No. S246669

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SOUTHERN CALIFORNIA GAS COMPANY,
Respondent to Petition for Review,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent to Petition for Writ of Mandate.

FIRST AMERICAN WHOLESALE
LENDING CORPORATION et al.,
Real Parties in Interest, Petitioners.

After a Decision by the Court of Appeal,
Second Appellate District, Division Five, Case No. B283606

The Superior Court of Los Angeles County,
Judicial Council Coordination Proceeding No. 4861,
The Hon. John Shepard Wiley, Jr., Judge

PETITIONERS' OPENING BRIEF ON THE MERITS

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*Robert J. Nelson (CA Bar No. 132797)
Sarah R. London (CA Bar No. 267083)
Wilson M. Dunlavey (CA Bar No. 307719)
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: 415.956.1000
Facsimile: 415.956.1008
rnelson@lchb.com
slondon@lchb.com
wdunlavey@lchb.com

Additional Attorneys Appear on Signature Pages
Attorneys for Real Parties in Interest

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ISSUE PRESENTED FOR REVIEW

Does a gas company that negligently caused the largest methane gas leak in United States history, and which forced residents in the surrounding community to evacuate their homes for several months, owe a duty of care to the community's businesses for the economic losses caused by the gas company's misconduct?

INTRODUCTION

Southern California Gas Company's ("SoCalGas") negligence caused a catastrophic gas leak near the community of Porter Ranch, California. The noxious fumes forced many of the community's tens of thousands of residents to evacuate their homes, depriving neighborhood businesses of patrons for several months. Applying an incorrect standard, the Court of Appeal erroneously concluded that SoCalGas owed no duty of care to businesses in the affected area ("Business Plaintiffs") because the economic losses they suffered did not arise from any contractual relationship with SoCalGas.

The Court of Appeal should have begun its analysis with California Civil Code section 1714(a), which mandates that all Californians owe each other a duty to act with reasonable care in the management of their property or person. The Court of Appeal then should have analyzed the factors first articulated in *Rowland v. Christian* (1968) 69 Cal.2d 108 (*Rowland*), to determine if SoCalGas's misconduct somehow warranted an exception to section 1714(a)'s bedrock duty rule. (*Id.* at pp. 118–19.) Application of these so-called *Rowland* factors here demonstrates that neither foreseeability issues nor policy reasons warrant an exception from section 1714(a) and the general rule that SoCalGas had a duty to act with reasonable care to prevent the economic injuries Business Plaintiffs suffered.

Rather than start with section 1714(a) and the *Rowland* factors, the Court of Appeal instead applied the so-called "economic loss" doctrine to this case. According to the Court of Appeal, that doctrine bars the recovery of economic injury in tort unless that injury arises from a contract between SoCalGas and another person or entity.

But this Court's precedents and the fundamental policies behind the economic loss doctrine point to exactly the opposite conclusion: the economic loss doctrine bars the recovery of economic injury in tort only when that injury arises from a contract or warranty. This Court has never barred the recovery of economic losses in an environmental disaster such as this where the injury does not arise from a contract or warranty. And for good reason: the economic loss doctrine was created to deal with circumstances where businesses contract with one another, or with their consumers, and thereby agree upon a private ordering of their relationships. Courts respect that private ordering, and have determined that tort law generally ought not interfere in those private business relationships. Business Plaintiffs' injuries here do not arise from a contractual relationship with SoCalGas. Indeed, their only relevant "relationship" to SoCalGas is one of geographic proximity, operating in the vicinity of the gas storage facility. The very fact that Business Plaintiffs' losses here do not arise from a contract is the reason why the law of tort should, and does, apply. The parties never contracted out of the basic duty of care they owed to one another under section 1714(a).

Even if the economic loss doctrine does apply to this case (it does not), the Court of Appeal nonetheless erred by not following this Court's standard when it determined that Business Plaintiffs did not meet the special relationship exception to the economic loss doctrine. As this Court first directed in *Biakanja v. Irving* (1958) 49 Cal.2d 647 (*Biakanja*), the special relationship exception to the economic loss doctrine turns on a six-

factor *balancing* test. The Court of Appeal, however, did not balance the six so-called *Biakanja* factors. Instead, it narrowly construed the first factor—the extent to which a defendant's transaction was meant to affect the plaintiff—to mean that the defendant must have entered into a contract for the special relationship exception to be satisfied. Finding this factor to be dispositive, the Court of Appeal saw no need to consider the five other *Biakanja* factors. This, too, was clear error.

The Court of Appeal's approach, if upheld, would force these local small businesses to absorb the costs of SoCalGas's catastrophe. The Court of Appeal's sole policy justification for this outcome was a glancing reference to the danger of "unlimited responsibility for intangible injury." However, recognizing a duty in this case would not have such drastic effects. First, for these small businesses that survive on the smallest of margins and the patronage of local residents, the alleged economic injuries are very much tangible. Second, recognizing a duty would not create "unlimited responsibility" because the proposed class is precisely limited to businesses within the geographic boundaries of the evacuation zone, and so by definition there is no risk of "unlimited responsibility." Moreover, by concluding that a duty exists does not mean that SoCalGas will be liable; it remains to be proven whether SoCalGas breached its duty of care or whether that breach proximately caused Plaintiffs' injuries.

This Court has rejected unfounded or exaggerated concerns about the risks of unlimited liability before. Its response to those concerns sums up Plaintiffs' position here: "The Court of Appeal majority below . . . claimed that potential liability, if recognized here, would have no end. . . . [But] if a duty is not imposed under the facts of this case, then where does it begin?" (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 784 (*Cabral*), original italics.)

STATEMENT OF FACTS

I. SoCalGas negligently caused the largest methane gas leak in U.S. history leading to the evacuation of much of the community.

A. SoCalGas operates the Aliso Canyon Facility, which stores natural gas in a huge underground reservoir.

Defendant SoCalGas operates the Aliso Canyon Storage Facility ("Aliso Canyon Facility" or "Facility"), located in the hills just north of Porter Ranch in Los Angeles. (Exhibits in Support of Writ of Prohibition, Mandate, or Other Appropriate Relief Appellants' Appendix ["EP"], 1 EP 165, ¶ 2; *Southern California Gas Leak Cases* (2017) 18 Cal.App.5th 581, 583 (*Gas Leak*).)

The Facility is one of the largest gas storage facilities in the nation, and stores natural gas in an underground reservoir that can hold 80 billion cubic feet of natural gas. (1 EP 170, ¶ 27; 1 EP 165, ¶ 2.) The reservoir extends below the community of Porter Ranch. (1 EP 170, ¶ 24.) To get the gas in and out of the Facility's reservoir, SoCalGas uses 115 high-pressure injection wells. (1 EP 170, ¶¶ 24–26.)

B. SoCalGas violated industry standards—and then lied about those violations.

SoCalGas failed to operate and maintain the Facility in accordance with industry standards. (1 EP 177–178, ¶¶ 58–59.) SoCalGas was aware that many of the valves on the wells were leaking (1 EP 176–177, ¶¶ 53–56), but removed or never installed safety valves on most of the wells in the Facility. (1 EP 177-178, ¶ 58.)

The well that caused the catastrophe at issue here is a case in point. SoCalGas removed the safety valve in 1979 from that well, SS-25. (*Ibid.*) Yet it continued to report to the government regulator that it had "replaced" the safety valve, and that the SS-25 well had an operable safety valve.

(*Ibid.*) After the blowout, SoCalGas finally admitted it had removed the safety valve more than three decades earlier. (*Ibid.*)

SoCalGas failed to take other reasonable measures to protect against a well blow-out and resulting massive gas leak. Injection wells contain an exterior casing and interior tubing. Gas is meant to be pumped through the well's interior tubing, so that if the tubing springs a leak, the exterior casing, normally filled with a protective brine, will act as a safety or secondary barrier. (*Ibid.*) But SoCalGas pumped gas through both the interior tubing and the exterior casing at high pressure. (*Ibid.*) The only protection against a leak, therefore, was the bare exterior casing. Moreover, SoCalGas did not cement the SS-25 well's casing all the way to the well's surface, so the casing was exposed to elements, increasing corrosion. (1 EP 178, ¶ 59.)

C. Predictably, when gas began leaking uncontrollably, gas "spread an oily mist over nearby neighborhoods."

Due to this negligence, well SS-25 blew on October 23, 2015 and continued to emit large amounts of natural gas for over four months. (1 EP 171, ¶ 33.) Unable to activate a safety valve, SoCalGas could not stop the blowout and the resulting uncontrolled gas leak. (1 EP 174, ¶ 44). Finally, on February 18, 2016, the government certified the alleged plugging of the well. (1 EP 175, ¶ 49.)

The escaping natural gas "spread an oily mist over nearby neighborhoods, intruding upon and damaging yards, homes, vehicles, communal spaces, and other property." (1 EP 171, ¶ 34.) Residents and individuals who worked near the Facility complained about odors and experienced acute respiratory and central nervous system symptoms. (1 EP 176, ¶ 51.)

II. Business Plaintiffs suffered tangible economic injuries due to the six month evacuation of local residents.

A. Los Angeles County ordered SoCalGas to relocate residents within a five-mile radius of the Facility.

In response to reports of respiratory and central nervous system symptoms, Los Angeles County ordered SoCalGas to relocate residents who lived within a five-mile radius of the leak. (1 EP 172-173, ¶ 40.) The County's Board of Education also decided to relocate public school students and staff at two nearby public schools inside this five-mile radius for the rest of the 2015-2016 school year. (1 EP 173, ¶ 41.)

As a result, approximately 15,000 residents were evacuated for several months. (1 EP 178-179, ¶¶ 63-64.)

B. Plaintiffs are local businesses dependent on the patronage of local residents and so lost income when approximately 15,000 residents were evacuated.

The Business Plaintiffs are small businesses located within five miles of the blowout, the same area that the County ordered evacuated, and each lost income due to the blowout and ensuing evacuation. (1 EP 179-182, ¶¶ 65-79.) On behalf of a class of about 400 local businesses within the evacuation zone, the Plaintiffs sued SoCalGas and its parent company for strict liability, negligence, negligent interference with prospective economic advantage, and violations of the Unfair Competition Law. (1 EP 186, 188-196, ¶¶ 103-104, 111-162.) Plaintiffs seek to recover for the income they lost due to the gas blowout. (1 EP 165-166, ¶ 4.)

PROCEDURAL HISTORY

I. SoCalGas demurred, arguing that the economic loss doctrine barred Plaintiffs' tort claims.

SoCalGas demurred to Plaintiffs' first three causes of action: strict liability, negligence, and negligent interference with prospective economic

advantage. (1 EP 128-131; *Gas Leak, supra*, 18 Cal.App.5th at p. 585.) It argued that the economic loss doctrine barred those causes of action because it owed no duty to the Business Plaintiffs. According to SoCalGas, the only way to recover for economic loss is to demonstrate the existence between the plaintiff and defendant of a "special relationship" pursuant to *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 804 (*J'Aire*), by satisfying the *Biakanja* factors. Among the factors absent from this case, SoCalGas argued, was the existence of a "transaction" that affected the plaintiff, the first *Biakanja* factor. (1 EP 139-142; *Gas Leak, supra*, 18 Cal.App.5th at p. 585.)

II. The Superior Court overruled the demurrer.

The Superior Court overruled the demurrer. In an incisive order, it explained why "[t]raditional tort theory supports" the Plaintiffs' claims. (2 EP 386; *In re Coordination Proceedings Special Title (Rule 3.550) Southern California Gas Leak CA* (Super. Ct. L.A. County, May 8, 2017, No. JCCP 4861) 2017 WL 2361919, at *3 ("Trial Court Order").)

But, as the trial court observed, the law was "in a state of some uncertainty." (2 EP 388; Trial Court Order, *supra*, 2017 WL 2361919, at *5.) The "challenge," it stated, was this Court's decision in *J'Aire*, which approved the recovery of economic loss where the defendant and another party had a "contract" that was "intended to affect the plaintiff." (*Ibid.*)

The trial court was guided by this Court's analysis in *J'Aire* of a prior case, *Adams v. Southern Pacific Transportation Co.* (1975) 50 Cal.App.3d 37 (*Adams*). In *Adams*, a trainload of military bombs exploded, causing the destruction of the factory that employed the *Adams* plaintiffs. The workers sued Southern Pacific for their lost income due to not being able to work at the destroyed factory. The court of appeal in *Adams* held that plaintiffs' suit was barred because they were seeking to recover purely economic losses.

As the trial court here noted, however, *J'Aire* "disapproved" of the court of appeal's decision in *Adams*. (2 EP 388; Trial Court Order, *supra*, 2017 WL 2361919, at *6, quoting *J'Aire*, *supra*, 24 Cal.3d at p. 807.) The trial court interpreted *J'Aire*'s disapproval of *Adams* to mean that California law allows recovery for purely economic loss when that loss does not arise from a contract or warranty. The trial court observed that the facts of *Adams*—a negligently caused explosion causing economic loss to workers at a nearby factory—were somewhat analogous to the facts of this case, where a negligently caused natural gas leak caused economic loss to neighborhood businesses. (*See* 2 EP 388-389; Trial Court Order, *supra*, 2017 WL 2361919, at *6.)

The trial court certified its order for immediate appellate review under Code of Civil Procedure Section 166.1.

III. On writ review in a divided opinion, the Second District ordered that the demurrer be sustained.

In response to the SoCalGas's petition for writ review, the Court of Appeal issued an alternative writ. The Superior Court elected not to overrule the demurrer.

A. The Majority Opinion held that SoCalGas owed no duty to Business Plaintiffs.

A majority of the Court of Appeal panel thereafter issued a peremptory writ, holding that SoCalGas owed no duty of care to prevent the economic injuries suffered by Business Plaintiffs. It identified a "general rule that precludes business plaintiffs from recovering for pure economic losses under a negligence theory . . . ." (*Gas Leak*, *supra*, 18 Cal.App.5th at p. 595.) According to the Court of Appeal, this blanket "no-duty" rule has only one exception: where the plaintiff's economic loss arises out of a contractual transaction between the defendant and another person, courts may recognize that the defendant has a "special relationship"

with the plaintiff. (*Id.*, at p. 594 [citing *J'Aire*, *supra*, 24 Cal.3d at p. 806].) It is only a special relationship that can give rise to a duty not to inflict economic loss. But, because the Court of Appeal found that a special relationship requires a contract between the defendant and another party, and because such a contract was absent here, SoCalGas did not owe Plaintiffs a duty of care. As a result, all Plaintiffs were barred from recovering in tort for their economic losses caused by SoCalGas's misconduct.

B. The Dissent argued that a duty may be owed, and that writ relief was not appropriate.

Justice Baker dissented, stating that writ relief was not appropriate. (*Gas Leak*, *supra,* 18 Cal.App.5th at p. 595 (dis. opn. of Baker, J.).) A "more developed record" was "important to arrive at an appropriate disposition of this case." (*Id.* at p. 596.)

On the merits, according to Justice Baker, it was "quite possible" that some businesses "in a five-mile radius" from the Facility "are situated such that Southern California Gas Company owed them a duty of care." (*Gas Leak*, *supra*, 18 Cal.App.5th at p. 596 (dis. opn. of Baker, J.).) This was because "some businesses in the immediate geographic area of the gas leak could have a special dependence on that area such that harm to them would be foreseeable to Southern California Gas Company . . . ." (*Ibid.*)

Justice Baker argued that litigation in the trial court should proceed to allow the Plaintiffs to prove that kind of special dependence. "Because the majority's opinion resolves the business plaintiffs' litigation on the demurrer record, however, it has no ability to approach the question of duty with a scalpel, and unfortunately resolves it instead with a meat axe." (*Gas Leak*, *supra*, 18 Cal.App.5th at p. 596 (dis. opn. of Baker, J.).)

STANDARD OF REVIEW

"Duty is a question of law for the court, to be reviewed de novo on appeal." (*Kesner v. Super. Ct.* (2016) 1 Cal.5th 1132, 1142 (*Kesner*) [quoting *Cabral, supra*, 51 Cal.4th at p. 770].)

ARGUMENT

Plaintiffs' argument proceeds in four parts. First, they explain why Civil Code section 1714(a) and the *Rowland* factors—and not the economic loss doctrine—is the correct framework to determine whether SoCalGas owed Plaintiffs a duty of care. (See *infra* Argument § I.) They then apply the *Rowland* factors to this case to show that the Court should not recognize an exception to the general duty of care embodied in section 1714(a)—i.e., that SoCalGas did indeed owe Business Plaintiffs a duty of care. (See *infra* Argument § II.) Next, Plaintiffs explain why, even *if* the economic loss doctrine were the correct legal standard for determining duty here, SoCalGas would still owe a duty of care to Business Plaintiffs under the so-called *Biakanja* factors. (See *infra* Argument § III.) Finally, Plaintiffs briefly discuss why remand for further proceedings would be appropriate should this Court conclude that it is premature to rule on a duty of care on the pleadings. (See *infra* Argument § IV.)

I. The correct analysis to apply here is Civil Code section 1714(a) and *Rowland*—not the economic loss doctrine.

The central question in this case is what framework should be used to analyze the question of duty. Below, Plaintiffs first summarize the usual framework that this Court uses to answer duty questions: the framework provided by section 1714 of the Civil Code and *Rowland*. Plaintiffs then turn to the economic loss doctrine, briefly explaining how it is used to analyze duty questions and then discussing in depth why it is the wrong framework to use here.

A. Civil Code section 1714 and *Rowland* supplies the correct framework to analyze duty.

"[T]he basic policy of this state" on the duty of care is "set forth by the Legislature in section 1714 of the Civil Code . . . ." (*Rowland*, *supra*, 69 Cal.2d at pp. 118–19.) Under that provision, "[e]veryone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has . . . brought the injury upon himself or herself." (Civ. Code, § 1714(a).)

In deference to this "broad principle enacted by the Legislature," this Court has recognized that a duty of reasonable care is the "'general rule,'" and a lack of duty is "'an exception.'" (*Kesner*, *supra*, 1 Cal.5th at p. 1143, [quoting *Cabral*, *supra*, 51 Cal.4th at p. 771].) When a question of duty is presented, therefore, this Court asks not "whether a *new duty* should be created, but whether an *exception* to Civil Code section 1714 . . . should be created." (*Cabral*, *supra*, 51 Cal.4th at p. 783, original italics.)

This general rule of duty holds true even when a plaintiff has suffered purely economic injury, as opposed to physical injury to the person or to physical property. This conclusion follows simply from the language the Legislature used in Civil Code Section 1714(a). As this Court observed in *J'Aire*, where the plaintiff had suffered purely economic injury, the language of Civil Code section 1714(a) "does not distinguish among injuries to one's person, one's property, or one's financial interests." (*J'Aire*, *supra*, 24 Cal.3d at p. 806, fn. 3.) As a result, this Court held, section 1714's general duty applies not only to "injury to one's person or property," but also to "[d]amages for loss of profits or earnings . . . ." (*Ibid.*)

When determining whether to create an exception to the general duty embodied in section 1714(a), this Court has consistently used "the *Rowland*

factors." (*Cabral, supra*, 51 Cal.4th at p. 772; *see also id.* at p. 771 [citing cases].) These factors are "[1] the foreseeability of harm to the plaintiff, [2] the degree of certainty that the plaintiff suffered injury, [3] the closeness of the connection between the defendant's conduct and the injury suffered, [4] the moral blame attached to the defendant's conduct, [5] the policy of preventing future harm, [6] the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and [7] the availability, cost, and prevalence of insurance for the risk involved." (*Rowland, supra*, 69 Cal.2d at p. 113.) Rather than apply these *Rowland* factors, the Court of Appeal required Plaintiffs to show that "a transaction between the defendant and another was intended to directly affect" them (*Gas Leak, supra*, 18 Cal.App.5th at p. 583), a requirement that plainly is not among the *Rowland* factors. For when *Rowland* applies, "there *is* no transaction." (*QDOS, Inc. v. Signature Fin., LLC* (2017) 17 Cal.App.5th 990, 999, italics added.)

The *Rowland* factors aid courts in performing what is ultimately a "line-drawing" exercise "based on policy considerations." (*Kesner, supra*, 1 Cal.5th at p. 1143.) Under *Rowland*, the underlying question is whether "public policy concerns outweigh, for a particular category of cases, the broad principle enacted by the Legislature that one's failure to exercise ordinary care incurs liability for all the harms that result." (*Ibid.*)

Plaintiffs discuss below why, under section 1714(a) and *Rowland*, SoCalGas owed a duty to Plaintiffs. (See *infra* Argument § II.) Before doing so, however, Plaintiffs next turn to the competing framework offered by SoCalGas—the economic loss doctrine—and explain why it is not the correct framework to apply here.

B. Because Plaintiffs' losses do not arise from contract or warranty, the economic loss doctrine does not govern.

SoCalGas maintains that, under the economic loss doctrine, it owed no duty of care to Plaintiffs.[1] But the economic loss doctrine simply does not apply.

Here, where Plaintiffs' losses do not arise from a contract or warranty, both precedent and policy dictate that the economic loss doctrine is the wrong framework to use to determine the duty question.

1. The economic loss doctrine applies only to cases where, unlike here, injury arises from contract or warranty.

This Court's jurisprudence shows that the economic loss doctrine comes into play only when the plaintiff's injury implicates a contractual obligation. Thus, application of the economic loss doctrine turns on the *cause* of the injury (whether it arises from contract or warranty) rather than the *type* of the injury (whether it is economic or non-economic).

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[1] While Plaintiffs will use the term "economic loss doctrine" as shorthand to refer to any rule that may bar the recovery of economic damages, the term is one that this Court has often declined to use. (*See Gas Leak*, *supra*, 18 Cal.App.5th at p. 591 [so noting].) That reluctance may stem from what the term falsely implies—namely, that California law normally bars the recovery of economic damages in tort simply because they *are* economic damages. That implication is false, since, as *J'Aire* observed almost forty years ago, Civil Code section 1714(a) does not exclude economic injury from the general rule that injury resulting from negligence leads to liability. (*J'Aire*, *supra*, 24 Cal.3d at p. 806; *see also supra* Argument § I.A.) For this very reason, several jurisdictions either have commented that the terms "economic loss doctrine" or "economic loss rule" can be misleading or have used it merely as a specialized term of art. (*See, e.g.*, *Town of Alma v. AZCO Constr., Inc.* (Colo. 2000) 10 P.3d 1256, 1262–63; *David v. Hett* (Kan. 2011) 270 P.3d 1102, 1108–09; *Hermansen v. Tasulis* (Utah 2002) 48 P.3d 235, 240; *Eastwood v. Horse Harbor Foundation, Inc.* (Wash. 2010) 241 P.3d 1256, 1261–62.)

a. The economic loss doctrine's purpose is to separate tort law from contract law.

The most detailed discussion of the economic loss doctrine can be found in *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979 (*Robinson Helicopter*). There, this Court articulated the doctrine's purpose: it "'prevent[s] the law of contract and the law of tort from dissolving one into the other.'" (*Id.* at p. 988, citation omitted.) Thus, the doctrine provides that "'[w]here a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only 'economic' losses.'" (*Ibid.*, citation omitted.) Importantly, however, this Court observed that those "'economic expectations'" are already "protected by commercial and contract law." (*Ibid.*, citation omitted.) A hallmark of the economic loss doctrine, then, is the presence of a contract.

Crucially, *Robinson Helicopter* noted that the economic loss doctrine does not apply whenever there are purely economic damages. Specifically, the Court rejected the "proposition that the economic loss rule should be broadly construed to bar tort recovery in every case where only economic damages occur." (*Robinson Helicopter*, *supra*, 34 Cal.4th at p. 997, fn. 7.) Application of the economic loss doctrine turns not on the nature of the plaintiff's damage, but, rather, on whether the defendant's wrong and the plaintiff's injury should be governed by contract or by tort. (See *id.* at p. 991.) Hence, this Court in *Robinson Helicopter* allowed a fraud claim to proceed even though the plaintiff and defendant had a contractual relationship, because the alleged misconduct arose from a duty "independent of [the defendant] Dana's breach of contract." (*Ibid.*) This is the rule for negligence as well as fraud. (See *Erlich v. Menezes* (1999) 21 Cal.4th 543, 551.)

b. In *Biakanja* and its progeny, the economic loss doctrine applies to losses arising from contract.

Robinson Helicopter is also consistent with the line of cases beginning with *Biakanja* that apply the economic loss doctrine (including the *Biakanja* factors) to losses that arise from contract. *Biakanja* itself arose from the negligent performance of a contract to draft a will. This Court held that the defendant, a notary, owed the intended beneficiary a duty of care. (*Biakanja*, *supra*, 49 Cal.2d at pp. 650–51.) A similar result was reached three years later in *Lucas v. Hamm* (1961) 56 Cal.2d 583, 588–89, which likewise arose out of a contract for legal services under which an attorney had negligently drafted a will.

In *J'Aire*, Sonoma County had contracted with a builder to renovate a portion of an airport that a restaurant was leasing from the County. When the renovation took too long, the restaurant sued the builder. The Supreme Court applied the analytical framework of the economic loss doctrine because the restaurant's injury arose from the builder's allegedly negligent performance of its contract with the County. (*J'Aire*, *supra*, 24 Cal.3d at p. 804.) *J'Aire* also emphasized that economic injury is not categorically unrecoverable, and instead stated that Civil Code section 1714(a)'s "basic principle of tort liability" covers economic injury as much as other kinds of injury. (*Id.* at p. 806; see also *supra* Argument § I.A.) Again, a contract was central to the Court's resort to the economic loss doctrine framework.

Similarly, *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370 (*Bily*) arose from a contractual relationship between an auditor and its client, a company making an initial public offering. (*Id.* at p. 376.) Investors in the company sued the auditor for negligence. Citing public policy concerns, including the *Biakanja* factors, the Court declined to recognize that auditors owed a duty of care toward all investors. (*Id.* at pp. 397–98.) In *Bily*, just

as in *J'Aire*, the plaintiffs' losses arose out of the defendant's negligent performance of a contract between the defendant and another entity.

Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal.4th 26 (*Quelimane*) featured multiple contractual relationships. The plaintiffs purchased properties by tax deed and then attempted to resell the properties to someone else. They sued title insurance companies when they declined to issue insurance and hence prevented the resale of the properties. Plaintiffs' losses, as this Court noted, thus arose from their own contracts—their decision to buy the properties and assume the risk that "would-be purchasers could not obtain title insurance . . . ." (*Id.* at p. 58.) In those circumstances, the defendants owed the plaintiffs no duty of care to prevent economic losses.

The most recent decision in this line of cases is *Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1013–14 (*Centinela*). Health plans had contractually delegated to independent practice associations (IPAs) their obligation to reimburse physicians. The IPAs became insolvent and were not able to reimburse the physician providers. A class of physician providers sued the health plans for negligence, alleging that the plans knew or should have known that the IPAs were insolvent. *Centinela* held that the plans had a special relationship with the physician providers under the *Biakanja* factors, and hence owed the class of physicians a duty of care. (*Id.* at pp. 1013–17.) Here, too, the economic loss doctrine framework applied because the loss arose from a contract—the health plans' contract with the IPAs.

c. In *Seely* and its progeny, the economic loss doctrine applies in the warranty context.

This Court has also applied the economic loss doctrine to the somewhat different contractual context of warranties. (See 4 Witkin, Summary of Cal. Law (11th ed. 2007) Sales, § 51 [noting that a warranty is

"a contractual term concerning some aspect of [a] sale"].) In this area, the seminal case is *Seely v. White Motor Corp.* (1965) 63 Cal.2d 9. There, a consumer sued an automobile manufacturer to recover income lost as the result of a defective truck. The Court allowed the consumer to recover for breach of an express warranty (*id.* at pp. 13–14), but barred any recovery in tort. The Court concluded that "performance of [a manufacturer's] products in the consumer's business" was a matter of warranty, not tort law. (*Id.* at p. 18.)

More recently, in *Aas v. Superior Court* (2000) 24 Cal.4th 627 (*Aas*), the Court applied the economic loss doctrine to a negligence action that homebuyers brought against the developer, contractor, and subcontractors who built their homes. The homebuyers sought damages "representing the cost to repair, or the diminished value attributable to, construction defects" that had caused no property damage. (*Id.* at p. 635.) The Court reasoned that the damages sought constituted "the difference between price paid and value received," and hence were "primarily the domain of contract and warranty law or the law of fraud, rather than of negligence." (*Id.* at p. 636.) Because the injuries arose from the homebuyers' contract for purchase, it was "contract and warranty law" to which they could appeal for protection, not the law of tort. (*Id.* at p. 652.)

d. This Court has also applied *Biakanja* to property damage arising from contract.

A third set of cases, which applied the *Biakanja* factors to *property* damage arising out of contract, also suggests that application of the economic loss doctrine turns on the distinction between contract and tort, and not between economic and non-economic injury.

In *Stewart v. Cox* (1961) 55 Cal.2d 857, homeowners sued a subcontractor for damage to their house and lot caused by water escaping from a negligently built swimming pool. Applying the *Biakanja* factors,

the Court held that the subcontractor owed a duty to the homeowners. (*Id.* at p. 863.)

Shortly after *Stewart v. Cox*, the Court decided *Sabella v. Wisler* (1963) 59 Cal.2d 21, where a house had sunk several inches into an improperly compacted lot, cracking the foundation and walls. The Court applied the *Biakanja* factors to determine that the contractor responsible for negligently preparing the lot owed a duty of care to the homeowners. (*Id.* at pp. 28–29.) The issue in both cases, as the Court framed it, was whether the contractor could be held liable for negligent performance. (*Id.* at p. 27; *Stewart v. Cox*, *supra*, 55 Cal.2d at p. 863.) Because the injury in both cases arose from contract, the Court applied the *Biakanja* factors—even though the injury in both cases was *also* non-economic. (See *Aas*, *supra*, 24 Cal.4th at pp. 641–42 [noting that *Sabella v. Wisler* and *Stewart v. Cox* concerned property damage, not economic injury].)

All three lines of case law—*Biakanja* and its progeny, *Seely* and its progeny, and the two cases applying *Biakanja* to property damage—point in the same direction. The economic loss doctrine is not a general rule against the recovery of economic injury. Rather, it is a specialized doctrine, applied when economic loss arises from a contract or warranty, and meant to separate the law of contract from tort law.

2. Public policy considerations limit the economic loss doctrine to cases where loss arises from contract or warranty.

Along with precedent, the policy concerns behind the economic loss doctrine also confine its scope to the contractual context. The goal of the economic loss doctrine, as this Court has recognized, is to prevent tort law from invading the province of contract law. (*Robinson Helicopter*, *supra*, 34 Cal.4th at p. 988; *Aas*, 24 Cal.4th at p. 643.) Hence, when economic loss arises from a contract, it makes sense for the fundamental principle of

tort law in Civil Code section 1714(a) not to apply with full force—and thus for courts to proceed with caution in recognizing a duty of care. However, when economic loss does not arise from a contract, the economic loss doctrine should have no application, and normal tort-law principles embodied by section 1714(a) and *Rowland* should decide the case.

Beyond the general concern of protecting contract law from tort law, the economic loss doctrine promotes the policies of contract law by protecting contractual allocation of risk. Contracting parties enter into agreements in large part to allocate risk in a predictable way, and a principal goal of contract law is to enforce that agreed-upon allocation. (See *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683 [contract law is intended to make the cost of contractual relationships predictable]; Kronman & Posner, The Economics of Contract Law (1979) p. 4 [stating that a contract can be viewed as an agreed-upon allocation of risks].) A tort duty imposed on a contracting party—whether to the other contracting party or to a related third party—interferes with contract law by creating risks of loss that the contracting party did not agree to assume. Likewise, permitting a party to recover in tort for a risk it assumed by contract also interferes with a contractual allocation of risk. (See *Quelimane*, *supra*, 19 Cal.4th at p. 58 [declining to allow recovery in tort "[for] a risk that the seller assumed when the property was acquired"].)

This kind of interference with a contractual allocation of risk is what the economic loss doctrine is intended to minimize. In turn, the *Biakanja* factors are intended to identify those cases where a court is justified in overriding the contractual allocation of risk for public policy reasons. (See *Centinela*, *supra*, 1 Cal.5th at p. 1013 [quoting *Quelimane*, *supra*, 19 Cal.4th at p. 58].)

In light of the economic loss doctrine's purpose, it is just plain wrong to hold, as the Court of Appeal did, that recovery of economic loss is

foreclosed unless there is a "transaction." (*Gas Leak*, *supra*, 18 Cal.App.5th at p. 583.) That holding actively works against the goal of preserving the line between contract and tort. All other things being equal, it can only be *less* appropriate to impose a tort duty on a contract "between the defendant and another [that] was intended to directly affect the plaintiff (a third party) . . . ." (*Ibid.*) It is precisely where a *contract is present* that the purpose of the economic loss doctrine is triggered. However, the doctrine does not apply where, as here, there is no contract or warranty.

Given the economic loss doctrine's narrow scope and purpose, the Court of Appeal also erred in viewing it as some kind of general rule prohibiting tort liability for economic damages. That view is rejected by the Restatement Third of Torts: Liability for Economic Harm, section 1 (tentative draft 2012), which was intended "to faithfully capture the approach that courts take" to economic loss. (2012 A.L.I. Proceedings 22, (May 1, 2012) [statement of Prof. Ward Farnsworth, who drafted the text of and comments to the Restatement].) The Restatement rejects the Court of Appeal's view, what the Restatement's authors describe as the "minority" view "that there is generally no liability in tort for causing pure economic loss to another." (Rest.3d, Torts: Liability for Economic Harm, *supra*, § 1, com. b.) Instead, the Restatement recognizes that "[d]eference to contract" is an important justification for the economic loss rule (*id.* § 1, com. c), which is "limited to parties who have contracts." (id. § 3, com. a) When a contract is not present, "[c]ourts recognize duties of care to prevent economic loss" (*id.* § 1, com. d). This justification plainly is not present here.

3. Concerns about limitless liability are appropriately addressed through the *Rowland* factors, rather than through the economic loss doctrine.

As just noted and without so stating, the Court of Appeal adopted the Restatement's "minority" view "that there is generally no liability in tort for causing pure economic loss to another." (Rest.3d, Torts: Liability for Economic Harm, *supra*, § 1, com. b.) To support that holding, it raised the specter of "unlimited" liability. (*Gas Leak*, *supra*, 18 Cal.App.5th at p. 594.) Avoiding limitless liability, however, does not require creating a general rule against recovering economic damages. Because that doctrine is poorly designed to draw intelligent limits on liability, it is the wrong tool of analysis to apply here.

Concerns about limitless liability are by no means unique to the economic-injury context. Rather, they are relevant to just about every tort case, because "'[e]very injury has ramifying consequences, like the ripplings of the waters, without end.'" (*Borer v. American Airlines, Inc.* (1977) 19 Cal.3d 441, 446, citation omitted.) Yet this Court has never categorically excluded certain categories of injury from tort law. For example, while the need to confine potential liability has loomed large in decisions on emotional-distress damages (see, e.g., *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 991), this Court has never suggested a general rule that damages for emotional distress are categorically unrecoverable.

Because concerns about limitless liability are relevant to every tort case, the usual framework used to analyze duty—the framework supplied by *Rowland*—*already* allows courts to take those concerns into account. Indeed, the *Rowland* factors are better designed to address concerns about limitless liability than the *Biakanja* factors. While the *Biakanja* factors "are similar to" the *Rowland* factors, *Rowland* accounts for "further

considerations," including "'the extent of the burden to the defendant and consequences to the community.'" (*QDOS, Inc. v. Signature Fin., LLC, supra*, 17 Cal.App.5th at p. 999 [quoting *Rowland, supra*, 69 Cal.2d at p. 113].)

Kesner illustrates how this aspect of the *Rowland* framework allows courts to set coherent limits on liability without adopting a categorical rule against duty. *Kesner* concluded that employers and landowners had a duty of care to prevent those exposed to asbestos from carrying the asbestos off on their bodies or clothing and exposing others. (*Kesner, supra*, 1 Cal.5th at p. 1140.) It came to this conclusion, of course, by applying the *Rowland* factors. (*Id.* at pp. 1143–55.) In analyzing one of those factors—"the burden that a finding of duty . . . would impose" (*id.* at p. 1150)—the Court recognized the defendants' "forceful contention . . . that a finding of duty in these cases would open the door to an 'enormous pool of potential plaintiffs.'" (*Id.* at p. 1153.) These "legitimate concerns," however, "do not clearly justify a categorical rule against liability for foreseeable take-home exposure. [Citation.] Instead, the concerns point to the need for a limitation on the scope of the duty here." (*Id.* at p. 1154.) Thus, the Court drew a line at "members of a worker's household"; outside of that "identifiable category of persons," the defendants had no duty of care to prevent secondary exposure to asbestos. (*Id.* at pp. 1154–55.)

Here, rather than following *Kesner*'s approach, the Court of Appeal categorically prohibited the recovery of economic damages unless a plaintiff's injury arose from a "transaction between the defendant and another . . . ." (*Gas Leak, supra*, 18 Cal.App.5th at p. 583.) This rule, at once underinclusive and overinclusive, is poorly designed to provide coherent limits on liability.

The Court of Appeal's rule is underinclusive because vast liability is still possible when a plaintiff's injury arises from a transaction between the

defendant and another. In *Bily*, for example, the plaintiffs' injury arose out of a contract for services between the defendant auditor and its client. Even so, the Court recognized that imposing a duty on the auditor would create "a broad and amorphous rule of potentially unlimited liability . . . ." (*Bily*, *supra*, 3 Cal.4th at p. 406.) *That* was the reason this Court declined to recognize a duty of care. The presence of a transaction played no role in its analysis, precisely because it was not a useful tool in limiting what the Court regarded as overly expansive liability.

The Court of Appeal's "transaction" requirement is also overinclusive, because it categorically forecloses liability even where the group of affected plaintiffs is small and limited by nature. This is a case in point. Here the proposed class of Plaintiffs is composed of an estimated 400 businesses located within five miles of the blowout. (1 EP 185-186, ¶¶ 103–04.) This was precisely the same area from which residents were evacuated under the relocation program that SoCalGas oversaw and paid for under the direction of Los Angeles County. (1 EP 172-173, ¶ 40.) The prospect of liability is thus literally bounded—and so obviously not unlimited. It is difficult to see how recognizing Plaintiffs' negligence claim under these circumstances would create a risk of unlimited liability.

In sum, the approach best suited to drawing limits on liability in tort is the framework provided by *Rowland*. The Court's recent decision in *Kesner* shows how that framework leads to coherent limits on liability. By contrast, the economic loss doctrine, particularly as applied by the Court of Appeal, is poorly designed to set limits on liability. Justice Baker likened it to using a "meat-axe" where a "scalpel" is necessary. (*Gas Leak*, *supra*, 18 Cal.App.5th at p. 596 (dis. opn. of Baker, J.).) If anything, that metaphor lets the economic loss doctrine off too easy, because it implies that the doctrine has the correct function but simply carries that function out too crudely. In fact, the economic loss doctrine was never designed for the

task at hand at all. Applying it here would be like trying to use a handsaw as a screwdriver – it just does not work.

II. Under Civil Code section 1714(a) and *Rowland*, SoCalGas owed Business Plaintiffs a duty of care.

This Court has applied the *Rowland* factors time and again to determine the existence of a duty where (as here) the parties are *not* involved in a business or contractual relationship with one another. (See, e.g., *Kesner*, *supra*, 1 Cal.5th at pp. 1143–44 [company has a duty of care to employee's household members to prevent them from asbestos exposure in the home]; *Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077, 1092 [landowner who maintains a parking lot across a public street does not owe a duty to protect invitees from the obvious dangers of the public street]; *Cabral*, *supra*, 51 Cal.4th at p. 771 [duty of ordinary care applies to parking along the shoulder of a highway]; *John B. v. Super. Ct.* (2006) 38 Cal.4th 1177, 1192 [persons have a duty to inform others of HIV status]; *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 473 [garbage truck operating on public street had no duty to guard against frightening plaintiff's horse].)

"The *Rowland* factors fall into two categories"—foreseeability and public policy considerations. (*Kesner*, *supra*, 1 Cal.5th at p. 1145.) The first "[t]hree factors—foreseeability, certainty [of injury], and the connection between plaintiff and defendant—address the foreseeability of the relevant injury, while the other four—moral blame, preventing future harm, burden, and availability of insurance—take into account public policy concerns that might support excluding certain kinds of plaintiffs or injuries from relief." (*Ibid.*)

Because a judicial decision on the issue of duty entails line-drawing based on policy considerations, "'the *Rowland* factors are evaluated at a relatively broad level of factual generality . . . [¶] In applying the . . .

Rowland factors, . . . we have asked not whether they support an exception to the general duty of reasonable care on the facts of the particular case before us, but whether carving out an entire category of cases from that general duty rule is justified by clear considerations of policy.'" (*Kesner*, *supra*, 1 Cal.5th at pp. 1143–44, citation omitted.)

None of the *Rowland* factors here supports immunizing SoCalGas from liability.

A. *Rowland*'s foreseeability factors show a duty exists here.

"The most important factor to consider in determining whether to create an exception to the general duty to exercise ordinary care articulated by section 1714 is whether the injury in question was foreseeable." (*Kesner*, *supra*, 1 Cal.5th at p. 1145.)

1. It is foreseeable that a massive gas leak prompting an evacuation of local residents will cause businesses within the evacuation zone to suffer economic injury.

For purposes of duty analysis, "'foreseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct.'" (*Bigbee v. Pacific Telephone & Telegraph Co.* (1983) 34 Cal.3d 49, 57–58 (*Bigbee*) [quoting 2 Harper & James, Law of Torts (1956) § 18.2, at p. 1020].) "[I]t is settled that what is required to be foreseeable is the general character of the event or harm . . . not its precise nature or manner of occurrence." (*Bigbee*, *supra*, 34 Cal.3d at pp. 57–58.)

Here, certainly, a reasonably thoughtful operator of a massive natural gas storage facility would account for the possibility that a large-scale gas leak requiring evacuation would injure area businesses located within the evacuation zone.

The trial court correctly recognized that the hazard to the surrounding community was foreseeable. In so doing, the court granted judicial notice of a recent SoCalGas 10-k filing (2 EP 235-299), where SoCalGas acknowledged that, "[b]ecause we are in the business of . . . storing . . . highly flammable and explosive materials . . . and operating highly energized equipment, the risk to our facilities and infrastructure, as well as the risks to the surrounding communities is [sic] substantially greater than a typical business." (Trial Court Order, *supra,* 2017 WL 2361919, at *7; 2 EP 259.) SoCalGas certainly had knowledge that a failure to maintain, inspect, assess, replace, and repair its Facility that can hold 80 billion cubic feet of natural gas could result in a catastrophic event that would injure Plaintiffs and their community. (1 EP 189, 192, ¶¶ 125,134; see also 1 EP 165, 170, 179-183, ¶¶ 2, 21, 26, 66, 70, 73, 76, 78, 86, 88.) Further, SoCalGas was also aware of its poor maintenance of the Facility and its need to perform upgrades to its wells. (1 EP 176-177, ¶¶ 54-46.)

Specifically, SoCalGas knew of the nature of the damaged wells and yet made few, if any, repairs despite seeking repeated rate increases for this purpose. (1 EP 176-177, ¶¶ 54-56.) Defendants did not operate the wells in accordance with industry standards, and experts founds the wells were poorly operated and maintained. (1 EP 178, ¶¶ 59-61.)

Moreover, the specific economic losses that Plaintiffs suffered were foreseeable. A reasonably thoughtful person would know that it would have been massively impracticable for Plaintiffs to simply pick up their businesses and physically move them elsewhere, outside the evacuation zone, particularly since SoCalGas made public reassurances that it was working to plug the leak promptly. (1 EP 184, ¶ 96.)

In sum, a reasonably thoughtful person would find it readily foreseeable that a massive natural gas blowout at the Aliso Canyon Facility

that warranted an evacuation of a sizeable percentage of the Porter Ranch community would harm area businesses dependent on the patronage of local residents.

2. Plaintiffs suffered tangible, quantifiable injuries.

The second *Rowland* factor, the "degree of certainty that the plaintiff(s) suffered injury," also weighs against creating a categorical duty exception. (See *Kesner*, *supra*, 1 Cal.5th at p. 1148.) As this Court has noted, Civil Code section 1714 "does not distinguish among injuries to one's person, one's property, or one's financial interests." (*J'Aire*, *supra*, 24 Cal.3d at p. 806, fn. 3.) Thus, "[r]ecovery for injury to one's economic interests, when it is the foreseeable result of another's want of ordinary care, should not be foreclosed simply because it is the only injury that occurs." (*Ibid.*)

The Complaint alleges that the local economy collapsed as a result of Defendants' wrongful conduct, which affected local businesses due to the relocation of some 15,000 residents, and includes specific facts regarding loss of business and profits for each Plaintiff. (1 EP 178-185, ¶¶ 62-98.) The trial court found that "Porter Ranch business victims seek to recover . . . quantifiable economic losses" that "are unquestionably real." (1 EP 386.)

Plaintiffs suffered tangible injury. This factor also does not weigh in favor of finding an exception to duty under *Rowland*.

3. Business Plaintiffs' injuries are closely related to SoCalGas's misconduct.

The third *Rowland* factor, "the closeness of connection between the defendant's conduct and the injury suffered," also weighs against creating a categorical duty exception for many of the same reasons that foreseeability weighs against creating a categorical duty exception. A finding of foreseeability "establish[es] not only "'the foreseeability of harm to

plaintiff,'" but also a sufficiently "'close[] connection between the defendant[s'] conduct and the injury suffered.'" (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 131 [quoting *Bigbee*, *supra*, 34 Cal.3d at pp. 59-60, fn. 14].) Plaintiffs' losses here result directly from the SS-25 well blowout.

Further, to the extent that the evacuation of Porter Ranch residents is considered "intervening conduct" (see *Kesner*, *supra,* 1 Cal.5th at p. 1148), it is conduct that is reasonably foreseeable. For that reason, the evacuation does not diminish the closeness of connection between the gas leak and Plaintiffs' injury: "An intervening third party's actions that are 'themselves derivative of defendants' allegedly negligent conduct . . . do not diminish the closeness of the connection between defendant's conduct and plaintiff's injury for purposes of determining the existence of a duty of care.'" (*Ibid.* [quoting *Beacon Residential Community Assn. v. Skidmore, Owings & Merrill LLP* (2014) 59 Cal.4th 568, 583].)

None of the foreseeability factors weighs in favor of finding an exception to the duty rule.

B. *Rowland*'s public policy factors also support the existence of a duty here.

This Court recently reaffirmed the general policy that a tortfeasor should pay for the injuries it causes. "[T]he tort system contemplates that the cost of an injury, instead of amounting to a 'needless' and 'overwhelming misfortune to the person injured,' will instead 'be insured by the [defendant] and distributed among the public as a cost of doing business.'" (*Kesner*, *supra*, 1 Cal.5th at p. 1153 [quoting *Escola v. Coca Cola Bottling Co.* (1944) 24 Cal.2d 453, 462, 150 P.2d 436 (conc. opn. of Traynor, J.)].)

Rowland sets out four policy factors: (1) moral blame attaching to a defendant's conduct, (2) the policy of preventing future harm, (3) the extent

of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and (4) the availability, cost, and prevalence of insurance for the risk involved. Analysis of each of these factors confirms that SoCalGas should pay for the economic injuries it caused Porter Ranch businesses. (*Kesner*, *supra*, 1 Cal.5th at p. 1150 [citing *Rowland*, *supra*, 69 Cal.2d. at p. 113].)

1. SoCalGas's conduct is morally blameworthy.

SoCalGas's conduct is morally blameworthy. SoCalGas knew that the local community would be harmed if the gas injection wells were not properly maintained. (1 EP 179–85, 188, 191–93, ¶¶ 66, 70, 73, 76, 78, 86.) SoCalGas also knew the wells were not properly maintained. (1 EP 176-77, ¶ 54-56.) It knew that it had removed safety valves that could help stop a well from leaking. (1 EP 177-78, ¶ 58.) It even lied to safety regulators about having done so. (*Ibid.*) SoCalGas's moral culpability is increased still further by the fact that it caused an enormous and unprecedented amount of greenhouse gases to be released into the atmosphere. (1 EP 165, ¶ 3.) SoCalGas's misconduct erased several *years* of progress California and its citizenry had made to reduce greenhouse emissions. (1 EP 171-172, ¶ 37.) Finally, while SoCalGas has touted its "relocation program"—i.e., the evacuation of the surrounding area—that program was the result of Los Angeles County's intervention rather than SoCalGas's altruism. (1 EP 172, ¶ 40.) The evacuation does little to lessen the moral blame attaching to SoCalGas's misconduct in causing an unmitigated environmental disaster. If anything, the evacuation program just emphasizes the gravity of SoCalGas's misconduct.

2. Recognizing a duty here would help prevent future harm.

The policy of preventing future harm also does not weigh in favor of creating an exception to the duty rule. "'The overall policy of preventing

future harm is ordinarily served, in tort law, by imposing the costs of negligent conduct upon those responsible.'" (*Kesner*, *supra*, 1 Cal.5th at p. 1150 [quoting *Cabral*, *supra*, 51 Cal.4th at p. 781].) "In general, internalizing the cost of injuries caused by a particular behavior will induce changes in that behavior to make it safer." (*Kesner*, *supra*, 1 Cal.5th at p. 1150.)

As the trial court noted, SoCalGas and other natural-gas storage companies are better positioned than neighboring businesses to internalize the costs associated with a gas leak. (2 EP 387.) In part, this is because massive transaction costs prevent storage companies from contracting with their neighbors ahead of time to allocate the risk of a gas leak. (*Ibid.*) Such companies are also in a better position to prevent future disasters because, unlike other businesses, they hold themselves out to be experts in the safe storage of natural gas. Indeed, doing so is one of their essential tasks. Making polluters like SoCalGas liable incentivizes them to use their expertise to make their facilities reasonably safe, whereas making businesses like Plaintiffs internalize the costs merely punishes blameless businesses and does nothing to prevent future harm.

3. The Porter Ranch community will benefit and SoCalGas will be appropriately burdened if a duty of care is maintained.

Rowland's third public policy factor is "the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach . . . ." (*Rowland*, *supra*, 69 Cal.2d at p. 113.) This Court has recently clarified that this analysis is "forward-looking, and the most relevant burden is the cost to the defendants of upholding, not violating, the duty of ordinary care." (*Kesner*, *supra*, 1 Cal.5th at p. 1152.)

Neither the Court of Appeal nor SoCalGas has argued that preventing these business losses by safely operating the natural gas storage facilities would be unreasonably expensive or unduly burdensome. Indeed, Plaintiffs merely want the opportunity to show that SoCalGas failed to follow industry-wide safety standards. (1 EP 177-178, ¶ 58.) Because those standards prevail in the industry, they necessarily cannot be unreasonably expensive or unduly burdensome.

Whatever burden does fall on SoCalGas to operate the Facility safely is far outweighed by the benefit of clean air, a healthy community, and vibrant commerce. Requiring SoCalGas to take reasonable precautions could only be a benefit to its neighbors.

4. Liability insurance is generally available.

The final *Rowland* policy factor is the availability of insurance. SoCalGas is the alter ego of its publicly traded parent company, Sempra Energy, which is the largest natural gas utility in the United States. (1 EP 169-170, ¶¶ 16-17, 21.) Liability insurance is generally available, and Sempra Energy has it. (2 EP 263.) This factor, then, also does not weigh in favor of finding an exception to the existence of a duty.

No *Rowland* policy factor weighs in favor of creating an exception to the general duty rule. Analysis of the *Rowland* factors therefore demonstrates that public policy does not "'clearly support[]'" a categorical exception to the duty rule established in section 1714(a). (*Kesner*, *supra*, 1 Cal.5th at p. 1143, citation omitted.) As a result, SoCalGas owes Business Plaintiffs a duty of care.

III. Even if the economic loss doctrine applies to environmental disasters like this one, Plaintiffs have sufficiently alleged a special relationship and the Court of Appeal erred in concluding otherwise.

As set forth above, the so-called economic loss doctrine does not apply to this case because the injuries did not arise from a contractual or warranty relationship between the parties. (See *supra* Argument § I.B.) Even if the Court of Appeal is correct that the doctrine does apply because Plaintiffs do not allege injury to person or property and seek recovery only for economic injuries, Plaintiffs have nonetheless established a special relationship under the *Biakanja* factors. The Court of Appeal plainly erred in finding otherwise.

This Court has found that duty is not presumed in certain cases involving the management of business affairs between a plaintiff and a defendant, where the plaintiff is not in a direct contractual relationship with the defendant but is affected by a defendant's contractual relationship with a third party. This was the case in *J'Aire*, where the restaurant owner plaintiff, a lessee, was impacted by the work of a contractor hired by the lessor. It also was the case more recently in *Centinela*, *supra*, 1 Cal.5th at p. 1013, where emergency room physician plaintiff partnerships, which were not in contract with the health care service plan defendants, were impacted by defendants' decision to delegate their financial responsibility to insolvent medical providers.

In such cases, to determine whether a special relationship exception to the economic loss doctrine exists, courts apply a test that "'involves the *balancing* of various factors, including the following: (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's

conduct, and (6) the policy of preventing future harm.'" (*Centinela*, *supra*, 1 Cal.5th at p. 1013 [quoting *Biakanja*, *supra*, 49 Cal.2d at p. 650].)

A. The Court of Appeal's application of the first *Biakanja* factor as dispositive contravenes numerous precedents of this Court.

The Court of Appeal interpreted the first factor to be a necessary prerequisite to recovery rather than just one factor to be weighed among each of the six *Biakanja* factors. (*Gas Leak*, *supra*, 18 Cal.App.5th at pp. 590-91.) It also interpreted the first factor to require "a transaction between the defendant and another," which "was intended to directly affect the plaintiff (a third party)." (*Id.* at p. 583.)

1. In *Biakanja*, *Quelimane* and *Centinela*, this Court held that the factors should be "balanced"—and never held that the first factor was dispositive.

Biakanja itself suggested that no one factor is dispositive. This Court stated that "[t]he 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*," and then listed those factors. (*Biakanja*, *supra*, 49 Cal.2d at p. 650, italics added.) If an inquiry involves the "balancing of various factors," then no one factor is dispositive. If one factor were dispositive, the presence of other factors could not be balanced against its absence.

This Court has reaffirmed its description of the inquiry as "balancing" again and again, most recently in 2016. (See, e.g., *Centinela*, *supra*, 1 Cal.5th at p. 1013; *Quelimane*, *supra*, 19 Cal.4th at p. 58.) Indeed, in *Quelimane*, the Court determined that the first factor was not satisfied, but nonetheless went on to consider the others. (*Quelimane*, *supra*, at pp. 58–59.) This procedure would make no sense if absence of the first factor were dispositive. The Court of Appeal's dismissal of these claims without bothering to analyze the other factors was erroneous.

2. As *Quelimane* shows, the first factor does not require a transaction per se—instead, it is determined by the defendant's conduct.

The Court of Appeal was also wrong to narrowly construe the first factor to require a contract, or "a transaction between the defendant and another." (*Gas Leak*, *supra*, 18 Cal.App.5th at p. 583.) Rather, this Court's precedents have come to consider defendant's *conduct* rather than require a *transaction* involving a contract.

One example is *Quelimane*. There, the defendants declined to issue title insurance for property that the plaintiffs wanted to sell. The conduct over which the plaintiffs were suing, in other words, was not a "transaction," but was the opposite: i.e., the *refusal* to enter into a transaction. If the Court of Appeal's version of the *Biakanja* factors were correct, then the Court in *Quelimane* could simply have noted that because the defendants had not entered into a transaction, the first factor was not satisfied. But that is not what this Court did. Rather, it decided that the first factor was lacking because "[t]he possible impact of unavailability of title insurance on sellers of tax-defaulted property was incidental . . . ." (*Quelimane*, *supra*, 19 Cal.4th at p. 58.) Thus, the Court simply examined the extent to which the defendants' *conduct*—i.e., their refusal to enter into transactions—was intended to affect the plaintiffs.

As another example, consider *Fifield Manor v. Finston* (1960) 54 Cal.2d 632 (*Fifield*), and the later discussion of that case in *J'Aire*. In *Fifield*, after a nursing home had agreed to provide a man with lifetime medical care, the defendant negligently struck him with his automobile, leading to the man's death six weeks later. (*Id.* at p. 634.) The nursing home sued the driver for the cost of the man's medical care, and the Court denied recovery—but not because there was no "transaction between the [negligent driver] and another." (*Gas Leak*, *supra*, 18 Cal.App.5th at

p. 583.) Rather, as *J'Aire* later explained, *Fifield* denied recovery because of unforeseeability—it was not sufficiently foreseeable that the driver's negligence "would injure the retirement home's economic interest." (*J'Aire*, *supra*, 24 Cal.3d at p. 807 [citing *Fifield*, *supra*, 54 Cal.2d at p. 637].)

The lack of foreseeability, moreover, was the sole ground on which *J'Aire*, which applied the *Biakanja* factors, distinguished *Fifield*: "The critical factor of foreseeability distinguishes *Fifield* from the present case." (*J'Aire*, *supra*, 24 Cal.3d at p. 807.)

Here, if the Court of Appeal were right, and the *Biakanja* factors required a defendant to have entered into a transaction that affected the plaintiff, *J'Aire* would have distinguished *Fifield* simply by pointing to the absence of a transaction by the defendant. Instead, this Court in *J'Aire* pointed to the lack of a close "nexus between the defendant's *conduct* and the risk of the injury that occurred to the plaintiff . . . ." (*J'Aire, supra,* 24 Cal.3d at p. 807, italics added; see also *ibid.* ["In contrast, the nexus in the present case between the injury that occurred and respondent's *conduct* is extremely close," italics added.].)

Once again, this shows how the Court's precedents applying the *Biakanja* factors focus on the defendant's *conduct* rather than give talismanic significance to the word "transaction."

3. Because, as *J'Aire* held, the second factor of foreseeability is "the key component," the first factor cannot be dispositive, as the Court of Appeal wrongly concluded.

This Court in *J'Aire* also stated that the second factor, foreseeability, is the most important factor in the six factor analysis. The Court "focused on foreseeability as the key component necessary to establish liability" in holding that "[r]ecovery for injury to one's economic interests, where it is the foreseeable result of another's want of ordinary care, should not be

foreclosed simply because it is the only injury that occurs." (*J'Aire, supra*, 24 Cal.3d at p. 806 & fn. 3.) In sum, this Court has never held the first factor to be the most important factor, much less the dispositive *Biakanja* factor.

Justice Baker's dissent also implicitly recognized that the first *Biakanja* factor is not dispositive. His conclusion that it was "quite possible" that SoCalGas owed a duty of care that was not based on the existence of any "transaction," but on the second *Biakanja* factor (the foreseeability of plaintiffs' losses): "[S]ome businesses in the immediate geographic area of the gas leak could have a special dependence on that area" such that harm to them was especially foreseeable. (*Gas Leak, supra*, 18 Cal.App.5th at p. 596 (dis. opn. of Baker, J.).) "One potential example that comes to mind are food delivery businesses . . . unlikely to deliver beyond a limited geographical area." (*Id.* at p. 596, fn. 2.) Per Justice Baker, another example was Plaintiff Polonsky Family Day Care, because "it would be unusually dependent on customers who work or live in the vicinity of the gas leak." (*Id.* at p. 596.)

Interpreting this Court's precedents, the Ninth Circuit has also held, not surprisingly, that the six *Biakanja* factors must all be weighed, and that no one factor is dispositive. For example, in *Kalitta Air, L.L.C. v. Central Texas Airborne Systems, Inc.* (9th Cir. 2008) 315 F. App'x 603, the court of appeal reversed a district court for not considering all six *Biakanja* factors. (*Id.* at 607.)

More recently, when criticizing the Court of Appeal's opinion in this case for finding the first *Biakanja* factor dispositive in a case involving a rupture of a gas pipeline that spilled oil into the Pacific Ocean, a federal district judge from the Central District of California Court noted:

> [T]he Court cannot accept that the California Supreme Court would continue to prescribe a six factor analysis—one that

> involves, according to *Biakanja*, a "balancing,"—when in fact the first factor is actually dispositive. Furthermore, '[i]n the absence of a controlling California Supreme Court decision, [the Court] must predict how the California Supreme Court would decide the issue.' The Court would be hard-pressed to predict that the California Supreme Court would suddenly depart from six decades of six-factor balancing.

(Andrews v. Plains All American Pipeline, L.P. (C.D. Cal., Feb. 6, 2018, CV 15-4113 PSG (JEMx)), ECF No. 418 at p. 2 (citations omitted.)

B. The *Biakanja* factors support a duty of care here—and the Court of Appeal's contrary decision was erroneous.

Biakanja listed six factors to be weighed in determining whether to recognize a duty of ordinary care not to inflict economic loss. (See *Biakanja*, *supra*, 49 Cal.2d at p. 650.) The Court of Appeal erred by failing to consider any of these factors, other than the first factor, which it applied incorrectly.

The first *Biakanja* factor asks whether the defendant's conduct was intended to affect the "'*class of which the plaintiff is a member*,'" rather than the specific plaintiff. (*Centinela*, *supra*, 1 Cal.5th at p. 1014, original italics, citation omitted.) The Court of Appeal erred in concluding that a transaction was required to satisfy this factor. (See *supra* Argument § IV.A.)

The arguments that SoCalGas has itself advanced show that this factor is satisfied. For example, SoCalGas has argued that the continued availability and viability of the Facility is critical to supplying customers like Business Plaintiffs with service. (Pet. for Writ of Prohibition, at pp. 50-51.) SoCalGas also knew that commercial activity was being conducted in close geographic proximity to the Facility. (1 EP 192, ¶ 139.) Storing gas so that it could be distributed to residents and businesses in Porter Ranch is necessarily intended to affect Plaintiffs, who are community neighbors to SoCalGas. Plaintiffs submit this first factor is met.

However, even if this first factor were not met, Business Plaintiffs meet all five of the other *Biakanja* factors. Those other *Biakanja* factors mirror several of the *Rowland* factors. These factors are foreseeability, the degree of certainty that Plaintiffs suffered injury, the closeness of connection between a defendant's conduct and a plaintiff's injury, moral blame, and the policy of preventing future harm. (*See Rowland*, *supra*, 69 Cal.2d at p.113; *Biakanja*, *supra*, 49 Cal.2d at p. 650.) For the reasons given in Plaintiffs' discussion of *Rowland*, these factors all favor finding the existence of a special relationship between the small business Plaintiffs and SoCalGas, the operator of the neighboring Facility that caused their economic injuries. (See *supra* Argument, §§ I.A–B.)

Hence, even if the economic loss doctrine were to apply, Plaintiffs have met the factors necessary to find a special relationship exception. Additionally, even if the Court were to find that Plaintiffs have not met the first factor due to the lack of a "transaction," the fact that they meet all five of the remaining *Biakanja* factors demonstrates that they satisfy the special relationship exception to the economic loss doctrine. (See, e.g., *Andrews v. Plains All American Pipeline, L.P.* (C.D. Cal., Aug. 25, 2017, CV 15-0443 (PSG) JEMx)), ECF No. 350 at p. 23 [denying defendant oil pipeline company's motion for summary judgment as to the negligence claims of regional oil industry workers suing for economic losses resulting from an oil spill because factors two through six each favored a special relationship].)

C. In addition, the three policy concerns of *Bily* are absent, further militating in favor of the existence of a duty here.

The Court has sometimes found it instructive to look at three policy concerns cited by *Bily* to limit auditor liability to third parties. (*Centinela*, *supra*, 1 Cal.5th at p. 1017; *Kesner*, *supra*, 1 Cal.5th at p. 1157.) *Bily* identified "three central concerns" (*Bily*, *supra*, 3 Cal.4th at p. 398) that

counseled against making auditors potentially liable to nonclients: (1) the multiplicity of suits that an auditor could face, leading to liability out of all proportion to fault; (2) the capacity of the persons that rely on audit reports to control and adjust risk by expending their own resources to verify the audit, by entering into a contract with the auditor's client for special protection, or by commissioning their own audit and thus establishing privity with an auditor; and (3) the likelihood that liability to nonclients would increase the costs of audits and decrease their availability without any compensating improvement in audit quality. (*Id.* at pp. 399–405.)

Here, the policy concerns that the Court articulated in *Bily* "actually reinforce[] why relevant policy considerations weigh in favor of a duty here." (*Kesner*, *supra*, 1 Cal.5th at p. 1156.)

Bily first examined whether recognition of a duty would "likely result in a vast number of suits and limitless financial liability . . . disproportionate to [a defendant's] fault." (*Centinela*, *supra*, 1 Cal.5th at pp. 1017–18.) It is in regards to this first policy concern that the present case departs most dramatically from *Bily*. While the group of potential plaintiffs in *Bily* was enormous—hundreds of thousands or even millions of investors in publicly traded companies—the proposed class here is small and sharply proscribed. The class of about 400 businesses is limited to those in the area within five miles of the gas blowout (1 EP 186, ¶¶ 103–04.), the precise area from which residents were evacuated. (1 EP 172, ¶ 40.) This geographical boundary limits liability—both here and in future cases. Because this was the largest single natural gas leak in the nation's history, larger evacuations are unlikely in the future. Moreover, no one has an incentive to evacuate more residents than is necessary. Here, for example, the relocation plan was the result of negotiations between SoCalGas and the County. SoCalGas had every incentive to negotiate vigorously, as it was responsible for relocation costs.

Bily's second concern was whether the class of plaintiffs can "control and adjust their risks by contract rather than rely on tort liability." (*Centinela*, *supra*, 1 Cal.5th at p. 1018.) As the Superior Court pointed out, this situation is a perfect example of a setting in which the contractual allocation of liability is impossible because the transaction costs—the costs involved in SoCalGas contracting with all its neighbors—are too high. (2 EP 386.) Nor, for that matter, do Plaintiffs have the knowledge necessary to intelligently allocate risk by contract. (See *Centinela*, *supra*, 1 Cal.5th at p. 1018 [noting the "more sophisticated business lenders and investors . . . in *Bily*"].) Plaintiffs do not have the capacity to monitor SoCalGas's safety practices, and even if they did, they do not have the expertise to discern whether those practices deviate from the standard of care. They, unlike SoCalGas, are not experts in the storage of natural gas.

The third and last *Bily* concern is whether potential liability would increase the cost of and decrease the availability of natural gas with no compensating improvement in gas-storage safety. (See *Centinela*, *supra*, 1 Cal.5th at p. 1018.) In *Bily*, this concern had weight because auditors are so dependent on the information their clients provide them. (*Bily*, *supra*, 3 Cal.4th at p. 404.) Given "the inherent dependence of the auditor on the client," courts could not create better audit reports simply by requiring auditors to take more care. (*Ibid.*) Here, by contrast, SoCalGas was not inherently dependent on anyone else in its maintenance of the Aliso Canyon Facility. It had sole control. (See 1 EP 170, 171, 176–78, ¶¶ 23, 25–26, 32, 54–58.) The so-called *Bily* policy-related concerns are not present here.

IV. The Court of Appeal erred in determining at the pleading stage that Plaintiffs could not state a cause of action for negligence because there was no relevant "transaction."

This appeal raises a question of duty, but questions of duty are typically resolved at summary judgment or later. (See, e.g., *Bigbee*, *supra*, 34 Cal.3d 49; *Lawrence v. La Jolla Beach & Tennis Club, Inc.* (2014) 231 Cal.App.4th 11; *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826.) Reluctance to decide the issue in the absence of a factual record makes sense. Although courts perform the duty analysis "at a higher level of generality" than the facts of a particular case (*Kesner*, *supra*, 1 Cal.5th at p. 1144), a developed factual record is nevertheless helpful to that analysis. Assessing "the moral blame attached to the defendant's conduct," for example (*Rowland*, *supra*, 69 Cal.2d at p. 113; *Biakanja*, *supra*, 49 Cal.2d at p. 650), "can be difficult . . . in the absence of a factual record." (*Kesner*, *supra*, 1 Cal.5th at p. 1151 [citing *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066, 1078].)

Additionally, facts developed in a particular case may not be unique to that case, and instead may be shared by a whole category of cases. Because those facts are not unique, they may inform a court's analysis of duty. As Justice Baker pointed out in his dissent below, factual development could reveal that "some businesses in the immediate geographic area of the gas leak . . . have a special dependence on that area such that harm to them would be foreseeable to Southern California Gas Company in a way it would not with respect to many other businesses in the area." (*Gas Leak*, *supra*, 18 Cal.App.5th at p. 596 (dis. opn. of Baker, J.).)

Business Plaintiffs here have amply demonstrated that SoCalGas owed them a duty of care, and this Court should so find. Were this Court to decide that SoCalGas does not owe a duty of care to the class that Business

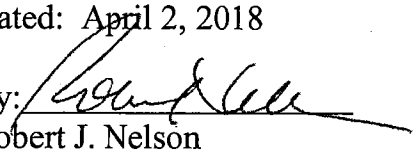
Plaintiffs seek to represent, and instead only to some subset of that class, an informed determination about the bounds of that subset should await discovery and class certification, and remand for further proceedings would be appropriate. Finally, if this Court holds that it is premature at this pleading stage to decide whether SoCalGas owed Plaintiffs a duty of care, Plaintiffs respectfully request that this Court overrule the Court of Appeal's decision and remand to the trial court with instructions for Plaintiffs to develop an appropriate factual record consistent with this Court's opinion, and, if necessary, to amend their Complaint accordingly.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeal should be reversed because there is no justification for creating an environmental disaster exception to Civil Code section 1714(a)'s general duty. SoCalGas owed Business Plaintiffs a duty to exercise due care to prevent economic harm to their businesses, and application of the *Rowland* factors offers SoCalGas no solace. Business Plaintiffs should be allowed to pursue their tort claims.

Dated: April 2, 2018

Respectfully submitted,

By: 

Robert J. Nelson
(CA Bar No. 132797)
Sarah R. London
(CA Bar No. 267083)
Wilson M. Dunlavey
(CA Bar No. 307719)
LIEFF CABRASER HEIMANN
& BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: 415.956.1000
Facsimile: 415.956.1008
rnelson@lchb.com
slondon@lchb.com
wdunlavey@lchb.com

Paul R. Kiesel (CA Bar No. 119854)
Helen Zukin (CA Bar No. 117933)
Mariana Aroditis (CA Bar No. 273225)
KIESEL LAW LLP
8648 Wilshire Boulevard
Beverly Hills, California 90211-2910
Telephone: 310-854-4444
Facsimile: 310-854-0812
kiesel@kiesel.law
zukin@kiesel.law
aroditis@kiesel.law

Liaison Counsel for Private Plaintiffs

Derek W. Loeser
Amy Williams-Derry
Ben Gould (CA Bar No. 250630)
KELLER ROHRBACK L.L.P.
1129 State Street, Suite 8
Santa Barbara, CA 93101
Telephone 805.456.1496
Facsimile: 805.456.1497
dloeser@kellerrohrback.com
awilliams-derry@kellerrohrback.com
bgould@kellerrohrback.com

Raymond P. Boucher
(CA Bar No. 115364)
Shehnaz M. Bhujwala
(CA Bar No. 223484)
Maria L. Weitz
(CA Bar No. 268100)
BOUCHER LLP
21600 Oxnard Street, Suite 600
Woodland Hills, CA 91367-4903
Telephone: 818.340.5400
Facsimile: 818.340.5401
ray@boucher.la
bhujwala@boucher.la
weitz@boucher.la

Taras Kick
(CA Bar No. 143379)
THE KICK LAW FIRM, APC
201 Wilshire Blvd.
Santa Monica, CA 90401
Telephone: 310.395.2988
Facsimile: 310.395.2088
Taras@kicklawfirm.com

Roland Tellis
(CA Bar No. 186269)
BARON & BUDD, P.C.
15910 Ventura Blvd, Suite 1600
Encino, CA 91435
Telephone: 818.839.2320
Facsimile: 818. 986.9698
rtellis@baronbudd.com

R. Rex Parris (CA Bar No. 96567)
Patricia Oliver (CA Bar No. 193423)
R. REX PARRIS LAW FIRM
43364 10th Street West
Lancaster, CA 93534
Telephone: 661.429.3399
Facsimile: 661.949.7524
rrparris@rrexparris.com
poliver@rrexparris.com

(Petitioners) Plaintiffs' Steering Committee for the Class Action Track

CERTIFICATE OF LENGTH OF BRIEF

The text of this Petitioners' Opening Brief On The Merits, including footnotes, consists of 12,828 words. Counsel relies on the word count of the Microsoft Word computer program used to prepare this brief.

WILSON M. DUNLAVEY

PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of eighteen (18) years and not a party to the within action. My business address is 275 Battery Street, San Francisco, California 94111-3339. I am readily familiar with Lieff, Cabraser, Heimann & Bernstein, LLP's practices for collection and processing of documents for mailing with the United States Postal Service and for transmission via facsimile machine. On the date listed below, I served copies of the following document(s):

PETITIONERS' OPENING BRIEF ON THE MERITS

upon the parties and attorneys listed below via U.S. Mail as follows:

Second District California Court of Appeal
Ronald Reagan State Building
300 S. Spring Street
Los Angeles, CA 90013

Superior Court Los Angeles
600 Commonwealth Avenue
Los Angeles, CA 90005

upon the parties and attorneys listed below via U.S. Mail and email as follows:

James J. Dragna
David L. Schrader
Yardena Rachel Zwang-Weissman
Morgan Lewis & Bockius LLP
300 South Grand Avenue, Suite 2200
Los Angeles, CA 90071

I declare under penalty of perjury under the laws of the State Bar of California that the foregoing is true and correct, and that this declaration was executed on April 2, 2018, at San Francisco, California.

WILSON M. DUNLAVEY