damages  
are and adjust it.

26 Q. Now, does that require you to be in the field when you say inspect the loss?

27 A. Yes.

28

1 Mr. Spetz further explained that he reviews forms and determines “when I do the investigation, do we  
2 have a loss that’s covered or not.”

3 Mr. Spetz pointed out that coverage decisions are “elevated”:

4 Q. . . . ultimately, who would determine whether or not there was coverage? It  
5 wouldn’t be you, would it?

6 . . .

7 A. I would do the investigation, do the inspection. Okay. If there were questions  
8 about whether we had a covered loss or not then that would be elevated.

9 Q. And elevated would mean what?

10 A. It would go up the chain to the supervisor and then to the home office.

11 Q. And who had the final say in that in terms of coverage?

12 A. In coverage, well, it would depend on the amount of loss. But in most cases,  
13 probably the home office consultant.

14 . . .

15 . . . if there was a question of coverage, it would still have to go up to the  
16 home office for a final decision on whether we covered a loss or not.

17 In his declaration, Mr. Dombrowski explains that he assists claims personnel regarding inquiries  
18 as to policy forms, including inland marine, ocean marine, international, property, and livestock, and  
19 responds to “discreet and individualized questions from claims personnel regarding pending claims.”  
20 Mr. Dombrowski notes that his assistance “applies solely to the individual facts of any given loss” and  
21 that his input is limited to “individual claims” which he is asked to review.

22 Mr. Dombrowski denies:

- 23 1. Serving as a Hartford director, officer or managing agent;
- 24 2. Responsibility to create Hartford “corporate policies” or “general principles”; and
- 25 3. “[S]ubstantial authority over decisions that set the general principals and rules that  
26 govern the adjustment and resolution of claims.”

27 As to Dairy America’s loss, Mr. Dombrowski notes that he “responded to several emails and  
28 telephone calls” from Mr. Spetz, who “had several questions regarding whether the product was still ‘in  
transit’ or was being stored for a longer period of time at the Port of Gulfport.” Mr. Dombrowski  
declares that Mr. Spetz informed Mr. Dombrowski of his conclusion “that the loss to the milk powder

1 product was caused by the storm surge” and that Mr. Spetz made the “coverage decision regarding the  
2 applicability of flood exclusion.” Mr. Dombrowski concludes that he “was not requested to provide  
3 input on this issue regarding the Dairy America claim.”

4 In his declaration, Dairy America attorney Charles Manock (“Mr. Manock”) notes that he  
5 reviewed Hartford’s claim file which lacks evidence of “correspondence or other documents showing  
6 that Mr. Spetz received any guidance from the Hartford’s home office in handling and investigating  
7 Dairy America’s claim.”

## 8 DISCUSSION

### 9 Summary Judgment/Adjudication Standards

10 Hartford seeks summary adjudication that Dairy America’s punitive damages claim is barred  
11 given the absence of fraud, oppression or wrongdoing by a Hartford officer, director or managing agent.

12 F.R.Civ.P. 56(b) permits a “party against whom relief is sought” to seek “summary judgment on  
13 all or part of the claim.” “A district court may dispose of a particular claim or defense by summary  
14 judgment when one of the parties is entitled to judgment as a matter of law on that claim or defense.”  
15 *Beal Bank, SSB v. Pittorino*, 177 F.3d 65, 68 (1<sup>st</sup> Cir. 1999).

16 Summary judgment/adjudication is appropriate when there exists no genuine issue as to any  
17 material fact and the moving party is entitled to judgment as a matter of law. F.R.Civ.P. 56(c);  
18 *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986); *T.W.*  
19 *Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9<sup>th</sup> Cir. 1987). The purpose of  
20 summary judgment/adjudication is to “pierce the pleadings and assess the proof in order to see whether  
21 there is a genuine need for trial.” *Matsushita Elec.*, 475 U.S. at 586, n. 11, 106 S.Ct. 1348; *International*  
22 *Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1405 (9<sup>th</sup> Cir. 1985).

23 On summary judgment/adjudication, a court must decide whether there is a “genuine issue as to  
24 any material fact,” not weigh the evidence or determine the truth of contested matters. F.R.Civ.P. 56(c);  
25 *Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 834 (9<sup>th</sup> Cir. 1997); *see Adickes v. S.H. Kress*  
26 *& Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598 (1970); *Poller v. Columbia Broadcast System*, 368 U.S. 464,  
27 467, 82 S.Ct. 486 (1962); *Loehr v. Ventura County Community College Dist.*, 743 F.2d 1310, 1313 (9<sup>th</sup>  
28 Cir. 1984). The evidence of the party opposing summary judgment/adjudication is to be believed and

1 all reasonable inferences that may be drawn from the facts before the court must be drawn in favor of  
2 the opposing party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505 (1986);  
3 *Matsushita*, 475 U.S. at 587, 106 S.Ct. 1348. The inquiry is “whether the evidence presents a sufficient  
4 disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as  
5 a matter of law.” *Anderson*, 477 U.S. at 251-252, 106 S.Ct. 2505.

6 To carry its burden of production on summary judgment/adjudication, a moving party “must  
7 either produce evidence negating an essential element of the nonmoving party’s claim or defense or  
8 show that the nonmoving party does not have enough evidence of an essential element to carry its  
9 ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210  
10 F.3d 1099, 1102 (9<sup>th</sup> Cir. 2000); *see High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d  
11 563, 574 (9<sup>th</sup> Cir. 1990). “[T]o carry its ultimate burden of persuasion on the motion, the moving party  
12 must persuade the court that there is no genuine issue of material fact.” *Nissan Fire*, 210 F.3d at 1102;  
13 *see High Tech Gays*, 895 F.2d at 574. “As to materiality, the substantive law will identify which facts  
14 are material. Only disputes over facts that might affect the outcome of the suit under the governing law  
15 will properly preclude the entry of summary judgment.” *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505.

16 “If a moving party fails to carry its initial burden of production, the nonmoving party has no  
17 obligation to produce anything, even if the nonmoving party would have the ultimate burden of  
18 persuasion at trial.” *Nissan Fire*, 210 F.3d at 1102-1103; *see Adickes*, 398 U.S. at 160, 90 S.Ct. 1598.  
19 “If, however, a moving party carries its burden of production, the nonmoving party must produce  
20 evidence to support its claim or defense.” *Nissan Fire*, 210 F.3d at 1103; *see High Tech Gays*, 895 F.2d  
21 at 574. “If the nonmoving party fails to produce enough evidence to create a genuine issue of material  
22 fact, the moving party wins the motion for summary judgment.” *Nissan Fire*, 210 F.3d at 1103; *see*  
23 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548 (1986) (“Rule 56(c) mandates the entry of  
24 summary judgment, after adequate time for discovery and upon motion, against a party who fails to make  
25 the showing sufficient to establish the existence of an element essential to that party’s case, and on  
26 which that party will bear the burden of proof at trial.”)

27 “But if the nonmoving party produces enough evidence to create a genuine issue of material fact,  
28 the nonmoving party defeats the motion.” *Nissan Fire*, 210 F.3d at 1103; *see Celotex*, 477 U.S. at 322,

1 106 S.Ct. 2548. “The amount of evidence necessary to raise a genuine issue of material fact is enough  
2 ‘to require a jury or judge to resolve the parties’ differing versions of the truth at trial.” *Aydin Corp.*  
3 *v. Loral Corp.*, 718 F.2d 897, 902 (quoting *First Nat’l Bank v. Cities Service Co.*, 391 U.S. 253, 288-  
4 289, 88 S.Ct. 1575, 1592 (1968)). “The mere existence of a scintilla of evidence in support of the  
5 plaintiff’s position will be insufficient.” *Anderson*, 477 U.S. at 252, 106 S.Ct. 2505.

6 Under F.R.Civ.P. 56(d)(2), a summary judgment/adjudication motion, interlocutory in character,  
7 may be rendered on the issue of liability alone. “In cases that involve . . . multiple causes of action,  
8 summary judgment may be proper as to some causes of action but not as to others, or as to some issues  
9 but not as to others, or as to some parties, but not as to others.” *Barker v. Norman*, 651 F.2d 1107, 1123  
10 (5<sup>th</sup> Cir. 1981); *see also Robi v. Five Platters, Inc.*, 918 F.2d 1439 (9<sup>th</sup> Cir. 1990); *Cheng v.*  
11 *Commissioner Internal Revenue Service*, 878 F.2d 306, 309 (9<sup>th</sup> Cir. 1989). A court “may grant  
12 summary adjudication as to specific issues if it will narrow the issues for trial.” *First Nat’l Ins. Co. v.*  
13 *F.D.I.C.*, 977 F.Supp. 1051, 1055 (S.D. Cal. 1977).

14 As discussed below, Dairy America raises factual issues whether Hartford’s conduct, by a  
15 managing agent, was malicious, oppressive or fraudulent in conscious disregard of Dairy America’s  
16 rights under the Hartford policy to bar summary adjudication.

### 17 **Punitive Damages – Malice, Oppression Or Fraud**

#### 18 ***California Law In General***

19 California Civil Code section 3294 (“section 3294”) provides that in an action “for breach of an  
20 obligation not arising from contract,” a plaintiff may seek punitive damages “where it is proven by clear  
21 and convincing evidence that the defendant has been guilty of oppression, fraud, or malice.” Cal. Civ.  
22 Code, § 3294(a). Section 3294(c)(1)–(3) defines:

- 23 1. “Malice” as “conduct which is intended by the defendant to cause injury to the plaintiff  
24 or despicable conduct which is carried on by the defendant with a willful and conscious  
25 disregard of the rights and safety of others”;
- 26 2. “Oppression” as “despicable conduct that subjects a person to cruel and unjust hardship  
27 in conscious disregard of that person’s rights”; and
- 28 3. “Fraud” as “an intentional misrepresentation, deceit, or concealment of a material fact

1 known to the defendant with the intention on the part of the defendant of thereby  
2 depriving a person of property or legal rights or otherwise causing injury.”

3 Punitive damages are “available to a party who can plead and prove the facts and circumstances  
4 set forth in Civil Code section 3294.” *Hilliard v. A.H. Robbins Co.*, 148 Cal.App.3d 374, 392, 196  
5 Cal.Rptr. 117 (1983). Punitive damages are never awarded as a matter of right, are disfavored by the  
6 law, and should be granted with the greatest of caution and only in the clearest of cases. *Henderson v.*  
7 *Security Pacific National Bank*, 72 Cal.App.3d 764, 771, 140 Cal.Rptr. 388 (1977).

8 “Punitive damages aren’t available in California for simple breaches of contract, no matter how  
9 willful.” *Slottow v. American Cas. Co.*, 10 F.3d 1355, 1361 (9<sup>th</sup> Cir. 1993). “Rather, the breach must  
10 have been tortious, and the breaching party must have ‘been guilty of oppression, fraud, or malice.’”  
11 *Slottow*, 10 F3d at 1361 (quoting Cal. Civ. Code, § 3294).

12 “‘Clear and convincing’ evidence requires a finding of high probability.” *Mock v. Michigan*  
13 *Millers Mut. Ins.*, 4 Cal.App.4th 306, 332, 5 Cal.Rptr.2d 594 (1992). The clear and convincing standard  
14 requires evidence “‘so clear as to leave no substantial doubt’; ‘sufficiently strong to command the  
15 unhesitating assent of every reasonable mind.’” *Mock*, 4 Cal.App.4th at 332, 5 Cal.Rptr.2d 594 (citations  
16 omitted.)

### 17 ***Punitive Damages In Claims Handling Context***

18 “Evidence that an insurer has violated its duty of good faith and fair dealing does not thereby  
19 establish that it has acted with the requisite malice, oppression or fraud to justify an award of punitive  
20 damages.” *Mock*, 4 Cal.App.4th at 328, 5 Cal.Rptr.2d 594. To establish that “an insurer's conduct has  
21 gone sufficiently beyond mere bad faith to warrant a punitive award, it must be shown by clear and  
22 convincing evidence that the insurer has acted maliciously, oppressively or fraudulently.” *Mock*, 4  
23 Cal.App.4th at 328, 5 Cal.Rptr.2d 594. Conduct required to impose punitive damages for the tortious  
24 breach of contract “is of a different dimension” than that required to find bad faith. *Shade Foods, Inc.*  
25 *v. Innovative Products Sales & Marketing, Inc.*, 78 Cal.App.4th 847, 890, 93 Cal.Rptr.2d 364 (2000).

26 “Where the plaintiff's ultimate burden of proof will be by ‘clear and convincing’ evidence, the  
27 higher standard of proof must be taken into account in ruling on a summary judgment motion.” *Basich*  
28 *v. Allstate Ins. Co.*, 87 Cal.App.4th 1112, 1118, 105 Cal.Rptr.2d 153 (2001) (affirming summary

1 adjudication that insurer was not subject to punitive damages for bad faith). To meet the clear and  
2 convincing standard, “some evidence should be required that is inconsistent with the hypothesis that the  
3 tortious conduct was the result of a mistake of law or fact, honest error of judgment, over-zealousness,  
4 mere negligence or other such noniniquitous human failing.” *Tomaselli*, 25 Cal.App.4th at 1288, n. 14,  
5 31 Cal.Rptr.2d 433 (quoting *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 362 (Ind. 1982)).

6 An insurer’s unreasonable actions do not equate to malice. See *Patrick v. Maryland Cas. Co.*,  
7 217 Cal.App.3d 1566, 1575, 267 Cal.Rptr. 24 (1990). For instance, punitive damages may not be  
8 imposed for an insurer’s actions “found to be negligent (failing to follow up information provided by  
9 the insured), overzealous (taking an unnecessary deposition under oath of the insured), legally erroneous  
10 (relying on an endorsement which was not shown to have been delivered), and callous (failing to  
11 communicate).” *Tomaselli*, 25 Cal.App.4th 1269, 1288, 31 Cal.Rptr.2d 433. A “consistent and  
12 unremedied pattern of egregious insurer practices’ [is required] in order for the insurer’s ‘bad faith’  
13 conduct to rise to the level of malicious disregard of the insured’s rights so as to warrant the imposition  
14 of punitive damages.” *Mock*, 4 Cal.App.4th at 329, 5 Cal.Rptr.2d 594 (1992) (citations omitted).

15 Hartford broadly argues that it engaged in no fraud, oppression or malice in handling Dairy  
16 America’s claim. Hartford points to its timely claim investigation and Mr. Spetz’ determination that a  
17 25-foot tidal wave caused Dairy America’s loss based on “preliminary evidence, reports, and a final  
18 report” of marine surveyor Mr. Kays. Hartford explains that it agreed to reconsider Dairy America’s  
19 claim to address whether wind caused damage and that Dairy America failed to submit support  
20 documentation. Hartford concludes that nothing contradicts determination that the tidal wave caused  
21 Dairy America’s loss.

22 Dairy America responds that it “has set forth evidence sufficient to allow a jury to find a ‘high  
23 probability’ that the Hartford’s actions constituted malice, fraud or oppression.” Dairy America accuses  
24 Hartford of “wrongfully denying Dairy America’s claim on the preconceived conclusion that water from  
25 the storm surge caused the loss of Dairy America’s product.” Dairy America further accuses Mr. Spetz  
26 of keeping himself and “his superior” Mr. Dombrowski “willfully ignorant” with failure to conduct an  
27 adequate investigation, concealing photos from Dairy America showing warehouse damage, and  
28 misrepresenting that Hartford reopened its investigation into wind as contributing to Dairy America’s

1 loss. As discussed below, Dairy America, unlike Hartford, specifically addresses malice, oppression and  
2 fraud.

### 3 ***Fraudulent Conduct***

4 Dairy America notes that fraudulent conduct may be shown by an insurer's misrepresentation,  
5 concealment or deceit "in connection with unreasonable conduct in handling or investigating an  
6 insured's claim." *See Pistorius v. Prudential Ins. Co. of America*, 123 Cal.App.3d 541, 555-556, 176  
7 Cal.Rptr. 660 (1981). Dairy America argues that Hartford's fraudulent conduct is reflected by:

- 8 1. An absence of evidence that Hartford conducted further investigation into wind  
9 contributing to Dairy America's loss after Hartford misrepresented that it would reopen  
10 its investigation;
- 11 2. Hartford's post reopening efforts limited to an examination under oath of Dairy America  
12 comptroller Ms. McAbee;
- 13 3. Hartford's failure to recontact Mr. Kays, during its reopened investigation, to confirm  
14 that he had investigated wind damage to the warehouse prior to a storm surge;
- 15 4. Mr. Spetz' November 28, 2005 email sending Gallagher's Mr. Head three photos, none  
16 showing sunlight shining through the warehouse roof;
- 17 5. Mr. Spetz' December 19, 2005 email to Gallagher's Mr. Olsen that Mr. Spetz had no  
18 photos of the warehouse's interior and sending photos of damaged shipping containers;
- 19 6. Mr. Spetz' possession of Mr. Kays' October 28, 2005 final report with two photos of the  
20 warehouse's interior;
- 21 7. Mr. Spetz' September 13, 2006 second denial letter stating that Mr. Kays' photos showed  
22 the warehouse's "upper portions and the roof intact" and that Hartford lacked evidence  
23 of wind damage prior to flooding although Mr. Kays' photos depicted sunlight through  
24 the warehouse roof; and
- 25 8. The Pictometry International September 9, 2005 aerial photo showing a 2,000 square foot  
26 hole in the warehouse roof.

27 Reasonable inferences drawn from Dairy America's evidence create genuine factual issues of  
28 Hartford's highly probable misrepresentations and concealments beyond mistake or an honest error in



1 judgment. Throughout his investigation and reopening, Mr. Spetz consistently denied the potential of  
2 wind to contribute to Dairy America's loss. Mr. Spetz continually took the position that the warehouse  
3 roof was intact to dispel wind damage. However, Mr. Spetz, based on viewing the evidence in Dairy  
4 America's favor, possessed photos that no less than raise the possibility that wind contributed to Dairy  
5 America's loss. The record lacks evidence of Hartford's concrete re-investigation after it reopened its  
6 claim evaluation. There is no evidence that Hartford followed up with Mr. Kays after it reopened its  
7 investigation. The reasonable inference is that Hartford simply reviewed again Mr. Kays' reports and  
8 20 photos and left it to Dairy America to prove wind damage. In the absence of Hartford's meaningful  
9 evidence to rebut the question of its fraudulent conduct, factual issues remain whether Hartford engaged  
10 in fraudulent conduct to warrant punitive damages.

### 11 *Malicious And Oppressive Conduct*

12 Punitive damages may be considered based on an insurer's "unreasonable interpretation of its  
13 policy and the deliberate restriction of its investigation in a bad faith attempt to deny benefits" due to  
14 the insured. *See Amadeo v. Principal Mut. Ins. Co.*, 290 F.3d 1152, 1165 (9<sup>th</sup> Cir. 2002) (applying  
15 California law).

16 Dairy America claims Hartford "deliberately restricted its investigation of the loss and ignored  
17 obvious evidence of damage to the warehouse" due to its following observations:

- 18 1. Mr. Spetz' September 2, 2005 email, two days after Dairy America's claim, noted that  
19 "it does not look like our policy will cover the loss";
- 20 2. Mr. Kays' did not know where Dairy America's product was stored in the warehouse and  
21 had to estimate where it was located;<sup>9</sup>
- 22 3. Hartford initially denied Dairy America's claim "without investigating possible wind  
23 damage";
- 24 4. Mr. Kays testified that he was not hired to survey the warehouse, which was "incidental"

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25 <sup>9</sup> Dairy America claims that "Mr. Kays did not know which warehouse stored Dairy America's product at  
26 the time he concluded his preliminary report." Dairy America appears to distort Mr. Kays' testimony in that Mr. Kays was  
27 asked: "Prior to the 25<sup>th</sup> of October, had you determined **where the product was stored in Warehouse 16?**" (Bold added.)  
28 Mr. Kays responded: "No. I was never able to get that information." Mr. Kays testimony reflects at most that he was unaware  
where in the warehouse Dairy America's product was stored, not that he did not know which particular warehouse stored  
Dairy America's product.

- 1 to his investigation”;
- 2 5. Mr. Spetz’ October 25, 2005 email, less than a week after Hartford’s initial denial, asked
- 3 Mr. Kays whether he photographed the warehouse area where Dairy America’s product
- 4 was located and whether wind contributed to damage the warehouse and Dairy America’s
- 5 product;
- 6 6. Mr. Kays’ sent his October 28, 2005 final report to Hartford with photos showing sun
- 7 shining into the warehouse;
- 8 7. An experienced insurance surveyor could not have inspected the warehouse without
- 9 seeing the large roof hole and not known the hole was evidence of wind damage and
- 10 would have investigated where the insured’s product was located to determine whether
- 11 wind contributed to the loss; and
- 12 8. On November 28, 2005, Mr. Spetz emailed Gallagher’s Mr. Head three warehouse
- 13 photos, none of which show sunlight shining down into the warehouse.

14 Dairy America argues that “these facts suggest that Mr. Spetz denied the claim without considering

15 whether high winds caused any of the loss.” Dairy America accuses Hartford of oppressively burdening

16 Dairy America with the obligation to demonstrate that wind contributed to its loss given that Dairy

17 America’s duty was limited to cooperate in Hartford’s investigation. Dairy America characterizes

18 Hartford’s conduct as “reckless disregard for Dairy America’s rights under the Policy.”

19 The evidence raises inferences that Hartford made a snap decision to deny Dairy America’s claim

20 without the benefit of a full, competent investigation. Mr. Spetz’ October 2, 2005 emails raise an

21 inference that he prejudged claim denial without Mr. Kays’ preliminary report. The record reflects that

22 Mr. Kays focused his efforts on the cargo, not the warehouse building, and reasonable inferences from

23 the evidence suggest potential damage from wind. After Gallagher and Dairy America raised the issue

24 of wind damage, the evidence suggests that Hartford was unrelenting with its determination that a tidal

25 wave caused all damage to Dairy America’s product, even after Hartford knew there were questions with

26 Mr. Kays’ investigation and its scope. The key problem for Hartford is the absence of details of efforts

27 to consider and substance to rule out wind damage. Reasonable inferences arise that Mr. Kays and in

28 turn Hartford unreasonably remained steadfast that a tidal wave alone damaged Dairy America’s product.

1 Hartford’s handling of photos further raises questions whether its conduct was malicious and  
2 oppressive. Dairy America demonstrates that at least one of Mr. Kays’ photos depict sun shining  
3 through the warehouse roof and that Mr. Kays did not photograph the roof. Hartford appears to have  
4 withheld key photos until this litigation. The evidence, including Mr. O’Malley’s declaration, raises  
5 factual issues that Mr. Spetz deliberately restricted investigation into potential wind damage and blindly  
6 accepted Mr. Kays’ evaluation when Mr. Spetz knew of potential problems with it. As such, factual  
7 issues exist whether Hartford, in particular Mr. Spetz, acted maliciously and oppressively in  
8 investigating and evaluating Dairy America’s loss.

9 **Punitive Damages – Officer, Director Or Managing Agent**

10 Given questions whether Mr. Spetz acted fraudulently, maliciously and oppressively, the focus  
11 turns to whether he qualifies as a Hartford managing agent.

12 Hartford argues that Dairy America’s punitive damages claim fails with no clear and convincing  
13 evidence that a Hartford officer, director or managing agent is culpable of malice, oppression or fraud.  
14 Dairy America responds that “Mr. Spetz exercised sufficient discretionary authority over Dairy  
15 America’s claim to qualify him as a managing agent.”

16 Section 3294(b) addresses requirements to impose punitive damages against employers:

17 An employer shall not be liable for [punitive] damages . . . based upon acts of an  
18 employee of the employer, unless the employer had advance knowledge of the unfitness  
19 of the employee and employed him or her with a conscious disregard of the rights or  
20 safety of others or authorized or ratified the wrongful conduct for which the damages are  
21 awarded or was personally guilty of oppression, fraud, or malice. With respect to a  
corporate employer, the advance knowledge and conscious disregard, authorization,  
ratification or act of oppression, fraud or malice must be on the part of an officer,  
director, or managing agent of the corporation.

22 “While an employer may be liable for an employee's tort under the doctrine of respondeat superior, he  
23 is not responsible for punitive damages where he neither directed nor ratified the act.” *Merlo v.*  
24 *Standard Life & Acc. Ins. Co.*, 59 Cal.App.3d 5, 18, 130 Cal.Rptr. 416 (1976).

25 Section 3294 requires proof of wrongful conduct among corporate leaders: the “officer[s],  
26 director[s], or managing agent[s].” Cal. Civ. Code, § 3294(b); *Cruz v. HomeBase*, 83 Cal.App.4th 160,  
27 166, 99 Cal.Rptr.2d 435 (2000). In *Cruz*, 83 Cal.App.4th at 166-167, 99 Cal.Rptr.2d 435, the California  
28 Court of Appeal explained:

1 This is the group whose intentions guide corporate conduct. By so confining liability, the  
2 statute avoids punishing the corporation for malice of low-level employees which does  
3 not reflect the corporate “state of mind” or the intentions of corporate leaders. This  
assures that punishment is imposed only if the corporation can be fairly viewed as guilty  
of the evil intent sought to be punished.

4 “The determination whether employees act in a managerial capacity, however, does not  
5 necessarily hinge on their ‘level’ in the corporate hierarchy.” *Egan v. Mutual of Omaha Ins. Co.*, 24  
6 Cal.3d 809, 822, 169 Cal.Rptr. 691 (1979), *cert. denied*, 445 U.S. 912, 100 S.Ct. 1271 (1980).

7 “Managing agents” are employees who “exercise[] substantial discretionary authority over decisions that  
8 ultimately determine corporate policy.” *White v. Ultramar, Inc.*, 21 Cal.4th 563, 573, 88 Cal.Rptr.2d  
9 19 (1999). “[C]orporate policy’ is the general principles which guide a corporation, or rules intended  
10 to be followed consistently over time in corporate operations.” *Cruz*, 83 Cal.App.4th at 167, 99  
11 Cal.Rptr.2d 435.

12 An act of oppression, fraud or malice, by an officer, director or managing agent, is sufficient to  
13 impose liability on a corporate employer for punitive damages, without an additional showing of  
14 ratification by the employer. Cal. Civ. Code, § 3294(b); *Agarwal v. Johnson*, 25 Cal.3d 932, 950, 160  
15 Cal.Rptr. 141 (1979), *overruled on other grounds*, *White*, 21 Cal.4th 563 at 574, n. 4, 88 Cal.Rptr.2d 19;  
16 *Kelly-Zurian v. Wohl Shoe Co., Inc.*, 22 Cal.App.4th 397, 420, 27 Cal.Rptr.2d 457, 469 (1994). The  
17 critical inquiry whether employees act in a managerial capacity is “the degree of discretion the  
18 employees possess in making decisions that will ultimately determine corporate policy.” *Egan*, 24  
19 Cal.3d at 822-823, 169 Cal.Rptr. 691; *see Kelly-Zurian*, 22 Cal.App.4th at 420, 27 Cal.Rptr.2d at 470  
20 (evidence that a supervisor had power to terminate and supervise employee’s performance was  
21 insufficient to establish managing agent).

22 The California Supreme Court has explained:

23 We therefore conclude that in amending section 3294, subdivision (b), the  
24 Legislature intended that principal liability for punitive damages not depend on  
25 employees’ managerial level, but on the extent to which they exercise substantial  
26 discretionary authority over decisions that ultimately determine corporate policy. Thus,  
27 supervisors who have broad discretionary powers and exercise substantial discretionary  
28 authority in the corporation could be managing agents. Conversely, supervisors who  
have no discretionary authority over decisions that ultimately determine corporate policy  
would not be considered managing agents even though they may have the ability to hire  
or fire other employees. 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

1 significant aspects of a corporation's business.  
2 *White*, 21 Cal.4th at 576-577, 88 Cal.Rptr.2d at 29; see *Myers v. Trendwest Resorts, Inc.*, 148  
3 Cal.App.4th 1403, 1437, 56 Cal.Rptr.3d 501 (2007) (critical inquiry is the degree of discretion the  
4 employees possess to make decisions that will ultimately determine corporate policy).

5 Hartford contends that Mr. Spetz, as a senior general adjuster, was not a Hartford officer, director  
6 or managing agent in that he "was assigned claims in the field to assess, investigate, and determine  
7 whether coverage existed for the loss." Hartford relies on Mr. Spetz' deposition testimony that he  
8 "specifically" handles claims and that coverage decisions are made at an "elevated" level in the home  
9 office. Hartford notes that Mr. Spetz does not craft Hartford general guiding principles or establish  
10 corporate-wide rules in that "coverage decisions are driven by analysis of each individual claim" and that  
11 "Mr. Spetz' conclusions regarding coverage were reviewable by any number of superiors." Hartford  
12 concludes that Mr. Spetz's role was limited to "merely adjusting Dairy America's claim."

13 Dairy America responds that "Mr. Spetz exercised broad authority in the disposition of Dairy  
14 America's claim." Dairy America argues that the evidence disputes Mr. Spetz' claim that he lacked  
15 "final say" on coverage determination. "When employees dispose of insureds' claims with little if any  
16 supervision, they possess sufficient discretion for the law to impute their actions concerning those claims  
17 to the corporation." *Egan*, 24 Cal.3d at 822, 169 Cal.Rptr. 691 (claims adjuster and claims analyst  
18 "exercised broad discretion in the disposition of plaintiff's claim" to warrant imposition of punitive  
19 damages).

20 The record suggests that Mr. Spetz disposed of Dairy America's claim with little supervision.  
21 Hartford home office claims consultant Mr. Dombrowski declares that Mr. Spetz made the "coverage  
22 decision regarding the applicability of flood exclusion." The evidence reflects that Mr. Spetz and Mr.  
23 Dombrowski were the only Hartford employees involved in the coverage determination and that Mr.  
24 Dombrowski's contribution was minimal to leave ultimate determination to Mr. Spetz, who engaged in  
25 all direct communications and dealings with Dairy America and Gallagher, including the denial and  
26 reconsideration letters. There is no evidence that Mr. Spetz sought or received higher approval of his  
27 denial of Dairy America's claim. The evidence reflects that Mr. Spetz did not question the absence of  
28 coverage to eliminate pursuing a final decision by the Hartford home office. Mr. Spetz had broad and

1 seemingly unfettered disposition over Dairy America’s claim to no less than raise factual issues whether  
2 he his managing agent, similar to the *Egan* claims personnel.

3 To attempt to avoid application of *Egan*, Hartford notes that *Egan* was decided prior to the  
4 section 3294(b)’s amendment to reference “managing agent” rather than *Egan*’s reference to “managerial  
5 employee.” However, *Egan* remains solid law, and Hartford points to no authority to undermine its  
6 application despite its characterization of Mr. Spetz as a “general adjuster.”

7 Turning to Mr. Dombrowski, Hartford notes his limited involvement of emails and telephone  
8 calls with Mr. Spetz regarding duration of storage of Dairy America’s product and whether the product  
9 was in transit. Hartford points to Mr. Dombrowski’s inability to impact substantially corporate  
10 operations or to establish Hartford corporate practices or policies. Hartford characterizes Mr.  
11 Dombrowski as “a sounding board, advising adjusters on discreet and individualized questions regarding  
12 coverage of claimed losses.” Hartford describes Mr. Dombrowski’s assistance to adjusters as “always  
13 fact specific, and applicable only to the circumstances of a particular claim.”

14 Unlike Mr. Spetz, there is no issue, under the present circumstances, whether Mr. Dombrowski,  
15 acted as a Hartford officer, director or managing agent. The evidence and his title suggest that Mr.  
16 Dombrowski consults on claim evaluation, and there is no evidence that he disposes of claims with little  
17 supervision. Nothing suggests that he exercises substantial discretionary authority over decisions that  
18 ultimately determine corporate policy. The evidence fails to raise an issue whether he crafts Hartford  
19 general guiding principles or establishes corporate-wide rules.

#### 20 **Ratification Of Mr. Kays’ Conduct**

21 Dairy America argues that Hartford is further subject to punitive damages by ratifying Mr. Kays’  
22 actions in that Mr. Spetz, as a managing agent, approved Mr. Kays’ inadequate investigation and  
23 “adopted his inadequately supported conclusion.”

24 To impose punitive damages on corporate or other large organizations, the malicious, fraudulent  
25 or oppressive conduct must have been performed by an agent employed in a “managerial capacity” and  
26 acting in the scope of employment, or ratified or approved by a “managerial agent” of the organization.  
27 *College Hospital Inc. v. Superior Court*, 8 Cal.4th 704, 723, 34 Cal.Rptr.2d 898 (1994) (citing *Egan*,  
28 24 Cal.3d at 822, 169 Cal.Rptr. 691. “For purposes of determining an employer's liability for punitive

1 damages, ratification generally occurs where, under the particular circumstances, the employer  
2 demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee  
3 in the performance of his job duties.” *College Hospital*, 8 Cal.4th at 726, 169 Cal.Rptr. 691.

4 To support ratification, Dairy America points to Mr. Spetz’ reliance on Mr. Kays’ investigation  
5 findings to deny coverage, although Mr. Spetz knew that Mr. Kays had not addressed wind contributing  
6 to damage of Dairy America’s product given that he asked Mr. Kays to consider wind damage after  
7 initial claim denial. Dairy America attributes Mr. Spetz to have known Mr. Kays’ investigation was  
8 inadequate in that Mr. Kays’ did not know where Dairy America’s product was stored in the warehouse,  
9 had to estimate where it was located, and considered the warehouse “incidental” to his investigation.

10 Dairy America raises factual issues whether Hartford, through Mr. Spetz, ratified conduct  
11 supporting punitive damages. The evidence raises questions as to the adequacy of Mr. Kays’  
12 investigation and whether it was result driven, and in turn, whether Mr. Spetz turned a blind eye to its  
13 inadequacy and continued to champion claim denial despite serious questions as to wind contributing  
14 to damage to Dairy America’s product. The purported holes in Mr. Kays’ investigation raise questions  
15 whether he consciously disregarded Dairy America’s rights as an insured.

16 In sum, Dairy America has raised factual issues as to Mr. Spetz’ managing agent status and  
17 whether his and Mr. Kays’ conduct was malicious, oppressive or fraudulent in conscious disregard of  
18 Dairy America’s rights under the Hartford policy to bar summary adjudication for Hartford.

19 **CONCLUSION AND ORDER**

20 For the reasons discussed above, this Court:

- 21 1. DENIES Hartford summary adjudication on Dairy America’s punitive damages claim;  
22 and  
23 2. CONFIRMS the July 15, 2010 pretrial conference and August 30, 2010 trial.

24 IT IS SO ORDERED.

25 **Dated: June 17, 2010**

**/s/ Lawrence J. O’Neill**  
**UNITED STATES DISTRICT JUDGE**