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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SOUTHERN CALIFORNIA GAS LEAK CASES

After A Decision By The California Court Of Appeal, Second Appellate District, Division Five, Case No. B283606

The Superior Court Of Los Angeles County,
Judicial Council Coordination Proceeding No. 4861,
The Honorable John Shepard Wiley, Jr.

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF; *AMICUS CURIAE* BRIEF OF PLAINS ALL AMERICAN PIPELINE, L.P., THE ASSOCIATION OF OIL PIPE LINES, AND THE WESTERN STATES PETROLEUM ASSOCIATION IN SUPPORT OF RESPONDENT

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 8.520(f) of the California Rules of Court, Plains All American Pipeline, L.P. ("Plains"), the Association of Oil Pipe Lines ("AOPL"), and the Western States Petroleum Association ("WSPA") respectfully request permission to file the *amicus curiae* brief in support of Respondent that is combined with this application.

Plains is a publicly traded master limited partnership that owns and operates midstream energy infrastructure and provides logistics services for crude oil, natural gas liquids, and natural gas both in California and elsewhere. As such, Plains has been the subject of tort claims brought by plaintiffs alleging to have suffered purely economic losses following leaks, spills, and other accidents in this State. For example, in *Venoco, Inc. v. Plains Pipeline, L.P.* (C.D. Cal. Sept. 26, 2016, No. 16-2988 PSG (JEMx)) 2016 WL 10646303, at *1, an oil platform operator seeks "damages [from Plains] in excess of $200 million" that it claims resulted from the shutdown of a Plains pipeline following a May 19, 2015 leak. The platform operator does not claim to have suffered any personal or property damage flowing from the leak; instead, it claims that it lost profits because—ever since the damaged pipeline was shut down for repair—it "has not been able to transport its crude oil from [its offshore platform] to its onshore contractors." (*Ibid.*) Because the economic loss doctrine is integral to

Plains' defense to liability in *Venoco* and other litigation,[1] Plains has a compelling interest in the proper interpretation and application of that doctrine in this case.

AOPL is a national trade association that represents owners and operators of oil pipelines across North America before state and federal agencies, legislative bodies, and the judiciary, and educates the public about the vital role oil pipelines serve in the daily lives of Americans. AOPL members bring crude oil to the Nation's refineries and important petroleum products to our communities, through pipelines that extend approximately 211,150 miles across the United States, including California. These pipelines safely, efficiently, and reliably deliver approximately 14.9 billion barrels of crude oil and petroleum products each year. AOPL strives to ensure that the public and all branches of government understand the benefits and advantages of transporting crude oil and petroleum products by pipeline as the safest, most reliable, and cost-effective method of serving energy consumption demand.

WSPA is a non-profit trade association that represents companies that account for the bulk of petroleum exploration, production, refining,

[1] Plains has other defenses to the platform operator's claims in *Venoco*, as well, including that the governing contract does not require Plains to continue operating its pipeline and, in fact, bars the operator's claims for lost profits and business interruption resulting from the shutdown of the pipeline. (See *Venoco, Inc.*, *supra*, 2016 WL 10646303, at *2.)

transportation, and marketing in the five western states of Arizona, California, Nevada, Oregon and Washington. Founded in 1907, WSPA is dedicated to ensuring that Americans continue to have reliable access to petroleum and petroleum products through policies that are socially, economically, and environmentally responsible.

As described more fully in the attached *amicus* brief, the applicants urge this Court to affirm the Court of Appeal. The economic loss doctrine is well-established in this State and has long been used by oil pipelines, natural-gas companies, telecommunications providers, and utilities to guard against the risk of unlimited exposure to tort claims lodged by plaintiffs that can allege to have suffered *only* economic losses. That doctrine thus resolves Plaintiffs' claims in this case, and this Court should reject Plaintiffs' invitation to radically depart from the majority rule in favor of vastly expanded damages liability for oil companies, natural-gas companies, and utility providers.

That conclusion is all the more appropriate in light of the fact that imposing additional liability on companies like Respondent and *amici* is unlikely to result in any material improvements to the safe operation of oil and natural-gas pipelines in this State. Utility companies and pipelines are already subject to heavy regulatory burdens at both the federal and state levels, and those regulatory regimes are more than adequate to promote safety. Moreover, by operation of federal and state law, oil companies like

amici are already obliged to cover the economic losses of certain plaintiffs following oil spills. Finally, Respondent and *amici* are already subject to significant liability in tort, given that the economic loss doctrine does nothing to prevent plaintiffs that have suffered personal or property injury following leaks or spills from also recovering their economic losses. The upshot is that Plaintiffs' preferred outcome would serve no useful purpose and cannot be squared with any correct understanding of California's economic loss doctrine.

Not only is Plaintiffs' preferred outcome unsupported by California law and unnecessary in light of the statutory, regulatory, and tort regimes that already police utilities' and other companies' behavior, but that outcome also amounts to poor policy. Respondent, the applicants, and others would be required to convince insurers to underwrite the risk of limitless liability following accidental leaks and spills in California, and then they would have to pass that increased insurance cost on to consumers in the form of substantial rate hikes. Plaintiffs have given this Court no reason why California law requires this bad-for-business and bad-for-consumers result, and thus this Court should affirm the Court of Appeal and thereby reaffirm California's commitment to the economic loss doctrine.

The applicants' attorneys have examined the briefs on file in this case and are familiar with the issues involved and the scope of the parties' presentations. The applicants have attempted to supplement, but not

duplicate, the parties' briefs, and thus they respectfully submit that this Court will benefit from the applicants' proposed additional briefing.

No party or counsel for any party authored this brief, participated in its drafting, or made any monetary contributions intended to fund the preparation or submission of the applicants' proposed brief. The applicants certify that no other person or entity other than the applicants and their counsel authored or made any monetary contribution intended to fund the preparation or submission of this brief. (See Cal. Rules of Court, rule 8.520(f)(4).)

This application is timely. It is being submitted within 30 days of the filing of Plaintiffs' reply brief, which was filed on August 6, 2018. (See *id.*, rule 8.520(f)(2).)

For these reasons, the applicants request that this Court accept and file the attached *amicus curiae* brief.

Respectfully submitted,

Dated: September 5, 2018 MUNGER, TOLLES & OLSON LLP

By: */s/ Henry Weissmann*
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INTRODUCTION AND SUMMARY OF ARGUMENT

As the Court of Appeal correctly recognized, the economic loss doctrine is well-established in this State and disposes of Plaintiffs' case. That doctrine makes clear that companies like Respondent owe no duty of care to prevent the purely economic losses of Plaintiffs, who have not suffered any personal or property injury, and with whom Respondent has no "special relationship." This Court should therefore resolve this case by applying settled economic loss principles, which oil pipelines, natural-gas providers, and utilities have long relied upon in California and elsewhere to guard against indefinite and unlimited liability flowing from leaks, spills, and other accidents.

In contrast, Plaintiffs urge a radical expansion of tort liability in this State, whereby energy providers like Respondent and *amici* would be presumptively liable for *all* economic losses flowing from accidents. Under Plaintiffs' limitless tort liability rules, energy companies and utilities would face liability regardless of how far downstream from the accident economic losses may occur. As Respondent explains, however, it makes no sense to expand energy companies' tort liability beyond the plaintiff who suffers a personal or property injury as a result of an accident, or who has a "special relationship" with the defendant. Plaintiffs' proposed rule would expose energy companies to claims for economic loss, not only by the person whose property was damaged, but also to that person's "barber who

expected to cut his hair that day," or "his employer who lost all the business his best sales representative would have been able to drum up." (Resp. Br. 34–35.) The economic loss rule, as modified by the "special relationship" test, imposes reasonable limits that prevent such downstream claims.

Plaintiffs' proposed rule would serve no good ends, and plenty of bad ones. Energy companies and utilities are *already* subject to federal and state regulatory schemes. These schemes establish detailed duties and regulations governing companies' operations and activities, from the way they design their pipelines, to the materials they use when constructing pipelines, to the way they inspect pipelines for corrosion and other vulnerabilities. Because these federal and state regulations are aimed at the same objective that Plaintiffs purportedly seek to promote (*i.e.*, ensuring pipeline safety), they obviate Plaintiffs' arguments in favor of eviscerating the economic loss doctrine or establishing an unfettered duty to prevent economic loss to parties whose property or person was not damaged, and who are not in a "special relationship" with the defendant. Indeed, exposing Respondent and *amici* to additional damages liability is unlikely to come with *any* material safety benefits.

Moreover, exposing Respondent and *amici* to such additional damages liability would upend the balance already struck by Congress and the California Legislature concerning the proper compensation of plaintiffs following certain oil pipeline accidents. Both the federal Oil Pollution Act

and the California Oil Spill Prevention and Response Act, for example, allow certain plaintiffs to recover their economic losses resulting from oil spills. But both statutes also impose clear limits on defendants' liability flowing from such spills. Plaintiffs' preferred outcome in this case would invite an end-run around these statutory limits; Plaintiffs, in effect, are asking this Court to substitute *their* policy judgments concerning who should (and should not) be compensated following oil spills for those of our legislators. This Court should do no such thing.

Finally, by layering such a common-law duty on top of the extensive regulatory framework under which utilities and energy companies already operate, this Court would subject these companies to expansive liability that would be impracticable to avoid. It would not be enough for these companies to comply with the safety standards and requirements that Congress, the Legislature, and regulatory agencies deem prudent for these companies' business operations. Nor would it be enough for these companies to exercise due care in their dealings with parties directly affected by their operations, whether measured by contract, injury to property or person, or special relationship. Nor would it be enough for these companies to cover the costs of clean-up and economic losses suffered by plaintiffs consistent with their obligations under the Oil Pollution Act and the Oil Spill Prevention and Response Act. Rather, companies like Respondent and *amici* would need to ensure that their

operations and activities had no downstream economic ripple effects *whatsoever*—or risk damages liability that far exceeds the limits imposed by traditional notions of tort liability and by federal and state law.

That cannot be correct. It would distort well-established tort principles in this State and elsewhere, while causing substantial harm to California businesses. It would also harm California consumers, who would inevitably face higher prices resulting from the increased costs businesses would face as a result of dramatically expanded liability for downstream economic losses. This Court should affirm the Court of Appeal and reaffirm the traditional standards governing the economic loss doctrine.

ARGUMENT

I. THE ECONOMIC LOSS DOCTRINE IS WELL-SETTLED IN CALIFORNIA AND HAS LONG BEEN RELIED UPON TO LIMIT ENERGY PRODUCERS' AND UTILITY PROVIDERS' EXPOSURE TO LIABILITY FOR PURELY ECONOMIC LOSSES

As Respondent ably explains, the economic loss doctrine is well-established in this State and has long been relied upon to avoid the danger of exposing defendants to "potentially infinite liability" that would be "out of proportion to fault." (*Bily v. Arthur Young Co.* (1992) 3 Cal.4th 370, 397–398; see also *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 804 [holding that plaintiffs may not bring negligence claims for purely economic damages absent a "special relationship" with the defendant];

County of Santa Clara v. Atlantic Richfield Co. (2006) 137 Cal.App.4th 292, 318 ["[E]conomic loss alone, without physical injury, does not amount to the type of damage that will cause a negligence or strict liability cause of action to accrue."].) And as Respondent argues, this Court can and should resolve this case through the simple application of "th[at] well-settled economic loss doctrine." (Resp. Br. 36.)

The economic loss doctrine is a crucially important limitation on liability for energy companies and utilities in California and elsewhere. Indeed, the federal and state reporters are full of examples of courts using the doctrine to impose sensible limits on the tort liability of oil producers and utility providers following leaks, spills, and other accidents. In *Zamora v. Shell Oil Co.* (1997) 55 Cal.App.4th 204, for example, the California Court of Appeal considered the viability of certain homeowners' tort claims against an oil company for negligently manufacturing pipes used in the construction of their homes. (*Id.* at p. 206, distinguished on other grounds by *Goodman v. Lozano* (2010) 47 Cal.4th 1327.) The court held that the economic loss doctrine barred the tort claims of any homeowners whose pipes had not *actually* leaked or otherwise failed, because those homeowners could allege only "economic losses"—not any cognizable property damage sufficient to establish a duty of care. (*Id.* at pp. 211–213; cf. *Greystone Homes, Inc. v. Midtec, Inc.* (2008) 168 Cal.App.4th 1194,

1213 [holding that the Right to Repair Act supplants the economic loss doctrine for *statutory* claims in certain construction defect cases].)

More recently, the Superior Court for the County of Santa Barbara sustained a demurrer filed by *amicus* Plains All American Pipeline, L.P. ("Plains") on the basis of the economic loss doctrine. In that case, a company that "provide[d] products and services to oil companies doing business in Santa Barbara County and elsewhere" claimed that it "lost substantial revenue" when a pipeline owned by Plains was forced to shut down following a May 19, 2015 leak, which—in turn—allegedly caused some of the plaintiff's oil-industry customers "to cease or reduce [their] operations." (*Safety Equip. Corp. v. Plains All Am. Pipeline, L.P.* (Super. Ct. Santa Barbara County, Apr. 13, 2017, No. 17CV02224) [attached hereto as Exhibit A].)[2] The Superior Court rejected this claim, however, concluding that the company could not allege any "personal injury or property damage" of its own resulting from the leak, and thus it could not recover its purely economic losses in tort. (*Ibid.*)

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[2] The Court may take judicial notice of this Superior Court decision. (See Evid. Code, § 452, subd. (d)(1) ("Judicial notice may be taken of … [r]ecords of … any court of this state."); *Gilbert v. Master Washer & Stamping Co., Inc.* (2001) 87 Cal.App.4th 212, 218 n.14 ["Although the Court of Appeal opinion … is not published, we may take judicial notice thereof as a court record pursuant to Evidence Code section 452, subdivision (d)(1)."].)

Other jurisdictions have likewise consistently applied the economic loss doctrine to find that utility companies owe no duty of care to third parties that allege only economic losses. (E.g., *Excavation Techs., Inc. v. Columbia Gas Co. of Pa.* (2009) 604 Pa. 50, 57 [affirming dismissal of contractor's claims against utility company for negligently failing to mark gas lines because, among other things, "if utility companies are exposed to liability for excavator's economic losses, such costs would inevitably be passed on to the consumer; if this is to be done, the legislature will say so specifically"]; *Coastal Conduit & Ditching, Inc. v. Noram Energy Corp.* (Tex. App. 2000) 29 S.W.3d 282, 290 [holding that utility company owed no "duty of care to [third party] in the marking of its [gas] lines, in the absence of personal injury and property damage"]; *In re Ill. Bell Switching Station Litig.*, (1994) 161 Ill.2d 233, 241–242 [holding that economic loss rule barred telephone company customers from recovering economic damages incurred following loss of phone service]; *FMR Corp. v. Boston Edison Co.* (1993) 415 Mass. 393, 395 [affirming summary judgment on businesses' attempts to recover economic losses following power outage because "economic losses are unrecoverable in tort and strict liability actions in the absence of personal injury or property damage"]; *Garweth Corp. v. Boston Edison Co.* (1993) 415 Mass. 303, 304–305 [holding that company's claims resulting from oil spill "are thwarted by the economic damage rule limiting recovery for economic losses in tort-based strict

liability or negligence cases"]; *Stevenson v. E. Ohio Gas Co.* (Ohio App. 1946) 73 N.E.2d 200, 204 ["If one who by his negligence is legally responsible for an explosion or a conflagration should be required to respond in damages not only to those who have sustained personal injuries or physical property damage but also to every one who has suffered an economic loss ... we might well be appalled by the results that would follow."].)

The cases both within and without California thus make clear that oil, natural-gas, telecommunications, and other utilities and energy providers have long relied on the economic loss doctrine to avoid exposure to limitless (and unreasonable) monetary demands from disappointed customers and other third parties. Abandoning this settled principle would be at odds with the governing law in this State, and would put California out of step with the law in other jurisdictions.

II. THIS COURT NEED NOT EXPAND THE SCOPE OF LIABILITY FOR PURELY ECONOMIC LOSSES IN ORDER TO PROMOTE THE EXERCISE OF REASONABLE CARE AMONG OIL PIPELINES AND OTHER HEAVILY REGULATED COMPANIES

In the face of California's well-settled economic loss doctrine, Plaintiffs seek a dramatic expansion of the scope of liability for companies like Southern California Gas and *amici*, who would suddenly find themselves exposed to a plethora of negligence claims from plaintiffs who have not suffered any direct injury to their person or property, and with

whom Respondent and *amici* never entered into any contractual or other special relationship. That outcome contravenes the purposes supporting the economic loss doctrine, however, which are aimed at preventing damages liability from spiraling out of control and out of proportion to a tortfeasor's fault.[3]

Before allowing injured plaintiffs to recover for their purely economic losses, courts are obliged to consider, among other factors, whether imposing liability will advance "the policy of preventing future harm." (*J'Aire Corp.*, *supra*, 24 Cal.3d at p. 804; see also *Bily*, *supra*, 3 Cal.4th at pp. 404–406 [concluding that another "pertinent" factor that a court should consider before imposing a duty of care to prevent economic

[3] (Rest.3d Torts, Econ. Harm, § 7, cmt. b ["[E]conomic losses can proliferate long after the physical forces at work in an accident have spent themselves. A collision that sinks a ship will cause a well-defined loss to the ship's owner; 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, and customers of the retailers, and so on. Recognizing claims for these sorts of losses would greatly increase the number, complexity, and expense of potential lawsuits arising from many accidents. In some cases, recognition of such claims would also result in liabilities that are indeterminate and out of proportion to the culpability of the defendant. These costs do not seem likely to be justified by comparable benefits.]; Goldberg, *Liability for Economic Loss in Connection with the Deepwater Horizon Spill* (2011) 30 Miss C. L. Rev. 335, 360–362 ["Practically any accident will have economic ripple-effects that extend broadly over time and space. There is thus a need to set limits on liability, especially when the basis for liability is negligence, which sets a relatively low culpability threshold."].)

loss is the effect on defendants of allowing such negligence liability].) Here, expanding liability for Southern California Gas—and for other heavily regulated companies like *amici*—would do no such thing. After all, by operation of federal and state law, as well as traditional theories of tort liability, energy companies and utilities are *already* sufficiently motivated to meet their customers' needs in a safe, efficient manner. There accordingly is no need to heap an additional layer of damages liability on those companies' heads.

A. Utilities And Energy Providers Like Respondent And *Amici* Are Already Heavily Regulated At Both The Federal And State Levels

Oil pipelines, natural-gas companies, and other energy providers and utilities are already subject to robust, detailed regulatory schemes that are meant to promote the safe and efficient provision of services to California consumers. To take just one example, oil pipeline companies like *amici* operate under significant federal and state oversight.

At the federal level, oil pipelines are regulated by the Hazardous Liquids Pipeline Safety Act of 1979 and its associated regulations.[4] (See 49 U.S.C. § 60101 *et seq.*; 49 C.F.R. §§ 190–199.) "The purpose of [the Pipeline Safety Act] is to provide *adequate* protection against risks to life

[4] Natural gas companies (including Respondent) are subject to a similar, overlapping regulatory regime. (See generally 49 U.S.C. § 60101 *et seq.* [Natural Gas Pipeline Safety Act of 1968]; 49 C.F.R. §§ 190–199.)

and property posed by pipeline transportation and pipeline facilities by improving the regulatory and enforcement authority of the Secretary of Transportation." (49 U.S.C. § 60102(a)(1) [italics added].) The Act therefore requires the Department of Transportation—which oversees pipelines through its Pipeline Safety and Hazardous Materials Administration ("PHMSA")—to "prescribe minimum safety standards for pipeline transportation and for pipeline facilities." (*Id.* § 60102(a)(2).) PHMSA has done just that, establishing a host of regulatory standards governing such topics as "the design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities," as well as "qualification[]" requirements for "individuals who operate and maintain pipeline facilities." (*Id.* § 60102(2)(B)–(C).)

In overseeing pipeline safety, federal agencies have adopted extensive regulations. They have, for example, issued regulations addressing the minimum design requirements that oil pipelines are expected to meet (see 49 C.F.R. § 195, subpart C), the materials that can be used in the construction of new oil pipelines (see *id.* § 195.112 ["The pipe must be made of steel of the carbon, low alloy-high strength, or alloy type that is able to withstand the internal pressures and external loads and pressures anticipated for the pipeline system."]), the kinds of valves that can be used in oil pipelines, and where those valves should be placed (see *id.*

§§ 195.116, 195.258–260), how "welding" can be performed on pipelines (see, e.g., *id.* §§ 195.208, 195.214–234), the tests that oil pipeline operators should perform on their pipelines (see, e.g., *id.* §§ 195.300–310), how oil pipelines must be operated and maintained (see *id.* § 195, subpart F), "the minimum requirements for operator qualification of individuals performing covered tasks on a pipeline facility" (*id.* § 195.501(a)), and how oil pipeline operators should go about protecting against, and controlling, corrosion on their pipelines (see *id.* § 195, subpart H).

Moreover, the detailed regulation of oil pipelines does not stop with the federal government, for California also imposes significant safety and other operational guidance and rules on pipeline companies. Although the federal Pipeline Safety Act broadly preempts state regulation of "interstate pipeline facilities or interstate pipeline transportation," it allows States to "adopt additional or *more stringent* safety standards for *intra*state pipeline facilities and … transportation," so long as "those standards are compatible with [the] minimum standards" established under federal law. (49 U.S.C. § 60104(c) [italics added].) Here, California has adopted such "additional" and "more stringent" safety standards.

California primarily regulates oil pipelines through the Elder California Pipeline Safety Act of 1981. (See Gov. Code, §§ 51010–51019.1.) The California Pipeline Safety Act gives the "State Fire Marshal … exclusive safety regulatory and enforcement authority over intrastate

hazardous liquid pipelines," and requires the Marshal to "adopt hazardous liquid pipeline safety regulations in compliance with the federal law relating to hazardous liquid pipeline safety, including, but not limited to, compliance orders, penalties, and inspection and maintenance provisions." (*Id.*, §§ 51010, 51011.)

Thus, in addition to requiring pipeline operators to comply with federal regulations (see, e.g., *id.*, §§ 51012.3, 51013, 51013.5, 51014), California law imposes duties on oil pipelines beyond those federal commands. For example, state law mandates that "any new or replacement pipeline near environmentally and ecologically sensitive areas in the coast zone use best available technology, including, but not limited to, the installation of leak detection technology, automatic shutoff valves, or remote controlled sectionalized block valves … to reduce the amount of oil released in an oil spill to protect state waters and wildlife." (*Id.*, § 51013.1, subd. (a).) It also requires the Marshal to "annually inspect all intrastate pipelines and operators of intrastate pipelines … to ensure compliance with applicable laws and regulations." (*Id.*, § 51015.1, subd. (a).)

These federal and state regulatory regimes come with real teeth. (See generally 49 C.F.R. § 190, subpart B [describing what PHMSA can do to enforce federal regulations].) For example, PHMSA "may conduct investigations, make reports, issue subpoenas, conduct hearings, require the production of records, take depositions, and conduct research, testing,

development, demonstration, and training activities and promotional activities relating to prevention of damage to pipeline facilities." (49 U.S.C. § 60117(a).) Based on its investigations and findings, PHMSA has authority to issue "[c]ompliance orders," directing compliance with the Pipeline Safety Act and/or PHMSA regulations, as well as "corrective action orders" if it determines that "a pipeline facility is or would be hazardous." (49 U.S.C. §§ 60118(b), 60112(d)(1).) Those corrective-action orders can require "suspended or restricted use of [a pipeline] facility, physical inspection, testing, repair, replacement, or other appropriate action." (*Id.*) If PHMSA determines that "an unsafe condition or practice ... constitutes or is causing an imminent hazard," it may impose "emergency restrictions, prohibitions, and safety measures on owners and operators" of pipelines. (*Id.* § 60177(o)(1).) Indeed, PHMSA even has the authority to regulate a pipeline operator's personnel decisions in certain circumstances, "direct[ing] the operator to relieve [an] employee from performing [pipeline] activities, reassign the employee, or place the employee on leave." (*Id.* § 60112(d)(2).)

Moreover, PHMSA's enforcement power includes administrative actions or referral to the Attorney General to bring lawsuits. (49 U.S.C. § 60120.) Potential monetary penalties in administrative enforcement actions can be substantial, reaching a "maximum civil penalty" of $2 million "for a related series of violations." (See, e.g., *id.* § 60122(a)(1)

[providing that defendants can be liable "for a civil penalty of not more than $200,000 for each violation," but that "[a] separate violation occurs for each day the violation continues"].) Potential liability in civil lawsuits brought by the Attorney General is even greater, because "the maximum amount of civil penalties for administrative enforcement actions … does not apply to [judicial] enforcement actions." (*Id.* § 60120(a)(1).)

California, too, has considerable power to enforce its statutory and regulatory scheme concerning oil pipelines. Just as with the federal scheme, the State has the power to "issue orders directing compliance with this chapter or any regulations adopted pursuant thereto." (Gov. Code, § 51018.8.) Just as with the federal scheme, the California Pipeline Safety Act provides that oil pipeline operators who violate the Act (or any regulation adopted pursuant to the Act) are "subject to a civil penalty of not more than … $200,000[] for each day that violation persists," with the maximum total penalty set at $2,000,000. (*Id.*, § 51018.6, subd. (b).) And just as with the federal scheme, the State may bring lawsuits to enforce these civil penalty provisions. (See *id.*, § 51018.6, subd. (d).)

Given these robust enforcement mechanisms, it should come as no surprise that federal and state regulatory efforts have had a significant positive effect on the safety records of companies like *amici*. According to data published on the PHMSA website, the last twenty years has seen a noteworthy downward trend in the number of "serious" and "significant"

incidents involving oil and natural-gas pipelines. (See PHMSA, *Pipeline Incident 20 Year Trends* available at https://www.phmsa.dot.gov/data-and-statistics/pipeline/pipeline-incident-20-year-trends (last visited Aug. 3, 2018).)

This safety trend belies Plaintiffs' unsupported claim that federal and state regulatory efforts concerning pipelines insufficiently serve their safety goals, or are, worse, "notoriously lax." (Reply Br. 29.) As the federal government recently has concluded, "[w]hile there is room for continued improvement, pipeline safety [concerning both oil and natural-gas pipelines] has *improved* over the past twenty years." (U.S. Dep't of Transp., *Pipeline Safety Update* (2012) at p. 5 available at https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/Pipeline%20Safety%20Update%20Oct%202012.pdf (last visited Aug. 3, 2018) [italics added].) Other reports have reached the same conclusion. (E.g., American Petroleum Institute/Association of Oil Pipe Lines, *Annual Liquids Pipeline Safety Excellence Performance Report & Strategic Plan* (2016) at p. 14 available at https://www.api.org/~/media/Files/Oil-and-Natural-Gas/pipeline/2016-API-AOPL-Annual-Liquids-Pipeline-Safety-Excellence-Performance-Report-Strategic-Plan.pdf?la=en (last visited Aug. 3, 2018) [concluding that "[t]he number of pipeline incidents per year in public spaces … ha[s] declined by more than half since 1999," which "reflects the

success of the pipeline Integrity Management program adopted in regulations by PHMSA in the early 2000s"].)

This safety trend underscores Respondent's and *amici*'s crucial point: This Court need not impose an expansive, unbounded liability scheme on utilities and energy providers like Southern California Gas and *amici* in order to ensure the safe, efficient operation of pipelines and utility conduits in this State, as that goal is already—and better—served by existing statutory and regulatory regimes. In light of those existing regimes, Plaintiffs' requested relief would not prevent future harm or otherwise serve any useful purpose, and it ought to be rejected. (See *J'Aire Corp.*, *supra*, 24 Cal.3d at p. 804; *Bily*, *supra*, 3 Cal.4th at pp. 404–406.)

B. Federal And State Law Already Provide Detailed Statutory Mechanisms Governing The Recovery Of Economic Losses

Beyond governing—and enforcing—the details of how, where, and when oil pipelines can operate in California, federal and state law also specifically govern how (and how much) allegedly injured plaintiffs can recover from such providers. Accordingly, there is again no need for California to become an outlier and allow "mass tort" plaintiffs to recover for their purely economic injuries. Indeed, adopting Plaintiffs' preferred remedy would upset the balance already struck by Congress and the California Legislature concerning the liability of energy providers like *amici*. (Cf. *Johnson v. Colonial Pipeline Co.* (E.D. Va. 1993) 830 F. Supp.

309, 310–311 ["The purpose of the [Oil Pollution Act] claim presentation procedure is to promote settlement and ... avoid costly and cumbersome litigation." (citing 135 Cong. Rec. at H7962, 7965 (Statements of Rep. Hammerschmidt and Rep. Lent))].)

At the federal level, for example, certain plaintiffs injured as the result of oil spills "into or upon the navigable waters or adjoining shorelines" may recover their damages pursuant to the Oil Pollution Act of 1990. (33 U.S.C. § 2702(a).) The Oil Pollution Act creates a "*comprehensive* compensation and liability scheme" that was intended to remedy the previously "'fragmented' federal and state legal framework governing" such oil spills. (*Seaboats, Inc. v. Alex C. Corp.* (D. Mass. Jan 30, 2003, No Civ. A. 01-12184-DPW) 2003 WL 203078, at p. *4; *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on Apr. 20, 2010* (E.D. La. 2011) 808 F. Supp. 2d 943, 959 ["OPA is a *comprehensive* statute addressing responsibility for oil spills, including the cost of clean up, liability for civil penalties, as well as economic damages incurred by private parties and public entities."].) That "comprehensive" scheme imposes "strict-liability ... for the costs of cleaning up oil spills: 'each responsible party for a vessel [or a facility] from which oil is discharged ... is liable for the removal costs and damages ... that result from such incident.'" (*Buffalo Marine Servs., Inc. v. United States* (5th Cir. 2011) 663 F.3d 750, 752 [quoting 33 U.S.C. § 2702(a)].)

The Oil Pollution Act also reflects Congress's judgment about which parties injured by a spill should be compensated. Whereas the common-law economic loss doctrine typically prevents plaintiffs from recovering economic losses unless the plaintiff has also suffered injury to her *own* person or property, the Oil Pollution Act is not so limited. Under the Act, recoverable "damages" include those "equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by *any claimant*," regardless of whether or not the claimant is, herself, the owner of the "injur[ed], "destr[oyed], or los[t]" property. (33 U.S.C. § 2702(b)(2)(E) [italics added]; see also *In re Oil Spill by the Oil Rig Deepwater Horizon*, *supra*, 808 F. Supp. 2d at p. 959 [noting that "one major remedial purpose of OPA was to allow a broader class of claimants to recover for economic losses" than was allowed under existing law].) The Oil Pollution Act thus imposes a careful balance: The Act allows plaintiffs to recover economic losses that would otherwise be unrecoverable in tort (because they flow from damage to someone *else*'s property), so long as those losses are "closely linked to the oil spill and traceable to clean-up efforts." (*Venoco, Inc.*, *supra*, 2016 WL 10646303, at p. *6.)

To recover economic losses under the Oil Pollution Act, then, a qualified claimant need only follow the claims procedure established by section 2713 of the Act. That is, the claimant should first present her claim

to the responsible party in accordance with the procedures established by that party following the spill. (See 33 U.S.C. §§ 2713(a), 2714(b)(1).) And if the responsible party denies liability for the claim or otherwise fails to make payment on the claim within a defined period, the claimant is then authorized "to commence an action in court against the responsible party … or to present the claim to the [Oil Spill Liability Trust] Fund." (*Id.* § 2713(c).)

California, too, has adopted a scheme designed to make certain injured plaintiffs whole following oil spills in this State. Under the Oil Spill Prevention and Response Act, "responsible part[ies]" are "absolutely liable without regard to fault for any damages incurred by any injured person that arise out of, or are caused by, a spill." (Gov. Code, § 8670.56.5, subd. (a).) Plaintiffs may therefore file civil actions to recover their oil-spill related economic losses, and the courts will adjudicate whether the plaintiff is an "injured person," whether the plaintiff has suffered "damages" within the meaning of the Act, and whether the defendant is a "responsible party". (*Id.*, §§ 8670.56.5, subds. (b), (e), (h).)

The parties responsible for oil spills have been subject to substantial monetary liability under these remediation schemes. One Government Accountability Office report concluded that "there were 51 major oil spills—with removal costs and damage claims totaling at least $1 million—that occurred in U.S. water from 1990 through 2006." As a result of those

spills, "responsible parties and the [Oil Spill Liability Trust] Fund ... paid between approximately $890 million and $1.1 billion" in clean-up and economic-loss compensation costs, with "[r]esponsible parties pa[ying] between 72 and 78 percent of th[o]se costs." (GAO, *Oil Spills: Cost of Major Spills May Impact Viability of Oil Spill Liability Trust Fund available at* https://www.gao.gov/new.items/d10795t.pdf (last visited Aug. 6, 2018); see *United States v. Am. Commercial Lines, LLC* (5th Cir. 2017) 875 F.3d 170, 172 ["As the statutorily-defined responsible party under the Oil Pollution Act ... , [defendant] incurred approximately $70 million in removal costs and damages."]; cf. PHMSA, *Failure Investigation Report: Plains Pipeline, LP, Line 901* (May 2016) at p. 166 available at https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/PHMSA_Failure_Investigation_Report_Plains_Pipeline_LP_Line_901_Public.pdf [summarizing Plains' "[e]stimated total costs" following the May 19, 2015 accidental oil discharge to be $142, 931,884].)

These federal and state remediation schemes thus not only adequately protect the interests of plaintiffs who suffer economic injury as the result of oil spills, but they *also* impose substantial economic burdens on oil companies like *amici*, who are thereby encouraged to avoid causing any compensable injuries in the first instance. There is accordingly no need for this Court to depart from the traditional, well-established economic loss doctrine to allow plaintiffs an *additional* recovery in tort.

Indeed, allowing plaintiffs to separately recover their purely economic losses in tort would be at odds with the governing statutory schemes, as both federal and state law recognize certain *limits* on plaintiffs' ability to recover from energy providers. For example, not *all* plaintiffs allegedly suffering economic losses are entitled to damages under the Oil Pollution Act and the Oil Spill Prevention and Response Act. Instead, under both statutes, only those whose economic losses are "due to" or "arise out of" an oil spill may recover their damages. (33 U.S.C. § 2702(b)(2)(E); Gov. Code, § 8670.56.5, subd. (a).) As a result, neither law was "designed to cover economic losses that are [merely] *derivative* of an oil spill." (*Venoco, Inc. v. Plains Pipeline, L.P.* (C.D. Cal. Sept. 26, 2016) 2016 WL 10646303, at p. *4 [italics added]). Moreover, under state law, if a plaintiff hopes to recover her purely economic losses arising out of damage to someone *else's* real property, personal property, or natural resources, she must show that she "derives at least 25 percent of ... her earnings from the activities that utilize the [injured] property or natural resources." (Gov. Code, § 8670.56.5, subd. (h)(6).) These statutory limitations on liability work together with the statutes' other provisions to "balance the need for swift and guaranteed recovery against the need for a *maximum recovery*." (*Venoco, Inc., supra*, 2016 WL 10646303, at p. *4 [italics added].)

Beyond limiting the kind of plaintiffs who can recover economic losses, the Oil Pollution Act also imposes hard caps on defendants' exposure to damages following an oil spill. According to that statute, "the total liability of a responsible party ... with respect to each incident shall not exceed ... $350,000,000" "for any onshore facility [or] deepwater port."[5] (33 U.S.C. § 2704(a).) When the total liability limits have been reached, plaintiffs with valid claims are directed to pursue recovery not from the "responsible party," itself, but, instead, from the Oil Spill Liability Trust Fund, which can be used to pay plaintiffs for otherwise "uncompensated removal costs ... or uncompensated damages." (*Id.* § 2712(a)(4); see also *id.* § 2713(d) [providing that "uncompensated damages and removal costs may be presented to the Fund" for payment].)

These liability limits were the result of substantial deliberation by members of Congress and ought not be disregarded. As the First Circuit has recognized, the Oil Pollution Act—and, specifically, its limitation of liability provisions—"embodies Congress's attempt to balance the various concerns at issue." (*S. Port Marine, LLC v. Gulf Oil Ltd. P'ship* (1st Cir. 2000) 234 F.3d 58, 66.) Noting that "the resolution of [such] difficult

[5] The total liability limits can be even smaller for certain onshore facilities, depending on their "size, storage capacity, oil throughput, proximity to sensitive areas, type of oil handled, history of discharges, and other factors." (33 U.S.C. § 2704(d)(1).))

policy questions [was] better suited to the political mechanisms of the legislature than to [the judiciary's] deliberative process," the court refused to second-guess Congress's chosen limits. (*Ibid.*; see also *Seaboats, Inc.*, *supra*, 2003 WL 203078, at p. *10 [concluding that "any choice of liability limits involves complex policy judgments" that are best resolved by Congress not "[l]ower court judges"].)

Plaintiffs' request that this Court dramatically expand the scope of liability for oil companies and utility providers is thus at loggerheads with the political branches' balancing act. While the federal Oil Pollution Act and California's Oil Spill Prevention and Response Act reflect careful, deliberate, and "difficult" policy choices concerning the scope of oil producers' liability following oil spills, Plaintiffs' preferred outcome would upend those choices in favor of limitless liability for a never-ending string of remote economic losses. Legislative decision-making should not be so casually disregarded. (See *S. Port Marine, LLC*, *supra*, 234 F.3d at p. 66; *Seaboats, Inc.*, *supra*, 2003 WL 203078, at p. *10.)

That is especially true here. After all, in creating and promulgating its host of regulations concerning oil pipelines, PHMSA is *required* to weigh the costs and benefits of those regulations. (See 49 U.S.C. § 60102(b)(2) [providing that "the Secretary shall consider … the reasonableness of the standard," "the reasonably identifiable or estimated benefits" of the standard," and "the reasonably identifiable or estimated

costs" of the standard]; see also *id.* § 60102(b)(3) [providing that "the Secretary shall … identify the costs and benefits associated with the proposed standard"].) Moreover, the standards ultimately adopted under the Pipeline Safety Act are required "to provide *adequate* protection against risks to life and property posed by pipeline transportation and pipeline facilities." (*Id.* § 60102(a)(1) [italics added].) The bottom line is that Congress and the California Legislature have *already* struck a fair balance between regulatory burdens and monetary liability for utilities and oil pipelines and the safety benefits of those regulations and damages exposure. Abrogating the economic loss doctrine as applied to those utilities and energy providers would throw this balance out of whack.

In analogous contexts—where a governmental body has already spoken concerning the scope of a utility provider's liability—the courts have refused to allow plaintiffs to expand that liability through tort. For example, in *Waters v. Pacific Telephone Co.* (1974) 12 Cal.3d 1, 7, a plaintiff sued a telephone company for purportedly failing to furnish adequate telephone service. But the California Supreme Court held that the plaintiff's action was barred, because the California Public Utilities Commission had previously approved a tariff filed by the telephone company that limited the company's liability to "the total fixed charges for exchange service" during the period of service interruption. (*Id.* at p. 5 [internal quotation marks omitted].) As this Court explained, "[t]he theory

underlying [the decision upholding the right of regulated utilities to limit their liabilities] is that a public utility, being strictly regulated in all operations with considerable curtailment of its rights and privileges, shall likewise be regulated and limited as to its liabilities. In consideration of its being peculiarly the subject of state control, *its liability is and should be defined and limited.*" (*Id.* at p. 7 [italics added; internal quotation marks omitted].)

The same is true for *amici.* The extensive regulations energy companies and utilities face makes them "peculiarly the subject of [federal and] state control." It only makes sense, then, that *amici*'s liability resulting from "mass torts" like oil spills would be "defined and limited" by the terms adopted by Congress and the Legislature. To hold otherwise would be to offer plaintiffs an end-run around the compromises reached in those federal and state remediation schemes, which were adopted for the purposes of "adequately compensate[ing] victims of spills," and "provid[ing]" "complete compensation" to those deemed eligible for recovery. (*Green Atlas Shipping S.A. v. United States* (D. Or. 2003) 306 F. Supp. 2d 974; Sen. Rep. No. 101-94 at p. 10 (July 28, 1989) reprinted in 1990 U.S.C.C.A.N. 722.)

Finally, it is no response for Plaintiffs to contend that they nevertheless ought to be allowed to recover their purely economic losses through tort just because the federal Oil Pollution Act, the California Oil

Spill Prevention and Response Act, and other statutory remediation schemes do not explicitly abrogate their common-law claims. (See 33 U.S.C. § 2718; Gov. Code, § 8670.56.5, subd. (g) ["This section does not prohibit a person from bringing an action for damages caused by oil or by exploration, under any other provision or principle of law, including, but not limited to, common law."].) The point is not that these statutory schemes wholly preempt common-law claims. Instead, the point is that distorting tort principles to allow recovery for purely economic losses would not materially advance the goals invoked by Plaintiffs, given the existing, "comprehensive" statutory remediation schemes. Put differently, injured plaintiffs can *already* recover their economic losses following oil spills through the federal Oil Pollution Act and/or the California Oil Spill Prevention and Response Act—subject, of course, to certain limits imposed by Congress and the State Legislature.

Indeed, the Restatement makes this very point in defense of its broad rule precluding plaintiffs from recovering in tort for their purely economic losses. It explains that "the victims of economic injury often can protect themselves effectively by means *other* than a tort suit," through, for example, "first-party insurance against their losses," or through "contract." (Rest.3d Torts, Econ. Harm, § 7, cmt. b [italics added].) The Restatement therefore concludes that in those few instances "[w]here exceptions [to the general rule precluding recovery] are appropriate, they are best established

by statute, *as was done in the Oil Pollution Act of 1990*." (*Ibid.* [italics added].)

Because the regulatory schemes governing Southern California Gas and *amici* are designed to "compensate victims *fully* for the costs of oil pollution" and deter unsafe conduct, there is no need to repudiate the well-established economic loss doctrine, and this Court should reject Plaintiffs' invitation to do so. (E.g., *Seaboats, Inc.*, *supra*, 2003 WL 203078, at p. *4; *Bily*, *supra*, 3 Cal.4th at p. 404 [concluding that imposing additional liability on auditors for purely economic losses would not "yield significantly greater accuracy [in audits] without disadvantages"]; see also *State of La. ex rel. Guste v. m/v Testbank* (5th Cir. 1985) 752 F.2d 1019, 1032 [hereinafter "*m/v Testbank*"] ["Denying recovery for pure economic losses is a pragmatic limitation on the doctrine of foreseeability, a limitation we find to be both workable and useful."].)

C. Tort Liability Provides Additional Incentive For The Exercise Of Reasonable Care

Finally, even setting aside the statutory and regulatory regimes that govern oil pipelines' and other companies' behavior, other, more traditional theories of tort liability also sufficiently deter such companies from engaging in dangerous, unsafe, or otherwise unwanted activities.

Under traditional California negligence principles, for example, companies like Southern California Gas and *amici* are obliged to exercise

"reasonable care in the circumstances" to avoid causing injury to another's person or property. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 112.) And the failure to abide by that reasonableness standard can come with serious consequences. Indeed, oil companies' potential exposure to damages for traditional negligence claims consistent with the economic loss doctrine can be staggering in scope. In *Exxon Shipping Co. v. Baker* (2008) 554 U.S. 471, 479, 481, 515, for example, after "Exxon stipulated to its negligence in the *Valdez* disaster and its ensuing liability for compensatory damages," the jury awarded plaintiffs $507.5 million in compensatory damages plus $5 *billion* in punitive damages.[6]

A decision from this Court reaffirming the economic loss doctrine would have no effect on such traditional common-law claims that, unlike Plaintiffs' claims here, concededly rest on the violation of a cognizable duty of care. Thus, oil producers and similar companies already have all the incentive they need to act in accordance with their common-law duties of care; this Court need not expand Respondent's and *amici*'s liability in order to police their "reasonable" behavior.

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[6] Although the Ninth Circuit later cut this punitive damages figure in half, and the Supreme Court further reduced that figure to match the jury's compensatory damages award, Exxon's total liability for plaintiffs' negligence claims nevertheless exceeded the billion-dollar mark. (See *Exxon Shipping Co.*, *supra*, 554 U.S. at pp. 481, 515.)

Both the treatises and the case law bear this conclusion out. For example, as the Restatement explains, "economic losses can proliferate long after the physical forces at work in an accident have spent themselves," but "[r]ecognizing claims for those sorts of [remote economic] losses" would not produce any "benefits." (Rest.3d Torts, Econ. Harm, § 7, cmt. b.) Indeed, "[c]ourts doubt that threats of open-ended liability would usefully improve the incentives of parties to take precautions against accidents or would make a material contribution to the cause of fairness." (*Ibid.*)

Similarly, in *m/v Testbank*, *supra*, 752 F.2d at p. 1029, the Fifth Circuit described the economists' rationale for the economic loss doctrine. It explained that simply increasing the "consequence[s]" for an accident will not necessarily "enhance [an industry's] incentive[s] for safety." (*Ibid.*) Instead, there is an "optimal level" of consequences; although "when the cost of an unsafe condition exceeds its utility there is an incentive to change," "[a]s the costs of an accident become increasing multiples of its utility, ... there is a point at which greater accident costs *lose meaning*, and the incentive curve flattens." (*Ibid.* [italics added].) Put differently, "[w]hen the accident costs are added in large but unknowable amounts the value of the exercise is diminished." (*Ibid.*) Other courts have reached the same conclusion. (See *Bily*, *supra*, 3 Cal.4th at p. 404 ["From our review of the cases and commentary, we doubt that a significant and

desirable improvement in audit care would result from an expanded rule of liability. Indeed, deleterious economic effects appear at least as likely to occur."]; *Lawrence v. O & G Indus., Inc.* (2015) 319 Conn. 641, 659 [holding that "the recognition of ... a duty [to prevent purely economic losses] fails to provide a corresponding increase in safety, given that companies like the defendants are subject to extensive state and federal regulation, and already may be held civilly liable to a wide variety of parties who may suffer personal injury or property damage as a result of their negligence"].)

D. Liability Rules Should Not Over-Deter Socially Beneficial Conduct

Plaintiffs insist that this Court impose additional economic liability on companies like Respondent and *amici* in order to prevent "negligent behavior in the future." (Reply Br. 17.) For the reasons set out above, however, Respondent and *amici* already have strong regulatory incentives to exercise reasonable care and conduct their operations safely. Those incentives are bolstered by traditional tort duties to parties that Respondent and *amici* affect or deal with directly, such as those who suffer physical or property injury as a result of the oil or utility company's operations.

Despite these existing incentives, Plaintiffs contend that potential defendants will make *additional* changes to their operations in response to Plaintiffs' unbounded and "unknowable" economic loss theory. But the

consequence of Plaintiffs' theory would be over-deterrence of socially beneficial activities. That is, the "'substitute precautions'" Plaintiffs expect Respondent and other energy industry firms to take in response to their expansive tort liability rule (Reply Br. 17) would exceed both the safety standards established by regulators, and the measures that, under traditional negligence principles, a "reasonably prudent person under like circumstances" would take. (*Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, 546–547; cf. *Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 Cal.4th 1, 15 [rejecting tort cause of action for spoliation, beyond existing sanctions, in part because it could "caus[e] persons or entities to take extraordinary measures to preserve for an indefinite period documents and things of no apparent value solely to avoid the possibility of spoliation liability if years later those items turn out to have some potential relevance to future litigation"]); *Smith v. Cote* (N.H. 1986) 513 A.2d 341, 351 [rejecting a liability rule that would "run the risk of penalizing and overdeterring merely negligent conduct"].)

Such additional measures would unnecessarily burden activities that benefit our society, which depends critically upon energy. That is because if energy producers were to undertake the measures necessary to avoid *any* risk of economic loss to downstream plaintiffs—as Plaintiffs contend would be the outcome if their position were adopted—they would incur massive safety, transaction, and litigation costs. (Cf. Rodriguez *et al.*, *The*

Oil Pollution Act of 1990 (1990) 15 Tul. Mar. L.J. 1, 26 [noting that the increased costs of oil spills following enactment of the Oil Pollution Act "appears to have caused [foreign oil companies] to announce that their vessels would boycott United States mainland ports"]. As Justice Mosk has explained, "courts must be cautious not to fashion remedies which overdeter the illegitimate and as a result chill legitimate activities." (*Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 109 [concurring in part and dissenting in part] [citing Posner, *Economic Analysis of Law* (1986) at p. 108]; see also Farnsworth, *The Economic Loss Rule* (2016) 50 Valparaiso Univ. L. Rev. 545, 554 ["[T]he indeterminate scope of … liabilities [for purely economic losses] might well put an exaggerated pressure on some potential defendants to avoid activities altogether if those ripple effects are a possible consequence."].)

Plaintiffs' desired outcome would be analogous to outsized punitive damages awards disproportionate to the conduct they punish. As with punitive damages, "a risk of extremely high awards is likely to produce excessive caution in risk-averse managers and companies. Hence unpredictable awards create both unfairness and ... inefficiency, in a way that may overdeter desirable activity." (Sunstein *et al.*, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)* (1998) 107 Yale L.J. 2071, 2077; see also Bovbjerg *et al.*, *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering"* (1989) 83 Nw. U. L. Rev. 908, 925

["Where liability costs are relatively predictable, they can be avoided (where it is efficient to do so) or 'built in' to the costs of goods and services .... But errors in valuation may cause overdeterrence—the taking of too many costly precautions, or withdrawal from risky activity altogether. For example, during the liability insurance crisis of the 1980s, many obstetricians reportedly stopped delivering babies, and some manufacturers ceased development or production of certain drugs and goods."].)

Courts apply the economic loss doctrine precisely to avoid circumstances like this, where increased liability is unlikely to promote better behavior by defendants and is, instead, likely to discourage socially beneficial and reasonably safe conduct. (See *Bily*, *supra*, 3 Cal.4th at pp. 404 ["[T]he stronger the probability that liability will be incurred when performance is adequate, the weaker is the deterrent effect of liability rules. Why offer a higher quality product if you will be sued regardless whenever there is a precipitous decline in stock prices?" (internal quotation marks omitted)].) This case thus presents a decidedly poor vehicle for any dramatic departure from this Court's traditional understanding of the economic loss doctrine.

III. REGULATED INDUSTRIES IN CALIFORNIA—AND CALIFORNIA CONSUMERS—WILL SUFFER IF THIS COURT ABANDONS THE ECONOMIC LOSS DOCTRINE

Finally, *amici* note that if this Court were to reverse the Court of Appeal and dramatically expand the scope of oil pipelines' and utility

companies' liability for economic losses resulting from "mass torts," an already challenging business environment in California for oil pipelines and utility providers would only get worse, injuring not just those companies, but also California consumers.

Oil companies, for example, may face difficulty obtaining sufficient insurance coverage, as insurers (rightly) balk at the prospect of paying a never-ending string of economic-loss claims flowing from spills, leaks, and other accidents. (E.g., *m/v Testbank*, *supra*, 752 F.2d at p. 1029 [concluding that "liability insurance might not be readily obtainable for" purely economic losses, as "[f]rom an insurer's point of view it is not practical to cover, without limit, a liability that may reach catastrophic proportions, or to fix a reasonable premium on a risk that does not lend itself to actuarial measurement"]; Rodriguez, *supra*, *The Oil Pollution Act of 1990*, 15 Tul. Mar. L.J. at p. 26 [noting that "[t]he unavailability of sufficient insurance" caused several foreign oil shippers to "boycott United States mainland ports"].) And any insurance that such companies *do* obtain will come at substantially increased costs. (See Edelman, *The Oil Pollution Act of 1990* (1990) 8 Pace Envtl. L. Rev. 1, 21 [noting that after the Oil Pollution Act went into effect, insurers assessed insurance premiums on certain oil tankers that were 10 to 20 percent higher than the prior year].)

Moreover, it is not just oil pipelines and utility companies that would bear the brunt of these increased costs. California consumers, too, would

feel the effect of Plaintiffs' requested expansion of such companies' tort liability, as those companies would increase their prices to recover these costs. (See Rodriguez, *supra*, *The Oil Pollution Act of 1990*, 15 Tul. Mar. L.J. at p. 27 [concluding that the "additional costs [imposed by the Oil Pollution Act] will be passed on to United States consumers"].)

Forcing the public to absorb the cost of Plaintiffs' recovery makes no sense because Plaintiffs are in the best position to protect themselves from economic loss, not Respondent or the public. As Dean Ward Farnsworth explains, "potential victims of 'rippling' economic losses [like Plaintiffs] can often ... seek protection by other means," through, for example, "business-interruption insurance purchased in advance" of an accident. (Farnsworth, *supra*, *The Economic Loss Rule*, 50 Valparaiso Univ. L. Rev. at p. 555; see also Dobbs, *An Introduction to Non-Statutory Economic Loss Claims* (2006) 48 Ariz. L. Rev. 713, 716–717 ["The [economic loss] rule encourages parties to adopt contractual solutions," including "contracting in the form of insurance. Indeed, in many instances, insurance may be preferable to the tort system as a mechanism for addressing pure economic losses."].)

Thus, rather than engage in this kind of post-accident cost-shifting, courts will not hesitate to reaffirm the economic loss doctrine and impose clear limits on plaintiffs' ability to state negligence and strict liability claims. (E.g., *Excavation Techs., Inc.*, *supra*, 604 Pa. at p. 57 ["[W]e

decline to afford heightened protection to the private interests of entities who are fully capable of protecting themselves, at the public's expense."]; *Bily*, *supra*, 3 Cal.4th at pp. 404–405 ["[T]he economic result of unlimited negligence liability could just as easily be an *increase in cost* … with no compensating improvement in overall audit quality." (italics added)].) Plaintiffs offer no good reason to buck this precedent and force the public to carry the cost of their recovery. There is none.

CONCLUSION

This Court should affirm the decision below.

Respectfully submitted,

Dated: September 5, 2018 MUNGER, TOLLES & OLSON LLP

By: ______________________________
HENRY WEISSMANN

Attorneys for *Amici Curiae* Plains All American Pipeline, L.P. *et al.*

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court 8.520(b)(1) and 8.204(c), I certify that the attached *amicus curiae* brief uses 13-point Times New Roman font and contains 9,561 words, which is less than the total words permitted by the rules of court. For this Certificate of Compliance, the undersigned relies on the word count of Microsoft Word, the computer program used to prepare this brief.

Dated: September 5, 2018

MUNGER, TOLLES & OLSON LLP

By: *_/s/ Henry Weissmann_*
HENRY WEISSMANN

Attorneys for *Amici Curiae* Plains All American Pipeline, L.P. et al.

EXHIBIT A

Pursuant to California Rules of Court 8.520(h), *amici* attach hereto as Exhibit A "a copy of an opinion required to be attached to the brief under rule 8.1115(c)," namely, *Safety Equip. Corp. v. Plains All Am. Pipeline, L.P.* (Super. Ct. Santa Barbara County, Apr. 13, 2017, No. 17CV02224):

Pursuant to CRC 2.259(e)(1) this document has been electronically filed by the Superior Court of California, County of Santa Barbara, on 4/11/2018

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FILED
SUPERIOR COURT of CALIFORNIA
COUNTY of SANTA BARBARA
04/13/2018
Darrel E. Parker, Executive Officer
BY Chavez, Terri
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA BARBARA

SAFETY EQUIPMENT CORPORATION (D/B/A SECORP INDUSTRIES, INC.), a California corporation; SAFETY EQUIPMENT CORPORATION (D/B/A SECORP INDUSTRIES, INC.), a Mississippi corporation; SAFETY INDUSTRIES PARTNERSHIP, a Louisiana partnership; SECORP OPERATIONS COMPANY (D/B/A SECORP INDUSTRIES), a Louisiana corporation; W&C, INC., a Louisiana corporation,

Plaintiffs,

vs.

PLAINS ALL AMERICAN PIPELINE, L.P., a Delaware limited partnership; PLAINS PIPELINE, L.P., a Texas limited partnership;

Case No. 17CV02224

~~[PROPOSED]~~ **ORDER SUSTAINING DEMURRER WITH LEAVE TO AMEND**

Date: April 9, 2018
Time: 9:30 a.m.
Dept.: 5
Judge: Hon. Colleen K. Sterne

Action Filed: May 19, 2017

1 and DOES 1 through 10, inclusive;
2 Defendants.
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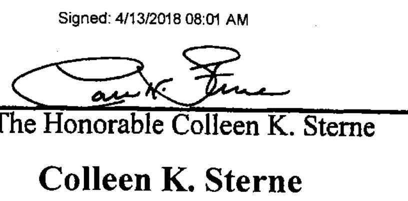
1 Defendants' Demurrer to Plaintiffs' First Amended Complaint came on regularly for
2 hearing at this Court on April 9, 2018, at 9:30 am in Department Five of said Court, the Honorable
3 Colleen K. Sterne, Judge presiding. Plaintiffs appeared by counsel, Nelson & Fraenkel LLP, by
4 Gabriel S. Barenfeld, Esq. Defendants appeared by counsel, Munger, Tolles & Olson LLP, by
5 Henry Weissmann, Esq. and Colin A. Devine, Esq., and Fell, Marking, Abkin, Montgomery,
6 Granet & Raney, LLP, by Craig S. Granet, Esq.
7 Having reviewed the parties' submissions and the relevant law, and having heard the oral
8 argument of counsel, and good cause appearing, the Court adopts the attached Tentative Ruling
9 issued on April 6, 2018, as the Order of the Court with the following modifications:
10 Defendants' Demurrer to the negligent interference with prospective economic advantage
11 cause of action is sustained, because the economic loss rule discussed at pages 4-8 of the tentative
12 ruling also applies to that claim. (See *J'Aire Corp. v. Gregory* (1979) 24 Cal. 3d 799, 808.)
13 Clarifications to the factual background section on page 2 of the Tentative Ruling were
14 noted on the record and are as follows: Plaintiffs' complaint alleges that the pipeline carries crude
15 oil "past" Refugio State Beach, not across it. Plaintiffs' complaint does not allege that 140,000
16 gallons of oil were discharged onto the beach and into the ocean, but that 140,000 gallons of oil
17 were discharged by the pipeline, some of which entered the ocean. And Plaintiffs' complaint does
18 not allege that the three offshore platforms are owned and operated by Exxon/Mobile.
19
20 For the foregoing reasons, Defendants' Demurrer is sustained with leave to amend. Any
21 amended complaint shall be filed on or before April 23, 2018, and may include additional causes
22 of action.
23 IT IS SO ORDERED.
24
25 DATED: **04/13/2018**

Signed: 4/13/2018 08:01 AM



The Honorable Colleen K. Sterne

Colleen K. Sterne
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1 Submitted by:

2 DATED: April 16, 2018 MUNGER, TOLLES & OLSON LLP

3

4 By: [signature]
Colin A. Devine
5 Attorney for Defendants

6 Approved as to form.

7 DATED: April 10, 2018 NELSON & FRAENKEL LLP

8

9 By: Gabriel Barenfeld
GABRIEL S. BARENFELD
10 Attorney for Plaintiff

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THE SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA BARBARA

TENTATIVE RULING

Judge Colleen Sterne
Department 5 SB-Anacapa
1100 Anacapa Street P.O. Box 21107 Santa Barbara, CA 93121-1107

CIVIL LAW & MOTION

Safety Equipment Corpooration, et al. v. Plains All American Pipeline, et al.	
Case No:	17CV02224
Hearing Date:	Mon Apr 09, 2018 9:30

Nature of Proceedings: Demurrer

CASE:

Safety Equipment Corporation, et al. v. Plains All American Pipeline, et al., Case No. 17CV02224 (Judge Sterne)

HEARING DATE: April 9, 2018

MATTER: Demurrer to First Amended Complaint

ATTORNEYS:

Gretchen M. Nelson for Plaintiffs Safety Equipment Corporation dba Secorp Industries, Inc., Secorp Operations Company, Secorp Industries Partnership, and W&C, Inc.

Brad D. Brian for Defendants Plains All American Pipeline, L.P., and Plains Pipeline, L.P.

TENTATIVE RULING: Defendants' demurrer to plaintiffs' first and second causes of action for strict liability for ultrahazardous activity and negligence is sustained with leave to amend. Defendants' demurrer to plaintiffs' third cause of action for negligent interference with prospective economic advantage is overruled. Plaintiffs shall have to and including April 23, 2018 to file an amended pleading.

BACKGROUND:

Plaintiffs Safety Equipment Corporation dba Secorp Industries, Inc., Secorp Operations Company, Secorp Industries Partnership, and W&C, Inc. provide products and services to oil companies doing business in Santa Barbara County and elsewhere. Defendants Plains All American Pipeline, L.P., and Plains Pipeline, L.P., own and operate a crude oil pipeline used to transport oil produced at three offshore platforms that are owned and operated by Exxon/Mobil. The pipeline carries crude oil from the offshore platforms inland, across Refugio State Beach, and to the Gaviota Pumping Station. On May 19, 2015, the pipeline ruptured near Refugio State Beach, spilling approximately 140,000 gallons of oil onto the beach and into the ocean. On May 21, 2015, the federal Pipeline and Hazardous Materials Safety Administration ("PHMSA") issued an order, shutting down the pipeline. As a result of the spill and shutdown order, the offshore platforms and processing facilities that utilize the pipeline were forced to shut down as well, laying off dozens of oil and gas workers. This has resulted in economic losses to businesses that support the local oil industry.

For decades, plaintiffs have sold products and services, including Hydrogen Sulfide safety equipment, rescue equipment, and rental equipment, to oil companies and drilling platform operators in and around Santa Barbara County and off the coast. Due to the oil spill and non-operation of the pipeline, some of plaintiffs' largest customers in Santa Barbara County have had to cease or reduce operations. As a result, plaintiffs have lost substantial revenue and have had to lay off numerous employees. Plaintiffs contend that their losses are a direct result of defendants' conduct.

On May 19, 2017, plaintiffs filed their original complaint in this action against defendants, asserting causes of action for (1) strict liability for ultrahazardous activity, (2) negligence, and (3) negligent interference with prospective economic advantage. On August 16, 2017, plaintiffs filed a first amended complaint ("FAC"), alleging the same three causes of action against defendants. Defendants now demur to the FAC on the ground that the FAC fails to state facts sufficient to constitute a cause of action. Plaintiffs oppose the demurrer.

ANALYSIS:

Request for Judicial Notice

Defendants request that the court take judicial notice of the May 21, 2015 shutdown order issued by the U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration ("PHMSA"). Judicial notice may be taken of the "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." *Evid. Code* §452, subd. (c). However, while courts may take judicial notice of official acts and public records, including the date the document was filed and the document's legally operative language, judicial notice may not be taken of any hearsay or disputed facts in the document. *Mangini v. R.J. Reynolds Company* (1994) 7 Cal.4th 1057, 1063; *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117. With this understanding, the court will take judicial notice of the PHMSA order.

In their reply, defendants ask the court to take judicial notice of (1) F.E.R.C. (Federal Energy Regulatory Commission) Local Tariff No. 114.2, (2) F.E.R.C. Local Tariff No. 114.3, and (3) F.E.R.C. Local Tariff No. 114.4, all of which pertain to Plains Pipeline, L.P. The court declines to take judicial notice of these documents because they were not included in defendants' original demurrer. It is a general rule of motion practice that new evidence (including matters subject to judicial notice) is not permitted with reply papers because the party opposing the motion has no opportunity to respond. *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1538.

Demurrer to FAC

The grounds for objecting to a complaint by demurrer are set forth in *Code of Civil Procedure* Section 430.10, which provides, in relevant part:

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds:

* * *

"(e) The pleading does not state facts sufficient to constitute a cause of action."

California law requires a complaint in a civil action to contain a statement of the facts constituting the cause of action in ordinary and concise language and a demand for relief to which the plaintiff claims to be entitled. *Code Civ. Proc.* §425.10, subd. (a). "What is necessary to state a cause of action are the facts warranting legal relief . . . ." *Alfaro v. Community Housing Improvement System & Planning Association, Inc.* (2009) 171 Cal.App.4th 1356, 1371. If the complaint does not state facts sufficient to constitute a cause of action, a general demurrer to the complaint will be sustained. *Code Civ. Proc.* §430.10, subd. (e).

Defendants challenge plaintiffs' first cause of action for strict liability based upon ultrahazardous activity. To establish such a claim, the plaintiff must allege (1) that the defendant was engaged in an ultrahazardous activity, (2) that the plaintiff was harmed, (3) that the plaintiff's harm was the kind of harm that would be anticipated as a result of the risk created by the ultrahazardous activity, and (4) that defendant's ultrahazardous activity was a substantial factor in causing the plaintiff's harm. *Luthringer v. Moore* (1948) 31 Cal.2d 489, 495; CACI 460 (2018). "An activity is ultrahazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care and (b) is not a matter of common usage." *Luthringer*, at 498. Whether an activity is ultrahazardous is a question of law to be determined by the court. *Id.*, at 496.

Defendants argue that plaintiffs cannot satisfy the third element of the cause of action because the economic damages sought by plaintiffs are not recoverable under a strict liability claim. The court agrees. The rule of strict liability for ultrahazardous activity applies only to harm that is within the scope of the abnormal risk that makes the activity abnormally dangerous. It does not apply to every possible harm that may result from engaging in the abnormally dangerous activity. *Goodwin v. Reilley* (1985)

176 Cal.App.3d 86, 91. Quoting Section 519, Restatement Second of Torts, the *Goodwin* court stated:

"One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm. . . . This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous."

Here, plaintiffs seek to recover purely economic losses allegedly stemming from the shutdown of the pipeline. However, if transporting oil is ultrahazardous, it is because of the risk of physical injury to persons or property from an oil spill, not because the non-operation of a pipeline may cause economic damages to businesses located in the same geographic area. An activity is ultrahazardous if it "necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care." *Luthringer*, at 498. Thus, in *Green v. General Petroleum Company* (1928) 205 Cal.328, 334, an oil company was held strictly liable to owners of residential property damaged by rocks and debris falling from a blow-out of the defendant's well. Likewise, in *Smith v. Lockheed Propulsion Company* (1967) 247 Cal.App.2d 774, 785, the court held that test firing a rocket is an ultrahazardous activity and because the seismic vibrations from the rocket caused damage to an adjacent property owner's well, the property owner could state a cause of action for strict liability in tort. Clearly, the economic damages alleged in the FAC are not the kind of damages that would make transporting oil an ultrahazardous activity and defendants' demurrer to plaintiffs' first cause of action will be sustained.

Plaintiffs' second cause of action is for negligence. A negligence action requires a showing (1) that the defendant owed the plaintiff a legal duty of care, (2) that the defendant breached the duty, and (3) that the breach was the proximate cause of the injuries or damages suffered by the plaintiff. *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673. Thus, the existence of a duty to use due care is "[t]he threshold element of a cause of action for negligence." *Bily v. Arthur Young & Company* (1992) 3 Cal.4th 370, 371; see also, *Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1012 ("The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion."). Whether a duty of care is owed by the defendant in a particular case is a question of law for the court to resolve. *Bily, supra,* at 397.

Defendants initially demur to plaintiffs' negligence cause of action on the ground that they are a public entity and, under established California case law, public entities owe no duty to prevent harm related to an interruption of services. "In the absence of a contract between the utility and the consumer expressly providing for the furnishing of a service for a specific purpose, a public utility owes no duty to a person injured as a result of an interruption of service or a failure to provide service." *White v. Southern California Edison Company* (1994) 25 Cal.App.4th 442, 448 (public utility owes no duty to the motoring public for inoperable streetlights); *Niehaus Brothers Company v. Contra Costa Company* (1911) 159 Cal. 305, 312-316 (water utility owes no duty to furnish water to extinguish a fire). The court, however, declines to consider whether defendants are a public entity and whether they are immune from liability for claims predicated on the interruption of service. Plaintiffs do not plead that defendants are a

public entity and, while defendants ask the court to take judicial notice that they transport oil pursuant to F.E.R.C. tariffs, which allegedly demonstrates that they are a regulated public utility, defendants did not seek judicial notice of the tariffs as part of their original demurrer, but as part of their reply, and the request was denied.

Defendants next argue that plaintiffs' negligence claim is barred by the economic loss rule. The economic loss rule holds that recovery for purely economic losses resulting from a negligence cause of action is not permitted, absent injury to person or property, unless there exists a "special relationship" between the parties. "[E]conomic loss alone, without physical injury, does not amount to the type of damage that will cause a negligence . . . cause of action to accrue." *County of Santa Clara v. Atlantic Richfield Company* (2006) 137 Cal.App.4th 292, 318; *Zamora v. Shell Oil Company* (1997) 55 Cal.App.4th 204, 210 ("In a . . . negligence case, compensable injury must be physical harm to persons or property, not mere economic loss."). The rationale for the economic loss rule is to prevent unlimited liability, otherwise damage awards in negligence cases would "threaten[] to impose liability out of proportion to fault [and thereby] promote virtually unlimited responsibility for intangible injury." *Bily, supra,* at 398. The tentative draft of the Restatement (Third) of Torts explains the rule as follows:

"[E]conomic losses can proliferate long after the physical forces at work in an accident have spent themselves. A collision that sinks a ship will cause a well-defined loss to the ship's owner; 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, and customers of the retailers, and so on. Recognizing claims for those sorts of losses would greatly increase the number, complexity, and expense of potential lawsuits arising from many accidents. In some cases, recognition of such claims would also result in liabilities that are indeterminate and out of proportion to the culpability of the defendant. These costs do not seem likely to be justified by comparable benefits. Courts doubt that threats of open-ended liability would usefully improve the incentives of parties to take precautions against accidents or would make a material contribution to the cause of fairness."

(Restatement (Third) of Torts: Liab. for Econ. Harm § 7 TD No 2 (2014).)

California recognizes an exception to the economic loss rule where a "special relationship" exists between the parties. *J'Aire Corporation v. Gregory* (1979) 24 Cal.3d 799, 804. The test for determining the existence of a "special relationship" is a matter of public policy and involves the balancing of various factors, including "(1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (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." *Ibid*; see also, *Centinela, supra,* at 1013-1014. The existence of such a relationship is a question of law for the court. *Greystone Homes, Inc. v. Midtec, Inc.* (2008) 168 Cal.App.4th 1194, 1228.

Defendants contend that the economic loss rule applies in this case because plaintiffs allege no physical injury to persons or property and seek only economic damages for

business losses suffered following the oil spill. (FAC, ¶¶ 69-73.) Additionally, plaintiffs do not allege facts establishing a "special relationship" between the parties that would give rise to a duty of care on the part of defendants because they do not allege facts establishing or satisfying the first factor in *J'Aire* – that defendants' maintenance of the pipeline was "intended to affect" plaintiffs. Without such a specific intent, there can be no special relationship, regardless of whether plaintiffs indirectly benefited from the pipeline. "The absence of this foundation [the "intended to affect" factor] precludes a finding of 'special relationship' as required by *J'Aire*." *Ott v. Alfa-Laval Agri, Inc.* (1995) 31 Cal.App.4th 1439, 1455-1456; see also, *Zamora v. Shell Oil Company, supra,* 55 Cal.App.4th 204, 212 (holding that the "special relationship" exception did not apply because the record did not support a finding that the defendant's actions "were intended to affect" the fourteen homeowner plaintiffs).

The specific intent requirement for a "special relationship" is analogous to that of a third party beneficiary contract. In *Adelman v. Associated International Insurance Company* (2001) 90 Cal.App.4th 352, 363, the court stated:

"[W]here the 'end and aim' of the contractual transaction between a defendant and the contracting party is the achievement or delivery of a benefit to a known third party or the protection of that party's interests, then liability will be imposed on the defendant for his or her negligent failure to carry out the obligations undertaken in the contract even though the third party is not a party thereto."

Here, plaintiffs do not allege that defendants' transportation of oil through their pipeline was specifically intended to affect plaintiffs. The allegations are much more general. Plaintiffs allege that "[t]he spill caused an immediate impact on the livelihood of local workers and businesses" and that "businesses that support the oil industry, like Secorp, saw their revenues plummet." (FAC, ¶37.) Plaintiffs further allege that "[f]or decades Secorp has sold its products and services to oil companies and drilling platforms who operate in and around Santa Barbara County and off the coast of Santa Barbara," that "[a]s a direct result of the spill, Secorp's customers have had to cease operations and have reduced and/or cancelled their contracts with Secorp," and that "[b]ecause of the loss of that business . . . Secorp has lost substantial revenue and has been forced to lay off numerous employees." (FAC, ¶¶ 71, 72, 73.) Plaintiffs further allege that defendants, in the exercise of reasonable care, "should have known that the Pipeline could rupture or otherwise fail, and spill significant amounts of oil, and cause local oil and gas operations to shut down." (FAC, ¶87.) However, the mere fact that plaintiffs do business with offshore oil platforms that transport oil through defendants' pipeline does not establish that the pipeline was intended for their benefit or to affect them or any other entity that has done or will do business with the platform operators.

Plaintiffs also fail to allege sufficient facts to establish most of the other *J'Aire* factors. First, while it is certainly "foreseeable" that companies doing business with the oil industry will suffer economic injury if there is an oil spill and shutdown, "[f]oreseeability of financial injury to third persons alone is not a basis for imposition of liability for negligent conduct." *Quelimane Company v. Stewart Title Guaranty Company* (1998) 19 Cal.4th 26, 58. Foreseeability is "but one factor to be considered in the imposition of negligence liability." *Bily, supra,* at 398; see also, *Nally v. Grace*

Community Church (1988) 47 Cal.3d 278, 297 ("Mere foreseeability of the harm or knowledge of the danger is insufficient to create a legally cognizable special relationship giving rise to a legal duty to prevent harm."). The reason foreseeability alone does not justify finding a special relationship is that it would provide virtually unlimited liability for nonphysical harm. *Thing v. LaChusa* (1989) 48 Cal.3d 644, 663.

The third *J'Aire* factor is "the degree of certainty that the plaintiff suffered injury." Here, plaintiffs have alleged that their oil industry customers have been unable to operate due to the oil spill and the pipeline closure and, as a result, they have "lost substantial revenue." (FAC, ¶73.) However, nothing more specific is alleged in the negligence cause of action concerning the nature of plaintiffs' business relationship with the platform operators and whether defendants knew (not just "should have known") that plaintiffs were engaged in business activities that would likely be harmed as the result of a negligent discharge of oil and a shutdown of the pipeline.

The fourth *J'Aire* factor, "the closeness of the connection between the defendant's conduct and the injury suffered," also weighs against finding a special relationship as the connection between defendants' conduct and plaintiffs' injuries is attenuated. While plaintiffs allege that the pipeline failure was due to defendants' long history of not properly maintaining the system, as well as their failure to install an automatic shut-off valve, which allegedly would have ensured an immediate shutdown of the pipeline without waiting for human action (FAC, ¶¶ 38, 39), plaintiffs acknowledge that PHMSA issued the shutdown order that remains in effect today (FAC, ¶¶ 53, 61, 73). Thus, the shutdown order, not just the pipeline failure, has caused the oil platforms to remain non-operational. Where an independent act separates a defendant's negligence from the plaintiff's injury, the connection between the defendant's conduct and the plaintiff's harm may be too tenuous to permit recovery as the defendant's conduct must be a "substantial factor" in causing injury to the plaintiff. *State Department of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 352.

In contrast to the first four *J'Aire* factors, the remaining factors ("the moral blame attached to the defendant's conduct" and "the policy of preventing future harm") both suggest the existence of a special relationship. Defendants' alleged lack of diligence in maintaining the pipeline, their decision not to install an automatic shut-off valve system, and their failure to respond to the spill in a timely manner are certainly blameworthy. (FAC, ¶¶ 33, 38, 39.) Defendants argue that a finding of moral blame is no different than a finding of negligence, but the court disagrees, though moral blame may attach to certain forms of negligence. Defendants also argue that the policy of preventing future harm does not justify finding a special relationship because oil pipelines are already heavily regulated, including by PHMSA. However, the allegations in the FAC suggest that additional safety incentives are needed.

On balance, consideration of all six *J'Aire* factors militates against finding a special relationship, notwithstanding how close some of the factors may be, as the case law clearly holds that the first factor ("the extent to which the transaction was intended to affect the plaintiff") is the most important factor. Here, it is not alleged that the transportation of oil through defendants' pipeline was specifically intended to affect plaintiffs and their business operations. On the contrary, the allegations show that the

effect of the shutdown on plaintiffs' business, like many other businesses whose operations are in the same geographic area, was merely incidental.

The recent decision of the Second Appellate District, Division Five, in *Southern California Gas Leak Cases* (2017) 18 Cal.App.5th 581, review granted Feb. 28, 2018, S246669, is directly on point. In *Southern California Gas*, a natural gas leak in a pipeline owned by defendant utility company resulted in the temporary relocation of approximately 15,000 area residents. Seven businesses within a five mile radius of the leak filed suit against the utility company for strict liability for ultrahazardous activity, negligence, and negligent interference with prospective economic advantage, alleging economic losses resulting from the relocation of the area residents. The businesses did not claim an injury to person or property. The utility company filed a demurrer to the negligence claims, which was overruled. The utility company then filed a petition for a writ of mandate. The court of appeal granted the petition and directed the trial court to vacate its order overruling the demurrer and issue a new order sustaining the demurrer without leave to amend. *Id.*, at 595.

The issue in *Southern California Gas*, as in this case, was whether the economic loss rule barred the businesses' claims. The court concluded that the claims were barred. "Where the alleged negligence has caused economic loss, but no personal injury or property damage, duty is not presumed. Rather, courts examine the [*J'Aire*] factors to determine whether to impose on the defendant 'an exceptional duty to third parties.'" *Id.*, at 588. After reviewing the *J'Aire* factors and relevant case law, the court noted that "[n]o appellate authority addressing negligent liability for purely economic loss to third parties has found the existence of a duty of care in the absence of the first [*J'Aire*] factor." *Id.*, at 590. The court concluded that "[t]he failure to establish this foundation precludes a finding of the 'special relationship' required by *J'Aire*." *Id.*, at 591. As the court explained:

"Although our Supreme Court long ago recognized plaintiffs may sue in negligence for economic loss alone such recovery has been limited to situations where a transaction between the defendant and another was intended to directly affect the plaintiff (a third party), whose economic loss was a foreseeable consequence of the defendant's negligence."

Id., at 583 (citation omitted).

Because the plaintiffs in *Southern California Gas* sought damages for purely economic losses resulting from the natural gas leak and did not claim any injury to person or property, the court concluded, as a matter of law, that the utility company did not owe a duty to prevent the plaintiffs' losses resulting from negligent conduct. "Without personal injury, property damage or a special relationship, the general rule that precludes business plaintiffs from recovering for pure economic losses under a negligence theory remains viable." *Id.*, at 595.

Like the *Southern California Gas* plaintiffs, the plaintiffs in this case allege no personal injury or property damage, but instead allege that the release of oil from defendants' pipeline resulted in their losing revenue. Plaintiffs also do not allege the

existence of any transaction that was intended to affect them. Defendants' demurrer to plaintiffs' negligence cause of action will therefore be sustained.

Plaintiffs' third cause of action is for negligent interference with prospective economic advantage. To state a claim for negligent interference with prospective economic advantage, the plaintiff must allege (1) an economic relationship existed between the plaintiff and a third party that contained a reasonably probable future economic benefit to the plaintiff, (2) the defendant knew of the existence of the relationship and was aware or should have been aware that if it did not act with due care its actions would interfere with this relationship and cause the plaintiff to lose in whole or in part the probable future economic benefit of the relationship, (3) the defendant was negligent, and (4) such negligence caused damage to the plaintiff in that the relationship was actually interfered with or disrupted and the plaintiff lost in whole or in part the economic benefit reasonably expected from the relationship. *North American Chemical Company v. Superior Court* (1997) 59 Cal.App.4th 764, 786.

Defendants argue that plaintiffs have not sufficiently alleged an economic relationship between plaintiffs and a third party, nor have they alleged that defendants *knew* about any such relationship. The court disagrees. Plaintiffs allege:

• Plaintiffs have existing or prospective economic relationships with individuals and organizations doing business in Santa Barbara County.

• These relationships have a reasonably probable likelihood of resulting in future economic benefit to plaintiffs.

• Defendants knew or in the exercise of reasonable care should have known of these existing and prospective economic relationships. Specifically, defendants knew that plaintiffs had contracts with Exxon/Mobil to provide services to the oil platforms located off the Santa Barbara coast and in the area affected by the oil spill.

• Defendants knew or should have known that if they failed to act with reasonable care, plaintiffs' existing and prospective economic relationships would be interfered with and disrupted.

• Defendants were negligent and failed to act with reasonable care in maintaining their pipeline so as to prevent an oil spill.

• As a direct and proximate result of defendants' negligence, plaintiffs' existing and prospective economic relationships were interfered with and disrupted, causing plaintiffs to suffer economic harm.

(FAC, ¶¶ 92-101.)

Defendants contend that these allegations are insufficient because plaintiffs do not allege any facts to indicate how defendants knew of plaintiffs' contracts with Exxon/Mobil. They also do not allege the nature of the contracts. Such specificity, however, is not required at the pleading stage. "[T]he complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged." *C.A. v. William S. Hart Union High School District* (2012) 53 Cal.4th 861, 872. Plaintiffs have pleaded ultimate facts. Defendants' demurrer to the third cause of action will therefore be overruled.

If a demurrer is sustained, leave to amend is ordinarily granted unless it appears from the complaint and applicable law that there is no reasonable possibility that an amendment could cure the defect. *Heckendorn v. City of San Marino* (1986) 42 Cal.3d 481, 486. In their opposition, plaintiffs have requested leave to amend. While the court questions whether plaintiffs can allege any facts that would cure the deficiencies of their first and second causes of action for strict liability for ultrahazardous activity and negligence, leave to amend will be granted. Any amended pleading shall be filed on or before April 23, 2018.

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DECLARATION OF SERVICE

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Francisco, State of California. My business address is 560 Mission Street, Twenty-Seventh Floor, San Francisco, CA 94105-3089.

On September 5, 2018, I served true copies of the following document

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF; *AMICUS CURIAE* BRIEF OF PLAINS ALL AMERICAN PIPELINE, L.P., THE ASSOCIATION OF OIL PIPE LINES, AND THE WESTERN STATES PETROLEUM ASSOCIATION IN SUPPORT OF RESPONDENT

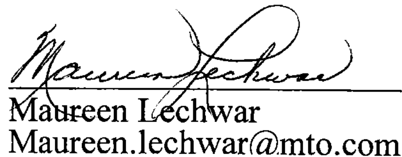
described as on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on September 5, 2018, at San Francisco, California.



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