**No. S246669**

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

SOUTHERN CALIFORNIA GAS COMPANY,
*Respondent to Petition for Review*;

v.

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

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FIRST AMERICAN WHOLESALE LENDING CORPORATION, ET AL.,
*Real Parties in Interest, Petitioners.*

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

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

# AMENDED APPLICATION TO FILE AN AMICUS CURIAE BRIEF OF CONSUMER ATTORNEYS OF LOS ANGELES SUPPORTING PETITIONER

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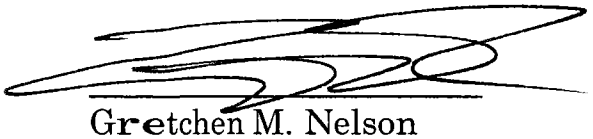
## CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Under California Rule of Court 8.208, Consumer Attorneys of Los Angeles certifies that it is a non-profit organization with no shareholders. Amicus curiae and its counsel certify that they know of no other entity or person that has a financial or other interest in the outcome of the proceeding that amicus curiae and its counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: September 6, 2018



Gretchen M. Nelson

*Attorney for Amicus Curiae Consumer Attorneys of Los Angeles*

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**STATUTES AND RULES**

**OTHER**

## I. APPLICATION FOR PERMISSION TO FILE

Amicus curiae Consumer Attorneys of Los Angeles (CAALA) respectfully seeks permission to file the accompanying brief as friend of the Court. (Cal. Rules of Court, rule 8.520(f)(1).)

Founded in 1950, CAALA is a voluntary non-profit membership organization representing over 4,000 consumer attorneys practicing primarily in Los Angeles County and its surrounding counties. CAALA's mission is to provide resources for its members and to advance the cause of those who are damaged in person or property and resist efforts of others to unduly curtail the rights of consumers. Among other things CAALA, through its Board of Directors and members, works to promote the public good through concerted efforts to secure safe products, a safe workplace, a clean environment, eliminate discrimination, and quality health care. CAALA's members have taken leading roles in advancing and protecting the rights of consumers, employees, and injured victims in both the courts and the Legislature.

CAALA and its members have a particular interest in the issues presented by this appeal in that the matter is one of significant importance to Los Angeles County and the communities affected by the methane gas leak at Porter Ranch. Although CAALA has participated previously as amicus curiae in cases before the California courts, it generally defers to the state wide organization Consumer Attorneys of California, which has participated as amicus curiae in many decisions shaping

California law. (See, e.g., *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480; *Duran v. U.S. Bank* (2014) 59 Cal.4th 1; *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004; *Rose v. Bank of America, N.A.* (2013) 57 Cal.4th 390; *In re Tobacco II Cases* (2009) 46 Cal.4th 298; *Delaney v. Baker* (1999) 20 Cal.4th 23; *Kesner v. Superior Court* (2016) 1 Cal.5th 1132; *Ramos v. Brenntag Specialties, Inc.* (2016) 63 Cal.4th 500.)

In the present case, CAALA requests leave to participate as amicus curiae because of the importance of the issues to the residents of Los Angeles County.

CAALA is familiar with the parties' briefing. Here, CAALA seeks to assist the Court "by broadening its perspective" on the context bounding the issue presented. (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1177, citation omitted.)[1]

## II. INTRODUCTION

The issue presented here – whether the court of appeal acted properly in dismissing, on demurrer, the claims of small business owners located in a closely defined area who were nearly driven to ruin as a result of the evacuation of homeowners in the area due to defendant's failure to prevent or correct the largest methane gas leak in history—arises in an important context with

[1] No party or its counsel authored any part of CAALA's amicus curiae brief and, except for CAALA and its counsel here, no one made a monetary or other contribution to fund its preparation or submission. (Cal. Rules of Court, rule 8.520(f)(4).)

significant practical consequences to litigants throughout California.

CAALA files as amicus curiae to make the following points which are grounded in the legal parameters that govern decisions regarding the viability of claims for economic damages arising out of negligent conduct and the public policy implications that flow from them.

1. The application of a "bright-line" rule that would categorically eliminate, on the pleadings, a claimant's right to seek recovery caused by a defendant's wrongful conduct simply because the injury is an economic loss undermines both the statutory and common law underpinnings of California's tort laws and leads inexorably to undesirable policy outcomes.

This Court is uniquely able to clarify that recovery for economic injury should not be summarily eliminated on the pleadings nor treated differently from other negligently inflicted injury under Civil Code § 1714, subdivision (a). Rather, where, as here, Defendant's wrongful conduct causes injury, no matter that the injury is an economic loss, the Defendant should not be allowed to summarily avoid liability without any consideration of the claims.

## III. ARGUMENT

### A. SoCalGas' Proposed Bright-Line, No-Recovery Rule for Purely Economic Losses Cannot Be Justified On Any Legal or Policy Grounds

SoCalGas urges that applying the *Rowland* test[2] to stranger cases[3]—instead of a bright-line no-recovery rule—will harm California's government and economy, usurp the authority of the state's Legislature and regulatory agencies, subject the judiciary to "massive new burden," and harm businesses by exposing them to the specter of limitless liability. (ABOM 68-69.) But it offers no credible rationale, or foundation, to support its claim that allowing tort victims to recover damages in stranger cases would cause the "sky to fall" in California – just as it has fallen (both literally and figuratively) over Porter Ranch.

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[2] In addition to a three-part foreseeability test, *Rowland* looks at the following policy factors to determine wheehter a duty exists: "[1] the moral blame attached to the defendant's conduct, [2] the policy of preventing future harm, [3] the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and [4] the availability, cost, and prevalence of insurance for the risk involved." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 113.)

[3] A so-called "stranger case" involves a pure economic loss claim for negligence where there is no contractual relationship between the parties.

### 1. Allowing Recovery of Economic-Loss Claims in Tort Would Not Intrude on Legislative Function or Displace Tort Law

SoCalGas highlights two statutes that authorize injured parties to recover pure economic losses caused by an oil spill—Civil Code section 3333.5 and Government Code section 8670.56.5—and argues that in light of these provisions, the "Legislature is more than capable of enacting statutory exceptions to the economic loss doctrine." SoCalGas further claims that the Court should not apply its own purported "exception" where the Legislature has not done so. (ABOM 69-70.)

But Civil Code section 3333.5 and Government Code section 8670.56.5 are not exceptions to a (supposed) no-recovery economic loss rule in stranger cases. Rather, they are *malum prohibitum* provisions, which *expand* liability without the need to prove fault. The statutes afford sanctuary to those who have suffered pure economic losses but cannot prove a negligent act. (*See* Civ. Code, § 3333.5, subd. (a) [imposing absolute liability "without regard to fault for any damages incurred by any injured party" caused by oil discharge from a utility pipeline]; *see also* Gov. Code, § 8670.56.5 [imposing "absolutely liable without regard to fault for any damages incurred by any injured person that arise out of, or are caused by, a spill"].)

Civil Code section 3333.5 and Government Code section 8670.56.5 thus reflect the Legislature's intent to ensure that

injured parties are compensated for pure economic losses in the mass tort scenario of an oil spill. If anything, *rejecting* a no-recovery rule in stranger cases would be consistent with that aim. And on the flip side of the same coin, a blanket no-recovery rule would be inimical to that aim.

Next, SoCalGas argues that as a regulated utility, it should be immune from tort liability. There is no statutory provision, or rationale, to justify such a blanket exemption for regulated utilities. To the contrary, as stated, Civil Code section 3333.5 and Government Code section 8670.56.5 expressly authorize strict liability *in stranger cases* against oil extraction and pipeline companies, each of which are highly regulated. Further, industry regulations were notoriously lax at the time of the gas leak. (*See* RBOM 29-30).

SoCalGas also claims that the Court should impose a bright-line exclusion in stranger cases to avoid displacing existing tort law. According to SoCalGas, other tort causes of action, such as public nuisance, permit recovery for pure economic losses, and allowing recovery of those losses in negligence would upend the existing tort regime. That argument is unavailing.

There is no reason why stranger cases sounding in negligence cannot exist alongside other torts. Public nuisance, for example, is defined broadly, and while it often overlaps with negligence (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 542),

the two torts are not antagonistic to one another. When the two causes of action overlap, courts simply treat nuisance claims as negligence claims – without apparent concern about usurping nuisance law:

> Given "the broad definition of nuisance," the independent viability of a nuisance cause of action "depends on the facts of each case." [Citation.] "Where negligence and nuisance causes of action rely on the same facts about lack of due care, the nuisance claim is a negligence claim." [Citation.] The nuisance claim "stands or falls with the determination of the negligence cause of action" in such cases.

(*Ibid.*) Causes of action often overlap, and when they do, courts are perfectly capable of erecting parameters for resolving any conflict.

One scholar who discussed the issue of whether negligence claims should be allowed alongside other causes of action for pure economic loss (Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule* (2009) 66 Wash. & Lee L. Rev. 523, 529–534), makes compelling arguments against a blanket no-recovery rule in stranger cases:

> If there is no agreement between the parties to a lawsuit, there is no risk that recognizing tort obligations will violate the parties' freedom to contract, because there never was an effort to exercise such freedom. If the parties are not in privity, contract law does not potentially afford a remedy, except in the relatively rare case of a third-party beneficiary. Thus, respect for

> contract principles and private ordering does not require that the economic loss rule bar the claims of persons not standing in a contractual relationship. The purpose of the economic loss rule is not to leave injured persons remediless for economic losses but to ensure respect for private ordering by relegating a plaintiff to contract remedies in cases where there is an agreement between the parties allocating economic risks.

(*Id.*, at 555, emphasis added.) The goal of ensuring that tort victims are not left without remedy should take primacy over the abstract concern about usurping existing tort law.

### 2. Allowing Recovery of Economic-Loss Claims in Tort Would Not Create A New Massive Judicial Burden

There are useful tools that can minimize judicial burden in cases involving pure economic loss. For example, in denying SoCalGas' motion to strike Plaintiffs' class allegations, the trial court expressed confidence (based on the pleadings) that this lawsuit could be efficiently managed, reasoning that "aggregated methods of decision making, including the class action mechanism," can be used to streamline the litigation. (2 EP 394.)

In addition to a class action, Judicial Council Coordinated Proceedings provide yet another means of consolidating lawsuits in economic loss cases involving mass torts. (*See* Cal. Rules of Court, rules 3.501-3.550; Code Civ. Proc., §§ 404-404.9 ["Coordination" refers to the process of bringing together cases pending in different counties that share a common question of fact or law before one judge for efficient case management.].) As

the trial court explained, "Judicial Council Coordinated Proceeding number 4861 has gathered...lawsuits [against SoCalGas] together into a single courtroom for speedy, efficient, and consistent resolution." (2 EP 394.) Damage issues in class or mass actions may also be susceptible to statistical techniques, helping to avoid the need for proof of individual damages for each Plaintiff. (*Ibid.*)

With these powerful tools at the ready, the specter of overburdening the judicial system with economic loss claims is unfounded. Tort victims in California should not be left without a remedy based on the concern that trial courts could not competently undertake their management function. Significantly, the trial court in this case expressed confidence in its own ability to efficiently oversee the economic loss claims. (*Cf. Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1022 ["trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action"].)

3. **Allowing Recovery of Economic-Loss Claims in Tort Would Not Adversely Affect Businesses in California or Cause Significant Social Losses**

SoCalGas fails to fully account for the uncompensated costs that its no-duty rule would create and, simultaneously, makes dubious arguments about the "social losses" that compensating victims would forge. It argues that the benefit of compensating Porter Ranch victims for their business losses would be vastly outweighed by over-deterrence of useful behavior and

indeterminate liability. (*E.g.*, ABOM 75-76.) SoCalGas is wrong – both as a matter of fact and theory.

### a) SoCalGas Downplays the Magnitude of the Harm it Caused

In a vain attempt to advance the argument that leaving the Plaintiffs without remedy would come at little cost, SoCalGas strains to minimize the calamitous impact of its negligence, recasting the gas leak as an event that caused a mild economic slow-down "because some Porter Ranch residents chose to relocate." (ABOM 37.)

But the gas leak was a gut punch to the local Porter Ranch economy. The blowout caused methane gas and other noxious pollutants to migrate directly into Porter Ranch, creating visible mists and toxic droplets that showered down on the community. (1 EP 172.) In addition to complaining about the foul odors, residents suffered acute respiratory and central nervous system symptoms. (1 EP 176.)

After the Governor declared a state of emergency, the Los Angeles County Health Department ordered SoCalGas to establish a relocation program for Porter Ranch's residents. (1 EP 174.) Then, following "unprecedented absenteeism" and ongoing student reports of nausea, headaches, nosebleeds, vomiting, and other symptoms," the Los Angeles County Board of Education relocated Porter Ranch students for an entire school year. (1 EP 173.) The enormous scope and duration of the leak

ultimately dislocated the Porter Ranch population living within a five-mile radius of the blowout for over a year. (1 EP 172.) While the consequences of this particular gas leak were unprecedented in scale (it was greater in volume than the 2010 Deepwater Horizon spill), there is no reason to believe—and SoCalGas gives no reason to believe—that they are unusual in *kind* when it comes to leaks from natural gas storage centers.

When 15,000 Porter Ranch residents left, the economy collapsed. Examples of the devastation wrought on the business community abound – the following are just a few. One plaintiff, a small taekwondo studio that had been experiencing steady business growth, saw its enrollment decline by one third because of the leak (1 EP 180), while another plaintiff who operates a daycare, had its enrollment drop by nearly half. (1 EP 180-81.) Plaintiff Hooper Camera's sales "plummeted and then stagnated" as customers were relocated. (1 EP 181.) Likewise, plaintiff Mediterranean Bistro saw its business dwindle to 5 customers in an 80-seat space and had to close early on weekend nights, which was a bustling time before the leak. Not surprisingly, realtors also suffered as home prices nose-dived by 44% following the gas leak.

After canvassing the area, the Valley Economic Development Center's senior vice president for external affairs said of the businesses: "'Every day that goes by brings more pain for them.'" (1 EP 184.) Also, the United States Small Business Association declared a disaster and approved disaster relief

loans, totaling $879,000 as of July 2016, for business affected by the gas leak. (*Id.*)

While SoCalGas tries to soft-pedal Plaintiffs' economic damages, they were real and significant for those affected. It would be unfair for them to go uncompensated. (Johnson, *The Boundary-Line Function of the Economic Loss Rule, supra,* 66 Wash. & Lee L. Rev. at 553-54.)

### b) There is No Merit to SoCalGas' Claims That Requiring It To Compensate Victims for Economic Losses Would Deter Useful Conduct

SoCalGas' argument that imposing liability in cases like this one would *not* lead to socially optimal behavior and would over-deter *useful* conduct rings hollow. In addition to minimizing the extent of the losses to the business community, SoCalGas also glosses over the magnitude of the environmental disaster and its own disregard of basic safety operations. Against the factual backdrop of this case—and cases like it involving mass torts or environmental disasters—it is hard to fathom that over-deterring useful conduct would be a real concern.

The gas leak, which caused the Governor to declare a State of Emergency, was a blow to California's progress in fighting climate change. At its zenith, the leak more than doubled the emissions of methane of the entire Los Angeles Basin, and increased California's greenhouse-gas emissions by 25 percent. (1 EP 171.)

Plaintiffs also allege that the catastrophe was preventable; that SoCalGas should have known that the well was dangerously corroded; that the facility consistently failed safety inspections; that SoCalGas lied to regulators about safety mechanisms in place; and that SoCalGas was aware of the potential for a catastrophic disaster beforehand. (1 EP 176-178; *see also* 2 EP 259.) And even though SoCalGas operates in a regulated industry, that did not deter it from flouting basic safety procedures.

The right amount of deterrence is the full range of economic harm caused by the negligent conduct: "In order to maintain efficient precaution incentives, parties should under most circumstances face the full range of economic consequences of their activities, no matter how severe the harm." (Francesco Parisi *et. al.*, *The Comparative Law and Economics of Pure Economic Loss* (2007) 27 Int'l Rev. L. & Econ. 29, 36; *see also* Sharkey, *Can Data Breach Claims Survive the Economic Loss Rule?* (2017) 66 DePaul L. Rev. 339, 347 ["Tort law, by forcing the internalization of externalities, plays a critical role in deterring excessively risky conduct and encouraging risk management strategies by actors and their insurers."].) This case illustrates the point.

SoCalGas deceived regulators, ignored known safety risks, and caused a monumental disaster. Yet, it basks in the comfort of having had the foresight to secure over $1 billion in liability insurance. And, the market capitalization of its parent, Sempra

Energy, is higher now than it was before the catastrophic gas leak.[4] Drawing an arbitrary line that restricts the full scope of damages would fail to adequately deter future harm.

SoCal Gas' argument that "elimination of the economic loss doctrine" would lead to problems for businesses in forecasting the extent of their liability fares no better than its over-deterrence argument. (ABOM 74-75.) Damages for pure economic losses do "not differ qualitatively from the foresight of other non-economic consequences of a typical tort situation." (Francesco Parisi et. al., *The Comparative Law and Economics of Pure Economic Loss, supra,* 27 Int'l Rev. L. & Econ. at 31.) In terms of forecasting damage exposure, no meaningful distinction can or should be made between economic and non-economic consequences of a tort. (*Id.* at 31–32.)

That is particularly true where, as here, there is a defined geographical boundary. The plaintiffs in this case are limited to a finite number of businesses (in the hundreds) within five miles of the facility (1 EP 186), who "have been uniquely affected due to their physical proximity" to the gas leak that caused their subsequent evacuation. (1 EP 185.)

That other economic loss cases might arise where the geographical boundary is not well defined—or the injured party's connection to the triggering act is more tenuous—does not justify

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[4] *See* https://finance.yahoo.com/quote/SRE?p=SRE&.tsrc=fin-srch, last visited September 5, 2018.

a draconian, bright-line exclusionary rule. This Court is perfectly capable of establishing reasonable limitations in those limited circumstances where causation, foreseeability, and natural boundaries do not sufficiently delimit the scope of liability. (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1156 [explaining that "any duty rule will necessarily exclude some individuals who, as a causal matter, were harmed"].) The *Rowland* test offers the perfect construct for courts to devise such limiting principles. (*See* fn. 2, *supra.*)

### B. Plaintiffs' Claims Should Be Viewed Through Tort Law Principles and Not A "Bright-Line" Rule Founded on Contract Principles.

SoCalGas implores this Court to impose a "bright-line" rule that would categorically eliminate all claims by anyone who suffers solely economic injury caused by the failure of another to use "ordinary care or skill in the management of his or her property or person," (Civ. Code, § 1714, subd. (a)), without regard for the underlying facts.

Although "bright-line" rules may be appealing as an easy solution to a complex problem, they pose an enormous risk to the public when applied to a vast array of factual tort scenarios. To avoid a solution that eliminates the rights of claimants without regard to the underlying factual context, the viability of any particular negligence claim should be made based on the principles outlined in *Rowland v. Christian, supra,* 69 Cal.2d at

112-113, and not on a "bright-line rule" that is grounded solely on the nature of the injury.

This Court has previously recognized the futility of applying "facile, 'bright line' rules," untethered to a statute, to a broad spectrum of cases that arise from complex factual scenarios. (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 754 [refusing to apply a bright line rule to when attorney error has caused actual injury so as to trigger the statute of limitations under Code of Civil Procedure section 340.6, subdivision (a)(1)]; *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 772-773 [refusing to set forth a categorical exception to Civil Code section 1714 that would exempt drivers from potential liability to other freeway users for stopping alongside a freeway]; *People v. Souza* (1994) 9 Cal.4th 224, 235 [refusing to apply a "bright-line" rule on when there is sufficient cause for police to detain an individual because courts must consider the "totality of the circumstances – the whole picture", quoting *United States v. Cortez* (1981) 449 U.S. 411, 417, & fn. 2].)[5]

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[5] See also *Rakas v. Illinois* (1978) 439 U.S. 128, 147-148 (bright-line rules are acceptable "[w]here the factual premises for a rule are so generally prevalent that little would be lost and much would be gained by abandoning case-by-case analysis," but are inappropriate where they conceal under a veneer of "superficial clarity . . . all of the problems of line drawing which must be faced in any conscientious effort to apply the Fourth Amendment."). *Cf. Biggs v. Wilson* (9th Cir. 1993) 1 F.3d 1537, 1544-1545, *dissent by* Trott, CJ. ("[w]e don't need bright lines for

This Court's valid concern over implementing a bright-line rule, in the absence of any statutory proscription, where the factual circumstances can vary is equally applicable here. For although "bright lines are sometimes useful . . . for all their seductive allure, they have a tendency in certain situations to blind courts and lawyers to the subtleties inherent in the problems to which they are addressed." (*Casa Marie Hogar Geriatrico, Inc. v. Rivera-Santos* (1st Cir. 1994) 38 F.3d 615, 619.)

General principals of tort law, including foreseeability and proximate causation balanced with other policy guidelines outlined by the courts, guard against liability for speculative, excessive or unforeseeable losses or losses outside the scope of the risks that made the defendant's conduct negligent. For this reason, rather than categorically eliminate claims, this Court has held that each case should be decided on a case-by-case basis with an eye to tort principles and guidelines outlined in prior decisions. (*Rowland, supra,* 69 Cal.2d at 112-113 [holding that bright-line test as to plaintiff's status as a trespasser, licensee, or invitee is not dispositive of liability of landowner for injuries suffered by a guest; absent an exception clearly supported by

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everything. Sometimes they work mischief. . . . There is a place for bright lines, but this is not it. This is essentially a *policy* choice. Because Congress has left it to us, I would choose a more comprehensive approach that recognizes the problems of the real world.").