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.

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

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

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

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF OF TOLL BROTHERS, INC. AND PORTER RANCH DEVELOPMENT COMPANY

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Attorneys for Toll Brothers, Inc. and Porter Ranch Development Company

Toll Brothers, Inc. and Porter Ranch Development Company, through their attorneys and pursuant to California Rule of Court, rule 8.520(f), respectfully apply for leave to file the following amici curiae brief in support of Petitioners.

INTEREST OF AMICI CURIAE

The lower court decision in this case applied an erroneous duty analysis that allows tortfeasors to shift the costs of their negligence to blameless victims in direct contravention of the goals of California tort law: compensating injured parties for their losses caused by others, holding parties responsible for the consequences of their actions, and deterring future negligent conduct. Proposed amici curiae Toll Brothers, Inc. and Porter Ranch Development Company (collectively, "Toll") have a direct and immediate interest in assisting the Court in setting forth the appropriate analysis of tortfeasors' duties to plaintiffs claiming pure economic loss.

Toll is the master developer of the Porter Ranch community and owns over 500 acres of undeveloped property directly adjacent to the Southern California Gas Company ("SoCalGas") Aliso Canyon Gas Storage Facility ("the Facility"). At the time of the blowout, Toll was in the process of developing its property into over 1500 new home sites. During the four-month-long uncontrolled blowout of gas injection well SS-25 ("the Blowout") Toll's property was contaminated with natural gas and other pollutants. (See First Amended Consolidated Complaint of Porter Ranch Development Co. and Toll Brothers, Inc., attached to the Petitioners' Request for Judicial Notice

("RJN") as Exh. A, at ¶¶ 42-44.) SoCalGas's repeated unsuccessful attempts to stop the Blowout through an ill-conceived top-kill process only exacerbated the problem. (*Id.*, at ¶ 50.)

Because of the Blowout, the sale of new Toll homes in Porter Ranch came to a halt, and Toll's development of additional Porter Ranch communities was set back years. Consequently, Toll suffered hundreds of millions of dollars of compensable damages. (*Id.*, at ¶¶ 2-5; 31-34.)

Toll filed an action against SoCalGas to recover for its injuries resulting from SoCalGas's negligence and misconduct, *Toll Brothers, Inc., et al. v. Sempra Energy, et al.*, Los Angeles Superior Court No. BC 674622 (the "Toll Action"), which has been coordinated with Petitioners' action before Judge John Shepard Wiley, Jr. Although SoCalGas did not demur to Toll's Complaint because Toll's claims differ in several material respects from Petitioners' claims—including because Toll suffered property damage, and its economic injury was more direct and foreseeable than Petitioners—Toll nevertheless has an interest in ensuring that courts conduct the appropriate duty analysis in cases where economic loss damages are claimed, including the present case.

STATEMENT IN COMPLIANCE WITH CALIFORNIA RULE OF COURT, RULE 8.520(f)(4)

Amici curiae states that (a) no party's counsel authored this brief in whole or in part; (b) no party, nor counsel for any party, contributed money that was intended to fund preparing or submitting this brief; and (c) no person other

than amici curiae, or its counsel contributed money that was intended to fund preparing or submitting this brief.

DATED: September 5, 2018

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I. SUMMARY OF ARGUMENT

SoCalGas advocates, and the lower court decision embraces, a radical expansion of the economic loss rule that would bar recovery in virtually all cases involving purely economic losses. Such an extreme result would make California an outlier in tort jurisprudence. It would also deprive blameless individuals and businesses suffering economic losses of the opportunity to present meritorious claims to a jury with no public policy justification for such deprivation. SoCalGas's argument that this severe approach is the only way to prevent runaway liability ignores the limiting check this Court has already put in place through *Rowland v. Christian*'s foreseeability inquiry. This Court should reject SoCalGas's unsupportable position and reverse the Court of Appeal's decision.

The panel majority below erred in two critical respects. First, it incorrectly began its analysis by assuming that when a plaintiff alleges purely economic loss, duty is not presumed. That approach contravenes California Civil Code Section 1714, this Court's prior precedent and California's basic tort policy, which presumptively assumes a duty to avoid harming others, as well as this Court's instruction that plaintiffs are owed such a duty regardless of whether the resulting damage is "to one's person, one's property or one's *financial interests*." (*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 806, fn. 3 (*J'Aire*) (emphasis added).) As a result of the Court of Appeal's mistaken duty presumption, it then applied the wrong set of factors—the *Biakanja* factors—to determine whether SoCalGas owed Petitioners a duty. Second, the

Court of Appeal compounded its error by treating the first *Biakanja* factor as dispositive, departing from decades of this Court's authority mandating that all six factors are to be considered and balanced. (See *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650 (*Biakanja*) [referring to the "balancing of various factors"].)

Under the proper analysis, a defendant is generally presumed under Civil Code Section 1714 to have a duty not to cause injury through negligent conduct, unless the *Rowland* factors counsel in favor of an exception. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 118-119 (*Rowland*).) Only in the limited circumstance where the defendant negligently performed contractual obligations and the plaintiff and defendant are not in privity is the defendant presumed to have no duty to prevent purely economic injury. (*Biakanja, supra*, 49 Cal.2d at p. 650.) Because this narrow exception set out in *Biakanja* does not apply here, SoCalGas is presumed to have a duty in the present context, and a "departure from this fundamental principle" (*Rowland, supra*, 69 Cal.2d at p. 113) is warranted only if the *Rowland* factors clearly justify such departure, which they do not.

The proper application of this framework is necessary to accomplish tort liability's tri-partite goals of requiring tortfeasors to internalize the full costs of their actions; incentivizing proper maintenance and safe operation of hazardous facilities to avoid future catastrophes; and making injured parties whole.

II. ARGUMENT

A. The Court of Appeal Applied the Wrong Legal Framework by Presuming that No Duty Exists

The panel majority erroneously held that, in negligence cases involving "personal injury or property damage . . . a duty of care is presumed" under Civil Code § 1714, while in cases "[w]here the alleged negligence has caused economic loss, but no personal injury or property damage, duty is not presumed." (*Southern California Gas Leak Cases* (2017) 18 Cal.App.5th 581, 587-88 (*SoCalGas*).)

This erroneous view of duty, which turns solely on the nature of damages sought, ignores both the plain language of Section 1714 and "the basic policy of this state set forth by the Legislature in section 1714 of the Civil Code [] that *everyone* is responsible for an injury caused to another by his want of ordinary care or skill in the management of his property." (*Rowland, supra*, 69 Cal.2d at pp. 118-19 [emphasis added]; see also *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 768 (*Cabral*) ["California law establishes the general duty of each person to exercise, in his or her activities, reasonable care for the safety of others."] [citing Civ. Code § 1714(a)].) It also runs directly contrary to this Court's pronouncement that California's "basic principle of tort liability," codified in Section 1714, imposes a duty to avoid harming others through want of ordinary care, *regardless* of whether the resulting damage is "to one's person, one's property or one's *financial interests*." (*J'Aire, supra*, 24 Cal.3d at p. 806, fn. 3 [emphasis added].) While SoCalGas argues that the presumptive duty that *Rowland* recognizes is only to

avoid personal injury and property damage (Answering Brief at p. 22), nothing in *Rowland* limits the presumptive duty to those types of injury. (See *Rowland, supra*, 69 Cal.2d at p. 112 [referring to the "general principle that a person is liable for injuries caused by his failure to exercise reasonable care in the circumstances" and holding that "no [] exception should be made unless clearly supported by public policy."].) And this Court has stated expressly that such a limit is inappropriate. (*J'Aire, supra*, 24 Cal.3d at p. 806, fn. 3 ["Recovery for injury to one's economic interests, where it is the foreseeable result of another's want of ordinary care, should not be foreclosed simply because it is the only injury that occurs."]

Before a court can establish a categorical no-duty exception to Section 1714's presumption, it must engage in a robust duty and policy analysis, applying the factors set forth in *Rowland*. (See, e.g., *Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1145-1157 (*Kesner*) [applying *Rowland* factors to conclude that employer whose employee had been exposed to asbestos owed a duty to members of employee's households]; *Cabral, supra*, 51 Cal.4th at p. 783 ["The question is not whether a *new duty* should be created, but whether an exception to Civil Code section 1714's duty of exercising ordinary care in one's activities ... should be created." (Emphasis in original.)].)

This Court has also recognized a narrow exception to the general duty to avoid harming others through want of ordinary care: where the defendant has negligently performed contractual obligations causing purely economic injury, and the plaintiff and defendant are not in privity, the presumption is

against the existence of a duty. (*Biakanja*, *supra*, 49 Cal.2d at p. 650; *J'Aire*, *supra*, 24 Cal.3d at p. 804.) In that limited situation, the *Biakanja* factors are applied to determine whether purely economic recovery is warranted. (*Aas v. Superior Court (William Lyon Co.)* (2000) 24 Cal.4th 627, 638 [*Biakanja* applies to claims of "the negligent performance of a contractual obligation, resulting in damage to the property or economic interests of a person not in privity"]; *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Servs. Grp., Inc.* (2009) 171 Cal.App.4th 35, 45 ["[T]he factors to be considered in determining whether a duty of care exists based on the relationship between two parties in a commercial context who are not in privity were established in *Biakanja.*"; *Lichtman v. Siemens Indus. Inc.* (2017) 16 Cal.App.5th 914, 924 [*Biakanja* applies to "cases involving contracts between a defendant and a person other than the plaintiff"].)

The distinction between the presumptions that apply in these two contexts is grounded in the desire to avoid "tortification" of contracts and quasi-contracts. (*See, e.g.*, *Stop Loss Ins. Brokers, Inc. v. Brown & Toland Medical Group* (2006) 143 Cal.App.4th 1036, 1043 [noting the rule that a party may not recover in tort for breach of a contractual obligation and holding that "[i]nvoking the *Biakanja* factors to create a tort duty in the absence of injury to a third party would circumvent this rule and blur the law's distinction between contract and tort remedies"]; *Seely v. White Motor Corp.* (1965) 63 Cal.2d 9, 18 [applying economic loss doctrine in a breach of warranty case on the ground that a consumer can "be fairly charged with the

risk that the product will not match his economic expectations unless the manufacturer agrees that it will"].) This is because, in a contractual or quasi-contractual relationship, the parties themselves have allocated, or can allocate, risk. In such situations, public policy dictates that, unless the *Biakanja* and *J'Aire* balancing test is satisfied, tort law not supersede the terms of the business agreement. Indeed, without such limitation, there might be a legitimate risk of liability beyond what the parties contemplated.

But as Judge Wiley recognized, in mass tort cases outside of the contractual context—such as this case—plaintiffs typically have no practical ability to predict their oncoming future harm and to guard against it through pre-injury negotiation. And freed of the burden of internalizing the economic losses caused by their behavior, risk-takers would have insufficient incentive to adopt safer practices to prevent future harm.

The lower court decision misguidedly expanded the narrow exception set forth by this Court in *Biakanja* and *J'Aire* to swallow the general rule that all persons are required to use ordinary care to prevent others from being injured as a result of their conduct.

B. Foreclosing Economic Recovery for a Plaintiff Not Alleging Property Damage Would Be Contrary to Law and Public Policy

This Court should confirm that SoCalGas's duty extends to Petitioners, because to hold otherwise would be contrary to law and to the fundamental public policy considerations underlying tort law.

1. Excusing SoCalGas from a Duty Not to Harm Local Businesses Is Contrary to Tort Law's Public Policies of Compensating Loss and Deterring Harm

California's "basic policy" of tort liability—the general presumption of duty set forth in Section 1714 (see *Rowland, supra*, 69 Cal.2d at pp. 118-19)—reflects the aims of tort law: to compensate injured parties for their loss and to decrease harm to society by requiring risk-takers to internalize the full costs of their actions. (*See, e.g., Martinez v. Robledo* (2012) 210 Cal.App.4th 384, 390 [purpose of tort law is to "make plaintiffs whole"]; *Burgess v. Superior Court (Gupta)* (1992) 2 Cal.4th 1064, 1081 ["One of the purposes of tort law is to deter future harm."].) By positing a general duty not to cause harm, California law ensures that, in the absence of a clear countervailing public policy, plaintiffs can be made whole and defendants can be made to internalize the costs they impose upon innocent victims. (*See Kesner, supra*, 1 Cal.5th at p. 1142.) Requiring that clear countervailing policy benefits justify any exception to the general presumption of duty thus is critical to respecting the legislature's policy choice to broadly define duty. (*Cabral, supra*, 51 Cal.4th at p. 777.)

Without engaging in the policy analysis required by this Court, the Court of Appeal's decision wholly failed to account for the aims of tort law. Declining to correct this failure would result in significant hardship to blameless victims, would create insufficient incentive to safely manage property or otherwise act in a manner that minimizes the likelihood of future

catastrophic loss, and would allow tortfeasors to escape liability for the foreseeable economic harm their actions cause.

First, recognizing SoCalGas's duty to those that are foreseeably harmed by SoCalGas's failure to properly maintain the facility is the only way to ensure blameless victims are made whole for the significant economic harm they suffered. Given that the Blowout lasted nearly four months, caused the County to order relocation of thousands of residents in the Porter Ranch community, and forced the closure of local schools, it is obvious that businesses within the relocation area would suffer serious economic harm. Any rule that categorically excludes such obvious and foreseeable victims of SoCalGas's negligence from the scope of SoCalGas's duty would condemn blameless victims to bear the substantial costs of SoCalGas's negligence without any legal or practical recourse.

Second, defining the scope of SoCalGas's duty to include the economic damages suffered by foreseeable victims incentivizes public safety by requiring SoCalGas to bear the full costs of its own negligence. SoCalGas argues that no additional deterrence would be accomplished by holding it responsible for the economic damage it caused, claiming that the Aliso Canyon facility is already heavily regulated and thus SoCalGas is sufficiently deterred from negligent conduct. (Answering Brief at pp. 49-52.) This assertion borders on the absurd in light of the facts here.

SoCalGas knowingly operated the injection wells at Aliso Canyon in a manner that increased the likelihood of an uncontrolled blowout and made no

preparations for dealing with such a blowout when it inevitably came. (*See, e.g., Ensuring Safe and Reliable Underground Natural Gas Storage: Final Report of the Interagency Task Force on Natural Gas Storage Safety* (Oct. 2016), attached to RJN as Exhibit D, at pp. 21, 22 [finding that prior to the leak "the vast majority of the wells [at the Aliso Canyon Facility] remained unevaluated for cement integrity along the cement casing," that SS-25 was operated "through both casing (uncemented in the uppermost critical sections) and tubing, providing only a single barrier" against a leak, and preliminarily observing that the practices for monitoring and assessing leaks and leak potential at the facility "were inadequate to maintain safe field operating pressures."]

In fact, SoCalGas concedes that its entire maintenance and repair system was reactive, waiting until problems occurred before addressing them; and, all the while, SoCalGas failed to have any contingency plan in place for a well blowout and failed to make any preparations for dealing with such a blowout. (Toll FAC, Exhibit A to RJN, at ¶¶ 41, 46-47, 50-51.)

In addition, despite internal warnings to the contrary, SoCalGas removed the downhole safety valve for SS-25 (and numerous other wells), thereby eliminating the possibility of shutting down the well below the point of the blowout in the event of mechanical failure; it failed to put a cement casing barrier all the way to the surface in many wells, including SS-25; and it failed to test for internal corrosion in its wells; it drew gas through both the inner metal tubing and the outer casing of SS-25 to increase well production—

thereby weakening and eroding the well's outer casing and eliminating the casing as a secondary safety barrier in the event of a leak in the inner metal tubing. After the SS-25 blowout, agency inspections led to approximately 80 of the 115 wells at SoCalGas's Aliso Canyon facility failing mechanical integrity tests or otherwise needing to be repaired or taken out of service. (*Id.*, ¶ 62.)

To the extent SoCalGas bases its claim that it is sufficiently deterred on changes it has made pursuant to regulations and mandates implemented since the Blowout, the Court has rejected this very argument. (See *Kesner*, *supra*, 1 Cal.5th at pp. 1150-51 [rejecting defendant's argument that "there is little prospective benefit to finding a duty" because "the future risk of the particular injury at issue. . . has largely been eliminated through extensive regulation."].) As *Kesner* made clear, no matter the effect the imposition of liability would have on current tortfeasors, the court's "duty analysis looks to the time when the duty was assertedly owed." (*Id.* at p. 1150.) Indeed, the implementation of later regulations only "suggest[s] that legislatures and agencies readily adopted the premise that imposing liability would prevent future harm." (*Id.* at p. 1151.) Here, as in *Kesner*, the adoption of additional regulations in the wake of the Blowout to address the obvious deficiencies in SoCalGas's operation of the Facility only highlights the public policy basis for forcing SoCalGas to internalize all costs caused by its negligent actions. SoCalGas and other operators of hazardous facilities should be incentivized to avoid the harm *before* it happens, instead of later complying reluctantly with after-the-

fact regulatory oversight that is strengthened as a result of the disaster. Failure to do so would invite abdication of responsibility for safe operation of businesses to regulators rather than the business owners, insulate businesses from full liability even when they flout appropriate safety measures as SoCalGas did here, and inevitably lead to future catastrophes.

Indeed, the regulatory oversight in place before the Blowout clearly was not sufficient to deter SoCalGas's negligent conduct or to incentivize it to be proactive in the operation of its wells. Despite operating the Facility for over 40 years, SoCalGas never implemented a storage integrity management plan until after the leak, and knowingly deferred necessary maintenance for years. For example, in 2014 testimony to the California Public Utilities Commission, SoCalGas admitted that "a negative well integrity trend seems to have developed since 2008," with "an increasing number of safety and integrity conditions." SoCalGas also admitted that "this concern is further amplified by the age, length and location of wells. Some SoCalGas wells are more than 80 years old, with an average age of 52 years.... In addition, some wells are located within close proximity to residential dwellings or high consequence areas." (SoCalGas Direct Testimony of Phillip E. Baker Underground Storage Before the Public Utilities Commission of the State of California, attached as Exhibit B to the RJN, at PEB-17.) Despite this acknowledged proximity to high impact areas, SoCalGas did nothing to address the history of corrosion and leaks in the casing of the wells of the

Facility, or the many wells with extensive corrosion at the time of the Blowout.

SoCalGas also admitted in 2014 that a "proactive, methodical, and structured approach, using state of the art inspection technologies and risk management disciplines to address well integrity issues before they result in unsafe conditions, or become major situational or media incidents, is a prudent operating practice." (*Id.*) Yet, SoCalGas never implemented such prudent operating practices. As SoCalGas admitted before the Blowout, its "reactive" policies and practices exposed the public to the risk of "uncontrolled well-related situations." (Toll FAC, Exhibit A to RJN, at ¶¶ 53-60.)

In short, SoCalGas did everything it could to increase production and minimize or postpone all safety measures it was not absolutely required to take. This approach and the massive safety failures that resulted at Aliso Canyon are plainly not the result of a company sufficiently deterred from imposing costs on its local community.

2. Foreseeability Is a Sufficient Check on Limitless Liability

SoCalGas argues that a bar on purely economic losses is necessary to "prevent[] the imposition of potentially infinite liability, out of all proportion to any fault, from endlessly rippling claims for pure economic loss." (Answering Brief at p. 20.) Despite the parade of horribles posited by SoCalGas, *Rowland's* foreseeability analysis already accomplishes this aim, curbing the scope of duty well before it reaches the absurd scenarios that

SoCalGas has spun in its effort to avoid any liability for the economic losses caused by its demonstrable negligence.

As this Court has noted, the "most important factor to consider in determining whether to create an exception to the general duty to exercise ordinary care articulated in section 1714 is whether the injury in question is foreseeable." (*Kesner*, *supra*, 1 Cal.5th at p. 1145; see also *J'Aire*, *supra*, 24 Cal.3d at p. 806 ["this court has focused on foreseeability as the key component necessary to establish liability."].) This analysis necessarily requires individualized attention to the facts concerning the specific plaintiffs claiming economic injury. Courts routinely engage in such reasoned line-drawing to avoid concerns of limitless liability, and there is no reason to abandon courts' role as an effective check.

Here, SoCalGas itself acknowledged the foreseeability of harm to its neighbors—and did so in a manner that involved reasoned line drawing: "Because we are in the business of . . . storing . . . highly flammable and explosive materials . . . the risks such incidents may pose to our facilities and infrastructure, as well *as the risks to the surrounding communities are substantially greater than the risks such incidents may pose to a typical business*." (Toll FAC, Exhibit A to RJN, at ¶ 8; *citing* Sempra Energy 2014 10-K; emphasis added.) The foreseeability of harm to the surrounding community is particularly obvious with respect to Toll, the largest and most prominent business and landowner in Porter Ranch, located right on the border

of the Aliso Canyon Facility. In fact, SoCalGas employees must drive through Toll's Porter Ranch development to enter the Facility.

In an attempt to distract from the clearly foreseeable injuries to Petitioners, SoCalGas argues that allowing recovery for economic harm could result in "endlessly rippling claims for pure economic loss" (Answering Brief at p. 20), and presents the analogy of a neighbor who slips on the defendant's ice, but recovery is extended to the neighbor's barber, family members, his employer, and so on. (Answering Brief at pp. 35-36.)

The strained parade of hypothetical liability posited by SoCalGas goes well beyond the claims presented in these coordinated cases—which involve a discrete set of readily foreseeable plaintiffs directly harmed by SoCalGas's conduct. *Kesner* rejects this very rhetorical device, noting that concerns about limitless liability can be addressed through foreseeability by excluding from the scope of duty harm to those people for which the tortfeasor could not reasonably have anticipated injury. (See *Kesner*, *supra*, 1 Cal.5th at p. 1154 [citing *Cabral*, *supra*, 51 Cal.4th at p. 772].) And this Court further held that "[a]lthough defendants raise legitimate concerns regarding the unmanageability of claims premised upon incidental exposure, as in a restaurant or city bus, these concerns do not clearly justify a categorical rule against liability for foreseeable take-home exposure." (*Id.* at p. 1154.) Here, too, SoCalGas's concerns about "rippling claims" are addressed by limiting the scope of duty to plaintiffs for which SoCalGas could reasonably have anticipated injury, as *Rowland* permits, and as courts do all the time.

The rule proffered by SoCalGas is singularly concerned with only one aspect of the Court's duty analysis—preventing recovery by victims with claims that are sufficiently attenuated from the wrongful conduct —without considering, and with the undeniable impact of, excluding a broad swath of plainly foreseeable victims from recovering for their injuries. This is at odds with the balancing approach this Court has countenanced for decades. (See, e.g., *J'Aire*, *supra*, 24 Cal.3d at p. 805 ["This court has repeatedly eschewed overly rigid common law formulations of duty in favor of allowing compensation for foreseeable injuries caused by a defendant's want of ordinary care."]

C. The Court of Appeal Erred in Applying the *Biakanja* Factors

Even if the panel majority were correct in applying a presumption against duty instead of a presumption in favor of duty—it was not—the opinion below spurned decades of jurisprudence when it held that the first factor of the six factor *Biakanja* "balancing" test was a dispositive requirement, rather than one of six factors courts are required to balance. (See, e.g., *Biakanja*, *supra*, 49 Cal.2d at p. 650 [referring to the "balancing of various factors"]; *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 58-59 [finding that the first factor was not satisfied and continuing to analyze the remaining factors].) Treating the first factor as dispositive flies in the face of this Court's prior holdings and departs from six decades of precedent, as a Central District of California court recently noted in criticizing the panel majority's opinion:

> [T]he Court cannot accept that the California Supreme Court would continue to prescribe a six *factor* analysis—one that involves, according to *Biakanja*, a "balancing,"—when in fact the first factor is actually dispositive. Furthermore, '[i]n the absence of a controlling California Supreme Court decision, [the Court] must predict how the California Supreme Court would decide the issue.' The Court would be hard-pressed to predict that the California Supreme Court would suddenly depart from six decades of six-factor balancing.

(*Andrews v. Plains All American Pipeline, L.P.* (C.D.Cal., Feb. 6, 2018, CV 15-4113), ECF No. 418 at p. 2 (internal citations omitted).) While there should be no analysis under *Biakanja* in this case, the lower court's analysis was plainly erroneous and must be corrected if the Court reaches this issue.

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