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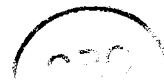
In the

Supreme Court

of the

State of California



SUPREME COURT
FILED

JUN 19 2018

Jorge Navarrete Clerk

Deputy

SOUTHERN CALIFORNIA GAS LEAK CASES

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION FIVE · CASE NO. B283606

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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QUESTION PRESENTED

Can a plaintiff who is harmed by a manmade environmental disaster state a claim for negligence against the gas company that allegedly caused the disaster if the damages sustained are purely economic?

INTRODUCTION

The answer to the question presented on the record here is clearly "No" under this Court's longstanding economic loss doctrine. Under that doctrine, parties have a general duty to avoid causing personal injury or property damage, but have no general duty to avoid causing purely economic losses. (See *Bily v. Arthur Young & Co.* (1992) 3 Cal. 4th 370, 400 ("*Bily*").) Plaintiffs ask this Court to abandon that settled precedent and announce a new general duty to avoid economic loss even in the absence of personal injury or property damage. This Court should reject any such radical change in California law.

Nor do the allegations here fit the narrow category of cases recognizing an exception to the economic loss doctrine where a defendant has entered into a transaction with a third party that is

specifically intended to affect the plaintiff. (See *Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1013–1014 ("*Centinela*").) Plaintiffs here have expressly disavowed any claim that their injuries arise from any such "special relationship," and none exists.

To the contrary, the allegations here present a classic case for application of the economic loss doctrine. The putative plaintiff class of 400 businesses does not claim any personal injury or property damage from the allegedly negligent leak at the Aliso Canyon Underground Natural Gas Storage Facility ("Aliso Canyon"). Plaintiffs instead seek from Southern California Gas Company ("SoCalGas") purely economic damages they claim they suffered when some residents of Porter Ranch temporarily relocated in response to the leak and temporarily stopped patronizing Plaintiffs' businesses.

Plaintiffs' claims threaten precisely the rippling and unlimited liability the economic loss doctrine is meant to prevent. As this Court has noted, "[a]n award of damages for pure economic loss

suffered by third parties raises the spect[er] of vast numbers of suits and limitless financial exposure." (*Centinela, supra,* 1 Cal.5th at pp. 1013–1014.) But under Plaintiffs' proposed rule, SoCalGas would face just such limitless exposure to every plaintiff claiming to have lost business during the residents' relocation. The burden on both SoCalGas and the judiciary from such unbounded claims would be immense. And there would be no offsetting benefit. SoCalGas already has powerful incentives to avoid personal injury or property damage and to comply with legislative and regulatory safety requirements in this heavily regulated industry. There is no reason to believe that liability for purely economic loss would have any *additional* deterrence value. Settled California law thus easily resolves this case.

In contrast, adopting Plaintiffs' proposed new general duty to avoid economic loss would render California an outlier and have grave and adverse practical consequences for the State. No other state has ever imposed such a sweeping duty, and the Restatement of the Law Third, Torts: Liability for Economic Harm (ALI, May 18,

2018) ("Restatement"), reflecting the widespread consensus of authority, expressly rejects it. Moreover, adopting such a sweeping new duty would impose massive new burdens on the California courts and displace longstanding limitations in other areas of tort law. Finally, adopting such a sweeping new duty would impose massive new uncertainty and cost on California businesses—both large and small alike—that would in turn discourage new investment.

Accordingly, this Court should affirm the decision of the Court of Appeal applying settled California governing economic loss claims, and direct that an order be entered sustaining SoCalGas' demurrer without leave to amend.

STATEMENT OF FACTS

A. The Aliso Canyon Gas Leak And Voluntary Relocation Program

SoCalGas operates Aliso Canyon in the Santa Susanna Mountains in a depleted oil reservoir it converted in the 1970s to store, supply and provide Southern California residents, businesses and organizations with natural gas. (1 EP 165, ¶ 2; 1 EP 170, ¶¶ 23–

26.[1]) On October 23, 2015, SoCalGas discovered a gas leak from a well in a remote mountain area more than a mile away from and 1200 feet above Porter Ranch, the community at the base of the Santa Susanna Mountains. (1 EP 3, 165, ¶ 3.) SoCalGas immediately worked to fix the leak, and successfully sealed it in February 2016. (1 EP 174–175, ¶¶ 47–48.)

Federal regulations require that an odorant be added to natural gas, which is otherwise odorless, to make leaks more recognizable. (1 EP 4; 49 C.F.R. § 192.625(a).) In some people, these odorants can cause nausea, headaches and short-term respiratory discomfort, but pose no long-term health dangers. (1 EP 17.) Around the time the leak was discovered, some Porter Ranch residents complained of unpleasant odors and respiratory problems allegedly due to such odorants. (1 EP 172, ¶ 39.) To mitigate the impacts of the leak on Porter Ranch residents, and in response to a

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[1] For ease of reference, Petitioner's Opening Brief on the Merits will be referenced herein as "Pl. Br." Petitioner's Exhibits to Petition filed in support of Petitioner's Writ of Prohibition, Mandate, or Other Appropriate Relief will be referenced herein as "EP." Petitioner's Writ Petition with the Court of Appeal will be referenced herein as "Writ Pet."

directive from the Los Angeles Department of Public Health, SoCalGas worked with government agencies to develop a Relocation Plan, under which residents were permitted (but not required) to temporarily relocate to a hotel or other residence outside the area at SoCalGas' expense. (1 EP 172–173, ¶ 40.)

No mandatory evacuation was ordered by any government authority at any time. Although many Porter Ranch residents chose to relocate, at least half declined relocation. (See 1 EP 165, ¶ 4; contra Pl. Br. 14.) None of the Plaintiffs here relocated or closed their businesses. SoCalGas extended the relocation program pursuant to a court order even after the well was sealed and multiple state agencies confirmed that air quality had returned to normal. (2 EP 385.) The voluntary relocation program ended by July 2016.

B. The Actions Filed Against SoCalGas

Tens of thousands of individual plaintiffs filed several hundred lawsuits against SoCalGas alleging physical injury to persons or property interests. (Writ Pet. 20.) Approximately 350 separate actions involving nearly 50,000 individuals alleging various

causes of action arising out of the gas leak have been coordinated before the Superior Court. (*Ibid.*)

In addition, business plaintiffs filed claims for purely economic loss. (Writ Pet. 20.) Plaintiffs here are businesses in and around Porter Ranch within a five-mile radius of the Aliso Canyon facility. (1 EP 166, ¶¶ 5–11.) Plaintiffs do not claim that they have suffered any personal injury or property damage as a result of the gas leak. (See generally 1 EP 164–197.) Nor do they claim that their places of business were directly affected by the gas leak, or that their businesses were forced to shut down. (*Ibid.*)

Instead, Plaintiffs allege that economic activity in Porter Ranch temporarily slowed because some Porter Ranch residents chose to relocate. (1 EP 178–184, ¶¶ 63–92.) Plaintiffs seek to recover for these disappointed economic expectations. In particular, Plaintiffs allege that SoCalGas' negligence led to a gas leak, which led to the spread of gas over an indeterminate area, which led some residents to complain about the mandated safety-related odor of the gas, which led to the creation of a voluntary relocation program

allowing residents within a radius of the leak to relocate at SoCalGas' expense, which led to some residents deciding to relocate, which led to a temporary reduction in the pool of potential customers for business in Porter Ranch, which led to a temporary reduction in Plaintiffs' expected revenues. (*Ibid.*)

Plaintiffs allege, for example, that a podiatrist lost revenue when patients canceled surgeries and other procedures purportedly on account of the relocation program. (1 EP 182–183, ¶¶ 86–87.) Plaintiffs also allege, *e.g.*, that walk-in traffic at two nail studios dropped; that sales decreased at a gas station, a restaurant and a party supply store; that customers transferred prescriptions from a pharmacy; that customers of a flooring business delayed putting in new floors; and that business slowed at a real estate business and a camera store. (1 EP 178–184, ¶¶ 62–98.) Each named business recites only economic harm flowing indirectly from injuries to others, which in turn allegedly led to a temporary decrease in potential customers.

Plaintiffs seek to recover these economic losses under theories of negligence, negligent interference with prospective economic advantage, and strict liability for ultrahazardous activities. (1 EP 188–194, ¶¶ 111–154.)[2]

C. The Superior Court's Order Overruling SoCalGas' Demurrer

SoCalGas demurred, explaining that the economic loss doctrine precludes Plaintiffs' claims as a matter of law. (1 EP 128, 137-144.) The Superior Court (Wiley, J.) overruled the demurrer. (Trial Ct. Order [2 EP 386].) The Superior Court acknowledged (*id.* at p. 3 [2 EP 387]) that the doctrine "routinely limits tort recoveries to avoid limitless rippling liability":

> According to th[e economic loss] doctrine, you cannot recover in tort for economic losses unless you also have suffered a physical injury. Why? Tort law normally does not permit recovery for economic loss absent physical injury for fear of a "conceivably limitless scope" for liability. If a motorist wounds a pedestrian, for instance, this accident triggers rippling economic losses that damage other people "ranging from the victim's boss to his barber." Yet tort law does not allow

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[2] Plaintiffs also asserted an unfair competition claim (1 EP 195–196), but that claim was not subject to the demurrer below (1 EP 137) and is not at issue before this Court.

> the boss and the barber to recover from the careless motorist.

(*Ibid.*, citations omitted.) Although mass torts create an obvious danger of such liability, the Superior Court held that the economic loss doctrine does not apply to mass torts. (*Ibid.*) In so doing, the court expressed doubt about the wisdom of barring recovery for such losses, suggesting that a tort defendant should bear "all costs that its accidents caused." (*Ibid.*) In addition, while acknowledging that *Adams v. Southern Pacific Transportation Co.* (1975) 50 Cal.App.3d 37 ("*Adams*") had applied the economic loss doctrine to bar liability in similar circumstances, the court took the view that *Adams* is no longer good law after *J'Aire Corp v. Gregory* (1979) 24 Cal.3d 799 ("*J'Aire*"). (Trial Ct. Order at p. 4 [2 EP 388].) Acknowledging that its decision was "not free from doubt" (*ibid.*), the Superior Court certified its decision for interlocutory review. (*Id.* at p. 5 [2 EP 389].)

D. The Court of Appeal's Decision

SoCalGas petitioned the Court of Appeal for the Second District (Division Five) for a writ. The Court of Appeal initially issued an alternative writ advising the Superior Court to vacate its

order and grant the demurrer, which the Superior Court declined. (*So. Cal. Gas Co. v. Superior Court* (2017) 18 Cal.App.5th 581, 585 ("*Gas Leak*").) The Court of Appeal (Dunning, J., joined by Kriegler, Acting P.J.) then granted the petition and reversed. (*Ibid.*)

The Court of Appeal explained that, "[g]enerally, a defendant owes no duty to prevent purely economic loss to third parties under any negligence theory." (*Id.* at p. 587.) The court further noted that, as *J'Aire* explained, this rule is not absolute: "'Where a special relationship exists between the parties, a plaintiff may recover for loss of expected economic advantage through the negligent performance of a contract although the parties were not in contractual privity.'" (*Ibid.*, quoting *J'Aire, supra,* 24 Cal.3d at p. 804.) Because Plaintiffs here alleged no such special relationship with SoCalGas, however, and because Plaintiffs declined an opportunity to amend, the Court held that SoCalGas owed no duty to prevent economic loss under the *J'Aire* exception. (*Id.* at pp. 591, 595.)

The Court of Appeal rejected the Superior Court's conclusion that this Court's decision in *J'Aire* had overruled *Adams*, explaining

that *J'Aire* disapproved *Adams* only "insofar as *Adams* held a plaintiff can ***never*** recover purely economic losses." (*Gas Leak, supra,* 18 Cal.App.5th at p. 592, emphasis orig.) The Court of Appeal further explained that the *J'Aire* special relationship exception allows recovery of economic losses only where they result from the negligent performance of a contract that is specifically intended to benefit a plaintiff—an exception it concluded does not apply here. (*Id.* at p. 594.) In addition, the court observed, "*J'Aire* recognized and preserved the distinction between presuming duty under Civil Code section 1714 and *Rowland*" for cases alleging physical injury on the one hand, and on the other hand generally barring but "not foreclosing duty for purely economic loss." (*Id.* at p. 589.) The Court of Appeal therefore declined to create a new exception to the economic loss doctrine, reasoning that "California has never recognized an unlimited duty of care" and that, "[i]n the absence of personal injury or property damage, the special relationship requirement serves as a foreseeability gauge" without which defendants would be subject to "virtually unlimited responsibility

for intangible injury." (*Id.* at p. 594.) The court concluded that the "traditional analyses hold" and directed the Superior Court to sustain the demurrer. (*Ibid.*) Justice Baker's dissent from the grant of writ relief as premature likewise expressed disagreement with the Superior Court's reasoning on the merits. (*Gas Leak, supra,* 18 Cal. App. 5th at p. 595 [dis. opn. of Baker, J.].)

ARGUMENT

The economic loss doctrine is long settled under this Court's precedent, and the Court should not abandon that precedent to adopt a sweeping new duty to avoid economic loss, as Plaintiffs propose. The economic loss doctrine serves a number of important purposes. It prevents the imposition of potentially infinite liability, out of all proportion to any fault, from endlessly rippling claims for pure economic loss. It promotes the pursuit of beneficial activities that would be discouraged by such wide, open-ended liability. It avoids the danger that such liability would leave many businesses, both large and small, without the ability to effectively insure against the risks involved. And it protects the overburdened trial courts

from having to entertain thousands of fact-intensive claims for pure economic loss from every possible accident.

At the same time, the economic loss doctrine recognizes that existing law already provides adequate incentives to avoid tortious harm. That is particularly true where the claimed economic losses are based (as here) on alleged direct injury to others, who then engage in less commercial activity. Potential tort claims by directly injured parties for personal injury or property damage already incentivize potential defendants to take safety precautions. And these incentives are magnified where (as here) defendants operate in heavily regulated industries that are subject to numerous statutory safety requirements, and face potential fines and penalties when regulators find failures to comply. As numerous decisions have recognized, introducing new and additional tort liability for failing to avoid purely economic harms will do little or nothing to increase those existing incentives. For all of these reasons, Dean Ward Farnsworth, the Reporter for the Restatement, has described the development of the economic loss doctrine as "the most important

development of the past generation in the American common law of torts." (Farnsworth, *The Economic Loss Rule* (2016) 50 Valparaiso Univ. L. Rev. 545, 545.)

This Court has repeatedly reaffirmed this economic loss doctrine subject to a narrow exception, inapplicable here, for special relationships arising out of transactions specifically intended to affect the plaintiff. Other jurisdictions overwhelmingly concur, as both judicial decisions and the Restatement make clear. Plaintiffs offer no persuasive reason to abandon this settled and consistent precedent.

I. THIS IS A CLASSIC CASE FOR APPLICATION OF CALIFORNIA'S ECONOMIC LOSS DOCTRINE

California tort law has long recognized two opposing duty regimes: parties have a presumptive ***duty*** to avoid personal injury and property damage, subject to an exception if warranted by public policy considerations justifying relaxation of that duty. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 112-113 ("*Rowland*").) But parties presumptively have ***no duty*** to avoid purely economic loss, subject to an exception if warranted by public policy considerations

justifying limited imposition of that duty. (*Quelimane Co. v. Steward Title Guaranty Co.* (1998) 19 Cal.4th 26, 59 ("*Quelimane*") ["a business entity has no duty to prevent financial loss to others"]; *Centinela, supra,* 1 Cal.5th at p. 1013 ["'Recognition of a duty to manage business affairs so as to prevent purely economic loss to third parties in their financial transactions is the exception, not the rule, in negligence law,'" quoting *Quelimane, supra,* 19 Cal.4th at p. 58].)

This Court has interpreted the latter exception narrowly, applying it only where a defendant has entered into a transaction with a third party that is specifically intended to benefit the plaintiff. For example, in the canonical case of *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650–651 ("*Biakanja*"), this Court held that a negligent notary was liable to a would-be heir for making errors that invalidated a will.

Plaintiffs here ask this Court to erase that long-settled distinction, to abandon the economic loss doctrine, and to collapse these two opposite duty regimes into a single, universal *Rowland* rule that extends the presumptive duty of care to economic and

physical harm alike. Under that new rule, a defendant would have a duty to avoid injuring another person's purely economic interests unless the defendant could justify otherwise. That would be nothing less than a sea change in California law, with profoundly harmful consequences.

A. California Law Has Long Recognized There Is No General Duty To Prevent Purely Economic Loss

1. A Long Line Of Precedent Cements The Economic Loss Doctrine In California Jurisprudence

For over half a century, this Court and the Court of Appeal have repeatedly ruled that plaintiffs may not bring negligence claims for purely economic damages absent a "special relationship" rendering any such losses limited and finite. (*J'Aire, supra,* 24 Cal.3d at p. 804.) This Court first articulated the economic loss doctrine as a general no-duty rule in *Fifield Manor v. Finston* (1960) 54 Cal.2d 632 ("*Fifield*"). That decision held that a retirement home could not recover from a negligent driver the costs of medical care it was contractually obligated to spend on a resident of the home who was injured by the driver. (*Id.* at pp. 635–637.) The Court declined to

recognize a claim based on negligent (as opposed to intentional) conduct that "interferes with the performance of a contract between third parties or renders its performance more expensive or burdensome." (*Id.* at p. 636).

Fifield cited favorably *Stevenson v. East Ohio Gas Co.* (Ohio App. 1946) 73 N.E.2d 200, 204 ("*Stevenson*"), which had denied recovery to a worker who lost eight days' wages when defendant's negligence caused a gas explosion that forced the plaintiff's workplace to shut down. (*Fifield, supra,* 54 Cal.2d, at p. 636.) Permitting tort claims for such economic losses, the Court noted, "would constitute an unwarranted extension of liability for negligence." (*Id.* at p. 637.)

The Court of Appeal applied this principle in *Adams v. Southern Pacific Transportation Co.* (1975) 50 Cal.App.3d 37. Relying on *Fifield* and *Stevenson,* the court held that a plant's employees could not recover lost wages from a railroad that had negligently transported bombs that exploded, damaging their workplace and forcing it to shut down for a period of time. (*Id.* at pp. 39–41.) The

court explained that the "general doctrine prevailing in American courts ... bars recovery for negligent interference with profitable economic relations." (*Id.* at p. 40.)

This Court again applied the economic loss doctrine in *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370. *Bily* explained that the doctrine avoids the "potentially infinite liability" threatened by claims for pure economic loss. (*Id.* at p. 397.) "Even when foreseeability [i]s present," *Bily* observed, courts do not allow recovery on a negligence theory where doing so "threaten[s] to impose liability out of proportion to fault or to promote virtually unlimited responsibility for intangible injury." (*Id.* at p. 398.) Applying this principle, the Court held that an auditor was not liable for the financial harms that investors suffered as a result of his negligent preparation of an audit report—even if those harms were readily foreseeable. (*Ibid.*)

This Court reaffirmed the economic loss doctrine as a general no-duty rule in *Quelimane, supra,* 19 Cal.4th at p. 26. In that case, a would-be property seller alleged that its property declined in value

and was harder to market because the defendant title insurance companies wouldn't sell title insurance to potential buyers. (*Id.* at p. 36.) This Court rejected the claim because the insurance companies had no duty to protect the purely financial interests of the sellers. (*Id.* at pp. 58-60.) The Court recognized that the harm to sellers was "foreseeable" but explained that "[f]oreseeability of financial injury to third persons alone is not a basis for imposition of liability for negligent conduct." (*Ibid.*)

In sum, in nearly sixty years of settled jurisprudence, California law has repeatedly reaffirmed that there is no general duty to avoid negligently injuring the purely economic expectations of others, even where the financial harms were a foreseeable consequence of the defendant's negligence. It has done so in cases involving fact scenarios from drivers who hit pedestrians (*Fifield*) to railroads that cause explosions (*Adams*), auditors who prepare inaccurate reports (*Bily*), and businesses that unfairly discriminate (*Quelimane*). In so holding the Court has recognized, time and again, the importance of tying negligence liability to a traceable, physical

injury to person or property in order to avoid limitless, rippling and disproportionate liability.

2. The Restatement Of Torts Reaffirms California's Economic Loss Doctrine

The economic harm section of the Restatement reinforces these principles and supports application of the economic loss doctrine here. As Plaintiffs admit, the Restatement "was intended to faithfully capture the approach that courts take to economic loss." (Pl. Br. 28.) The Restatement states the "general principle" that "[a]n actor has no general duty to avoid the unintentional infliction of economic loss on another" (Rest.3d, Torts, Econ. Harm § 1; see also *id.*, § 7), and observes that most courts "reject ... categorically" claims for economic loss from the impact of negligent conduct on third parties (*id.*, § 7, cmt. b).

The Restatement explains that to recognize economic loss claims would create the danger of indeterminate and disproportionate liability:

> Economic losses proliferate more easily than losses of other kinds. Physical forces that cause injury ordinarily spend themselves in predictable ways; their exact courses may be hard to predict, but their lifespan and power to harm are limited. A badly driven car threatens physical harm only to others nearby. Economic harm is not self-limiting in this way. A single negligent utterance can cause economic loss to thousands of people who rely on it, those losses may produce additional losses to those who were relying on the first round of victims, and so on.

(*Id.*, § 1, cmt. c.) This is so because economic losses "can proliferate long after the physical forces at work in an accident have spent themselves." (*Id.*, § 7, cmt. b; see *ibid.* ["A collision that sinks a ship will cause a well-defined loss to the ship's owners; but it also may foreseeably cause economic losses to wholesalers who had expected to buy the ship's cargo, then to retailers who had expected to buy from the wholesalers, and then to suppliers, employees, customers of the retailers, and so on."].)

The Restatement also notes that recognizing such proliferating economic loss claims would impose great burdens upon the courts, "greatly increas[ing] the number, complexity, and expense" of litigation. (Rest.3d Torts, Econ. Harm, § 7, cmt. b.) "These costs do not seem likely to be justified by comparable benefits," the

Restatement explains, because threats of additional liability are unlikely to improve already existing incentives to take precautions against causing physical harm to persons or property, and because individuals and businesses may be able to protect themselves through other means. (*Ibid.*)

The Restatement finally provides explicit illustrations showing that financial expectations are not recoverable against a defendant whose negligence reduces customer access to a business:

> Builder negligently constructs a building for Client. The building collapses as a result, forcing the closure of adjacent streets for several weeks. Delicatessen, which operates next door to the collapsed building, suffers no physical damage but loses profits because customers cannot reach the entrance while the street is closed. Delicatessen has no tort claim for negligence against Builder for lost profits.

(Rest.3d Torts, Econ. Harm § 7, illus. 4.) The Restatement thus confirms the widespread acceptance of the economic loss doctrine that this Court has long reaffirmed.

3. The Economic Loss Doctrine Is Not Limited To Losses Based On Contracts And Warranties

Plaintiffs seek to avoid these settled principles by mischaracterizing the economic loss doctrine as limited to those

economic losses that flow from a breach of a contract or warranty. The case law in fact does no such thing.

Contrary to Plaintiffs' suggestion (Pl. Br. 21, 26) *Robinson Helicopter v. Dana Corp.* (2004) 34 Cal.4th 979 ("*Robinson Helicopter*"), does not limit the economic loss doctrine "only" to those cases in which "economic loss arises from a contract or warranty." Certainly, that is one context in which recovery for purely economic loss is prohibited. (See, e.g., *Seely v. White Motor Co.* (1965) 63 Cal.2d 9, 18 [truck manufacturer was not liable for purely economic harm to the purchaser's business when the truck did not perform as expected]; see also *East River S.S. Co. v. Transamerica Delaval, Inc.* (1986) 476 U.S. 858, 861, 875 [valve manufacturer was not liable to ship charterers for lost income when ships had to be repaired due to defective valves].) But it is not the only one. Nothing in *Robinson Helicopter* restricts the general principle that a duty to avoid purely economic losses is the exception and that claims for such losses absent injury to person or property are generally not permitted. As the Court subsequently reaffirmed in *Centinela,* 1 Cal.5th at p. 1013,

"'[r]ecognition of a duty to manage business affairs so as to prevent purely economic loss to third parties in their financial transactions is the exception, not the rule, in negligence law.'" (*Ibid.*, quoting *Quelimane, supra,* 19 Cal.4th at p. 58.)

Robinson Helicopter, by its terms, discussed only the "economic loss ***rule***," a specific application of the more general economic loss ***doctrine*** in the product liability context.[3] (34 Cal.4th at 988.) As the Court of Appeal properly recognized below, however, these two concepts are distinct, and the economic loss doctrine bars "recovery in tort for purely economic loss" more broadly than the specific rule for product liability cases. (*Gas Leak, supra,* 18 Cal.App.5th at p. 591.) While the particular rule in products cases serves the purpose of "separat[ing] tort law from contract law" (Pl. Br. 22), the broader

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[3] Dean Farnsworth has also recognized this linguistic confusion, explaining that, while some cases use the term "economic loss rule" to describe the principle that "there is, in general, no recovery in tort for pure economic loss," other cases "use the expression just to refer to one or two" specific applications of that principle, such as "the rule in products cases." (Farnsworth, *supra,* 50 Valparaiso Univ. L. Rev. at pp. 549–550.)

doctrine serves the purpose of preventing limitless, rippling liability. Nothing about the first purpose obviates the second.

Plaintiffs' attempt to generalize from *Robinson Helicopter* fails. *Fifield,* which dealt with driver negligence, and *Adams,* which dealt with an exploding railway cargo, involved claims by strangers who had no contract or warranty with the defendant. And *Bily* offered a hypothetical to show that someone who causes a traffic accident has no duty prevent financial harm to businesses that lose money when a bridge or a tunnel is blocked—a situation likewise untethered to any contract or warranty obligation on the defendant's part. (*Bily, supra,* 3 Cal.4th at p. 400, fn. 11.) As *Fifield, Adams* and the *Bily* hypothetical all demonstrate, the broad principle that there is no duty to operate a business to avoid economic harm to third parties applies whether or not the cases arise from the defendant's performance of a contract or warranty.

Plaintiffs likewise mischaracterize the Restatement, suggesting that it "describ[es] as the 'minority' view 'that there is generally no liability in tort for causing pure economic loss to

another.'" (Pl. Br. 28, quoting Rest.3d, Torts, Econ. Harm., § 1, cmt. b].) In fact, the Restatement observes that a "minority of courts" use the term "'economic loss *rule*' to the effect that there is generally no liability in tort for causing pure economic loss to another." (Rest.3d, Torts, Econ. Harm, § 1, cmt. b, italics added.) While the Restatement criticizes this formulation (*ibid.*), its rejection of a general duty to avoid pure economic loss could not be clearer: "An actor has *no general duty* to avoid the unintentional infliction of economic loss on another" (*id.*, § 1, italics added).

Plaintiffs similarly mischaracterize the Restatement as suggesting that "'[c]ourts recognize duties of care to prevent economic loss'" when "a contract is not present." (Pl. Br. 28, first quotation quoting Rest.3d, Torts, Econ. Harm, § 1, cmt. d.) In fact, the Restatement says that "[c]ourts recognize duties of care to prevent economic loss *when the rationales stated in Comment C are weak or absent.*" (Rest.3d Torts, Econ. Harm, § 1, cmt. d, italics added.) Those rationales include the concern about "indeterminate

and disproportionate liability" that underlies the economic loss doctrine. (*Id.*, § 1, cmt. c(1), italics omitted.)

Notably, Plaintiffs fail to address, or even mention, Section 7 of the Restatement. That provision, as noted above, bars liability for "economic loss from injury to a third person or property not belonging to the claimant." (Rest.3d Torts, Econ. Harm, § 7.) Plaintiffs instead make irrelevant reference to Section 3 of the Restatement, which relates to "preclusion of tort liability arising from contract." (*Id.*, § 3.) Because Plaintiffs are not asserting tort liability arising from any contract, this section is inapplicable.

Nor would it make any practical sense to restrict the economic loss doctrine to loss where there was a contract or warranty in place. Under such an approach, a homeowner who negligently forgets to shovel her driveway might be liable not only to her neighbor who slips on the ice, but also to her neighbor's barber who expected to cut his hair that day; to a family member who used a personal day to take him to the hospital; to his employer who lost all the business his

best sales representative would have been able to drum up; and so on. Nothing in California law requires such absurd results.

Thus, California precedent and the Restatement refute the Plaintiffs' attempt to gloss over the distinction between the economic loss rule (which applies only to contract and warranty cases) and the economic loss doctrine (which does not).

B. California's Settled Economic Loss Doctrine Bars Recovery Here

The allegations here present a classic case for the application of this well-settled economic loss doctrine. Plaintiffs allege that, as a result of odors arising from the gas leak, SoCalGas offered temporary relocation services to area residents, some residents voluntarily chose to relocate, and as a result there were fewer people around to patronize Plaintiffs' businesses.

In light of settled precedent, the application of the economic loss doctrine is clear: Plaintiffs make no allegation of any personal injury or property damage. (See generally 1 EP 164–197; see also *supra*, p. 14.) Nor do they allege that they were exposed to any leaked gas, smelled any related odor or were otherwise directly

affected by the gas leak. (*Ibid.*) Instead, they seek recovery of their upset financial expectations alone. Because there is no "duty to manage business affairs so as to prevent purely economic loss to third parties in their financial transactions" (*Quelimane, supra,* 19 Cal.4th at p. 58), Plaintiffs have no negligence or strict liability claim under California law

Adams is illustrative. There, as here, a plaintiff sought to recover for his purely economic losses sustained because of injury or damage to a third party's property—in that case, the plant where the plaintiff worked that was forced to temporarily close as a result of defendant's negligence in transporting bombs. (*Adams, supra,* 50 Cal.App.3d at pp. 39–41.) The Court of Appeal in *Adams,* however, ruled such claims were not cognizable. (*Ibid.*) While the trial court here questioned *Adams'* continued viability in light of *J'Aire,* the Court of Appeal correctly rejected the trial court's interpretation, explaining that *J'Aire* disapproved of *Adams* only insofar as *Adams* purported to create an absolute rule that there could *never* be any liability for purely economic losses, even in the narrow, but

inapplicable, exception recognized by *J'Aire*. (See *Gas Leak, supra*, 18 Cal.App.5th at p. 593.) Plaintiffs have not challenged the validity of *Adams* here. And it compels the same result: Here too, Plaintiffs seek recovery for purely economic losses sustained because of alleged injury to third parties—in this case, the residents who temporarily relocated from the area. These claims are equally not cognizable.

The application of the economic loss doctrine in this case also makes sense in light of the doctrine's animating principles. In *Bily*, for example, this Court gave the following hypothetical to "illustrat[e] the need to limit liability for economic losses":

> [A]ssume[] a defendant negligently causes an automobile accident that blocks a major traffic artery such as a bridge or tunnel. Although defendant would be liable for personal injuries and property damage suffered in such an accident, it is doubtful any court would allow recovery by the myriad of third parties who might claim economic losses because the bridge or tunnel was impassible.

(*Bily, supra*, 3 Cal.4th at p. 440, fn. 11, citing Siliciano, *Negligent Accounting and the Limits of Instrumental Tax Reform* (1988) 86 Mich. L. Rev. 1929, 1942–1943.) Plaintiffs here assert a similar claim: that the

gas leak led potential customers to choose to undertake temporary and voluntary relocation that reduced the number of potential customers in the area of their businesses.

Contrary to Plaintiffs' suggestion (Pl. Br. 46–48), this Court's reasoning in *Bily* is fully applicable here. In *Bily*, the Court was particularly concerned about "limitless liability" because the financial harm from the auditor's negligence would foreseeably extend not only to the direct recipients of the auditor's report, but also to those who received the report from secondary sources, such as those who picked up the audit report from a stockbroker, friend or acquaintance, and those who relied on the advice of advisors who had received the report, and so on down the line. (*Bily*, *supra*, 3 Cal.4th at p. 390.) This "spect[er] of vast numbers of suits and limitless financial exposure" therefore counseled in favor of applying the economic loss doctrine to bar recovery, because there was no principled basis for limiting liability only to those who directly received the report given that the harms to other affected individuals were "no less 'foreseeable.'" (*Id.* at pp. 399–400.)

The "spect[er] of vast numbers of suits and limitless financial exposure" is even more dangerous here. SoCalGas has already been served with nearly 350 actions involving nearly 50,000 plaintiffs, including the putative class of 400 businesses here. (See, *supra*, pp. 13–14.) While the threat of lawsuits from 400 businesses is alone substantial, there are many more people and businesses who could allege to have been financially affected by the leak and whose harms were "no less foreseeable" than the Plaintiffs' harms here. (*Bily, supra,* 3 Cal.4th at pp. 390, 400.) Allowing recovery in this case thus would invite litigation by (1) the businesses located one block (or one mile) outside the relocation zone, that also saw a foreseeable reduction in traffic, (2) the suppliers and wholesalers to those businesses both within and outside Porter Ranch, that foreseeably saw a decline in their own business given the purportedly lowered demand for flooring, cameras, gasoline and other goods in and around Porter Ranch, (3) the manufacturers of those products that foreseeably saw a decline in their orders and revenue, (4) the employees in the affected businesses who foreseeably saw reduced

work hours as a result of the general, temporary economic slowdown in the area, (5) the businesses located outside of the voluntary relocation zone that had expected to provide products and services to Porter Ranch residents, such as landscaping businesses and delivery services that foreseeably saw a temporary decline in business when Porter Ranch residents temporarily relocated, (6) businesses planning investments in Porter Ranch that foreseeably perceived a decline in the value of those investments, such as a construction company outside of Porter Ranch that delayed plans for building new homes, and (7) the myriad other individuals and entities that foreseeably lost hoped-for profits because some Porter Ranch residents temporarily relocated. This case thus presents precisely the danger of limitless, rippling liability that California's economic loss doctrine has long been designed to prevent.

C. The Narrow "Special Relationship" Exception Does Not Apply

As the Court of Appeal correctly recognized, this case does not implicate the narrow exception this Court has recognized where

there is a "special relationship" that makes claimed economic losses finite. (*Gas Leak, supra,* 18 Cal.App.4th at pp. 590–591.) *Biakanja, supra,* 49 Cal.2d 647, and cases that follow it, see *J'Aire, supra,* 24 Cal.3d at p. 804, recognize that recovery may be available for purely economic losses where the defendant engages in a transaction that is *specifically intended* to benefit the plaintiff. (See Dobbs, *An Introduction to Non-Statutory Economic Loss Claims* (2006) 48 Ariz. L. Rev. 713, 714 ["[O]ne not in a special or contractual relationship owes no duty of care to protect strangers against stand-alone economic harm."].)

In allowing a would-be heir to recover against a negligent notary for making errors that invalidated a will, for example, *Biakanja* noted that the "'end and aim' of the transaction was to provide for the passing of the [testator's] estate to plaintiff," and the notary knew that, if any negligence occurred in his preparation of the will, the heir "would suffer the very loss that occurred." (49 Cal.2d at p. 650). Similarly, in *J'Aire,* this Court held that a construction company could be held liable to a tenant who lost

profits as a result of the company's negligent delay in completing construction because the contractor knew that its contract with the landlord was intended to affect the tenant, and that the tenant would suffer lost profits if construction took longer than expected. (24 Cal.3d at pp. 804–805.)

This Court's more recent decision in *Centinela* applied the same analysis in finding an "exceptional duty to third parties" to avoid economic loss. (1 Cal.5th at pp. 1013–1014.) There, the Court ruled that HMOs with a statutory obligation to pay emergency service providers and that contractually delegated such obligations to third-party companies were liable to the emergency service providers when those companies proved insolvent and unable to pay. (*Id.* at pp. 1012–1019.) The Court reasoned that the economic loss occurred to third parties that the contracting parties specifically intended to benefit. (*Ibid.*; see also *Beacon Residential Community Assn. v. Skidmore, Owings & Merrill LLP* (2014) 59 Cal.4th 568, 586 ("*Beacon Residential*") [under *Biakanja* factors, primary architect of condominium complex owed duty to subsequent homeowners].)

As the Restatement explains, when a case falls within this narrow exception for a transaction specifically intended to benefit the plaintiff, "the scope of a defendant's liability for economic loss is no more troubling than it would be in cases of physical harm: the set of potential plaintiffs is compact, and the size of the potential liability to them is clear and proportionate to defendant's liability." (Rest. 3d Torts, Econ. Harm, § 1, cmt. e.) Notably, this Court has never recognized negligence liability for purely economic harms in the absence of such a prior transaction, and no such transaction creates any special relationship here.

1. SoCalGas Entered Into No Transaction Specifically Intended To Benefit Plaintiffs

There is no transaction creating a special relationship between SoCalGas and every entity doing business within five miles of Aliso Canyon. Plaintiffs assert (Pl. Br. 41–44) that the "*Biakanja* factors"[4]

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[4] These factors include "[1]the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [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." (*Biakanja, supra,* 49 Cal.2d at p. 650.)

are all weighed whether or not there is a predicate transaction creating a "special relationship." That is incorrect, for the very first factor—"the extent to which *the transaction* was intended to affect the plaintiff"—*presupposes* the existence of a "transaction" creating such a relationship. (See *Biakanja, supra,* 49 Cal.2d at p. 650, italics added.).

That requirement is not met here. Plaintiffs contend (Pl. Br. 45) that SoCalGas owes them a duty to prevent mere economic losses because their businesses are located within an arbitrary five miles of the storage facility and because SoCalGas provides gas to the community. Neither is a "transaction" specifically intended to affect Plaintiffs, and thus neither creates the special relationship that *Biakanja* presupposes.

This Court's decision in *Quelimane* does not suggest otherwise. Although Plaintiffs contend that there was no transaction in *Quelimane* (Pl. Br. 42), in fact purchasers of properties acquired through tax sales sought title insurance from each of the defendants, but the defendants refused. (*Quelimane, supra,* 19 Cal.4th at p. 35).

Thus, while there were no contracts executed in *Quelimane*, there were transactions. And while the Court considered the *Biakanja* factors, its ultimate conclusion was that "[n]o special relationship existed between plaintiffs and defendants to give rise to a duty ... to ensure that they did not suffer financial losses." (*Id.* at pp. 59–60.) Thus, to the extent that *Quelimane* considered the issue, it recognized that *Biankanja* requires a prior transaction creating a special relationship.

Contrary to Plaintiffs' assertion (Pl. Br. 45), the fact that SoCalGas supplies natural gas to the 21.6 million customers within its 20,000 square mile service territory also does not create a "special relationship" with those customers, much less with businesses patronized by those customers. If SoCalGas had a "special relationship" with every single business in and around Porter Ranch on this theory, then this Court's "special relationship" exception would have no boundaries at all.

2. The *Biakanja* Factors Here All Weigh Against Any Exception

Even if there were a transaction creating a special relationship between SoCalGas and every business in and around Porter Ranch (and there is not), the *Biakanja* factors would still weigh against a finding of duty here.

The first *Biankanja* factor—"the extent to which the transaction was intended to affect the plaintiff" (49 Cal.2d at p. 650)—weighs against any duty here to avoid purely economic loss. Plaintiffs do not allege that they had any contractual relationship with SoCalGas, and any economic losses from such a contract in any event would be barred by the *Seely* economic loss rule. Nor were any contracts between SoCalGas and customers in Porter Ranch who relocated specifically intended to affect businesses like Plaintiffs'.

Biakanja factors two through four—the foreseeability of harm to plaintiff, the degree of certainty that the plaintiff suffered injury, and the closeness of the connection between the defendant's conduct and the injury—also weigh against recognition of any duty to avoid purely economic loss. Plaintiffs assert that SoCalGas should have

reasonably foreseen that (1) there would be a leak of this duration and magnitude, (2) some people would assert that they experienced symptoms as a result of odors attributed to the leak, (3) the government would order a novel voluntary relocation program offering reimbursement to residents within some radius of the leak, (4) some unknown number of people would accept this offer, and (5) customer traffic would temporarily decrease enough for revenues to temporarily decline. (See, *supra*, pp. 14–15.) Even if the links in this Palsgrafian chain were foreseeable (they are not), it is not clear that all Plaintiffs would have suffered a decline in profits as a result, and there certainly would be no "close[] connection" between the alleged negligence and that alleged decline that could justify a new exception to the economic loss doctrine here. (Compare, e.g., *Centinela, supra,* 1 Cal.5th at pp. 1013–1014 [finding "close connection" between HMOs' unreasonable delegation of payment responsibilities and non-payment of emergency service providers]; *Beacon Residential, supra,* 59 Cal.4th at pp. 572, 586 [finding close

connection between primary architect's allegedly negligent design work and defects in condominiums].)

The fifth factor, moral blame, also weighs against an exceptional duty here. Plaintiffs' claims sound purely in negligence and strict liability; there are not, for example, any well-pled factual allegations of any intentional harm or malice or wanton intent. (See *Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 270 ["[T]he moral blame that attends to ordinary negligence is generally not sufficient ...."].) And once the gas leak was discovered, SoCalGas acted immediately to repair the leak, develop a plan to allow relocation of residents, and clean their homes to mitigate any damages as much and as quickly as possible. (1 EP 3.)

The final factor, preventing future harm, weighs strongly against any exception to the economic loss here. The question is not whether imposing negligence liability will provide incentives to take more safety precautions, but rather whether adding *additional* liability for purely economic harms on top of existing liability will prevent future harm. It will not. Where, as here, a claim for

economic loss is derived from the impact of negligent conduct on other parties (would-be customers), those other parties are able to bring negligence claims for any personal injury or property damage that they may suffer. As the Restatement has noted, threats of additional liability for economic loss caused by such impact are unlikely to improve incentives to take appropriate precautions against future accidents. (Rest.3d Torts, Econ. Harm, § 7, cmt. b.)

The facts of this case confirm this conclusion. SoCalGas has already spent over $450 million on remediation efforts alone. In addition, SoCalGas is subject to hundreds of other lawsuits claiming damage to property, personal injury, public nuisance, health and safety code violations, impairment of natural resources and more from both public and private plaintiffs. Those other lawsuits will be unaffected by this Court's reaffirmance here that the economic loss doctrine precludes recovery to businesses that earned less than they hoped during the temporary relocation program. SoCalGas is moreover subject to investigations by its regulators, the California Public Utilities Commission, the Division of Oil, Gas and

Geothermal Resources of the California Department of Conservation and others, into the cause of the leak in which fines and penalties may be imposed. And SoCalGas is required to comply with detailed safety regulations and requirements imposed by the California Public Utilities Commission and other public agencies. These existing obligations give SoCalGas ample incentive to take appropriate safety precautions. That deterrence will be no less effective should this Court uphold its longstanding principle that tort liability for unintentional acts needs to end somewhere, and that somewhere is where downstream entities suffer only lost financial expectations.

II. NEITHER CIVIL CODE SECTION 1714 NOR *ROWLAND* IMPOSES A GENERAL DUTY TO AVOID ECONOMIC LOSS

Unable to fit this case within this Court's narrow exception to the economic loss doctrine, Plaintiffs argue that this Court should abandon that doctrine and instead adopt a single, universal *Rowland* test. (Pl. Br. 18–39.) Contrary to Plaintiff's suggestion, neither Civil Code section 1714 nor *Rowland, supra,* 69 Cal.2d 108 favors this result.

A. Civil Code Section 1714 Does Not Impose Any General Duty To Avoid Economic Loss

Plaintiffs' reliance (Pl. Br. 19–20) on Civil Code section 1714 is unpersuasive. Section 1714 provides that "[e]veryone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care." (Civ. Code, § 1714, subd. (a).) But the duty imposed by section 1714 is not absolute. (See *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 814 ["[I]t was not the intention of the Legislature in enacting section 1714 of the Civil Code ... to insulate the matters therein expressed from further judicial development; rather it was the intention of the Legislature to announce and formulate existing common law principles ... with a distinct view toward continuing judicial evolution."].)

Following these principles, this Court has concurrently developed two opposite lines of cases: the *Rowland* line of cases creates a rebuttable presumption of duty where there is injury to person or property, and the *Fifield/Biakanja* line of cases presumes no duty to avoid economic loss absent a narrow "special relationship" exception. Critically, this Court developed both the *Rowland* and

Fifield/Biakanja lines of cases against the backdrop of section 1714 and with full appreciation of how that Code provision applies. (See, e.g., *Bily, supra,* 3 Cal.4th at p. 397; *J'Aire, supra,* 24 Cal.3d at p. 806, fn. 3.)

Historically, moreover, *Rowland* has been applied only in cases where the plaintiff is already claiming injury to his person or property, and has never been construed to overrule the economic loss doctrine where such physical damage and thus finite liability is absent. In *Rowland,* for instance, this Court decided whether an apartment renter had a duty to warn a guest about a broken faucet that severely injured the plaintiff's hand. The Court defined the question presented as whether "[a] man's life or limb [was] worthy of protection by the law" under the circumstances of the case at hand. (*Rowland, supra,* 69 Cal.2d at p. 118.) *Rowland* had no occasion to consider whether a man's hoped-for *profits* were worthy of protection from unintentional acts, nor did it purport to overrule *Fifield* and *Biakanja,* or the careful balance this Court had previously struck in cases seeking recovery for a purely economic loss.

Similarly, in *Kesner v. Superior Court* (2016) 1 Cal.5th 1132, this Court applied the *Rowland* test to determine whether an exception to the general duty of reasonable care should be created in a case involving an employer who used asbestos in its business. The Court declined to find an exception, and held that the employer had a duty to protect members of its employees' families from "take-home" exposure that allegedly caused their deaths. (*Id.* at p. 1140.) Again, the duty to prevent a purely economic loss was not at issue.

Indeed, California courts have recognized limits on the *Rowland* presumption of duty in other contexts that present similar dangers of expanding a presumptive duty of care beyond the physical injury domain. In *Thing v. La Chusa* (1989) 48 Cal.3d 644, for example, this Court declined to extend *Rowland* to actions for negligent infliction of emotional distress, explaining that "[r]ecovery for this type of damage, when no other injury is present, has never been subject to the general principles of foreseeability applied in *Rowland*." (*Id.* at p. 668, fn. 11 [driver owed no duty of care to

accident victim's mother who suffered emotional distress when she arrived on accident scene].)

Following *Thing,* the Court of Appeal has similarly emphasized limits on the scope of *Rowland*'s presumption of duty, explaining that it applies only to cases involving "personal (physical) injury" and so has *"absolutely nothing to do with negligent infliction of emotional distress."* (*Krupnick v. Hartford Accident & Indem. Co.* (1994) 28 Cal.App.4th 185, 199, emphasis orig. [insurance company owed no duty to policyholders to avoid emotional distress].) The court further expounded on the dangers of expanding *Rowland*'s reach to cases involving non-physical injuries, explaining that "reliance on foreseeability of injury alone in finding a duty, and thus a right to recover, is not adequate when the damages sought are for an intangible injury," because allowing compensation for all foreseeable intangible injuries would result in "limitless liability. . . against which it is impossible to insure." (*Id.* at p. 201.) The Plaintiffs' reliance on Section 1714 there did not change this conclusion.

This Court similarly refused to apply a *Rowland*-type analysis in holding that a defendant owes no duty to an accident victim's children to prevent loss of consortium. (See *Borer v. Am. Airlines, Inc.* (1977) 19 Cal.3d 441, 450.) *Rowland,* the Court explained, did not "involve[] the creation of a new cause of action for solely intangible damages, attended with the problems of multiplication of claims and liability," and the foreseeability test presumptively applied under *Rowland* does not apply where there was "no physical injury." (*Ibid.*) The United States Supreme Court similarly has declined to find a duty to prevent the emotional distress of workers negligently exposed to carcinogens, based in part on concern over "unlimited and unpredictable liability." (*Metro-North Commuter Railroad Co. v. Buckley* (1997) 521 U.S. 424, 433.)

The same reasoning applies here. *Rowland* involved only a physical injury and has nothing to do with claims for pure economic loss. Further, presuming duty based on what amounts to a pure foreseeability test is inadequate in cases of economic loss for the same reason it is inadequate in cases of negligent emotional distress:

defendants would be exposed to "limitless liability" for mere negligence.

This Court should thus reaffirm that any presumption that a party owes a duty of care under Section 1714 does not apply where the defendant's actions caused purely economic harm. In such situations, *Fifield* and *Biakanja,* not *Rowland,* apply, and Civil Code section 1714 does not require this Court to disregard almost six decades of judicial precedent in holding otherwise.

B. *Rowland* Does Not Create Any General Duty To Avoid Economic Loss

Plaintiffs' proposal to replace the settled economic loss doctrine and its narrow special relationship exception with a newly universal *Rowland* test also would be a radical departure from settled California law. Even though the *Rowland* factors and *Biakanja* factors overlap, they start from opposite presumptions. *Fifield* and *Biakanja* presume that there is no duty to avoid economic loss, and recognize an exception only if there is a transaction intended to benefit the plaintiff. Such an exception limits a duty to avoid economic loss to a finite and limited set of parties that the defendant

has identified in advance. *Rowland,* by contrast, presumes a duty to protect others' interests unless the defendant can satisfy a multi-factored balancing test justifying an exception. If *Rowland* were extended to the economic loss context, removing the no-duty presumption and the "special relationship" safeguard, defendants would be exposed to potentially limitless and disproportionate liability for purely economic losses, and *Rowland*'s multi-factored test for an exception would provide no reliable limit.

Moreover, Plaintiffs here urge an extreme version of the *Rowland* test that makes foreseeability the main and effectively dispositive factor. Plaintiffs recognize that "[t]he *Rowland* factors fall into two categories—foreseeability and public policy considerations." (Pl. Br. 32, quotations omitted.) But Plaintiffs' public policy rationales—that the defendant acted negligently in failing to exercise sufficient care (*Id.* at p. 37), that more damages always means more safety (*Id.* at pp. 37–38), that the financially injured parties were blameless and will otherwise go uncompensated (*ibid.*), and that insurance is "generally available"

wherever there is liability (*id.* at. p. 39)—will universally apply. Thus, Plaintiffs' version of the *Rowland* test requires no balance at all: If the harm is foreseeable, the presumption of duty cannot be rebutted.

The logical conclusion of Plaintiffs' proposed new rule would be that any business or individual foreseeably affected by a stranger's negligence could claim recovery in tort. Every worker who missed out on overtime opportunities because the local economy slowed. Every supplier and manufacture who was able to sell less goods to the Porter Ranch retailers. Every business outside of Porter Ranch that services or delivers to the local clientele. Every Uber driver who received less in fares or surge pricing than he hoped as demand declined. Every waitress who saw a decline in tips. Every investor who had projects planned in Porter Ranch who perceived a decline in their value, or outcome become more uncertain, following the leak. Every doctor, nurse, lawyer, secretary, businessman, restauranteur, manager, busboy, landlord, and speculator with any hoped-for business in Porter Ranch. And under

Plaintiffs' proposal, such harms would not even be limited to the duration of the relocation. (See 1 EP 185, ¶ 98 [alleging future harm because "business will never return to Porter Ranch as usual"].)

In any event, even if *Rowland* applies here (it does not), SoCalGas should prevail for the same reasons described above under the *Biakanja* factors: the risk of unlimited liability, the attenuated and unforeseeable nature of Plaintiffs' purported losses, the lack of moral blame and the low likelihood that the incremental liability would lead to additional safety. (See, *supra*, pp. 47–51.) Moreover, the two factors *Rowland* arguably adds to the *Biakanja* factors (see Pl. Br. 20) make no difference to this analysis. "[T]he extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for the breach" (*Rowland, supra,* 69 Cal.2d at p. 108) weigh against a duty to avoid economic losses here. Subjecting SoCalGas to claims of purely financial losses would burden both it and the courts with a flood of new lawsuits. And the "availability, cost, and prevalence of insurance for the risk involved" (*Rowland, supra,* 69

Cal.2d at p. 113) similarly counsels against extending a duty of care here. Business interruption insurance is available in various forms for business owners to protect against actual interference with their operations because they can estimate their potential losses if their business is affected by an insured risk. (Farnsworth, *supra,* 50 Valparaiso Univ. L. Rev. at p. 555; see also Dobbs, *supra,* 48 Ariz. L. Rev. at p. 717 ["[I]nsurance may be preferable to the tort system as a mechanism for addressing pure economic losses."].) By contrast, potential defendants may face more difficulty obtaining liability insurance against unlimited liability for wide-open and potentially exorbitant claims for economic loss because they have no way of accurately estimating their exposure to such losses claimed by others. (James, *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal* (1972) 25 Vand. L. Rev. 43, 53.)

For all these reasons, even if the Court applies *Rowland* here (it should not), it should nonetheless hold for SoCalGas.

III. THIS COURT SHOULD REJECT PLAINTIFFS' REQUEST FOR A RADICAL CHANGE IN CALIFORNIA LAW

Plaintiff's proposal merits rejection for the additional reasons that it would make California an outlier among its sister states, unsettle other areas of tort law, impose onerous judicial burdens and cast a cloud of uncertainty over the operation of businesses in the State.

A. Adoption Of Plaintiffs' Test Would Make California An Outlier

Courts in other jurisdictions have rejected over and over again claims for economic losses resulting even foreseeably from negligence toward other parties. (See Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment* (1987) 37 Stan. L. Rev. 1513, 1528 ["In these cases [where negligence temporarily reduces trade], the courts have almost uniformly denied recovery."].) Permitting such a claim here would therefore constitute an extreme departure not only from existing California law, but from the law of every other State in the Union.

In *532 Madison Avenue Gourmet Foods, Inc. v. Finlandia Center, Inc.* (N.Y. 2001) 750 N.E.2d 1097 ("*532 Madison*"), for instance, the

New York Court of Appeals rejected an argument similar to the one Plaintiffs make here. In that case, an office tower partially collapsed, causing the closure of fifteen heavily trafficked blocks surrounding the accident. Businesses within those blocks sued the construction company, alleging they lost profits because their customers were unable to access their businesses. The Court of Appeals ruled that the plaintiffs had no valid claim:

> As we have many times noted, foreseeability of harm does not define duty. Absent a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm. This restriction is necessary to avoid exposing defendants to unlimited liability to an indeterminate class of persons conceivably injured by any negligence in a defendant's act.

(*Id.* at p. 289, quotations omitted.) Applying this principle, the Court found that, while an actor has a general duty to avoid injury to a person or property, "[w]e have never held . . . that a[defendant] owes a duty to protect an entire urban neighborhood against purely economic losses." (*Id.* at p. 290).

532 Madison applies with even greater strength here: In this case, the Plaintiffs' businesses were not closed, but rather allegedly

saw a temporary decline in revenue as a result of individual, voluntary relocation decisions. Thus, here too, this Court should find no duty to protect the economy of an entire neighborhood from purely economic loss.

The Supreme Court of West Virginia reached the same conclusion in *Aikens v. Debow* (W.Va. 2000) 541 S.E.2d 576. In that case, a truck damaged a bridge, closing it for nearly three weeks. A motel owner sued the truck driver, claiming that the bridge closing reduced its revenues. After a survey of the case law, the West Virginia Supreme Court concluded that there should be no recovery absent a "special and narrowly defined relationship." (*Id.* at p. 590). Otherwise, the court explained, a careless actor would be liable for "ripple-effect losses" that threaten to impose "limitless liability." (*Id.* at pp. 591–592.)

Other decisions likewise reject claims for pure economic losses suffered when damage to a bridge or roadway impeded customer access. (See *Dundee Cement Co. v. Chemical Laboratories, Inc.* (7th Cir. 1983) 712 F.2d 1166, 1170 [applying Illinois law and holding cement

company could not recover lost profits from truck driver that crashed and blocked cement plant's only means of access]; *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.* (Iowa 1984) 345 N.W.2d 124, 128 [businesses on far side of bridge could not recover lost profits from steel fabricator when cracks were discovered, requiring bridge closure]; *The Stop & Shop Cos. v. Fisher* (Mass. 1983) 387 Mass. 889, 894 [store owner could not recover lost revenues from owners of tugboat that collided with drawbridge, resulting in obstruction of a bridge].)

Still other decisions have rejected claims for pure economic loss caused by other sorts of negligent destruction to the property of others. For example, in the decision upon which *Fifield* relied (see, *supra*, p. 25), the Ohio Court of Appeal held that an employee put out of work by a natural gas explosion that shut down his place of employment could not sue the company that stored the natural gas for negligently causing the explosion. (*Stevenson, supra,* 73 N.E.2d at p. 204.) Although the plaintiff was employed in the vicinity of the plant where the gas was stored, the court reasoned that "to permit

recovery of damages in such cases would open the door to a mass of litigation which might very well overwhelm the courts." (*Id.* at p. 203.) Foreseeability alone thus did not suffice to determine liability.[5]

The Fifth Circuit (en banc) has similarly ruled that "[d]enying recovery for pure economic loss is a pragmatic limitation on the doctrine of foreseeability." (*Louisiana ex rel. Guste v. m/v Testabank* (5th Cir. 1985) 752 F.2d 1019, 1032 ("*m/v Testabank*") [applying Louisiana law and finding negligent oil spiller not liable to shipping interests and other marine enterprises that sued for purely economic loss].) The Court stressed the danger of limitless liability created by claims for pure economic loss and the minimal additional incentive provided by such claims where parties remain liable for any damages to person or property causing that loss. (*Ibid.*) Thus, there

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[5] While in *People Express Airlines v. Consolidated Rail Corp.* (N.J. 1985) 495 A.2d 107 the New Jersey Supreme Court allowed an airline to recover for economic losses suffered when a terminal was forced to shut down due to a nearby railroad's negligence under a heightened "particular foreseeability" test (*id.* at p. 116), that case is a "lonely outpost" that other courts have refused to follow "[w]ith a striking degree of unanimity." (Rabin, *Respecting Boundaries and the Economic Loss Rule in Tort* (2006), 48 Ariz. L. Rev. 857, 858.)

too, disruption to the plaintiffs' expected profits caused by an oil spill did not alone give rise to liability. (See also, e.g., *American Petroleum & Transports, Inc. v. City of New York* (2d Cir. 2013) 737 F. 3d 185, 197 [holding transport company could not sue City of New York for economic loss caused by negligent delay in raising drawbridge]; *Leadfree Enterprises, Inc. v. U.S. Steel Corp.* (7th Cir. 1983) 711 F.2d 805, 809 [applying Wisconsin law and holding plaintiff could not recover for lost business, employment, income, time and other purely economic losses suffered as a result of negligence that caused bridge closure]; *Dick Meyers Towing Serv., Inc. v. United States* (5th Cir. 1978) 577 F.2d 1023, 1025 [plaintiff could not sue lock operator for negligence that caused his tugboats and other vessels to be stranded, and unusable for commercial purposes]; *Union Oil Co. v. Oppen* (9th Cir. 1974) 501 F.2d 558, 570 [applying California law and allowing commercial fisherman as a favored class to recover under *Biakanja*, but making clear that defendant was not liable for "every decline in the general commercial activity of every business in the Santa Barbara area following the" oil spill].)

In light of this precedent, finding SoCalGas liable for the purely economic harms alleged in the complaint here would constitute a breathtaking departure from established law both within and outside California.

B. Plaintiffs' New Test Would Have Severely Adverse Practical Consequences For The State

Finally, adoption of Plaintiffs' new test would harm California's government and economy by usurping the role of the Legislature and regulatory agencies, imposing massive new burdens on the judiciary, displacing other longstanding limitations in tort law, and harming the State's businesses, both large and small.

1. Intrusion Upon Legislative Functions

Any such sweeping change as Plaintiffs propose should be adopted (if at all) by legislators, not the courts. Traditionally, exceptions to the economic loss doctrine have been created by statute. Under the Federal Oil Pollution Act of 1990, for instance, Congress created an exception to the economic loss doctrine that allows recovery of compensation for economic loss if that loss is "due to" harm to property or resources that "result[s] from" an oil

spill, even if the plaintiff does not own that property or those resources. (33 U.S.C. §§ 2702(a), 2702(b)(2)(D)–(E).)

The California Legislature also has enacted statutes creating limited exceptions to the economic loss doctrine in very narrow situations. One such provision allows a party to recover "loss of profits ... due to the injury [or] destruction ... o[f] natural resources" in an oil spill if the party "derives at least 25 percent of his or her earnings from ... natural resources." (Gov. Code, § 8670.56.5.) Another provision allows a party to sue a pipeline corporation for "economic losses resulting from destruction of or injury to, real or personal property," even if that property is not owned by plaintiffs. (Civ. Code, § 3333.5, subd. (c)(2).) These statutes show that the Legislature is more than capable of enacting statutory exceptions to the economic loss doctrine, if needed, based on a considered, deliberative process.

The case for judicial restraint is even stronger here, given that SoCalGas is a highly regulated public utility. SoCalGas is subject to extensive safety regulations by multiple government agencies such

as the California Public Utilities Commission, the Division of Oil Gas and Geothermal Resources, the Department of Conservation and the federal government—certain of which are actively conducting investigations related to the leak. And as part of this legislative and regulatory oversight, California recently enacted Section 3217 of the Public Resources Code, which requires the State Gas and Oil Supervisor to conduct a "comprehensive review of the safety of the gas storage wells at the facility" and prohibits SoCalGas from injecting any natural gas into the facility until that review is complete. (Pub. Res. Code, § 3217.) The fact that other branches of government are exercising their regulatory authority in this very matter, to ensure the ongoing safety of this very facility, weighs strongly against allowing purely economic losses in this case.

2. Increase In Judicial Burden

Plaintiffs' proposed elimination of the economic loss doctrine also would impose a massive judicial and administrative burden on the State's courts. Plaintiffs' new rule would multiply existing tort litigation exponentially by expanding liability to allow anyone whose financial interests were foreseeably affected by an actor's

negligence or other tortious act to recover in negligence, where no cause of action has ever existed before. Moreover, the economic loss doctrine can be applied by the courts as a matter of law at the outset of a case. (See, e.g., *Fifield, supra,* 54 Cal.2d at p. 643 [sustaining demurer]; *Adams, supra,* 50 Cal.App.3d at p. 47 [same]; *Quelimane, supra,* 19 Cal.4th at p. 60 [same].) By contrast, Plaintiffs' new test would invite prolonged discovery under a multi-factor fact-intensive test, and give every economic loss claim some settlement value as complex, highly fact-specific claims proceed to summary judgment or trial. In addition, "administrative factors" such as "the possibility of 'feigned claims' and the difficulty of proof of a particular injury" counsel against the creation of new legal duties. (*Peter W. v. San Francisco Unified Sch. Dist.* (1976) 60 Cal.App.3d 814, 823.) The additional burdens on the courts from the exponential increase in lawsuits and the complexity of the claims will be substantial, and will divert scarce resources away from the judiciary's other important missions.

3. Displacement Of Other Tort Law

Recognizing a freestanding duty in tort to avoid purely economic harms to third parties also would undermine limitations imposed in other areas of tort law. Many environmental torts, for example, give rise to actions sounding not only in negligence, but in nuisance. (*m/v Testabank, supra,* 752 F.2d at p. 1030.) In nuisance law, however, a plaintiff must show a special injury distinct from that suffered by the general public in order to state a claim. (Civ. Code, § 3493 ["A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise."]; *Venuto v. Owens-Corning Fiberglas Corp.* (1971), 22 Cal.App.3d 116, 124 [a private individual has no public nuisance claim "unless he alleges facts showing special injury to himself in person or property of a character different in kind from that suffered by the general public"].)

Like the economic loss doctrine, this limitation prevents exposure to virtually limitless liability by a multiplicity of lawsuits against mass tort defendants. (See Blackstone, Commentaries On the Laws of England (1763) p. 167 [explaining common nuisances

are "not actionable [because] it would be unreasonable to multiply suits by giving every man a separate right of action"].) Should this Court recognize a new, freestanding duty of care to avoid purely economic losses, plaintiffs would be able to recast public nuisance claims as negligence claims and thereby evade the "special injury" requirement.

Scholars have recognized this concern as a reason for the economic loss doctrine. Professor Dobbs, for example, has explained that the economic loss doctrine "enforces the requirements of other tort law." (Dobbs, *supra*, 48 Ariz. L. Rev. at p. 715.) That is because other torts, such as libel and interference with contract, "require something more than negligence." (*Ibid.*) Thus, the "economic loss [doctrine] merely directs legal traffic for analysis under the best suited set of rules ... by saying negligent infliction of economic loss by strangers is no ground for recovery." (*Ibid.*) In other words, if the economic loss doctrine did not exist, plaintiffs would cut straight to negligence in virtually every case, rather than try to meet the

more stringent requirements of the more particular tort theories that would normally apply.

4. Economic Harms To California Businesses

By allowing imposition of duties to prevent economic loss in virtually any situation, moreover, Plaintiffs' sweeping new test would expose defendants to indeterminate and potentially jaw-dropping claims out of all proportion to culpability. It would thus increase the cost of doing business in the State for both large and small businesses alike.

Adoption of Plaintiffs' new rule would also likely lead to over-deterrence of useful conduct, which would increase the cost and decrease the availability of valuable services., for several reasons. *First,* where there is already substantial financial liability as a result of the negligence, it is less likely that the imposition of additional liability by recognizing causes of action for purely economic harm will result in greater precautions. (See, e.g., *m/v Testabank, supra,* 752 F.2d at p. 1029.) That is unquestionably the situation here. (See, *supra,* pp. 47–51.)

Second, the elimination of the economic loss doctrine would lead to "problems of identification, boundaries, and source" that make the "parameters of risk" and the extent of potential damages difficult to ascertain in advance of an accident, which "drastically undermine[s] the deterrent role of liability." (Rabin, *Environmental Liability and the Tort System* (1986) 24 Hous. L. Review 27, 43; see also *m/v Testabank, supra,* 752 F.2d at p. 1029 ["When the accident costs are added in large but unknowable amounts the value of the exercise is diminished."].) Likewise here, the indeterminable number of parties that might be financially affected by a leak, and the indeterminable quantity of damages each of those parties may seek, make it far less likely that the deterrence of additional potential liability would be effective.

Third, even if economic damages could be accurately estimated, the imposition of liability for such losses would not lead to socially optimal behavior. For example, while the temporary relocation of customers might have diminished businesses within Porter Ranch, the relocation benefitted the businesses in the areas to

which the residents relocated. As scholars have explained, when people merely shift their spending from one business to another, there is not a "social loss" to the economy but rather only privatized losses for one particular business or individual. (Parisi, *The Comparative Law and Economics of Pure Economic Loss* (2007) 27 Int'l Rev. L. & Econ. 29, 36–38; see also Posner, *Common-Law Economic Torts: An Economic and Legal Analysis* (2006) 48 Ariz. L. Rev. 735, 736–737.) Under these circumstances, "tort liability for a private loss that exceeds externalized social cost leads to the overdeterrence of injurers." (Gilead, *Tort Law and Internalization: The Gap Between Private Loss and Social Cost* (1996) 17 Int'l Rev. L. & Econ. 589, 592.) Here too, because many of the claimed "losses" involve merely shifts in consumer spending, forcing a tort defendant to pay for these "losses" would over deter socially useful conduct.

For all of these reasons, this Court should reject Plaintiffs' request that it abandon the longstanding economic loss doctrine and its settled narrow exception in favor of a sweeping presumption of duty that would impose rippling and potentially infinite liability for

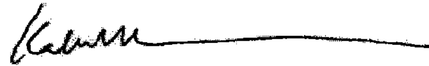
any and all economic losses. Any such radical change would upend nearly sixty years of California precedent and work profound harm to the State's judiciary and economy.

CONCLUSION

The judgment of the Court of Appeal should be affirmed and the trial court ordered to sustain SoCalGas' demurrer without leave to amend.

DATED: June 18, 2018

Respectfully submitted,



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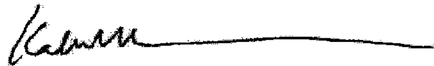
CERTIFICATE OF COMPLIANCE

(Cal. Rules of Court, rule 8.204)

Pursuant to California Rule of Court 8.204, the foregoing Respondent's Answer Brief On The Merits is double-spaced and printed in proportionally spaced 13-point Palatino Linotype typeface. It is 70 pages long and contains 12,537 words (excluding the tables, this certificate, and the proof of service). In preparing this certificate, I relied upon the word count generated by Microsoft Word 2003.

Executed on June 18, 2018, at Redwood Shores, California.

DATED: June 18, 2018



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