No. S246669
(Court of Appeal No. B283606)
(Los Angeles Super. Ct. JCCP No. 4861)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SOUTHERN CALIFORNIA GAS LEAK CASES

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

OPPOSITION TO MOTION REQUESTING JUDICIAL NOTICE

James J. Dragna (SBN 91492)
David L. Schrader (SBN 149638)
Yardena R. Zwang-Weissmen (SBN 247111)
MORGAN, LEWIS & BOCKIUS, LLP
300 South Grand Ave., Ste. 2200
Los Angeles, CA 90071-3132
jim.dragna@morganlewis.com
david.schracer@morganlewis.com
yardena.zwang-weissman@morganlewis.com

*Kathleen M. Sullivan (SBN 242261)
Daniel H. Bromberg (SBN 242659)
QUINN EMANUEL URQUHART & SULLIVAN, LLP
555 Twin Dolphin Drive, 5th Fl.
Redwood Shores, CA 94065
Telephone: (650) 801-5000
Facsimile: (650) 801-5100
kathleensullivan@quinnemanuel.com
danbromberg@quinnemanuel.com

Attorneys for Respondent Southern California Gas Company

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES 3

I. INTRODUCTION 5

II. ARGUMENT 6

A. Plaintiffs' Request To Augment The Record At This Late Date Is Procedurally Improper 6

B. Plaintiffs' Requests For Judicial Notice Are Improper On The Merits 9

III. CONCLUSION 13

PROOF OF SERVICE 15

TABLE OF AUTHORITIES

Page

Cases

Aquila, Inc. v. Superior Court
(2007) 148 Cal. App. 4th 556 13

Arce v. Kaiser Found. Health Plan, Inc.
(2010) 181 Cal.App.4th 417 10

Brosterhous v. State Bar
(1995) 12 Cal.4th 315 7

Cal. Sch. Bds. Assn. v. State of Cal.
(2011) 192 Cal.App.4th 770 6

Espinoza v. Calva (2008)
169 Cal.App.4th 1393 10

In re James V.
(1979) 90 Cal.App.3d 300 ..... 6, 14

In re Zeth S.
(2003) 31 Cal.4th 396 6

Kesner v. Superior Court
(2016) 1 Cal.5th 1132 11

Licudine v. Cedars-Sinai Med. Center
(2016) 3 Cal.App.5th 881 12

Mangini v. R.J. Reynolds Tobacco Co.
(1994) 7 Cal.4th 1057 12

Optional Cap., Inc. v. DAS Corp.
(2014) 222 Cal.App.4th 1388 8

Ross v. Creel Printing & Publishing Co.
(2002) 100 Cal.App.4th 736 8

TABLE OF AUTHORITIES
(continued)

Page

Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.
(2000) 78 Cal.App.4th 847 8

Sheet Metal Workers' International Assn., Local 104 v. Duncan
(2014) 229 Cal.App.4th 192 12

Tran v. Farmers Group, Inc.
(2002) 104 Cal.App.4th 1202 8

Williams v. Wraxall
(1995) 33 Cal.App.4th 120 ..... 9, 10, 11, 15

World Fin. Group, Inc. v. HBW Ins. & Fin. Servs., Inc.
(2009) 172 Cal.App.4th 1561 8

Statutes

Cal. Civil Code § 1714 7

I. INTRODUCTION

Plaintiffs' motion for judicial notice of nearly 400 pages of new material—filed for the first time with its Reply Brief in this Court—should be denied on multiple grounds.

First, Plaintiffs' motion is untimely. None of the exhibits, or the information contained within them, is new. Yet Plaintiff failed to submit them to the trial court, the Court of Appeal, or even with its Opening Brief. Plaintiffs have offered no reasoned basis, much less the requisite "exceptional circumstances," that would excuse their delay. They should not be permitted to wait until the reply brief stage in this Court to submit this extra-record evidence for the very first time.

Second, Plaintiffs' motion should be denied on the merits. While Plaintiffs claim that their exhibits—another party's complaint, government reports and a submission to a government agency—are judicially noticeable, courts can take notice only of the *existence* of such documents, not their contents. Because Plaintiffs seek to use these documents for their factual assertions, and because those

assertions can and will be disputed by SoCalGas, these documents are not subject to judicial notice.

II. ARGUMENT

A. Plaintiffs' Request To Augment The Record At This Late Date Is Procedurally Improper

Plaintiffs' request should first be denied because Plaintiffs inexcusably failed to submit any of these materials to the trial court, the Court of Appeal, or even with their Opening Brief.

"It has long been the general rule and understanding that 'an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration.'" (*In re Zeth S.* (2003) 31 Cal.4th 396, 405, quoting *In re James V.* (1979) 90 Cal.App.3d 300, 304.) In light of this "fundamental principle of appellate law," a court will not take judicial notice of any extra-record materials unless the moving party can show "exceptional circumstances that would justify a deviation" from the general rule. (*Cal. Sch. Bds. Assn. v. State of Cal.* (2011) 192 Cal.App.4th 770, 803); see also *Vons Co. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.)

Plaintiffs have not met that burden here. None of the facts that Plaintiffs seek to inject into this appeal is a recent development. To the contrary, Plaintiffs admit that four of the five exhibits "pre-date the decision below." (Mot. at 5.) And while the fifth exhibit—another party's complaint in another lawsuit—was filed later, Plaintiffs do not argue that any of the *facts* they are relying on from that complaint is new or could not have been included in Plaintiffs' own submission.

Further, Plaintiffs have not argued that these documents only recently became relevant due to some new argument that SoCalGas made. Just the opposite: The motion asserts that the exhibits are "relevant" only because they relate "to application of Civil Code § 1714(a) and the factors set forth in *Rowland*." (Mot. at 4.) These are the same issues the parties have been briefing since demurrer. (See 1 EP 212-213 [Plfs.' Opp'n to Demurrer, citing Civil Code, § 1714 and *Rowland*].) Plaintiffs' inability to explain why these materials were not submitted earlier is fatal to their request. (See, e.g., *Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325 [denying request where party

gave "no reason for its failure to request the trial court and Court of Appeal take judicial notice"]; *World Fin. Group, Inc. v. HBW Ins. & Fin. Servs., Inc.* (2009) 172 Cal.App.4th 1561, 1569 fn. 7 [denying request where party "fail[ed] to offer a good reason why these documents should be considered for the first time on appeal"].)

Even if Plaintiffs could justify their failure to submit these documents to the courts below, however, their request for judicial notice should still be denied because Plaintiffs waited to raise these issues until their Reply Brief. It is well settled that "points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before." (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10.) Consistent with this rule, the Courts of Appeal have regularly refused to grant requests for judicial notice raised for the first time in reply. (See, e.g., *Optional Cap., Inc. v. DAS Corp.* (2014) 222 Cal.App.4th 1388, 1395, fn. 5; *Tran v. Farmers Group, Inc.* (2002) 104 Cal.App.4th 1202, 1207, fn. 2; *Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 744.) Here, at a minimum,

Plaintiffs could have included their request for judicial notice with their Opening Brief. Their failure to do so is not only procedurally improper, but highly prejudicial to SoCalGas, which is now left with no opportunity to substantively respond. Plaintiffs' untimely request should be denied, and the Court should disregard any reference to these documents in the Reply Brief.

B. Plaintiffs' Requests For Judicial Notice Are Improper On The Merits

The motion should also be denied on the merits. Plaintiffs argue that the exhibits are all subject to judicial notice because they are "court filings" (RJN Ex. A), "government documents" (RJN Exs. B-D), and a "submission to a government agency" (RJN Ex. E). (Mot. at 4.) But while the Court may take judicial notice of the *existence* of such documents (and their legal effect), it may not take judicial notice of statements contained therein. (See *Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 130 fn. 7 (*Williams*).) Because Plaintiffs offer each exhibit for its factual content, judicial notice is improper.

Exhibit A: Exhibit A is another party's complaint from

another lawsuit against SoCalGas. While courts can take notice of the fact that a complaint exists or that a lawsuit has been filed, they "cannot take judicial notice of the truth of hearsay statements in [such] . . . pleadings." (*Williams*, 33 Cal.App.4th at p. 130 fn. 7; see also *Espinoza v. Calva* (2008) 169 Cal.App.4th 1393, 1396 ["We can take judicial notice of the fact that the pleadings were filed, but not of the truth of the statements contained in them."].) That is the sole reason Plaintiffs cite this exhibit. In particular, Plaintiffs invite the Court to review the "[a]dditional salient facts" alleged in Exhibit A to (1) shore up their claim that the gas leak caused a "massive disruption," (Reply Br. at 3), (2) contend that "SoCalGas was Sempra's agent," (*id.* at p. 25 fn. 20), and (3) argue that SoCalGas foresaw "service failures" prior to the leak, (*id.* at p. 25 fn. 21.) Because these statements all relate to the underlying factual allegations, rather than the existence of the lawsuit, judicial notice is improper. (See *Arce v. Kaiser Found. Health Plan, Inc.* (2010) 181 Cal.App.4th 417, 482-84 [denying judicial notice of truth of allegations in complaint from another case].)

Further, this Court should decline to take judicial notice of Exhibit A for the additional reason that it is unhelpful and irrelevant to the question the Court must resolve, which is whether the Court should eliminate the economic loss doctrine and create a new duty of care for an entire category of cases. (See *Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1143-1144 [explaining that the duty analysis is not conducted "on the facts of the particular case before us, but [instead considers] whether carving out an entire category of cases" is warranted].) The specific facts of this particular gas leak are therefore irrelevant.

Exhibits B-D: Exhibits B, C and D are "government documents"—specifically, testimony given during an agency hearing and two reports—that Plaintiffs again cite for the truth of certain statements contained therein. (See Reply Br. at 25 fn. 21; *id.* at p. 29 fn. 24 .) But as with Exhibit A, the Court is permitted only to consider these materials for their existence or legal effect. (*Williams*, 33 Cal.App.4th at p. 130 fn. 7.) Accordingly, courts have refused to take judicial notice, for instance, of a California Department of

Health report on tobacco use in litigation against a cigarette company (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063–64, *overruled on other grounds by In re Tobacco Cases II* (2007) 41 Cal.4th 1257), and statistics contained within a Labor Bureau report, (*Licudine v. Cedars-Sinai Med. Center* (2016) 3 Cal.App.5th 881, 902). And these documents similarly speak only to the particular facts of this case and prior storage regulation enforcement, and are therefore also irrelevant and unhelpful. (See *Sheet Metal Workers' International Assn., Local 104 v. Duncan* (2014) 229 Cal.App.4th 192, 199 fn. 3 ["[M]atters subject to judicial notice must be relevant to issues raised on appeal."].) Plaintiffs' request for judicial notice of the contested factual statements contained in these documents should likewise be denied.

Exhibit E: Exhibit E is a Sempra SEC statement. Plaintiffs cite Exhibit E to argue that because SoCalGas' parent company has liability insurance that may or may not cover purely economic losses of the kind alleged here, that entity "is in a better economic position ... to insure against SoCalGas's negligence" than retailers who can

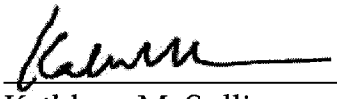
buy business interruption insurance. (Reply Br. at 18.) Under the law, however, courts may take judicial notice of SEC filings only where there is no dispute about the meaning or interpretation of the cited portion of the filing, and where that undisputed statement is relevant to the issues for the Court to resolve. (See *Aquila, Inc. v. Superior Court* (2007) 148 Cal. App. 4th 556, 575 [reversing grant of judicial notice of SEC filings].) That is not the situation here. Sempra's general statements regarding the general categories of losses it believes will be covered by its liability insurance cannot be interpreted to mean its insurance will cover any specific loss, including the purely economic losses claimed here. And regardless of whether such losses are covered, it would not follow that Sempra is better able to predictably measure, and therefore insure against, the potential loss.

III. CONCLUSION

For all of these reasons, Plaintiffs' request for judicial notice should be denied, and this Court should disregard the portions of the Reply Brief that refer to or rely on this material. (See Reply Br. at 3, 18, 25-26, 28-31 and fn. 2, 15, 20-21, 23-26.)

DATED: August 21, 2018

Respectfully submitted,



James J. Dragna (SBN 91492)
David L. Schrader (SBN 149638)
Yardena R. Zwang-Weissmen
(SBN 247111)
MORGAN, LEWIS & BOCKIUS, LLP
300 South Grand Ave., Ste. 2200
Los Angeles, CA 90071-3132
Telephone: (213) 612-2500
Facsimile: (213) 612-2501

Kathleen M. Sullivan
(S.B. No. 242261)
Daniel H. Bromberg
(S.B. No. 242659)
QUINN EMANUEL URQUHART
& SULLIVAN LLP
555 Twin Dolphin Drive, 5th Fl.
Redwood Shores, CA 94106
Telephone (650) 801-5000
Facsimile (650) 801-5100

Attorneys for Respondent Southern California Gas Co.

PROOF OF SERVICE

I am employed in the County of San Mateo, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 555 Twin Dolphin Drive, 5th Floor, Redwood Shores, California 94065-2139.

On August 21, 2018, I served true copies of the foregoing document described as **OPPOSITION TO MOTION FOR JUDICIAL NOTICE** on the interested parties in this action as follows:

Robert J. Nelson
Sarah R. London
Wilson M. Dunlavey
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. corn

Paul R. Kiesel
Helen Zukin
Mariana Aroditis
KIESEL LAW LLP
8648 Wilshire Boulevard
Beverly Hills, CA 90211-2910
Telephone: 310-854-4444
Facsimile: 310-854-0812
kiesel@kiesellaw
zukin@kiesellaw
aroditis@kiesel.law

Derek W. Loeser
Amy Williams-Deny
Ben Gould
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
Shehnaz M. Bhujwala
Maria L. Weitz
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
THE KICK LAW FIRM, APC
201 Wilshire Blvd.
Santa Monica, CA 90401
Telephone: 310.395.2988
Facsimile: 310.395.2088
Taras@kicklawfiiiii.com

Roland Tellis
BARON & BUDD, P.C.
15910 Ventura Blvd, Suite 1600
Encino, CA 91435
Telephone: 818.839.2320
Facsimile: 818. 986.9698
rtellis@baronbudd.com

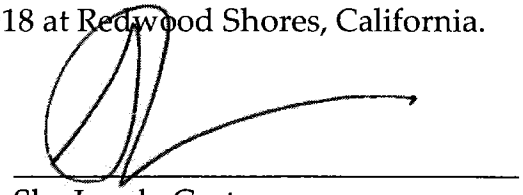
R. Rex Parris
Patricia Oliver
R. REX PARRIS LAW FIRM
43364 10th Street West
Lancaster, CA 93534
Telephone: 661.429.3399
Facsimile: 661.949.7524
riparris@rrexparris.com
poliver@rrexparris.com

Frederick Bennett
Superior Court of Los Angeles County
111 North Hill Street, Room 546
Los Angeles, CA 90012

BY E-MAIL OR ELECTRONIC TRANSMISSION: Pursuant to the parties' agreement to accept service by e-mail or electronic service, I caused such documents to be sent to the person at the email address listed by submitted a PDF format copy of such documents vis file transfer protocol (FTP) to CaseAnywhere through the upload feature at www.caseanywhere on August 21, 2018. The documents were transmitted by file transfer protocol (FTP) without error.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 21, 2018 at Redwood Shores, California.



Sha Londa Castanon