S225398

IN THE
SUPREME COURT OF CALIFORNIA

ROY ALLAN SLURRY SEAL, INC., et al.,

Plaintiffs and Appellants,

v.

AMERICAN ASPHALT SOUTH, INC.,

Defendant and Respondent.

OPENING BRIEF ON THE MERITS

After a Decision by the Court of Appeal,
Second Appellate District, Division Eight
No. B255558

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ISSUES PRESENTED FOR REVIEW

1. In the context of a competitively-bid public works contract, may a losing bidder state a claim for intentional interference with prospective economic advantage against the winning bidder based on an allegation that after the contract is awarded the winning bidder did not fully comply with California's prevailing wage laws?

2. To state a cause of action for intentional interference with prospective economic advantage, must a losing bidder allege that it had a *preexisting* economic relationship with a third party public agency with a probable future benefit which preceded defendant's interference, or is it sufficient for a losing bidder to allege that its economic expectancy arose at the time the public agency awarded the contract to the low bidder?

INTRODUCTION

Starting with the first time this Court recognized the tort of intentional interference with prospective economic advantage in *Buckaloo v. Johnson* (1975) 14 Cal.3d 815, this Court has always acknowledged the requirement that a plaintiff must establish a "pre-existing economic relationship" as a necessary element of this cause of action. It likewise did so in its last pronouncement on this tort, *Korea Supply v. Lockheed Martin Corporation* (2003) 29 Cal.4th 1134, 1164, when the Court declared that "a plaintiff that wishes to state a cause of action for this tort must allege the existence of an economic relationship with some third party that contains the probability of future economic benefit to the plaintiff."

Moreover, this Court has always limited the application of this tort to "ordinary commercial dealings." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 330.)

But the case at bar arises in the context of the awarding of public works construction contracts, a process which is anything but an "ordinary commercial dealing." Unlike business relations in the private setting, California's Public Contract Code guarantees "all qualified bidders with a fair opportunity to enter the bidding process" and is designed to "eliminate favoritism" in the awarding of public contracts. (Pub. Contract Code, § 100.) Before a bid can be awarded, the agency must evaluate whether the low bidder is "responsible" and possesses the qualities of trustworthiness, quality, fitness, capacity, and experience, to carry out the project. (Pub. Contract Code, § 1103.) Thus, even the low bidder on public works contracts has no right to compel the agency to accept its bid. (*Charles L. Harney v. Durkee* (1951) 107 Cal.App.2d 570, 580.) And, losing bidders may pursue bid protests to set aside the award of a contract. (*Great West Contractors, Inc., v. Irvine Unified School District* (2010) 187 Cal.App.4th 1425.)

The sharp contrast between the statutorily-mandated process involved in the award of public contracts and the way contracts are made in the private sector shows why the tort of intentional interference with prospective economic advantage has never been extended out of its historical application in "ordinary commercial dealings" to the context of competitively-bid public works contracts and should not be done so now. No bidder enjoys the requisite "existing economic relationship containing the probability of future economic benefit" before the agency formally awards the contract to a bidder, and even then only the winning bidder has that economic relationship. The mere submission of a bid at best suggests an "economic relationship which has yet to arise," which is patently insufficient to state a claim for intentional interference with prospective advantage. (*Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 524.)

Nevertheless, the Court of Appeal held that the threshold requirement of a sufficient "existing economic relationship" was met here. In doing so, the court incorrectly melded the two separate elements of a pre-existing economic relationship and the expectancy of probable future economic benefit into one. This represents an unwarranted expansion of this tort with significant public policy consequences.

The Court of Appeal justified allowing the tort to apply in the public works bidding context as a means to combat "wage theft." Yet Plaintiffs do not seek unpaid prevailing wages on behalf of workers; instead Plaintiffs want their own speculative lost profits on contracts that they may or may not have ever been awarded. California's Labor Code already provides extensive enforcement mechanisms to protect workers by insuring that employers pay prevailing wages.

The Court of Appeal ignored the real floodgate concerns in its expansion of the tort. Its decision would motivate business competitors to

sue for lost profits on work they never had to perform. The impact on public agencies from having to participate in litigation and increased costs to the agencies can hardly be understated.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Roy Allan Slurry Seal, Inc. and Doug Martin Contracting Co., Inc. are asphalt contractors that regularly bid on municipal road maintenance projects. (1 CT 3–6.) Defendant and Respondent American Asphalt South, Inc. ("American") is one of Plaintiffs' main business competitors and frequently bids on the same projects. (*Ibid.*)

Plaintiffs allege that between 2009 and 2012, American outbid Plaintiffs on 23 public works contracts totaling more than $14.6 million. (Maj. Opn., 184 Cal.Rptr.3d 279, 282.)[1] Plaintiffs brought five separate lawsuits against American in Los Angeles, San Bernardino, Riverside, Orange and San Diego Counties, alleging on information and belief that American failed to pay its workers prevailing wages on those contracts. (1 CT 3–6.) Plaintiffs alleged they were the second lowest bidders as to the contracts they respectively bid on, and alleged on information and belief that they would have been awarded those contracts were it not for American's alleged failure to pay all prevailing wages. (1 CT 6.) Based on this theory, Plaintiffs asserted causes of action for intentional interference with prospective economic advantage and other claims.[2]

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[1] The Court of Appeal's opinion was originally published at 234 CalApp.4th 748 and 184 Cal.Rptr.3d 279. In an effort to avoid confusion regarding the pagination between the majority and dissent in the typed, slip copy of the opinion, this brief will cite to the Court of Appeal's decision using the California Reporter citation.

[2] Plaintiffs also alleged a cause of action for predatory pricing under the Unfair Practices Act (Bus. & Prof. Code, §§17000 et seq.) and sought an injunction under the Unfair Competition Law (Bus & Prof. Code, § 17200). The trial court sustained demurrers to these causes of action, and the Court

American, while denying that it violated the prevailing wage laws, demurred to the complaints, arguing that as bidders to a public works contract, Plaintiffs did not have an existing economic relationship with any of the awarding agencies and could not allege a reasonable probability of being awarded the contracts. American contended that the mere act of submitting bids for public works contracts does not create an economic relationship and thus Plaintiffs could not allege a necessary element of their cause of action for intentional interference with prospective economic advantage. (1 CT 20–41.)[3]

These demurrers led to conflicting rulings from three of the trial courts. The Riverside Superior Court sustained American's entire demurrer without leave to amend (2 CT 344–345), while the courts in Los Angeles and San Diego overruled the demurrers as to the tortious interference claims. (See 2 CT 187.) In January 2014, Plaintiffs appealed from the Riverside judgment. One week later, this Court ordered all five matters to be coordinated for trial in Los Angeles Superior Court and for appellate purposes in the Second District Court of Appeal. (184 Cal.Rptr.3d at p. 283.)

The Court of Appeal, in a 2-1 decision, reversed the trial court and reinstated Plaintiffs' claim for intentional interference with prospective economic advantage. Relying chiefly on *Korea Supply*, *supra*, 29 Cal.4th 1134, the majority reasoned that at the time the public agency awarded the contract to American as the low bidder, Plaintiffs as the second lowest

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of Appeal affirmed. Accordingly, these issues are not before the Court.

[3] Although the demurrers raised only issues of law, American strongly denies the factual allegations of the complaints and maintains that it has not engaged in any wrongdoing. Significantly, Plaintiffs do not allege that any court or public agency—including the Department of Industrial Relations, Division of Labor Standards Enforcement—has ever made any determination that American violated any prevailing wage laws.

bidders possessed a reasonably probable economic expectancy that they would have been awarded the contracts but for American's allegedly illegal acts in underpaying its employees. (Maj. Opn., 184 Cal.Rptr.3d at pp. 284–289.)

STANDARD OF REVIEW

An order sustaining a demurrer without leave to amend is reviewed de novo. (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1049.) The court's only task is to determine whether the complaint states a cause of action. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The court accepts the truth of all facts properly pleaded but cannot accept contentions, deductions, or conclusions of fact or law. (*Ibid.*) Taking the allegations as a whole, the court decides whether there is a reasonable possibility that the pleading can be cured by amendment; if not, the court must affirm. (*Ibid.*) The burden of proving such reasonable possibility is on the plaintiff. (*Ibid.*; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081,)

ARGUMENT

I.

California's Public Contracting Laws, Which Protect the Public by Prohibiting Favoritism and Collusion, Preclude Plaintiffs from Establishing the Required Elements of Their Claim for Intentional Interference with Prospective Economic Advantage

A. As a Matter of Law, a Disappointed Bidder to a Public Works Contract Cannot Sustain a Claim for Intentional Interference

This Court first articulated the elements of the tort in *Buckaloo v. Johnson* (1975) 14 Cal.3d 815, 827. In order to state a claim for interference with prospective economic advantage, plaintiff must allege: (1) an economic relationship between plaintiff and a third party, with the probability of future economic benefit to the plaintiff; (2) defendant's knowledge of the relationship; (3) an intentional act by the defendant,

designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the defendant's wrongful act, including an intentional act by the defendant that is designed to disrupt the relationship between the plaintiff and a third party. (*Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 944.) The plaintiff must also allege that the interference was "independently wrongful," meaning that it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard. (*Korea Supply*, *supra*, 29 Cal.4th at p. 1159; *Della Pena v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th. 376, 381.)

The threshold element contains two subparts. First, a plaintiff must allege the "existence of a business relationship with which the tortfeasor interfered. Although this need not be a contractual relationship, an existing relationship is required." (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 546, internal citations omitted.) Second, a plaintiff must allege that the existing relationship "probably" would have ripened into an economic benefit. (*Korea Supply Co. v. Lockheed Martin Corp.*, *supra*, 29 Cal.4th at p. 1164.) Regarding the interplay of these two subparts, this Court has said, "The tort protects the expectation the relationship will produce the desired benefit, not 'the more speculative expectation that a potentially beneficial relationship will arise.'" (*Ibid.*) "Only plaintiffs that can demonstrate an economic relationship with a probable future economic benefit will be able to state a cause of action for this tort." (*Ibid.*; *Sole Energy Co. v. Petrochemicals Corp.* (2005) 128 Cal.App.4th 212, 243.)

This Court's decisions in *Blank v. Kirwan* (1985) 39 Cal.3d 311 and *Youst v. Longo* (1987) 43 Cal.3d 64 illustrate how these two, independent subparts—the existing relationship and the probable economic expectancy—limit the types of injuries eligible for recovery. In *Blank*, *supra*, 39 Cal.3d 311, plaintiff sued its competitors and city officials for

intentional interference with prospective economic advantage after it was denied a city license to operate a poker club. The plaintiff alleged that its competitors conspired with the city to monopolize the operation of the clubs and "but for defendants' acts he would have made some undetermined profit operating a poker club" within the city. (*Id.* at pp. 329–330.) This Court held the plaintiff's complaint did not state a cause of action "because the first element of the tort is lacking." (*Id.* at p. 330.)

Specifically, *Blank* explained that the plaintiff had (1) failed to establish a business relationship with any recognizable third party, and (2) could not allege probability of future economic benefit because the expectation of a government license was too speculative given the city's discretionary licensing powers. (*Ibid.*) In other words, the plaintiff had no protectable expectancy "but at most a hope for an economic relationship and a desire for future benefit," which was inadequate to state the first element. (*Id.* at p. 331.)

In *Youst, supra,* 43 Cal.3d 64, the Court denied claims for intentional interference with prospective economic advantage made by a plaintiff whose racehorse lost a harness race due to alleged interference by another jockey. Pointing to the first element, the Court instructed that "as a matter of law, a threshold causation requirement exists for maintaining a cause of action for [tortious interference], namely, proof that it is reasonably *probable* that the lost economic advantage would have been realized but for the defendant's interference." (*Id.* at p. 71; italics in original.) "To require less of a showing would open the proverbial floodgates to a surge of litigation based on alleged missed opportunities to win various types of contests," which "would essentially eliminate the tort's element of causation, which links the wrongful act with the damages suffered." (*Id.* at p. 74.)

Taken together, *Youst* and *Blank* support the view that the interference tort "applies to interference with existing non-contractual relations which hold the promise of future economic advantage." (*Westside Center Associates v. Safeway Stores 23, Inc., supra,* 42 Cal.App.4th at p. 524.) The elements "presuppose the relationship existed at the time of the defendant's allegedly tortious acts lest liability be imposed for actually and intentionally disrupting a relationship which has yet to arise." (*Id.* at pp. 523–524.) To be actionable, "a defendant's tortious conduct must have interfered with a specific existing relationship, not simply with the formation of one in the future." (*Id.* at p. 525; see also *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 243; Cal. Practice Guide: Claims & Defenses (The Rutter Group), § 3:156 ["Plaintiff must have an existing relationship that is likely to produce economic benefits in the future. An expectation that the relationship itself will be created in the future is not sufficient."].)

B. Plaintiffs Cannot Allege They Would Have Been Awarded the Contracts Because California's Public Contracting Laws Give Awarding Agencies Significant Discretion, Including the Right to Reject All Bids

The Court of Appeal fashioned a "pre-existing economic relationship" between the public entities and the Plaintiffs based on its presumption that Plaintiffs would have been awarded the contracts simply because the contracts were awarded to American and because Plaintiffs alleged that they were the second lowest bidders. (184 Cal.Rptr.3d 279, 286.) But no such grand leap of faith can be made from "second lowest bidder" to "winning bidder" with sufficient certainty to meet the "preexisting economic relationship" element of the tort at issue here. This is because the competitive bidding laws in this state afford agencies significant discretion in awarding public contracts. (*City of Inglewood-L.A.*

County Civic Center Auth. v. Superior Court (1972) 7 Cal.3d 861, 867.) The fact that the agencies concluded American was the lowest responsible bidder provides no assurance that the agencies would conclude the same as to Plaintiffs and their bids.

Under the competitive bidding laws, an agency has the sole discretion to reject all bids. (See, e.g. Pub. Contract Code, §§ 20166, 10122, subd. (d), 10185.) Where the contract must be awarded to the lowest responsible bidder, if two bids are lowest, the agency may select either bid. (Pub. Contract Code, § 22038, subd. (b).) Thus, "a public body where it has expressly reserved the right to reject all bids, [may] do so for any reason and at any time before it accepts a bid. If the entity so decides, it may return all bids unopened." (*Universal By-Products, Inc. v. City of Modesto* (1974) 43 Cal.App.3d 145, 152.)

Awarding agencies are also vested with discretion in evaluating the adequacy of the bids and bidders. Before a public agency can award a public works contract, it is required by the Public Contract Code to determine whether a contractor's bid is *responsive* and whether the contractor has submitted the lowest *responsible* bid.

A bid is "responsive" if it "promises to do what the bidding instructions require." (*MCM Construction, Inc. v. City and County of San Francisco* (1998) 66 Cal.App.4th 359, 368.) A determination of "responsiveness" concerns whether or not a bidder complied with the bid's requirements. The agency must reject a bid that materially deviates from the bid's requirements, but if the deviation is not material the agency has the discretion, but not the requirement, to waive the deviation and accept the bid. (*Id.* at p. 374.)

The "lowest responsible bidder requirement" imposes a duty on agencies to evaluate bidders' possession of the attributes of trustworthiness, quality, fitness, capacity, and experience to carry out the contract

requirements. (Pub. Contract Code, § 100; *Eel River Disposal and Resource Recovery, Inc. v. Humboldt* (2013) 221 Cal.App.4th 209, 220.) The determination whether the bidder is "responsible" thus entails multiple factors of an inherently qualitative nature. Any decision that a bidder is not responsible requires the entity to afford basic due process rights to the affected bidder. (*Boydston v. Napa Sanitation District* (1990) 222 Cal.App.3d. 1362, 1369 [before a contract may be awarded to one other than the lowest bidder, the agency "must (1) notify that bidder of any evidence reflecting upon the bidder's responsibility received from others or adduced as a result of independent investigation, (2) afford the bidder an opportunity to rebut such adverse evidence, and (3) permit the bidder to present evidence of qualification"].)

Only by first evaluating the bids and determining whether a bid is both responsive and is made by the lowest responsible bidder can the agency assure that the taxpayers receive the most for their money and that awards are made without favoritism, fraud or corruption. (*City of Inglewood–L.A. County Civic Center Auth. v. Superior Court*, *supra,* 7 Cal.3d at pp. 866–867.) It necessarily follows that simply because the agencies awarded the contracts to American after determining that American and its bid met the contract requirements does not necessarily mean the agencies would have awarded the same contracts to Plaintiffs. Thus, the Court of Appeal's conclusion that Plaintiffs' enjoy an "existing economic relationship" because the contracts were awarded and because Plaintiffs alleged themselves to be the "second low bidder" is overly simplistic and ignores the realities facing the public agencies and bidders for public works contracts.

Casting further doubt on the Court of Appeal's holding is that some statutes and city charters specifically contemplate "discretion on the part of the public entity to look at factors in addition to the monetary benefit of the

bid, and awards to other than the best monetary bidders have been upheld." (*Great West Contractors, Inc., v. Irvine Unified School District* (2010) 187 Cal.App.4th 1425, 1448 [citing several decisions where awards to other than the low monetary bidder were upheld by the courts].) In some cases, agencies are authorized to exercise their discretion and may award contracts to the bidder the agency deems to be "superior" but is not necessarily the "lowest responsible bidder." (*Ibid.*) In this regard, an agency may also accept bids that deviate from the contract specifications so long as the variance does not give the bidder an advantage. (*Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal.App.4th 897, 900, 904.)

The over-arching theme is that the award of a public contract is an open process, and one that is designed to serve the taxpayers, not to benefit bidders. In the context of public works contracting, neither low bidders, second lowest bidders, nor any other bidders, can claim to possess the requisite "existing relationship" with the public agency or a legally-protected expectancy that they will be awarded the contract. The depth and level of discretion afforded public agencies in awarding contracts simply precludes any bidder from claiming a probability of a future economic benefit merely upon the submission of a bid.

C. As Bidders to a Public Works Contract, Plaintiffs Cannot Establish an "Existing Relationship" with the Public Agency Soliciting Bids

Here, Plaintiffs allege they had a sufficient and protectable relationship merely because like many other bidders on the subject contracts, they submitted a bid in response to the agencies requests for bids.

In addition to the reasons stated above, Plaintiffs have not and cannot allege the existence of an economic relationship merely by submitting a bid to the public entities that solicited bids because public contract law in this state forbids it.

1. The Purpose of Public Contract Law Is to Protect the Public, Not to Benefit Bidders

In California, competitive bidding is largely governed by statute. (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 315–316.) The competitive bidding laws are designed to safeguard the public, not serve the interests of bidders. (Pub. Contract Code, § 100; *Swinerton & Walberg Co. v. City of Inglewood-L.A. County Civic Center Authority* (1974) 40 Cal.App.3d 98, 101.) The purpose of the competitive bidding process is to guard against favoritism, improvidence, extravagance, fraud and corruption, to prevent the waste of public funds, and to obtain the best economic result for the public. (*Konica Business Machines U.S.A. Inc. v. Regents of University of California* (1998) 206 Cal.App.3d 449, 456.) Competitive bidding also guarantees "all qualified bidders with a fair opportunity to enter the bidding process" thereby stimulating advantageous marketplace competition. (*Ibid.*, *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 173.) The bidding laws are specifically designed to create a level playing field for all participants and by design preclude any one bidder enjoying a protectable relationship with the entity, i.e., having a "leg up" on any of the other bidders. (*Swinerton, supra*, 40 Cal.App.3d 98, 101.)

Thus, the very foundation underlying our competitive bidding system is that all bidders must be treated equally. Although a contractor may have worked for an awarding agency on prior projects or have received numerous past awards, for each new contract bid upon and awarded, the bidders are treated as strangers to the awarding agency. In order for the bid award to be fair, none of the bidders have a prior claim to the contract, nor can any of them claim an existing relationship with the agency. Even if a public agency has valid business reasons for favoring a particular contractor based on prior contracts, that contractor as a matter of

law has no relationship or expectancy and cannot be awarded the contract if after evaluating its bid the agency finds its bid is not responsive or that it is not the lowest responsible bidder.

From the agencies' perspective it must disavow any contractor's claim to an existing relationship before a contract is awarded in order to avoid any suggestion of collusion or favoritism in violation of the Public Contract Code. The threshold element of an intentional interference claim, that of an existing business relationship with the awarding agency, is antithetical to our state's public contracting system, and as a matter of law, Plaintiffs' claims for intentional interference fail at this threshold element and must be rejected.

The Public Contract Code exists solely and specifically to ensure that any such alleged ongoing "relationships" have no bearing on the outcome of future bids. Therefore, the required element of a sufficient pre-existing economic relationship is fatally incompatible with the purposes behind public contract laws, which are "to guard against favoritism, improvidence, extravagance, fraud and corruption; to prevent the waste of public funds; and to obtain the best economic result for the public" and to stimulate advantageous market place competition. (Pub. Contract Code, § 100; *Swinerton & Walberg Co. v. City of Inglewood-L.A. County Civic Center Authority, supra,* 40 Cal.App.3d at p. 101.)

Upon submitting a bid, the Plaintiffs gained no more than a "hope for an economic relationship and a desire for a future benefit," which has never been an adequate substitution for an actual, existing relationship. (*Blank v. Kirwan, supra,* 39 Cal.3d. at p. 331.) The fact that the bid was submitted in response to the agency's request means nothing since logically all bids are submitted in response to a request. However, a solicitation for bids is plainly not a contract or even evidence of an existing business relationship; instead, it is just the prelude to the formation of an economic

relationship. A solicitation for bids is merely a request for offers from the universe of potentially interested and capable bidders, not just from the Plaintiffs alone, and a bidder's response to that solicitation is not evidence of any "relationship" between Plaintiffs and the public agencies.

The majority's articulation of an economic relationship based solely on the submission of bids represents a significant dilution of this element of the tort, and does what the court in *Westside Center Associates v. Safeway Stores 23, Inc., supra,* 42 Cal.App.4th at pages 523–524, specifically guarded against, imposing liability for "disrupting a relationship which has yet to arise."

2. Courts in Other Jurisdictions Have Rejected Plaintiffs' Arguments

Other courts considering whether a mere bidder possesses a legally sufficient pre-existing relationship have held that Plaintiffs cannot maintain a claim for tortious interference. (See, e.g. *Powercorp Alaska, LLC v. Alaska Energy Authority* (Alaska, 2012) 290 P.3d 1173, 1187 ["Submitting a bid does not provide any one bidder with a contractual expectancy superior to the rights of other bidders" necessary to state a claim for interference].)

The decision in *Cedroni Associates, Inc. v. Tomblinson, Harburn Associate, Architects, & Planners, Inc.* (Mich. 2012) 492 Mich. 40, 42–46, is particularly instructive. In *Cedroni*, the plaintiff was not the second low bidder, but the lowest bidder. There, the court rejected the same argument Plaintiffs make here:

> Given that a contractor that submits the lowest bid cannot bring a cause of action against the municipality when its bid is rejected, even when the municipality has adopted a charter provision that requires it to accept the 'lowest responsible bidder,' it is difficult to fathom how plaintiff's submission of the lowest bid could have created a valid business expectancy in light of the highly discretionary process of awarding

> governmental contracts. In terms of whether a valid business expectancy is created, a plaintiff's expectations are entirely the same regardless of whether it alleges that the government has wrongfully denied it the contract or, as here, that a third party has interfered and caused a denial of the contract. [.] 'when the ultimate decision to enter into a business relationship is, by statute, a highly discretionary decision, a plaintiff cannot establish that its 'business expectancy' [reflected] a reasonable likelihood or possibility and not merely wishful thinking.' (*Id.* at pp. 46-47.)

Similarly, in *Duty Free Americas, Inc. v. Estee Lauder Companies, Inc.* (S.D.Fla., 2013) 946 F.Supp.2d 1321, the court concluded that "[A] bidder generally cannot establish a protected business relationship with an entity soliciting bids through a competitive bidding process" because a solicitation for bids is "merely a request for offers from interested parties," and cannot serve as evidence that the bidder probably would have entered into a contract with the awarding agency but for the defendant's interference. (*Id.* at pp. 1338–1339.)

Federal law is in accord. In *Mobile Shelter Systems USA, Inc. v. Grate Pallet Solutions, LLC* (M.D. Fla. 2012) 845 F.Supp.2d 1241, the court held that a manufacturer of shipping and storage systems for use by the United States military failed to show that it had an existing business relationship with the federal government, and that its competitors intentionally and unjustifiably interfered with that relationship, as would support its claim against competitors for tortious interference with a business relationship. The court held there was no existing contract, and there was no evidence that, in all probability, the United States military would have entered into a contract with the manufacturer but for the competitors' protest. (*Id.* at p. 1259.)

As the dissent below correctly pointed out (184 Cal.Rptr.3d at p. 304), the majority's arguments in distinguishing these out-of-state authorities are off base. These cases uniformly support the general

principle that, as stated in *Powercorp, supra,* at pp. 1186-1187, "Procurement laws entitle the [plaintiff] to a fair bidding process in which no particular contractor is favored from the outset. Submitting a bid entitles the bidder to 'fair and honest consideration.' Submitting a bid does not provide any one bidder with a contract expectancy superior to the rights of others." In the end, the Court of Appeal's decision confuses the rule of law with the issue of law. The rule of law enunciated in these sister state decisions is as advocated here by American, that a bidder's submission of the second lowest bid, or even the lowest bid, fails to create "a valid business expectancy in light of the highly discretionary process of awarding governmental contracts." (*Cedroni, supra,* 492 Mich. at p. 46.)

In contrast, some of the out-of-state decisions relied upon by the Court of Appeal do not mirror the elements required here to establish the tort. (Maj. Opn., 184 Cal.Rptr.3d at pp. 282-283.) For example, the majority opinion below cites *National R.R. Passenger v. Veolia Transportation Services* (D.D.C. 2009) 592 F.Supp.2d 86, but does not recognize that under District of Columbia law the threshold element is met by pleading *either* "a valid business relationship *or* expectancy" – not both as required under California law. Similarly, in *Killian Construction Company v. Jack D. Ball & Associates* (Mo. App. S.D. 1993) 865 S.W.2d 889, Missouri law only requires pleading *either* "a valid business relationship *or* an expectancy." In neither case is there a mention of the rules in those jurisdictions regarding the awarding of public works contracts.

D. Plaintiffs Cannot Allege an Expectancy Interest in Receiving a Public Works Contract

The first element of Plaintiffs' cause of action requires not only that there be an existing relationship between Plaintiffs and a third party, but also that the relationship contains an "expectancy," or the probability of

future economic benefit. Once again, this idea is anathema to California's public contracting laws because in a competitive bidding environment, no bidder may claim an expectancy interest in the award.

As noted by this Court in *Youst v. Longo, supra,* 43 Cal.3d 64, "Although varying language has been used to express the "expectancy" prong of the element, the cases generally agree that it must be reasonably probable the prospective economic advantage would have been realized but for defendant's interference. (See W*orldwide Commerce, Inc. v. Fruehauf Corp.* (1978) 84 Cal.App.3d 803, 811 ["creditor-guarantor relationship was one reasonably expected to be economically advantageous"]; *Wilson v. Loew's Inc.* (1956) 142 Cal.App.2d 183, 190, cert. granted (1957) 352 U.S. 980, 77 S.Ct. 381, 1 L.Ed.2d 364, cert. dism. (1958) 355 U.S. 597, 78 S.Ct. 526, 2 L.Ed.2d 519 ["it must appear that such (prospective) contract or relationship would otherwise have been entered into"].) This requirement that the plaintiff plead and prove that a business relationship containing the probability of future economic benefit precludes application to hypothetical relationships not developed at the time of the allegedly tortious acts. (*Roth v. Rhodes, supra*, 25 Cal.App.4th 530, 546; *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1291.)

As argued earlier, the basic public policy foundation underlying the public contracts laws, and the discretion afforded agencies in awarding public contracts is inherent in the process. These very same reasons preclude any claim to an "expectancy," or a reasonable probability that the Plaintiffs would have been awarded the contracts.

This principle was established in *Pacific Architects Collaborative v. State of California* (1979) 100 Cal.App.3d 110. There, the disappointed bidder argued that every time a public agency issues a notice inviting bids, the bidder has a protectable expectancy because the public entity makes an

"implied promise to award the contract to the lowest bidder." (*Id.* at 123–124.) The court, however, soundly rejected that theory, explaining that:

> When bids are opened and read in public, the mere fact that a particular person has made the lowest bid does not mean that he has been awarded the contract. A contract may be awarded only to the lowest 'responsible' bidder. (Gov. Code, § 14330.) . . . But even the lowest responsible bidder is not necessarily the successful bidder because all bids may be rejected if 'acceptance of the lowest responsible bid or bids is not for the best interests of the State.' (Gov. Code, §14335.)" [citations] Thus until the bids have been analyzed and the requisite discretion exercised, the state cannot award the contract. (*Id.* at pp. 124-125.)

Similarly, the Court of Appeal long ago held in *Charles L. Harney, Inc. v. Durkee* (1951) 107 Cal.App.2d 570, that a disappointed bidder has no legally-protectable expectancy in a public works contract. There, the lowest bidder sought a writ of mandate to accept its bid after the state director of public works rejected all bids for a highway project. The court denied the claim, explaining that "[the] competitive bidding statutes are not passed for the benefit of bidders but for the benefit and protection of the public. No right exists in the lowest bidder to have his bid accepted where the statute confers the power to reject all bids." (*Id.* at 580.)

Thus, Plaintiffs have not, and cannot allege that their bid constituted an "actual economic relationship or a protected expectancy" with a public entity, as opposed to "merely a hope of future transactions." (*Janda v. Madera Community Hosp.* (E.D.Cal., 1998) 16 F.Supp.2d 1181, 1189–1190.) As a bidder on a competitively-bid public works project, Plaintiffs had "at most a hope for an economic relationship and a desire for future benefit," which has always been rejected as meeting the first element. (*Blank v. Kirwan*, *supra,* 39 Cal.3d at p. 331.)

Despite this clear precedent, the Court of Appeal concluded that Plaintiffs, as the alleged lawful lowest bidders, had a reasonably probable

economic expectancy that they would be awarded the contracts, which arose "once the public agency awards a contract to an unlawful bidder, thereby signaling that the contract would have gone to the second lowest qualifying bidder." (Maj. Opn., 184 Cal.Rptr.3d at p. 288.) As noted by the dissent, the Court of Appeal's decision effectively rewrites the first element of the cause of action—"an economic relationship with a probable future benefit"—by wiping out the predicate "relationship" language. (184 Cal.Rptr.3d at p. 306 [Grimes, J., *dissenting*].) Under this theory, anyone who submits a bid has a legitimate expectation of winning the contract, an expectation that arose at the moment of submitting a bid, even the highest bidder, and even though it cannot be determined until after all the bids have been unsealed which bidder is the lowest or second lowest bidder, and even though the agency has yet to analyze and evaluate the bidders and their bids. (*Pacific Architects Collaborative v. State of California*, *supra*, 100 Cal.App.3d at pp. 123–124.) This is a sharp departure without logical reason from all prior case law limiting the tort to "interference with an existing contract or a contract which is certain to be consummated." (See *Buckaloo v. Johnson*, *supra*, 14 Cal.3d at p. 823, fn. 6 [overruled on other grounds by *Della Penna v. Toyota Motor Sales, U.S.A, Inc.*, *supra,* 11 Cal.4th 376].)

1. The Court of Appeal's Decision Relies On a Temporally-Backward Analysis

The Court of Appeal held that the Plaintiffs' relationship and expectancy were formed after the completion of the bidding process and after Defendant had submitted its bids. However, California law has always required that the economic relationship containing the probability of future benefit must precede the defendant's alleged interference and that the defendant had knowledge of that relationship at the time of its allegedly wrongful conduct. Indeed, this Court in *Korea Supply* held that "a plaintiff

that wishes to state a cause of action for this tort must allege the existence of an economic relationship with some third party that contains the probability of future economic benefits." (*Korea Supply*, *supra*, 29 Cal.4th at p. 1164.) The court in *Westside Center Associates, supra*, 42 Cal.App.4th 507, 526, held that the elements of the tort "presuppose the relationship existed at the time of the defendant's allegedly tortious acts lest liability be imposed for actually and intentionally disrupting a relationship which has yet to arise."

In this same vein, in *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 243, the court rejected a cause of action for tortious interference where plaintiffs failed to allege an existing economic expectancy that preceded the interfering conduct. There, plaintiffs were shareholders who alleged that a company tortiously interfered in a transaction by which a corporation called Sole Energy Corporation was to acquire the stock and assets of a corporation called Hillcrest Beverly Oil Corporation (HBOC). Two of the plaintiffs were to be shareholders of Sole Energy Corporation, but it never issued stock. Plaintiffs sought as damages the future profits Sole Energy Corporation purportedly would have earned had the transaction been consummated. In denying plaintiffs' claims, the court held that the defendants made the alleged misrepresentations "to induce Plaintiffs into seeking an economic relationship with HBOC . . . not to disrupt an existing economic relationship." (*Id.* at p. 243. See also, *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2014) 58 F.Supp.3d 989, 999 [plaintiffs "did not have an 'existing' relationship with potential Uber customers at the time" of the interfering conduct]; *Louisiana Pacific Corp. v. James Hardie Building Products, Inc.* (N.D.Cal. Nov. 14, 2012, No. C–12–3433 SC) 2012 WL 5520394, *2 [claim dismissed because "consumers do not have an existing business relationship with Plaintiff merely because they perform an internet search," quoting *Google Inc. v. Am. Blind &*

Wallpaper Factory, Inc. (N.D.Cal. Mar. 30, 2005, No. C03–05340 JF) 2005 WL 832398, *9]; *Piping Rock Partners, Inc. v. David Lerner Associates, Inc.* (N.D. Cal. 2013) 946 F.Supp.2d 957, 980 aff'd, (9th Cir., July 13, 2015, 13-16110) 2015 WL 4187861 ["[a]llegations that amount to a mere hope for an economic relationship and a desire for future benefit are inadequate to satisfy the pleading requirements of the first element of the tort."].)

Contrary to the above authorities, the Court of Appeal found "an actionable economic expectancy arises once the public agency awards a contract to an unlawful bidder, thereby signaling that the contract would have gone to the second lowest qualifying bidder." (Maj. Opn., 184 Cal.Rptr.3d at pp. 288–289.) The Court explained that it saw "no reason to cut off any legal effect from the winning bidder's misconduct simply because it precedes the completion of the bidding process. . . . In short, by continuing its unlawful conduct after wrongly winning the contract, the defendant interferes with an expectancy that would have otherwise materialized." (*Ibid.*)

The dissent correctly indicted this analysis as being "temporally backward." (184 Cal.Rptr.3d at p. 304 [Grimes, J., dissenting].) The alleged wrongful act at issue here is the submission of a bid by American that was allegedly predicated on American's post-bid award failure to pay all prevailing wages once the job commenced. The submission of such a bid, the majority further states, "precedes the completion of the bidding process." Given the inherent uncertainties and the agency discretion in awarding public works contracts, no bidder, even the lowest responsible bidder, has a sufficient existing economic relationship and expectancy "prior to the completion of the bidding process," i.e., prior to the time the bidder is finally awarded the contract.

Creating an economic relationship and expectancy based on events occurring subsequent to the defendant's allegedly wrongful conduct and after "the completion of the bidding process" effectively emasculates all prior case law and re-writes the threshold element. Tellingly, the majority opinion offers no authority for its conclusion that a sufficient economic relationship and expectancy may arise after the defendant's wrongful interfering conduct.

Instead, the economic relationship and reasonable probability of future economic benefit are threshold elements and cannot depend on whether or not defendants acted wrongly. As the dissent correctly put it, "The threshold question to ask is did plaintiffs have an existing economic relationship with the public entity soliciting bids for a public project containing the probability of future economic benefit? —without regard to defendant's allegedly illegal conduct." (184 Cal.Rptr.3d at p. 305 [Grimes, J., dissenting].)

A final but compelling reason why the Court of Appeal's reasoning is flawed in finding a protectable economic relationship arising upon the determination that Plaintiffs were second low bidders and then the subsequent award of the contracts to American, is that the tort has always required that the defendant have knowledge of the existing relationship at the time of its allegedly wrongful conduct. (*Edwards v. Arthur Andersen LLP, supra,* 44 Cal.4th 937 at p. 944.) While the operative complaint alleges that American knew Plaintiffs were bidding on the same projects, this allegation is nothing more than a "contention or conclusion" that the court does not have to accept as true in ruling upon a demurrer. (*Blank v. Kirwan, supra,* 39 Cal.3d 311, 318.) Due to the nature of sealed bids, American could not possibly have known at the time it submitted its bid that Plaintiffs would prove to be the second lowest bidders, and therefore American could not possibly have known of Plaintiffs' economic

relationship arising, as it must under the analysis employed by the Court of Appeal, after American had submitted its bids.

2. The Availability of Administrative Remedies Such as Bid Protests and Mandamus Actions Does Not Support the Court of Appeal's Conclusion that a Bidder Has a Business Relationship or Economic Expectancy with the Awarding Agency

The Court of Appeal concluded that "an actionable economic expectancy arises once the public agency awards a contract to an unlawful bidder, thereby signaling that the contract would have gone to the second lowest qualifying bidder." (184 Cal.Rptr.3d at p. 288.) According to the Court of Appeal, the cases relied upon by American, including *Swinerton, supra*, 40 Cal.App.3d 98, and *Rubino v. Lolli* (1970) 10 Cal.App.3d 1059, recognize that the lowest bidder "has an enforceable right in mandate to stop a public agency from improperly awarding a contract." (184 Cal.Rptr.3d at p. 287.) Each plaintiff's right of recovery in those cases was "consistent with the notion that the true and lowest bidder may bring a mandate action to compel the public agency to reverse its previous decision improperly awarding a contract. Absent some enforceable right, such mandate actions would not be possible." (*Ibid.*)

The Court of Appeal's argument misses the point. A bid protest proceeding—a writ of mandate action to set aside the contract—does not create any expectancy in the contract award; instead, its purpose is to enforce due process and ensure the agency followed the proper procedure in making a fair award. (*Bay Cities Paving & Grading, Inc. v. City of San Leandro* (2014) 223 Cal.App.4th 1181, 1187; see also *Taylor Bus Service, Inc. v. San Diego Bd. of Education* (1987) 195 Cal.App.3d 1331, 1340; *Boydston v. Napa Sanitation Dist.* (1990) 222 Cal.App.3d 1362, 1369.)

For example, in *Monterey Mechanical Co. v. Sacramento Regional County Sanitation Dist.* (1996) 44 Cal.App.4th 1391, 1414, the court explained, "As potentially the lowest responsible bidder, plaintiff has a beneficial right in seeing the contract is properly awarded. Plaintiff may not compel the Board to award it the contract. . . . But plaintiff does have a right to require the District to apply the proper criteria in assessing" whether it was lowest responsible bidder. The trial court cannot substitute its judgment for that of the agency and it cannot compel an agency to make the award to the second lowest bidder. (*Judson Pacific-Murphy Corp. v. Durkee* (1956) 144 Cal.App.2d 377, 381.)

Thus, contrary to the Court of Appeal's conclusion, the fact that California law recognizes bid protest remedies does not support the conclusion that a bidder to a public works contract has an actionable economic expectancy once the public agency awards a contract to an unlawful bidder, which is consistent with the notion that competitive bidding statutes are enacted for the benefit of taxpayers, not bidders. (*Kajima, supra,* 23 Cal.4th at p. 316–317.) Bid protests are merely designed to protect the process of making a fair award, not to enforce an already-established expectancy of the bidder, let alone to create such an expectancy. (See also *Konica Business Machines U.S.A. Inc. v. Regents of University of California* (1988) 206 Cal.App.3d 449, 458 [in a bid protest proceeding, the remedy is to set aside a contract award; the court does not direct the agency to exercise its discretion in re-bidding or re-awarding the contract to any particular party].)

3. ***Korea Supply*** **Did Not Hold That a Disappointed Bidder Has an Economic Expectancy in the Award of a Public Contract**

Against this legal backdrop, the Court of Appeal's majority decision relied on *Korea Supply, supra*, 29 Cal.4th at 1164 for the proposition that "a bidder on a government contract who submits a superior bid and loses

out only because a competitor manipulated the bid selection process through illegal conduct has been a victim of actionable interference." (184 Cal.Rptr.3d at p. 288.)

The majority plainly misconstrues *Korea Supply*. There, plaintiff KSC was a broker that represented a military supplier (MacDonald Dettwiler) in negotiations for a contract with the Republic of Korea. Plaintiff stood to receive a commission of over $30 million if its client's bid was accepted. (*Id.* at p. 1140.) Ultimately, the contract was awarded to a competitor. Plaintiff then sued the competitor, arguing that it and its agent had offered bribes and improper favors to key Korean officials in violation of the Foreign Corrupt Practices Act ("FCPA").

This Court reinstated Plaintiff's intentional interference cause of action, explaining, "KSC merely alleged that it had an economic expectancy in that it was acting as MacDonald Dettwiler's broker and it expected a commission if the contract was awarded to MacDonald Dettwiler." (*Ibid.*) The Court further went on to instruct:

> [A] plaintiff that wishes to state a cause of action for this tort must allege the existence of an economic relationship with some third party that contains the probability of future economic benefit to the plaintiff. This tort therefore 'protects the expectation that the relationship eventually will yield the desired benefit, not necessarily the more speculative expectation that a potentially beneficial relationship will arise.' [citations.] Here, KSC had an agency relationship with MacDonald Dettwiler under which KSC's commission was fixed at 15 percent of the contract price. As alleged in the complaint, if Macdonald Dettwiler had been awarded the contract, KSC's commission would have exceeded $30 million. This business relationship and corresponding expectancy is sufficient to meet this first element. Only plaintiffs that can demonstrate an economic relationship with a probable future economic benefit will be able to state a cause of action for this tort. (*Korea Supply, supra,* 29 Cal.4th at p. 1164, emphasis added.)

Importantly, nowhere does this Court's holding in *Korea Supply* endorse Plaintiffs' theory that the mere submission of a bid by KSC or MacDonald Dettwiler coupled with the foreign government's award to the unlawful bidder, constitutes a sufficient existing economic relationship. Instead, it was the *agency relationship* between KSC and its client MacDonald Dettwiler—which was already in place at the time of bidding—that this Court relied upon in recognizing an actionable claim for intentional interference. No such actual relationship can be claimed here by Plaintiffs.

Nonetheless, the majority maintains that per *Korea Supply,* if a broker of a losing bidder can state a claim for tortious interference against the winning bidder based on its expectation of receiving a commission, then "it seems inescapable" that the losing bidder would likewise have a cause of action based on interference with its bid. (184 Cal.Rptr.3d at p. 286, fn. 4.)

The majority's reasoning is flawed because it is California's Public Contract Code and the public policy supporting it that bars the formation of a protectable relationship here. The FCPA does not apply to bidding for public contracts in California and was enacted for the purpose of making it unlawful to make payments to foreign government officials to assist in obtaining business. Obviously, the FCPA does not regulate the bidding process at issue here and does not contain any statutory requirements governing the award of public contracts in California. Similarly, the FCPA was not designed to protect California's public fisc, nor to insure open access to all bidders to California public contracts.

Also, *Korea Supply* is distinguishable because in bribing the Korean officials who had the authority to award the contracts, the defendants violated the FCPA, which was specifically intended to prevent official corruption in the procurement of contracts with foreign countries. By

contrast, here Plaintiffs allege that American failed to comply with California's prevailing wage laws, which were passed for the protection of workers (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987) and not intended to protect bidders on public works construction contracts.

Moreover, the threshold element of existing economic relationship was not at issue in *Korea Supply.* However, as made clear in *Korea Supply,* there are two distinct parts to this element: "This business relationship and corresponding expectancy is sufficient to meet this first element." (*Korea Supply*, *supra,* 29 Cal.4th at p. 1164.) *Korea Supply* clearly distinguishes an existing business relationship from a "probable future economic benefit," articulating that the "probable future economic benefit" merely qualifies the type of existing economic relationship protected by the tort.

The majority's opinion however, conflates the second element—the expectancy of future economic benefit to the plaintiff—with the threshold element of a pre-existing economic relationship. The dissent correctly points out that in *Korea Supply*, the "economic relationship existed entirely apart from and before the defendant's illegal conduct that disrupted the relationship." (184 Cal.Rptr.3d at p. 304 [Grimes, J., dissenting].)

II.

Under Well-Settled California Law, a Disappointed Bidder May Not Recover Lost Profits for the Misaward of a Public Contract

The Court of Appeal's decision is the first California case to recognize a disappointed bidder's claim for lost profits against the winning bidder based on the wrongful denial of a public contract. Fifteen years ago, in *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 315–316, this Court held that a bidder who has been wrongfully denied a public contract cannot be awarded lost profits. Instead, the bidder's monetary recovery is limited to its bid preparation expenses. (*Ibid.*)

In *Kajima*, the lowest responsible bidder on a public works contract sued the Los Angeles Metropolitan Transportation Authority ("MTA") after it awarded the contract to the second lowest bidder. (*Kajima*, *supra*, 23 Cal.4th at p. 309.) The trial court granted a writ of mandate on plaintiff's bid protest, finding plaintiff had not received the proper credit in order to meet MTA's disadvantaged business enterprise participation goal. (*Ibid.*) The trial court entered judgment for plaintiff and awarded damages for plaintiff's bid preparation costs and lost profits. After the Court of Appeal affirmed, this Court granted review to determine "whether the lowest responsible bidder who is wrongfully denied a public contract had a cause of action for monetary damages, and if so, whether those damages include lost profits." (*Id.* at p. 310.)

In reversing the lower courts, this Court held that because the contract was fully performed and injunctive relief was no longer available, plaintiff had a cause of action for monetary damages based on a promissory estoppel theory. (*Kajima*, *supra,* 23 Cal.4th at pp. 313–315.) When a public entity solicits bids, it represents, consistent with the statutory mandate, that if the contract is awarded, it will be awarded to the lowest responsible bidder. (*Id.* at p. 315.) In reliance on this representation or requirement, a bidder incurs costs preparing and submitting a bid. (*Ibid.*) Allowing recovery of bid preparation expenses thereby furthers the purposes of the competitive bidding laws by encouraging proper challenges to mis-awarded public contracts by the most interested parties and by deterring government misconduct. (*Id.* at p. 316.)

However, because the awarding agency, MTA, was authorized to reject all bids, plaintiff did not know at the time it submitted its bid whether the contract would even be awarded. (*Kajima*, *supra,* 23 Cal.4th at p. 315.) Additionally, because of the secrecy of the bidding process, plaintiff could not have known at the time it tendered its bid whether it was indeed the

lowest responsible bidder. (*Ibid.*) Given these uncertainties, which are inherent in competitive bidding, bid preparation costs, not lost profits, were the only costs reasonably incurred. (*Ibid.*) The lowest bid could turn out to be an unprofitable one, as any miscalculation or unanticipated rise in costs could erode or even extinguish the bidder's profit margin. Awarding plaintiff profits it *might* have earned on the contract would be vastly disproportionate to the losses actually sustained as a result of its detrimental reliance and would be necessarily speculative. (*Ibid.*)

As this Court pointed out, public policy supported limiting damages for two salutary reasons: (1) to protect the public fisc from runaway damage awards, and (2) to prevent a windfall to disappointed bidders by compensating them "for effort they did not make and risks they did not take." (*Kajima*, *supra,* 23 Cal.4th at p. 317 [quoting *City of Atlanta v. J.A. Jones Construction Co.* (1990) 260 Ga. 658, 659, 398 S.E.2d 369, 371].) In other words, this Court refused to award damages that would put plaintiff in a better position than if it had actually been awarded the contract, because "the possibility of significant monetary gain alone may encourage frivolous litigation and further expend public resources." (*Id.* at p. 317.)

Although *Kajima* finally put to rest this legal issue, a long line of cases prior to that decision had uniformly held that bidders to a competitively-bid public works contract have no legally-protectable interest in the award and are not entitled to lost profits. (See, e.g., *Pacific Architects Collaborative v. State of California* (1979) 100 Cal.App.3d 110, 121-122; *Rubino v. Lolli*, *supra*, 10 Cal.App.3d 1059, 1062; *Swinerton & Walberg Co. v. City of Inglewood-L.A. County Civic Center Authority*, *supra*, 40 Cal.App.3d 98, 101.)

Kajima and *Swinerton* are also supported by the overwhelming majority of other jurisdictions. "It is now well established in virtually all

jurisdictions that an unsuccessful bidder's remedy at law for the wrongful denial of a contract award is . . . limited to bid preparation costs." (1 Bruner & O'Connor Construction Law § 2:148, fn. 1 [collecting cases]; see also Schwartzkopf & McNamara, Calc. Constr. Dmgs. (Aspen, 2014) § 8.06A [collecting cases]; Kelleher, et al., Construction Disputes Prac. Guide with Forms (Aspen, 2014) § 5.03 ["The majority of courts allow, either by statute or case law, the recovery of bid preparation, and in some cases, bid protest costs. . . .These jurisdictions, however, do not generally allow an award of lost profits."].

Here, the Court of Appeal's decision effectively nullifies *Kajima* and its ruling that a disappointed bidder may not recover lost profits for the mis-award of a contract. The Legislature has commanded that California's public contract law should be uniform. (Pub. Contract Code, § 102.) The Court of Appeal's decision would work an incongruity in that it would allow a disappointed bidder to assert tort damages against any rival who won a contract through underbidding so long as it can allege that the underbidding was caused by some independently wrongful conduct, e.g. misstatements in subcontractor listing, licensing, even something as remote to the bidding as the failure to properly smog test and license its vehicles, anything that a frustrated bidder could whip up as "wrongful." (*Konica*, *supra*, 206 Cal.App.3d at p. 454; V*alley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432, 1441–1443.) There are no sound policy reasons cited by the majority opinion below for this incongruity, and the one reason cited by it—to prevent "wage theft"—is both unnecessary and contrary to public policy, for the reasons explained below.

III.

The Prevailing Wage Law Already Contains Adequate Enforcement Mechanisms

A. Creating New Tort Remedies for the Second Lowest Bidder Would Not Help Prevent "Wage Theft"

The Court of Appeal admitted that its decision rested, in large part, on a perceived need to police the public bidding process so as to prevent "wage theft" and enforce the prevailing wage laws. Yet, California's Labor Code contains an extensive enforcement mechanism for the prevailing wage laws. Labor Code section 1741 authorizes the Division of Labor Standards Enforcement ("DLSE") to issue either a civil wage and penalty assessment or a Notice of Withholding of Contract Payments to the awarding agency if the DLSE determines that there has been a violation of the prevailing wage requirements. Labor Code section 1741 also authorizes the DLSE to recover wages, interest, and liquidated damages on behalf of the employees and provides for a hearing process, including settlement and discovery procedures. Section 1771.3 authorizes a civil action by a joint labor-management committee against a contractor that violates prevailing wage laws, and the affected employees also possess a private right of action to recover the non-payment of prevailing wages. (*Road Sprinkler Fitters Local Union 669 v. G&G Fire Sprinklers, Inc.* (2002) 102 Cal.App.4th 765.)

Additionally, Labor Code section 1777.1, subdivision (a), allows for debarment of contractors where the contractor acted with the intent to defraud. Debarment is also available where a contractor is found to have committed two or more willful violations of the Prevailing Wage Law within a three-year period, or where a contractor fails to timely respond to requests for certified payroll records. (Lab. Code, § 1777.1, subds. (b)-(c).) Debarment under this statute can include prohibition on bidding and

working on a public works project for a period of one to three years. (*Ogundare v. Department of Industrial Relations, Division of Labor Standards Enforcement* (2013) 214 Cal.App.4th 822, 830.)

Furthermore, the awarding agency is charged with monitoring compliance with prevailing wage laws by its contractors. Labor Code section 1773.2 requires the public agency to specify the prevailing wage for each craft and classification of worker need to carry out the contract. Section 1776 requires the contractor to prepare and maintain certified payroll records, affirming under oath that the contractor has complied with the provisions of Labor Code section 1771 and that the contractor has paid all required prevailing wages to its workers. The contractor is required to provide the certified payroll records to the public agency within ten days of the agency's request. (§ 1776(d).) Finally, the awarding agency is authorized to withhold payments to the contractor found to have violated the prevailing wage laws. (§ 1726(a), (b).) Other administrative remedies are available. (*Mobley v. Los Angeles Unified School District* (2001) 90 Cal.App.4th 1221, 1232–1233.) A contractor who falsely certifies its prevailing wage payrolls may be liable under the False Claims Act, which offers treble damages and other penalties. (*U.S. ex rel. Local 342 Plumbers and Steamfitters v. Dan Caputo Co.* (9th Cir. 2003) 321 F.3d 926.)

By contrast, the Labor Code is clear that Plaintiffs here have no standing to enforce American's pay practices: "The duties created by the wage-and-hour statutes run solely from employer to employee." (*Castillo v. Toll Bros., Inc.* (2011) 197 Cal.App.4th 1172, 1210, citing *Violante v. Communities Southwest Development & Construction Co.* (2006) 138 Cal.App.4th 972, 978–979.) The contractor's duties under the prevailing wage law are limited to its own employees, not to its subcontractors, employees of other entities, or anyone else. (See also *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 969 [contractor has no duty to pay

prevailing wages, absent an express or implied contractual relationship with the worker].)

Further, it is important to remember that none of the damages awarded to a disappointed bidder in a tortious interference lawsuit will actually go towards reimbursement of workers' wages. The Court of Appeal's efforts to add a further layer of enforcement to the prevailing wage laws is not only unnecessary, but also results in numerous unintended consequences, as outlined above.

In *Kajima*, this Court warned that "prudence is warranted whenever courts fashion damages remedies in an area of law governed by an extensive statutory scheme." (*Kajima*, *supra,* 23 Cal.4th 305, 317.) This principle was applied in *Settimo Associates v. Environ Systems* (1993) 14 Cal.App.4th 842, where the court denied a claim for intentional interference when the underlying conduct was already regulated by other statutes. There, plaintiff, the holder of a general contractor's license, was twice underbid on a private construction project by defendant, the holder of only a specialty contractor's license that was not sufficient for some of the work involved. (*Id.* at p. 844.) Plaintiff pleaded alternative causes of action for intentional or negligent interference with prospective economic advantage, asserting that defendant's lack of a general contracting license alone satisfied the element of unlawful interference. (*Ibid.*) The court in *Settimo* affirmed defendant's motion for judgment on the pleadings, holding that while defendant's unlicensed contracting was illegal, the regulatory statutes gave responsibility for sanctioning the misconduct to the Contractors' Licensing Board. (*Id.* at p. 845.) The contractor licensing statutes do not create any action for civil damages in competing bidders who lose projects to unlicensed contractors. (*Ibid.*) Thus, *Settimo* held that even though the defendant was not properly licensed and had violated California law, its

conduct in submitting a bid did not amount to actionable unlawful interference. (*Id.*, at 846.)

Similarly, here the trial court's ruling sustaining American's demurrer without leave to amend is correct because the alleged conduct—American's underbidding of Plaintiffs on public contracts—is not actionable as tortious interference. As in *Settimo* where the regulatory statutes gave responsibility for enforcing the licensing laws to the Contractors' Licensing Board, here the prevailing wage laws vest the Labor Commissioner with authority for their enforcement. (Lab. Code, §§ 1741 et seq., 1775.) Although employees themselves enjoy a private right of action to recover unpaid prevailing wages from their employer (*Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers* (2002) 102 Cal.App.4th 765, 772-773), the prevailing wage statutes do not create any action for civil damages in favor of competing bidders who lose projects to low bidders. And, like the regulatory statutes, the Labor Code does not grant a fellow bidder a right of action against a bidder who is alleged to have violated the prevailing wage laws. The prevailing wage laws do not confer a right of action in favor of Plaintiffs, nor may Plaintiffs use the alleged prevailing wage violations as the predicate upon which to base their tortious interference claims. The trial court correctly recognized this principle and the Court here should affirm.

If Plaintiffs' allegations are true and prevailing wages were not paid, then logically it is American's employees—not Plaintiffs—who are directly harmed by this purported pay practice and are entitled to recover. Plaintiffs' injuries are too remote to be recoverable.

B. Legislative History of Public Contract Code Section 19102 Supports American's Argument that the Existing Enforcement Mechanisms for Prevailing Wage Laws Are Sufficient

The Court of Appeal rejected American's argument that the legislative history of Public Contract Code section 19102 limits the claims against bidders/contractors to those convicted of violating section 3200 of the Labor Code [workers compensation laws], the Unemployment Insurance Code, or both. (184 Cal.Rptr.3d at pp. 293-295.) But the Court of Appeal's analysis supports American's position that an adequate statutory scheme for the enforcement of prevailing wage laws already exists.

The opinion referenced an Assembly committee report that specifically discussed that "existing laws requires the payment of prevailing wages to workers employed by private contractors on public works projects valued at $1,000 or more." Based on this the opinion concludes that the "Legislature did not intend to include prevailing wage violations as a basis for recovery under Public Contract Code sections 19102 and 20104.70." (184 Cal.Rptr.3d at p. 295.)

If the Court of Appeal is correct, the reason behind the Legislature's decision not to include prevailing wage law violations in the final bill must be because the existing, robust, and multi-faceted enforcement scheme in place for prevailing wage laws is sufficient to combat "wage theft" from workers on public works projects.

IV.

The Court Should Not Extend Tort Liability to Bidders on a Competitively-Bid Public Works Contract

Under the Court of Appeal's reasoning, any contractor that submits a bid to a public agency has, from the moment of submitting its bid, a legally-protected economic relationship with the awarding agency and an

expectancy in the award. The Court of Appeal acknowledged that this is so even though it cannot be determined until after all the bids have been unsealed which bidder is the second lowest bidder and which bidder is awarded the contract. While the majority opinion did not specifically articulate the basis for its conclusion, the Court of Appeal's holding rests, as it must, on some duty by bidders to other bidders to prepare their bids in a non-tortious fashion. This judicially-imposed duty in the context of a competitive bidding situation marks an unprecedented and unwarranted expansion of tort liability.

A. Successful Bidders on Public Contracts Do Not Owe Common Law Tort Duties to Their Unsuccessful Competitors

A cause of action in tort is based on the violation of a legally protected right. (*Mega Life and Health Ins. Co. v. Superior Court*, (2009) 172 Cal.App.4th 1522, 1527-1529.) Thus, the crucial issue in any analysis of tort liability is whether the defendant breached a duty owed to the plaintiff. (*Id.* at 1529; see also *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 596.) Absence of duty bars recovery for intentional torts as well as for negligence. (*Gregory v. Cott* (2014) 59 Cal.4th 996, 1011-1012.)

Here, the notion that American owed a duty of care to Plaintiffs to prepare its bids in a certain fashion—i.e., so that its bid price and labor costs would take into account compliance with prevailing wage laws—was adopted by the majority with no analysis. There is no reported decision holding that bidders owe a duty sounding in tort to the soliciting agency to create its bids in a particular fashion, much less a duty to fellow bidders. (See *Settimo Associates v. Environ Systems* (1993) 14 Cal.App.4th 842.) A bid that does not satisfy the contract specifications and/or materially deviates from the specifications would be rejected by the agency, but certainly once the agency rejects the bid it has no right to recover tort

damages from that bidder. Only after the contract is awarded and the contract breached by the contractor could any claim arise on behalf of the agency. Plaintiffs have failed to articulate how a bidder to a public works contract owes any duties to its fellow bidders and competitors.

The gaps in the Court of Appeal's reasoning become even more apparent when one tries to define the scope of these purported duties. Does the agency now have a relationship with prospective bidders? If so, what duties do public agencies owe to those bidders, and *vice versa*? What are the contours of those duties?

The majority not only failed to articulate the parameters of the duties between bidders, it also failed to identify *to whom* the duties are owed. The Court of Appeal left open the door for the disappointed bidder's sub-contractors and material providers to also sue for their lost profits. The majority's decision offers "no principled way to cut off a myriad of other indirect claimants" who can each "claim that their business was somehow impacted or adversely affected by" Plaintiffs' loss of the contracts. (*Sharp v. United Airlines, Inc.* (10th Cir.1992) 967 F.2d 404, 408-409 [dismissing antitrust and prospective economic advantage claims of employees alleging that the defendant's illegal conduct destroyed their employer].)

This is not the first time that this Court has considered whether a defendant owes a duty of care to a third party for purely economic loss. In *Biakanja v. Irving* (1958) 49 Cal.2d 647, this Court set forth a list of six factors for courts to consider when determining whether a tortious duty exists:

> The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's

> conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." (*Biakanja, supra,* 49 Cal.2d at 650.)

In *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, this Court applied the *Biakanja* factors to determine whether the tenant of a building could state a cause of action against a contractor hired by the building's owner for lost business income stemming from delays in completion of a construction contract. Although the case involved *negligent* interference with prospective economic relations, rather than the intentional interference at issue here, the analysis is still relevant.

In *Bily v. Arthur Young & Company* (1992) 3 Cal.4th 370, 397-398, the Court held that the auditors of a company owed no duty to third party investors who lost money relying on the defendant's audit opinions of a company's financial statements when those statements had grossly understated the company's liabilities. Similarly, in *Aas v. Superior Court* (2000) 24 Cal.4th 627, 644, the Court applied the *Biakanja* factors to find that homeowners could not recover tort damages for construction defects that had not caused property damage, that is, for purely economic loss. *Aas* acknowledged that to apply the multi-factored balancing test tends to involve a court making fairly subjective judgments. However, a relatively objective obstacle to plaintiffs' claim appears in factor (3), which looks to "the degree of certainty that the plaintiff suffered injury...." (*Id.* at p. 646.) Where, as here, the alleged wrongdoing caused only speculative harm or the "threat of future harm," this does not suffice to create a cause of action. (*Ibid.*; *Davies v. Krasna* (1975) 14 Cal.3d 502, 513.)

In this case, Plaintiffs cannot establish that American owed a duty to prepare its bids in a particular fashion, to ensure that its bid price included prevailing wages, or to refrain from underbidding its competitors for the contracts.

B. The Court Does Not Need to Recognize a Damages Remedy In Favor of the Second Lowest Bidder

Plaintiffs contend that unless the Court authorizes a damages remedy, bidders will act with impunity by engaging in "whatever type of tortious act was required in order to win the bid." (AOB, p. 3.) Plaintiffs' theory rests on a mistaken view of the maxim that "[f]or every wrong there is a remedy." (Civ. Code, § 3523.) Yet this abstract legal concept does not create substantive rights or an unbounded right to damages; instead, it extends only to those wrongs for which the law authorizes or sanctions redress. (*Mega Life and Health Ins. Co. v. Superior Court*, *supra,* 172 Cal.App.4th at pp. 1526–1527.) In *Mega Life,* the Fourth Appellate District refused to recognize a new type of tort claim authorizing spouses of insureds to recover in their personal capacities against insurers for fraud. In doing so, the court noted that modern law is replete with examples of "wrongs" for which there is no remedy. (*Id.* at p. 1527.)[4]

Likewise, in *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 8-9, this Court recognized that the act of intentional spoliation of evidence is an "unqualified wrong." However, pointing out the difficult and speculative nature of proving what the destroyed evidence would have

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[4] For example, a spouse may sue for loss of consortium deriving from the injury to his or her spouse, an unmarried cohabitant may not. (Cf. *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 404-405; *Elden v. Sheldon,* (1988) 46 Cal.3d 267, 277-279.) Although it is easily foreseeable that a child may suffer grievous harm when a parent is personally injured—similar to a spouse's loss of consortium—no recovery is allowed to a child for damages based on the immediate injury to a parent. (*Borer v. American Airlines, Inc.* (1977) 19 Cal.3d 441, 444; *Zwicker v. Altamont Emergency Room Physicians Medical Group* (2002) 98 Cal.App.4th 26, 32.) And, while that same child may recover for *personal* distress if he or she witnesses the injury to the parent, a sibling who is not present at the moment of injury cannot. (See *Dillon v. Legg* (1968) 68 Cal.2d 728.)

shown, and also noting the costs of meritless litigation, it declined to allow recovery in tort. (*Id.* at p. 17.) *Cedars–Sinai* was followed up only a few years later by *Temple Community Hospital v. Superior Court* (1999) 20 Cal.4th 464, which denied a tort claim for intentional spoliation or destruction of evidence by a third party not involved in the lawsuit.

There can be no doubt that the payment of prevailing wages and the integrity of the public bidding process are important public policies that are deserving of legal protection. However, there is no reason why the Court needs to apply tort remedies. As shown above, prevailing wages and competitive bidding are already subject to extensive government regulation and administrative remedies. Plaintiffs have not and cannot demonstrate why this State should recognize a cause of action in tort in favor of the second lowest bidder.

V.

Strong Policy Reasons Dictate Against Imposing Tort Liability for a Bidder's Alleged Prevailing Wage Violations

Courts look to public policy considerations to determine whether a particular type of economic expectancy is one deserving of protection by the tort of intentional interference. (*Youst v. Longo*, *supra*, 43 Cal.3d at p. 74 [holding that as a matter of public policy, no tort remedy available in the context of a sporting event]; accord *Cedars–Sinai Medical Center v. Superior Court*, *supra*, 18 Cal.4th at pp. 6–8 [whether to recognize a new "legal wrong" is governed by policy factors].) In making these determinations, both the courts and the Legislature must weigh competing interests, and consider factors such as problems inherent in measuring loss, "floodgates" concerns, in addition to the traditional elements of

foreseeability and proximate cause.[5] (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 278-280.)

The Court of Appeal's decision greatly expands the potential liability of parties involved in competitive bidding. Based on the Court of Appeal's ruling, disappointed bidders who are limited to recovering bid preparation costs from the public entity may now turn to the lowest bidder as a source for recovering lost profits.

While the majority dismissed American's argument that this case will "open the floodgates" to new litigation, the decision paves the way for lawsuits by a broad class of plaintiffs alleging all types of interference. Although the court purported to limit its holding to those bidders who can show they were the "actual and lawful lowest bidders" on the project, the court acknowledges in footnotes that its holding extends by implication to a large class of potential plaintiffs, including subcontractors, suppliers, and other businesses that would have benefitted had the losing bidder obtained the contract. (184 Cal.Rptr.3d at p. 289.) Further, while the Court of

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[5] Like the concepts of duty and foreseeability, proximate cause is a policy-based filter used to limit tort liability. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 464.) As this Court has explained, "[p]roximate cause involves two elements. [Citation.] One is cause in fact. An act is a cause in fact if it is a necessary antecedent of an event. [Citation.] ... [¶] To simply say, however, that the defendant's conduct was a necessary antecedent of the injury does not resolve the question of whether the defendant should be liable.... '[T]he consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would "set society on edge and fill the courts with endless litigation." ' [Citation.] Therefore, the law must impose limitations on liability other than simple causality. [.] In short, proximate cause is "'a policy-based legal filter on "but for" causation' " that courts apply 'to those more or less undefined considerations which limit liability even where the fact of causation is clearly established." ' [Citation.]" (*Id.* at p. 464.)

Appeal argued that its decision was supported by public policy to enforce the prevailing wage laws and prevent "wage theft," the majority itself recognized that its opinion is not limited to cases alleging violations of the prevailing wage laws as the predicate act of interference. The court's holding clearly allows for tortious interference claims based on many other types of alleged misconduct. This concern is echoed by the dissent. (184 Cal.Rptr.3d at pp. 306–307 [Grimes, J. *dissenting*].)

Significantly, the Court of Appeal blithely concedes that "[w]hether a plaintiff was in fact the second lowest bidder and would have been awarded a contract had the winning bidder complied with the prevailing wage law is a factual issue susceptible to standard civil discovery practices," such as conducting discovery of "the relevant officials involved in the contract award process." (184 Cal.Rptr.3d at p, 290 fn. 8.) This fact alone supports American's floodgate argument since it means that public officials will now be necessary participants in litigation between bidders. Disappointed bidders are now greatly incentivized to sue so that they can gain access through discovery into their competitor's confidential and proprietary methods for pricing bids. As a further consequence, successful bidders will be forced to expend time and money on defending lawsuits from their competitors rather than focusing their resources on completing their projects, which in turn affects public owners if projects cannot be completed on time due to litigation.

These floodgate concerns are especially relevant here, where under Plaintiffs' theory a protectable economic relationship arises upon the mere submission of a bid, since public agencies routinely receive multiple, if not dozens, of bids for a project. According to Plaintiffs' theory, each of these bidders could now sue for lost profit damages, by simply claiming all bids below them were in some fashion "wrongfully" prepared and/or those

bidders were not responsible bidders as defined in Public Contract Code section 1103.

These practical concerns were echoed by the Court in *Universal By-Products, Inc. v. City of Modesto* (1974) 43 Cal.App.3d 145, 152-153, wherein the court refused recovery to a disappointed bidder: "The competitive bidding statutes are for the benefit and protection of the public, not the bidders. (citations.) To countenance a judicial review of the reasons behind a rejection of bids in order to ascertain whether the entity acted in 'good faith' would thwart the right to reject all bids and would subject public agencies to endless lawsuits by bidders contending that their bids had not been given proper consideration."

As can be seen, incentivizing participants in the public works process is a poor way to police the conduct of bidders to a public works contract and creates many unintended consequences. Incentivizing losing bidders to sue for their own lost profits is a roundabout and grossly inefficient way to combat "wage theft," puts no money in the pockets of the affected workers, and is bad policy. This Court should reject the Court of Appeal's attempt to deputize all bidders on public works projects to police other competitors' bids, as allowing bidders to do so "would amount to a disservice to the public if a losing bidder were to be permitted to comb through the bid proposal or license application of the low bidder after the fact, [and] cancel the low bid on minor technicalities, with the hope of securing acceptance of his, a higher bid. Such construction would be adverse to the best interests of the public and contrary to public policy. [Citation.]" (*Ghilotti, supra*, 45 Cal.App.4th 897, 908-909.)

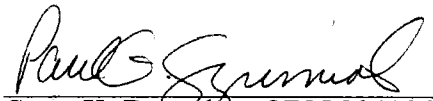
By contrast, the existing enforcement mechanisms for prevailing wage laws, and the bid protest procedures provide more than adequate means to regulate the behavior of bidders. As the Supreme Court said in *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transp. Authority*,

supra, 23 Cal.4th at p. 316, "The numerous cases in which a disappointed bidder has sought a writ of mandate to have the contract awarded to another set aside demonstrate that the incentive of significant monetary damages is not required for unsuccessful bidders to act as guardians of the competitive bidding process."

CONCLUSION

As shown herein there are numerous compelling reasons why this Court should affirm the trial court's ruling. Recognizing a protectable economic relationship in this context re-defines the tort of intentional interference with prospective economic advantage in a way never previously recognized by this Court. There can be no economic relationship enjoyed by mere bidders on public works contracts and the tort's protection should be not be extended to mere bidders to incentivize them to litigate for the recovery of highly speculative lost profits. There are real floodgate outcomes from creating this new right of recovery, and the Court should reject Plaintiffs' claims in their entirety.

Dated: August 7, 2015 Respectfully submitted,

By: 

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Dated: August 7, 2015

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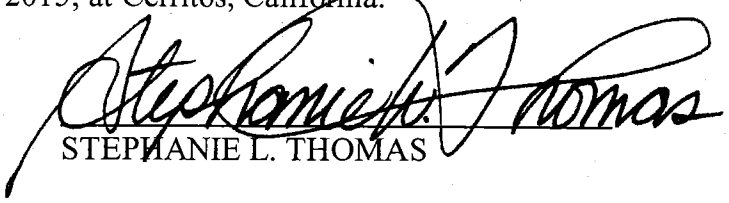

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