Case No. 18-55850

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEITH ANDREWS, *ET AL.*,

Plaintiffs/Appellees,

v.

PLAINS ALL AMERICAN PIPELINE, L.P., *ET AL.*,

Defendants/Appellants.

Appeal from the United States District Court for the Central District of California, Case No. 2:15-CV-04113-PSG-JEM
The Honorable Philip S. Gutierrez, United States District Judge

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OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Plains All American Pipeline, L.P. (NYSE: PAA) is a publicly traded master limited partnership. Plains GP Holdings L.P. (NYSE: PAGP), a publicly traded master limited partnership, indirectly owns 10% or more of the outstanding common units of Plains All American Pipeline, L.P.

Plains Pipeline, L.P. is an indirect, wholly owned subsidiary of Plains All American Pipeline, L.P.

DATED: November 2, 2018

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INTRODUCTION AND SUMMARY OF ARGUMENT

District courts weighing whether to certify a class action have a "duty" to undertake a "rigorous analysis" of Rule 23's requirements, and "to take a 'close look' at whether common questions predominate over individual ones" under Rule 23(b)(3). *Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 34 (2013) (citation omitted). In this case, the district court failed to carry out this duty in analyzing what it recognized were the "vital issues" bearing on certification: "whether individualized questions predominate as to injury and causation," and whether "the size and scope of the proposed Subclass" preclude "a common inquiry" into Defendants' duty to Plaintiffs. (ER12; Order 11.) The court committed multiple errors of law in framing these issues, confusing the questions of whether the alleged misconduct actually caused legally compensable injury to Subclass members with the quantification of damages, and deeming it sufficient that Subclass members were "exposed" to a *risk* of harm. It exacerbated these errors by relying on a financial model that did not even *purport* to offer classwide evidence of injury and causation. This Court should reverse.

Defendants/Appellants Plains All American Pipeline, L.P., *et al.* ("Plains") own and operate an oil pipeline in Santa Barbara County. In 2015, the pipeline experienced an oil release. Plains shut down the line, and a federal regulator ordered Plains to suspend the line's operations indefinitely, pending further

investigation. Less than two weeks after the spill, Plaintiffs filed their class action lawsuit. The class now includes individuals and businesses connected to the Santa Barbara oil industry who assert claims of negligence and negligent interference with prospective economic advantage. The gravamen of Plaintiffs' claims is that the oil spill caused Plains to shut down the pipeline and caused regulators to order it to remain shut down, which caused certain offshore oil platforms and onshore oil facilities to curtail certain operations, which, in turn, caused Plaintiffs to suffer lost jobs or future revenues.

Plaintiffs initially sought to certify a class of employees and businesses who supported the oil platforms or were "dependent" upon "the functionality of Plains' pipeline," but the district court concluded the class was "overbroad." (ER82–83; CR 257 at 19–20.) The class "potentially include[d] any business within the vicinity of the oil platforms," the court explained, including businesses "whose damages may have been caused by other factors [beyond the pipeline leak], including poor performance or other declines in oil prices." (*Id.*) On a renewed motion, however, the court certified a similarly broad Oil Industry Subclass, limited only by the requirement that individuals and businesses have some contractual tie to the oil industry. The class includes:

> [i]ndividuals and entities who were employed, or contracted, to work on or to provide supplies, personnel, or services for the operations of the off-shore oil drilling platforms, Hidalgo, Harvest, Hermosa, Heritage, Harmony, Hondo, and/or Holly, off the Santa Barbara

> County coast, or the on-shore processing facilities at Las Flores/POPCO Gaviota, and/or Venoco/Ellwood, as of May 19, 2015.

(ER4; Order 3.)

Although the court deemed it "more narrowly defined" (ER11; Order 10), the certified Subclass—on its face—sweeps in myriad individuals and businesses. It includes not only employees who worked on the platforms and on-shore processing facilities, but also the potentially thousands of employees of companies with a contract to support those platforms and facilities. It includes these employees whether they actually lost their jobs as a result of the pipeline shutdown or their employment remained unchanged.

The certified Subclass also includes any company that contracted to provide any goods or services to support those facilities, whether it contracted directly with the platforms and processing facilities or with another third party. These businesses span companies focused on the oil industry (like companies supplying rig workers) to local companies providing general services (like pest control) to national companies with only an incidental tie to these facilities (like Verizon). The certified Subclass includes these companies irrespective of whether the pipeline shutdown actually caused them to lose business or money.

The district court candidly acknowledged that the Subclass includes employees "not injured as a result of the Pipeline shutdown," and "myriad businesses," some of which "continued to provide services following the

shutdown," as well as others whose performance was "subject to varying factors other than the oil spill that might affect their success and profitability." (ER15; Order 14.)

The district court nevertheless certified the Oil Industry Subclass. The court equated the individualized questions about whether Plains' alleged negligence caused Subclass members any injury to "individualized damage assessments," which, it concluded, posed no obstacle "at the class certification stage." (ER7; Order 6.) On the "vital issues" of "injury and causation," the court deemed it sufficient that putative Subclass members were "at the very least *exposed* to the shutdown," even if they did not actually suffer any economic harm attributable to it. (ER12, 15; Order 11, 14.) And despite recognizing that Plaintiffs' economic model "cannot assess damages"—or injuries—"for each individual member" (ER7; Order 6), the court deemed the model adequate to establish predominance.

The district court also determined that common issues predominated on the economic loss doctrine, which bars Plaintiffs from seeking purely economic losses on their negligence theories unless they can establish a "special relationship" with Plains giving rise to a duty of care to prevent economic harm. (ER12; Order 11.) Despite recognizing that the existence of a special relationship turns on a fact-bound, multi-factor test, the court concluded that it could resolve that issue without

individualized inquiries because all of the Subclass members had a "contractual relationship tying them to the oil industry." (ER13; Order 12.)

These grounds all rest on legal error.

First, *the district court improperly conflated the question of whether Plains' conduct caused any injury, which goes to liability, and damages, which goes to remedy*. It is blackletter law that "whether questions of law or fact common to class members predominate begins … with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011). Proving liability for both of Plaintiffs' negligence theories here requires a showing of "economic harm proximately caused by the defendant's negligence." *Redfearn v. Trader Joe's Co.*, 20 Cal. App. 5th 989, 1005 (2018). This Court has repeatedly distinguished between individual issues of proximate causation and injury, which can foreclose class certification, and individual damages calculations, which sometimes do not:

> To gain class certification, Plaintiffs need to be able to allege that their damages *arise from a course of conduct that impacted* the class. But they need not show that each members' *damages* from that conduct are identical.

Just Film, Inc. v. Buono, 847 F.3d 1108, 1120 (9th Cir. 2017) (emphasis added). By treating individualized questions about causation and injury as damages questions, the district court improperly relieved Plaintiffs of their burden to establish that common issues predominated on two key liability elements. Nor is

this result justified by the cases the court cited, which stand for the unremarkable, and inapposite, proposition that "[s]o long as the plaintiffs were harmed by the same conduct, disparities in how or by how much they were harmed [do] not defeat class certification." *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1168 (9th Cir. 2014). This case presents precisely the opposite scenario, for the putative Subclass members indisputably were *not* all harmed, much less "harmed by the same conduct."

Second, *the district court wrongly concluded that mere "expos[ure] to the alleged misconduct" sufficed for certification.* (ER15; Order 14.) This Court has focused on whether putative class members were "exposed to the same misrepresentations or deceptions" in a narrow set of class action cases alleging false advertising or information under California's Unfair Competition law ("UCL") and similar consumer protection statutes. *E.g.*, *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1069 (9th Cir. 2014), *abrogated on other grounds by Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017). Mere "exposure" may suffice in those cases because the statutes at issue do not impose the "elements of common-law fraud," but require only "that members of the public are likely to be deceived." *Id.* at 1068.

Unlike in consumer protection cases, "exposure" to a pipeline shutdown is legally insufficient to establish that Plains' conduct caused any tort injury. At

most, it connotes a *risk* of harm. A putative Subclass member who was "exposed" to the pipeline shutdown, but who did not lose a job or whose business suffered no losses, "'share[s] little in common'" with "'presently injured class members.'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997). Indeed, even the injured Subclass members share "little in common … with each other"; their work and businesses vary widely in their relationship to the oil platforms and facilities. If mere "exposure" were enough to certify in these circumstances, it would nullify the elements of proximate causation and injury for many Subclass members. That would contravene the settled principle that the class action device cannot be used to "enlarge" an individual plaintiff's substantive rights. *See id.* at 613.

Third, *Plaintiffs' economic loss model—the lynchpin of their purportedly common evidence—does not show whether Plains' conduct caused injury to Subclass members.* The principal evidence offered by Plaintiffs to support the Oil Industry Subclass was an economic loss model prepared by economist Peter Rupert. But Rupert did not even purport to show that the Subclass as a whole suffered economic harm from the pipeline shutdown. Rather, using a regression analysis, he opined that the shutdown led to a 34 percent reduction in employment in Santa Barbara's oil industry. (ER344–46; CR 351-1 ¶ 39.) The model focused only on employees, and ignored the businesses within the Subclass. It offered no means of identifying which employee Subclass members were among the

estimated 66 percent who suffered no job loss. It did not account for new jobs the employees may have found in other industries. And its job-loss figures included *new* jobs that hypothetically would have been created, even though the Subclass includes only workers actually employed at the time of the leak.

Instead of engaging these glaring deficiencies and undertaking a "rigorous analysis" of Rupert's report, the district court glossed over them. The district court deemed it unnecessary for Plaintiffs "to have a definitive method [for] calculating damages" (ER15; Order 14), and failed to "resolve the critical factual disputes [surrounding the adequacy of Rupert's model]." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011).

That was error. A "rigorous" predominance analysis requires the district court to "judg[e] the persuasiveness of [expert] evidence presented," not just its admissibility. *Id.* at 982. Here, however, the district court "seemed to end its analysis of [Rupert's model] after determining such evidence was merely admissible [under *Daubert*]." *Id.* The upshot was that the court certified the Oil Industry Subclass based upon an expert report that did not support, and actually undercut, the case for certification. An economic model's inability to link economic injury to the theory "on which [the Defendant's] liability in this action is premised" makes it inadequate to satisfy Rule 23(b)(3), *Comcast*, 569 U.S. at 36, and Rupert's model was untailored to the class definition: It included Plaintiffs

who were not Subclass members (potential new hires), while excluding an entire category of Plaintiffs who were (businesses). And because Rupert's expert report opined that most Subclass members were *uninjured*, it confirmed that the Subclass members' claims would require individual trials even if the question of injury were treated as a damages issue.

Fourth, *the district court erred in determining that common issues predominated on the question "whether a special relationship between Plaintiffs and Defendants existed" under California's economic loss doctrine.* (ER12; Order 11.) The court reasoned that the Subclass "only includes individuals and entities with contractual relationships to the oil industry." (ER13; Order 12.) But determining whether Subclass members have a "special relationship" will require the court to balance multiple factors, most of which focus on the degree of connection between Plains and the alleged economic harm. *See J'Aire Corp v. Gregory*, 24 Cal. 3d 799, 804 (1979); *Bily v. Arthur Young & Co.* 3 Cal. 4th 370, 399–407 (1992). Far from unifying the Subclass, the fact that each Plaintiff has some contractual tie to the oil industry is another point of variance. An employee who worked on a platform and lost her job after the pipeline shutdown has a far different connection to Plains' pipeline operation than a contractor that provided incidental services to the same platform, such as pest control, or than an employee of a national services company. The existence of a contract does not ensure "a

clear and definite connection" to Plains' conduct, nor does it permit "consistent" treatment of the many outside factors bearing on "causal chain[s]" in this case. (ER13; Order 12.)

This Court should reverse class certification.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1332(d). This Court has jurisdiction under 28 U.S.C. § 1292(3). The district court issued its order certifying the Oil Industry Subclass on February 9, 2018 (ER2), and this Court granted Plains' petition to appeal under Rule 23(f) on June 26, 2018 (ER1).

STATEMENT OF ISSUES

1. Whether the district court legally erred in certifying the Oil Industry Subclass where its predominance inquiry (a) improperly conflated questions of injury-in-fact and causation with quantification of damages, (b) improperly treated mere exposure to a risk of injury as sufficient to establish injury and causation, and (c) failed to undertake the required "rigorous analysis" of Plaintiffs' economic loss model.

2. Whether the existence of a contractual connection between a business or its employees and oil rigs or facilities impacted by the shutdown of Plains' pipeline can provide a common answer to whether a "special relationship" exists

between Plains and individual Subclass members that would allow them to sue Plains in tort for economic losses.

STATEMENT OF THE CASE

I. Procedural History

Plaintiffs filed their initial class action complaint on June 1, 2015, less than two weeks after the spill. (CR 1.) Following consolidation proceedings (CR 40), Plaintiffs filed the operative, Second Amended Complaint ("SAC") on April 6, 2016 (ER865; CR 88). Plaintiffs sought to certify four subclasses. The district court initially certified a single subclass of workers and businesses in the fishing industry and denied certification of the other three subclasses, including the Oil Industry Subclass at issue in this appeal. (ER64; CR 257.)

Before the court considered a renewed motion for class certification, it permitted Plains to move for partial summary judgment on all of the claims raised by the named Oil Industry Subclass members. (CR 293.) On August 25, 2017, the court granted the motion in part, dismissing all of the oil industry Plaintiffs' claims except for negligence and negligent interference with prospective economic advantage. (ER37; CR 350.)

While the summary judgment motion was pending, Plaintiffs moved again for class certification. (CR 300.) On February 9, 2018, the district court granted

the motion and certified the Oil Industry Subclass. (ER2; CR 419.) Plains' Rule 23(f) petition, and the Court's order allowing this appeal, followed.

II. Background

A. The Pipeline Suspension

Plains owns and operates Line 901, a 10-mile crude oil pipeline in Santa Barbara County, California. On May 19, 2015, Line 901 leaked, and some of the leaked oil reached the Pacific Ocean near Refugio State Beach, about 20 miles west of Santa Barbara. Plains suspended operations on the line, and immediately began working with federal and state authorities on an extensive cleanup and response effort. (ER582–84; CR 161 ¶¶ 44–52.)

Two days after the leak, on May 21, 2015, the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration ("PHMSA") issued a Corrective Action Order directing Plains not to operate Line 901 until the agency authorized it. (ER38; CR 350 at 2.) The Corrective Action Order has since been amended several times, and later extended the shut-down requirement to a portion of Line 903, an approximately 130-mile pipeline that connects to Line 901 and transports oil inland to the Bakersfield area. (*Id.*)

Lines 901 and 903 transported oil produced at seven offshore Santa Barbara platforms, three owned and operated by Exxon, three owned and operated by Freeport-McMoran ("Freeport"), and one owned and operated by Venoco.

(ER876–77; ER820–21; SAC ¶¶ 47–48; Ans. ¶¶ 47–48.) Since the pipelines have been closed, the platforms continue to be manned, but have not produced crude oil. (*Id.*)

B. The Lawsuit

The Plaintiffs in this appeal are individuals and businesses connected to the Santa Barbara oil industry who seek economic damages from Plains based on negligence claims. None of the Plaintiffs worked for Plains, had a contract with Plains, or had any other direct relationship with Plains that created any duties or obligations that Plaintiffs were entitled to rely upon.

Two of the named Plaintiffs, Boydston and Wilson, were employed by companies that contracted with Exxon to provide workers to work on its platforms, and allege they were laid off after Line 901 suspended operations. (ER803–04; ER781–82; Boydston Decl. ¶¶ 1–2, 8; Wilson Decl. ¶¶ 1, 4–7, 11.) Plaintiff Guelker worked at another Exxon contractor, Tidewater Marine Western, Inc. ("Tidewater"). (ER792–93; Guelker Decl. ¶¶ 1–7.) Guelker alleges he was laid off from his job on a supply vessel because Tidewater lost its contract with Exxon in the wake of Line 901's suspension of operations. (*Id.*)

Two named oil industry Plaintiffs, Frazier and Lilyglen, worked for businesses that contracted to provide workers to the Freeport platforms. (ER798; ER787; Frazier Decl. ¶¶ 1–5; Lilygren Decl. ¶¶ 1–4.) They allege that they were

laid off because the Freeport platforms were shut-in as a result of the suspension of operations on Line 901. (*Id.*).

Finally, Plaintiff TracTide Marine provides marine fuels to supply and crew vessels for oil drilling platforms in the Port of Hueneme. (ER808–09; Belchere Decl. ¶¶ 1–4.) TracTide Marine did not have a contract with any platform operator; it subcontracted with vendors that contracted directly with Exxon and Freeport to provide fuels for their offshore operations. (*Id.*) TracTide alleged it lost revenues because the platforms have been shut-in. (*Id.*)

C. The Class Certification Motions

Plaintiffs' first class certification motion sought to certify an Oil Industry Subclass that included any "[p]ersons or entities who worked on or supported the oil platforms off the Santa Barbara Coast, and whose jobs or businesses were dependent, in whole or in part, upon the functionality of Plains' Pipeline as of May 19, 2015." (CR 123 at 6.)

The district court denied Plaintiffs' motion to certify the Oil Industry Subclass, as well as property owner and tourism subclasses, certifying, at that time, only a fisher and fish industry subclass. (ER64; CR 257.) As to the Oil Industry Subclass, the court "agree[d with Plains] that this subclass [was] overbroad," and the "potential scope of the subclass" foreclosed the court from "conclud[ing] that it [was] sufficiently cohesive or that common questions would predominate over

uncommon ones." (ER83; *id.* at 20.) The court noted that the class "potentially includes any business within the vicinity of the oil platforms, and businesses in communities with high concentrations of oil platform workers where much of the income … comes from the oil platforms." (*Id.*) In order for putative class members to recover on Plaintiffs' negligence theory, the court noted, Plaintiffs would need to establish "that the defendant owed the plaintiff a duty of care." (*Id.*) The breadth of the class precluded classwide evidence on this score, since "[a] jury may very well conclude that [Plains] owed some duty to the workers actually employed on the platforms, but not to the restaurant owners in the workers' home communities or those whose damages may have been caused by other factors, including poor performance or other declines in oil prices." (*Id.*)

The court denied Plains' motion to strike Plaintiffs' expert, but nonetheless concluded that the economic model offered by Plaintiffs' expert did not support the proposed Oil Industry Subclass. (ER72–74, 83; CR 257 at 9–11, 20.) While Plaintiff's expert promised to "collect wage and hour information, as well as information on layoffs and contracts cancelled and renegotiated, from oil platform operators," the proposed analysis said "nothing about businesses that have no formal contracts with the oil platform operators." (*Id.*)

D. The Summary Judgment Motion

Plains filed a motion for partial summary judgment on July 6, 2017, as to all of the oil industry Plaintiffs' individual claims. The district court granted Plains summary judgment as to each of Plaintiffs' claims, except for their claims for negligence and negligent interference with prospective economic advantage. (ER63; CR 350 at 27.)

Plains argued that Plaintiffs' negligence claims were barred by California's "economic loss rule." That rule prohibits third parties from recovering purely economic losses in tort unless they can show that they "fit into the narrow 'special relationship' exception to [that] … rule." (CR 293-1 at 1.) Plains argued that Plaintiffs could not satisfy that "special relationship" test, because, among other things, they could not show "that Plains' transportation of oil was … *specifically* intended to affect the Oil Industry Plaintiffs," which "'precludes a finding of 'special relationship.'" (*Id.* at 10–11).

The court agreed that Plaintiffs could not establish that Plains' operation of Line 901 was "intended to affect" Plaintiffs, but concluded that this factor was not "dispositive" of the "special relationship" inquiry. (ER50–52; CR 350 at 14–16.) After considering the remaining factors that California courts use to determine the existence of a "special relationship," the court concluded that "it [was] not prepared at this time to conclude, as a matter of law, that a special relationship

permitting recovery for economic losses does not exist between [Plains] and the Oil Industry Plaintiffs." (ER59; *id.* at 23.)

E. The Renewed Class Certification Motion

While the summary judgment motion was pending, Plaintiffs filed a renewed class certification motion. This time, Plaintiffs defined the Oil Industry Subclass to include "[i]ndividuals and entities who were employed, or contracted, to work on or to provide supplies, personnel, or services for the operations of the [specified] off-shore oil drilling platforms." (CR 300-1 at 6.) Plaintiffs offered the expert testimony of a new expert, Peter Rupert, who promised to develop a regression model demonstrating job loss and economic injury. (ER331.)

Plains again opposed certification, arguing Plaintiffs' claims still raised individual issues that predominated over common ones. (CR 389 at 1.) Plains also argued that Plaintiffs could not establish by common evidence that their remaining negligence claims survived the "economic loss rule," because (a) none of the Plaintiffs could satisfy the "special relationship" test's first—and dispositive—factor, and (b) the remaining factors would require numerous individualized inquiries. (*Id.* at 9–10, 19–20.) Finally, Plains moved to strike Plaintiffs' supporting expert opinion on *Daubert* grounds, challenging it as unreliable and insufficient to show which class members were actually injured. (CR 368-2 at 24–30.)

The district court certified the following Oil Industry Subclass:

> Individuals and entities who were employed, or contracted, to work on or to provide supplies, personnel, or services for the operations of the off-shore oil drilling platforms, Hidalgo, Harvest, Hermosa, Heritage, Harmony, Hondo, and/or Holly, off the Santa Barbara County coast, or the on-shore processing facilities at Las Flores/POPCO Gaviota, and/or Venoco/Ellwood, as of May 19, 2015.

(CR 300-1 at 6.) The subclass includes businesses that had no contractual relationship with Plains, but instead contracted or even sub-contracted to provide supplies, services, or workers to the platforms and onshore facilities. (ER792–93; ER808–09; Guelker Decl. ¶¶ 1–7; Belchere Decl. ¶¶ 1–4.) It includes employees not only of the platform and facilities operators, but also employees of businesses that contracted or subcontracted to support those operations. (ER803–04; ER798; ER787; ER781–82; Boydston Decl. ¶¶ 1–2, 8; Frazier Decl. ¶¶ 1–5; Lilygren Decl. ¶¶ 1–4; Wilson Decl. ¶¶ 1, 4–7, 11.)

The district court reasoned that the new, "more narrowly defined subclass addresses its prior concerns and presents common legal questions with manageable inquiries." (ER11; Order 10.) The court acknowledged that "at least some class members were not injured as a result of the Pipeline shutdown," but it reasoned that "the need for some individualized inquiries need not defeat class certification," and the court deemed it sufficient that "all employees were at the very least *exposed* to the shutdown, which distinguishes the proposed Subclass from classes that include members who never experienced the alleged misconduct." (ER14–15;

Order 13–14.) Similarly, while acknowledging that the Subclass included a "myriad [of] businesses," including some "subject to varying factors other than the oil spill that might affect their success and profitability," the court concluded that these individual issues "do[] not preclude certification as long as the members were at least *exposed* to the alleged misconduct." (ER15; Order 14.) The court reasoned that "'individualized damage assessments" were not a bar "at the class certification stage." (ER7; Order 6.)

The district court denied Plains' related motion to strike Plaintiffs' expert report, concluding that "Rupert's methodology satisfies Rule 702." (*Id.*) While noting that "Rupert's model cannot assess damages for each *individual* member," the court treated this as a "predominance analysis" issue rather than a *Daubert* challenge." (*Id.*) "[W]hatever faults that may exist in Rupert's data and calculations," the court concluded, they were not fatal to its admissibility because "Rupert will likely do additional work." (*Id.*)

The court acknowledged that under its recent summary judgment order, Plaintiffs must overcome the economic loss rule, showing that a "special relationship" existed between themselves and Defendants. (ER12; Order 11.) But the court concluded that Plaintiffs could establish such a relationship based on common evidence because "each Subclass member would have a contractual relationship tying them to the oil industry." (ER13; Order 12.)

STANDARD OF REVIEW

This Court reviews class certification decisions for an abuse of discretion. *See Yokoyama v. Midland Nat'l Life Ins. Co*., 594 F.3d 1087, 1091 (9th Cir. 2010). However, the "[C]ourt has oft repeated that an error of law is an abuse of discretion." *Id.* "Thus, when an appellant raises the argument that the district court premised a class certification determination on an error of law, [the Court's] first task is to evaluate whether such legal error occurred." *Id.*; *see also Zinser v. Accufix Research Inst*., 253 F.3d 1180, 1186–88 (9th Cir. 2001).

ARGUMENT

I. The District Court Erred In Holding That Purported Classwide Economic "Exposure" To The Pipeline Shutdown Is Sufficient To Certify A Class Under A Negligence Claim

District courts are charged with "conduct[ing] a 'rigorous analysis'" to determine whether plaintiffs have met their Rule 23(b)(3) burden to establish that common questions "predominate over any questions affecting only individual members." *Id.* at 1186, 1189. The district court failed to meet that standard in certifying the Oil Industry Subclass, and in the process committed multiple errors of law.

First, the court improperly conflated the question of whether Plains' alleged misconduct proximately caused actual injury to the putative Subclass members with "calculating damages." (ER15; Order 14.) Proximate causation and injury are distinct elements of Plaintiffs' negligence claims under California law, and this

Court's precedents make clear that individual issues regarding *causation* and the *fact* of injury or damage foreclose certification even if the need for individual inquiries into the *amount* of damages sometimes may not.

Second, the district court erred as a matter of law in reading this Court's cases to hold that a class may "include members who were not injured" so "long as the members were at least *exposed* to the alleged misconduct." (*Id.*) That principle is limited to class actions alleging false advertising or misrepresentations under consumer protection laws that require only a *likelihood* of deceiving the general public, or that otherwise relax the tort element of injury and proximate causation. It has no application here.

Third, the district court exacerbated these legal errors by refusing to engage, much less rigorously examine, the deficiencies identified by Plains and its experts in the economic loss model offered by Plaintiffs. As a result, the court certified the Subclass on the basis of a model that refutes, rather than demonstrates, classwide injury, and is misaligned to the certified Subclass, ignoring the businesses within the Subclass while including employees *outside* it. Because the model does not match or support Plaintiffs' theories of economic loss to the putative Subclass members, it is inadequate to support certification and, if anything, confirms that this case is unsuitable for class treatment.

A. The District Court Committed Legal Error, And Relieved Plaintiffs Of Their Predominance Burden, By Conflating The Fact of Injury, Which Goes To Liability, With The Amount Of Damages

1. The District Court's Analysis Of Injury And Causation Contravenes Both Negligence And Class Certification Law

Class treatment "is justified where the class members and the class representative possess the same interest and have suffered the same injury." *Alcantar v. Hobart Serv.*, 800 F.3d 1047, 1052 (9th Cir. 2015). This Court has made clear that Rule 23(b)(3)'s predominance requirement is not met if the putative class claims present "individual causation and injury issues," demanding "proof specific to [the] individual litigant." *Wolin v. Jaguar Land Rover N. Am.*, 617 F.3d 1168, 1174 (9th Cir. 2010); *accord In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869*, 725 F.3d 244, 252 (D.C. Cir. 2013) (predominance requires proof "through common evidence, that all class members were in fact injured by the alleged [misconduct]").

This "[p]roof of injury (whether or not an injury occurred at all) must be distinguished from calculation of damages (which determines the actual value of the injury)." *Newton v. Merrill Lynch, Pierce, Fenner & Smith*, 259 F.3d 154, 188 (3d Cir. 2001). Accordingly, while "[d]amage calculations alone cannot defeat class certification," *Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 513 (9th Cir. 2013), individualized issues as to whether defendant's conduct caused *any* injury

to putative class members can foreclose class certification, *see, e.g.*, *Alcantar*, 800 F.3d at 1054 (upholding denial of class certification because individual "questions as to why [the plaintiffs] missed their meal and rest breaks … would predominate over questions common to the class"); *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 664 (9th Cir. 2004) (certification denial upheld where "individualized reliance issues related to proof of causation would predominate over common questions").

Here, the district court acknowledged that "at least some class members were not injured as a result of the Pipeline shutdown" and that "other factors" could bear on whether the shutdown caused individual Subclass members' claimed injuries. (ER15; Order 14 (internal quotation marks omitted).) That should have been the end of the matter, because it meant Plaintiffs could not offer common liability evidence. An analysis of "[w]hether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund.*, 563 U.S. at 809; *accord Abdullah v. U.S. Sec. Assocs.*, 731 F.3d 952, 965 (9th Cir. 2013). To make out their negligence cause of action under California law, Plaintiffs must establish that Plains breached its duty of care, and that this breach was "a proximate cause of the plaintiff's injury." *Federico v. Superior Ct.*, 59 Cal. App. 4th 1207, 1210–11 (1997); *Baptist v. Robinson*, 143 Cal. App. 4th 151, 167 (2006) (elements of negligence are (1) a duty of care, (2) breach of that duty, (3) proximate causation, and (4) resulting

damages). Similarly, negligent interference with prospective economic advantage requires, as an "element," a showing of "economic harm proximately caused by the defendant's negligence." *Redfearn*, 20 Cal. App. 5th at 1005.[1]

It is precisely "[b]ecause the proximate causation analysis involves individualized factual issues" that "courts generally consider negligence claims ill-suited for class action litigation." *Gartin v. S & M NuTec LLC*, 245 F.R.D. 429, 439 (C.D. Cal. 2007); *cf. Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("[H]istorically, certification of mass tort litigation classes has been disfavored."); Adv. Comm. Notes to 1966 Amend. to Fed. R. Civ. P. 23(b)(3) ("A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways.").

Instead of denying class certification on the basis of this fundamental defect, as it initially did, the district court minimized the inherently individualized inquiries required to identify which members of the Oil Industry Subclass actually suffered economic injury from the pipeline shutdown. The court reasoned that "[a]s for injuries, Plaintiffs are not required to have a definite method of

[1] Why the existence of a duty of care cannot be proven with common evidence is addressed in Section II, below.

calculating damages at class certification." (ER15; Order 14.) But in treating the existence of economic injury as an issue of damages calculation, the court collapsed two distinct elements and certified a Subclass where Plains' *liability* was not susceptible of common evidence. While this Court has noted "damages calculations alone [can]not defeat class certification," *Jimenez*, 765 F.3d at 1167 (citation omitted), it has also recognized the difference between injury and damages:

> To gain class certification, Plaintiffs need to be able to allege that their damages arise from a course of conduct that *impacted* the class. But they need not show that each members' *damages* from that conduct are identical.

Just Film, 847 F.3d at 1120 (emphasis added). This common-sense distinction is well-grounded in cases from this Court and across the Circuits. Those authorities show that where, as here, "it is clear that at least some of the plaintiffs have not suffered economic injury, individual questions remain that would have to be adjudicated separately." *Newton*, 259 F.3d at 190; *In re Asacol Antitrust Litig.*, 2018 WL 4958856, at *6 (1st Cir. Oct. 15, 2018) (slip op.) (reversing certification where 10% of the class was uninjured, and thus "injury-in-fact will be an individual issue, the resolution of which will vary among class members").

In ignoring the difference between injury and damages, the district court erred as a matter of law. First, it contravened the settled principle that plaintiffs seeking certification must show that common issues predominate on "the elements

of the class member's case-in-chief." *E.g.*, *Parsons v. Ryan*, 754 F.3d 657, 676 (9th Cir. 2014). That principle required the district court to treat injury and causation, on the one hand, and damages, on the other, as distinct elements of Plaintiff's negligence cause of action in testing their offer of common proofs. *Cf. Rail Freight*, 725 F.3d at 252 ("The plaintiffs must also show that they can prove, through common evidence, that all class members were in fact injured…. That is not to say the plaintiffs must be prepared at the class certification stage to demonstrate through common evidence the precise amount of damages incurred by each class member."); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6 (1st Cir. 2008) (similar).

Second, and more critically, the district court misread this Court's precedents on predominance. The court relied on *Jimenez*'s observation that "[s]o long as the plaintiffs were harmed by the same conduct, disparities in how or by how much they were harmed [do] not defeat class certification." (ER15; Order 14 (quoting 765 F.3d at 1168).) But the quoted holding of *Jimenez*, as well as related cases, reflects the critical distinction between common questions of causation and injury (whether "plaintiffs were harmed by the same conduct") and individualized damages issues ("how or by how much they were harmed"). In *Jimenez*, the plaintiff's wage-and-hour claims challenged the defendant's "informal or unofficial policy" of treating their pay as "salaries for which overtime was an

'exception.'" 765 F.3d at 1166. The question of whether the plaintiffs "were harmed by the same conduct" was susceptible of classwide proof because plaintiffs challenged an employer policy; this Court was referring strictly to damages when it upheld certification despite "disparities in how or by how much [the plaintiffs] were harmed." *Id.*

This Court has subsequently adhered to the principle that "[i]f the plaintiffs cannot prove that damages *resulted from* the defendant's conduct [with common evidence], then the plaintiffs cannot establish predominance." *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1154 (9th Cir. 2016) (emphasis added); *see Zinser*, 253 F.3d at 1189 (**"**[T]o determine causation and damages for each of the three claims asserted here, it is inescapable that many triable individualized issues may be presented.").

2. This Court's Precedents Confirm That Certification Was Improper Here Because Causation And Injury Vary Among Class Members On Plaintiff's Own Evidence

Far from supporting certification, *Jimenez* and similar wage-and-hour cases were recently applied in a way that highlights the district court's error here. "In a wage and hour case," this Court explained, "the employer-defendant's actions *necessarily* caused the class members' injury." *Vaquero*, 824 F.3d at 1155. Because "Defendants either paid or did not pay their [employees] for work performed," and "[n]o other factor contributed to the alleged injury," there was no

question that the putative class members' injuries "stemmed from *Defendants*' actions" even if "the measure of [classwide] damages proposed" was "imperfect." *Id.* The same reasoning explains the Court's willingness to uphold certification of the wage-and-hour class actions, despite individual damages issues, in *Jimenez* and *Leyva*, and, conversely, the Court's reversal of certification orders where the defendant's wage-and-hour policies did "nothing to facilitate common proof on the otherwise individual issues," *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 959 (9th Cir. 2009).

Jimenez's reasoning is manifestly inapplicable here. The putative Subclass includes Plaintiffs who "were not injured as a result of the Pipeline shutdown" (ER15; Order 14) precisely because the sheer breadth of the Plaintiffs' Subclass and their boundless economic loss theory foreclosed any possible inference that "the [] defendant's actions [here] *necessarily* caused the class members' injuries." *Vaquero*, 824 F.3d at 1155. Plaintiffs contend that Plains' conduct caused an oil release, which led Plains to shut down Line 901 and then caused regulators to keep it shut down, which in turn led certain offshore oil platforms and oil processing facilities to suspend operations, and which only then caused economic injury to *some* of the Subclass members who had a contractual connection to those platforms and facilities (but not to Plains itself). They seek to recover for alleged economic harms suffered by businesses and employees with varying, and often

remote, connections to the pipeline shutdown, where "other factors *could have* contributed to the alleged [economic] injury." *Id*. (emphasis added).

The proposed Oil Industry Subclass embraces any company that had a contract, and any employee who had a job, to provide goods or services to the oil platform or onshore processing facilities. It includes not just oil-related companies and employees whose work focused on the facilities' operations, but also companies and employees in other industries who only incidentally provided goods and services to the facilities. (ER1143–44; CR 389-4 ¶ 31.) The connection between Plains' alleged negligence and any economic harm suffered by these putative Subclass members varies dramatically, from oil rig workers (like named Plaintiffs Boydston, Wilson, and others) who allegedly lost their jobs following the pipeline spill, to national, publicly-traded companies like Verizon whose financial performance bears no meaningful relationship to the spill. (ER1143–47; *id.* ¶¶ 31–36.) Because the connection between the putative Subclass members and Plains is so varied and, in many cases, so indirect, the question of whether a given Plaintiff suffered an economic injury proximately caused by the spill is inherently fact-bound and riven with many intervening factors. *Cf. Benefiel v. Exxon Corp.*, 959 F.2d 805, 807 (9th Cir. 1992) (Exxon Valdez oil "spill itself did not directly cause an injury to the [plaintiff gasoline consumers]," as "plaintiffs alleged the spill triggered a series of [] events").

The requirement that "each Subclass member had a contract" with *somebody* (ER15; Order 14), is no limiting factor at all, but another point of variation. There is no reason to think the contracts—which include contracts and subcontracts among thousands of vendors to the platforms and facilities—are even close to uniform, and the existence of a contract does nothing to offset the external factors that bear on the causation of injuries to remote companies and employees.

The fact that employees may have had employment contracts does not make their claims susceptible to common proof. Plaintiffs' own expert estimated that there was a 34 percent decline in oil industry employment after the spill, but even taking that number at face value means 66 percent of employee Subclass members were not injured. (ER344–46; CR 351-1 ¶ 39.) Other evidence underscores the uncontroverted fact that many Subclass members suffered no injury. For example, some oil platform workers were transferred to other locations after the pipeline shutdown and did not lose their jobs—although Plaintiffs' expert's methodology treats transfers as job losses. (ER1136; CR 389-4 ¶ 18.)

Putative Subclass members who worked for companies who performed incidental work for the platforms and onshore facilities, such as telecommunications, pest control, and landscaping companies, may have seen no reduction in hours or pay. (ER1136–37; *id.* ¶ 19.) Even if the class were limited to employees who lost their jobs or had their hours reduced, causation would *still* be

individualized because countless other factors, from violating company policies to a failed drug test to business changes unrelated to the spill, may have caused the layoff or hours reduction. (ER1137; *id.* ¶ 20.) The district court made this very point in rejecting Plaintiffs' initial certification motion, noting that the Subclass members' "damages may have been caused by other factors, including poor performance or other declines in oil prices." (ER83; CR 257 at 20.)

As for businesses, there is an equal, if not greater, risk that "other factor[s]" could have contributed to any economic injury. *Cf. Vaquero*, 824 F.3d at 1155. Because the Subclass includes contractors and subcontractors who provided general goods and services to the platforms and onshore facilities, as well as oil-related businesses, many of the businesses may have been unscathed by the pipeline shutdown. (ER1143–44, 1147; CR 389-4 ¶¶ 31, 36.) Businesses like landscaping and pest control services may have continued to carry out their contracts and provide services undisturbed, with no effect on their contract, and no reduction in their revenue. (*Id.*) Even for the businesses that *did* suffer economic losses after May 19, 2015, individualized inquiries would still be required to determine the *cause* of those losses, which could be attributable to a wide range of factors other than the spill, including competition, local, state, national, and global industry trends, and changes in distribution, supply, or corporate structure. (ER1149–50; *id.* ¶¶ 41, 42.) The fact that the Subclass, in the district court's

words, includes a "diverse collection of parties potentially scattered across the globe" (ER13; Order 12) only underscores the need for individualized inquiries into causation and injury (ER1148; CR 389-4 ¶¶ 39–40).

It is no answer to say that courts have sometimes recognized that "fortuitous non-injury to a subset of class members does not necessarily defeat certification of the entire class." *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1137 (9th Cir. 2016). The problem here is not that a handful of Subclass members fortuitously avoided the common harm that a defendant inflicted upon an otherwise cohesive class. Instead, the problem is that, by Plaintiffs' expert's own reckoning, two-thirds of the employee Subclass members did not lose their jobs, that Plaintiffs have no evidence that businesses suffered any common injury, and that Plaintiffs have presented no method by which they can determine which Subclass members suffered injury and which did not. Courts rightly deny certification under these circumstances. *E.g.*, *Schellenbach v. GoDaddy.com, LLC*, 321 F.R.D. 613, 625 (D. Ariz. 2017) (denying certification where "almost one-third of the proposed class members were never subjected to [the] allegedly wrongful conduct"); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 292 F. Supp. 3d 14, 138 (D.D.C. 2017) (denying certification because evidence that 12.7 percent of class was uninjured was "beyond the outer limit of what can be considered de minimis for purposes of establishing predominance"); *Wyatt v. Phillip Morris USA, Inc.*, 2013 WL

4046334, at *3 (E.D. Wis. Aug. 8, 2013) ("[T]he problem is not just that the class as defined likely contains a large number of persons who suffered no injury…. It is also that it is impossible to distinguish between the class members who were injured … and those who were not without holding an individualized hearing.").

The certification record here thus confirms what this Court recognized in *Vaquero*: The nature of the Plaintiffs' claims matters. Because Plaintiffs assert purely economic harms on behalf of employees and companies in a myriad of businesses, with radically different causation chains, this case is nothing like a *Jimenez* wage-and-hour case. It is, instead, more analogous to the "antitrust case[s]" that the *Vaquero* court used to illustrate variance in proximate causation. *See* 824 F.3d at 1154–55. In an antitrust case, the central causation issue posed by the plaintiffs' claims is often the existence of antitrust injury or "impact": whether the defendant's alleged anti-competitive conduct, or unrelated market forces, caused the plaintiff's economic injury. *See Theme Promotions, Inc. v. News Am. Markets FSI*, 546 F.3d 991, 1001 (9th Cir. 2008) ("[A]ntitrust injury and proximate cause are closely related concepts."). Because an antitrust plaintiff "'must prove that his loss flows from an anticompetitive aspect of the defendant's behavior,'" *Glen Holly Entm't v. Tektronix, Inc.*, 343 F.3d 1000, 1008 (9th Cir. 2003), "impact often is critically important for the purpose of evaluating Rule 23(b)(3)'s predominance requirement because it is an element of the claim that may call for

individual, as opposed to common, proof," *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008). The same is true here.

The importance of distinguishing between injury and damages in cases asserting purely economic harms is illustrated by *Motor Vehicles*, 522 F.3d at 28–29. There, the plaintiffs sought to certify a class of automobile consumers who purportedly paid inflated prices as a result of a conspiracy to block lower-priced imports from Canada. *Id.* at 8. The plaintiffs proposed a "novel and complex" theory of economic injury, relying heavily on the "inference" that "a restriction on the supply of lower-priced cars coming into the United States market w[ould] exert an upward pressure on domestic car prices." *Id.* at 8, 21, 22, 26. The district court granted certification, finding that common issues predominated, and that "the mere fact that there are differences among members of [the] class regarding their individual amounts of damages does not preclude class certification." *Id.* at 23.

The First Circuit reversed. It explained that "plaintiffs' theory" of common impact resulting from the manufacturers' conspiracy "must include some means of determining that each member of the class was in fact injured, even if the amount of each individual injury could be determined in a separate proceeding." *Id.* at 28. In other words, while "[p]redominance is not defeated by individual damages questions … , [e]stablishing *liability* … still requires showing that class members were injured at the consumer level." *Id.* (emphasis added). Because there were

"[t]oo many [individualized] factors" that might "play into" the price a given consumer paid, the court held that the predominance inquiry was not satisfied. *Id.* at 28, 29.

In this case, as in *Motor Vehicles*, Plaintiff's putative Subclass rests on a "novel and complex" theory of purely economic loss and causation, extending to companies and employees far downstream from Plains. Here, as in *Motor Vehicles*, Rule 23(b) required Plaintiffs to offer "some means of determining that each member of the class was in fact injured," even if damages could be determined individually. And here, as in *Motor Vehicles*, the district court erred in conflating the two and eliding the "many factors" that "play into" the injury and proximate causation analysis in this case.

B. The District Court's "Exposure" Theory Misapplied Binding Precedent Limiting This Theory To Informational Harm Cases, And Cannot Be Used To Gloss Over Individualized Issues Concerning Injury

The district court reasoned that it could certify the Subclass even though "some class members were not injured as a result of the Pipeline shutdown," because all class members were "at the very least *exposed* to the shutdown." (ER15; Order 14.) This too was legal error. The principle that exposure to alleged misconduct can support certification arises from cases asserting false advertising claims under California and similar state consumer protection laws. Far from supporting a general "exposure" principle of certification, those cases rest on the

peculiarities of state statutes that differ from tort claims and provide expansive relief for consumers. Those cases have no application where, as here, Plaintiffs seek damages on negligence theories requiring proof of injury and causation.

To support the "exposure" theory, the district court relied on *Torres*, an unfair competition case that in turn relied upon a line of cases analyzing predominance in the context of false advertising claims under California's UCL. *See* 835 F.3d at 1136 (citing *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012), and *Berger*, 741 F.3d at 1068–69). Those cases stressed that "[u]nlike common-law fraud claims," California's UCL requires the plaintiff "only to show that members of the public are likely to be deceived." *Berger,* 741 F.3d at 1068 (quoting *In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (2009)); *see also Mazza*, 666 F.3d at 595. Concluding that the UCL permits relief "without individualized proof of deception, reliance or injury," these cases reason that a UCL class may satisfy the predominance requirement so long as its members were all "*exposed* to advertising that is alleged to be materially misleading." *Id.* at 595–96 (emphasis added). In that situation, California law "has created what amounts to a conclusive presumption" that "the defendant has caused an injury [to consumers]." *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020 n.13 (9th Cir. 2011).

The district court erred in unmooring this "exposure" principle from its anchor in claims involving alleged "informational injury" under California's UCL and similar statutes. *Torres*, 835 F.3d at 1136–37. It is only because such statutes provide broad consumer protections, and typically do not require tort elements such as injury and causation, that mere classwide "exposure" to the same alleged misrepresentations suffices for certification. *See Pulaski v. Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 986 (9th Cir. 2015) ("[A] court need not make individual determinations regarding entitlement to restitution" under the UCL when alleged misrepresentations were presented all class members.). That is why the predominance test in these cases focuses on whether the class was "exposed" to the same misrepresentation or omissions or, instead, to "disparate information." *Compare Mazza*, 666 F.3d at 596 (predominance not met where putative class members "were exposed to quite disparate information from various representatives of the defendant" (citation omitted)) *and Berger*, 741 F.3d at 1068 (similar), *with Stearns*, 655 F.3d at 1020 (reversing denial of class certification because the district court erred in assuming "proof of reliance and causation would be required" under the UCL) *and Pulaski*, 802 F.3d at 986 (similar).

Torres is yet further afield. The certified class there asserted an "informational injury" under a Washington state consumer protection statute providing relief even if the consumer's injury is not "'great, or even quantifiable.'"

835 F.3d at 1135 (citation omitted). Like the wage-and-hour class actions discussed above, the plaintiffs' claims challenged a "common [employee] policy or practice" that, "if proven, is evidence that the class as a whole was exposed to purportedly misleading omissions." *Id.* at 1137.

This "exposure" theory has no bearing on the certification issues here. Plaintiffs' certified causes of action are not based upon the UCL or any other unfair competition law; they sound in negligence. Even in cases alleging informational injuries, this Court has recognized that individual issues may predominate if the plaintiffs' claims sound in fraud, and they "must show that the defendants' alleged misconduct proximately caused the injury." *Poulos*, 379 F.3d at 664–65. The negligence claims asserted here likewise require proof that Plains' conduct proximately caused Plaintiffs' alleged injuries.

Classwide exposure may be a predominating question when the actionable injury consists of a *likelihood* of deceiving the public, and the defendant made uniform statements or omissions to the putative class. *See Berger*, 741 F.3d at 1069. But because Plaintiffs' negligence theories require a showing of proximate causation and injury, and because the asserted injury here is economic, rather than informational, the rationale of the exposure cases does not fit. Mere "exposure" to some *risk* of economic injury—which is all that binds the class here—is not the same as actually suffering that injury.

Risk of injury is not enough to state a claim for negligence or negligent interference, *see Int'l Engine Parts, Inc. v. Fedderson & Co.*, 9 Cal. 4th 606, 608 (1995) ("[U]ntil the client suffers damage or actual injury from the negligence, a cause of action for professional negligence cannot be established."), which is why such claims do not even accrue until "the aggrieved party has suffered actual injury as a result of the negligent conduct," *Apple Valley Unified Sch. Dist. v. Vavrinek, Trine, Day & Co., LLP*, 98 Cal. App. 4th 934, 942 (2002). Classwide proof of *potential* injuries, or a *risk* of harm, is not enough to show predominating issues of injury and causation, for a court would necessarily have to undertake a further inquiry into whether any given class member in fact suffered economic harm proximately caused by the shutdown. *See Poulos*, 379 F.3d at 666 (upholding the denial of class certification because "to prove proximate causation *in this case*, an individualized showing of reliance is required").

The district court's error in applying a generalized "exposure" theory of injury is underscored by *Amchem*. There, the Supreme Court considered the propriety of certifying a class that was defined by the class members' "exposure" to asbestos. 521 U.S. at 622. The Court held that it was not enough that "[t]he members of the class have all been exposed to asbestos products supplied by the defendants." *Id.* at 623 (quoting district court). "Even if Rule 23(a)'s commonality requirement may be satisfied by that shared experience," the Court

explained, Rule 23(b)(3)'s "predominance criterion is far more demanding," and the class was riven by "disparate questions" of injury and causation. *Id.* at 623–24. In particular, the class members who were exposed to asbestos, but did not suffer injury, "share[d] little in common, either with each other or with the presently injured class members." *Id.* at 624; *see also Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006).

Here, the district court's "exposure" theory of classwide injury is even *more* tenuous than the certification order vacated in *Amchem*. In *Amchem*, all the proposed class members had at least been similarly "exposed to asbestos products supplied by the defendants" and thus had *some* "shared experience" that (allegedly) led to similar "health consequences" and/or "medical expenses." *Id.* at 623–24 (internal quotation marks omitted). Yet that "shared" exposure to asbestos was insufficient for certification. The Oil Industry Subclass members do not have any comparable "shared experience." The Subclass members cannot all claim to have been directly "exposed" to the oil that leaked from Line 901. The only thing the Subclass members have in common is some contractual connection to the Santa Barbara oil industry, however remote. At most, the Subclass members share only some general risk of the *possibility* of economic harm from the spill. That amorphous "shared experience" cannot support class certification.

In applying an "exposure" theory of economic tort injury, then, the district court committed legal error. The certification order runs roughshod over the elements of Plaintiff's tort causes of action. It fundamentally misconstrues and misapplies this Court's class certification precedents. And because it certifies a Subclass that concededly includes uninjured Plaintiffs, the order "rests on a conception of Rule 23(b)(3)'s predominance requirement irreconcilable with the Rule's design." *Anchem*, 521 U.S. at 625. The class action device is designed merely to aggregate claims, not to alter substantive rights or relieve Plaintiffs of their obligation to prove their claims. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011).

C. Plaintiffs Have Offered No Method Of Common Proof Beyond The Court's "Exposure" Theory To Determine Which Class Members Suffered A Cognizable Injury As A Result Of Line 901's Shutdown

Even apart from these errors, the certification order would still need to be vacated because the district court failed to undertake the required "rigorous analysis" of Plaintiffs' proposed common evidence of injury. *See Zinser*, 253 F.3d at 1186. Instead of testing whether the economic loss model offered by Plaintiffs' expert, Peter Rupert, presented a viable method of classwide proof, the court considered only whether Rupert's qualifications and methodologies passed the *Daubert* test. But an expert model that survives a *Daubert* challenge cannot

support class certification when the model is not designed to, and cannot, show that Plains' alleged misconduct caused injury on a classwide basis.

Rupert offered no methodology for establishing classwide common injury, much less one that would trace economic harms to the pipeline shutdown. As the district court noted, Rupert's regression analysis purported only to "demonstrate[] that employment in the local oil and gas industry was 34 percent lower than it would have been but for the shutdown." (ER14; Order 13.) The opinion that 34 percent of jobs were lost—and 66 percent retained—simply begs the question of *who* was injured. The court specifically noted that "Rupert's model cannot assess damages for each *individual* member of the proposed Oil Industry Subclass." (ER7; Order 6.) But that deficiency goes beyond simply assessing the amount of damages; it goes to the fundamental element of whether Plains' conduct caused any injury at all, and if so, to whom.

What is more, Rupert's regression analysis is limited to the purported effects on employee Subclass members, and says nothing about the *businesses* that are members of the Oil Industry Subclass. Rupert has yet to present any analysis whatsoever concerning the injuries to, or damages sustained by, those businesses as a result of the pipeline shutdown. (ER291–93; CR 376 ¶¶ 42–45.)

These deficiencies are fatal to Plaintiffs' predominance showing. While a plaintiff may offer an expert's model to prove both classwide injuries and

damages, "it must include some means of determining that each member of the class was in fact injured." *Motor Vehicles*, 522 F.3d at 28. Rupert's regression analysis ignored one of the two categories of Plaintiffs comprising the Oil Industry Subclass, and his analysis confirmed that two-thirds of the Subclass members he *did* address were uninjured. Plains' expert, Avram Tucker, explained these shortcomings in detail, outlining the individual issues of injury and causation left open by Rupert's regression analysis. (ER1138–40, 1154–56; CR 389-4 ¶¶ 24–26, 51–54.) But despite recognizing "that a significant number of potential [employee] class members suffered no injury," and that the Subclass included "myriad businesses" whose performance was "subject to varying factors other than the oil spill" (ER14–15; Order 13–14), the court neither analyzed these problems nor resolved the dispute between Rupert and Tucker about the adequacy of Rupert's regression analysis. Instead, the court took a lax approach to certification, reasoning that "the need for some individualized inquiries need not defeat class certification." (ER14; Order 13.)

The district court seemed to recognize, in denying Plains' motion to strike based upon *Daubert*, that Rupert's inability to "assess damages for each *individual* [class] member" was a "matter that the Court [should] raise[] in its *predominance* analysis." (ER7; Order 6.) But the court's certification analysis never addressed Rupert's inability to identify which employee Subclass members fell within the 34

percent he believed suffered job loss, or his glaring omission of the putative business Subclass members. It is error for a court simply to "end its analysis of the plaintiffs' evidence after determining such evidence was merely admissible [under *Daubert*]." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011); *accord Hydrogen Peroxide*, 552 F.3d at 323. To satisfy Rule 23's "rigorous analysis" requirement, the court must "judg[e] the persuasiveness of the evidence presented" and resolve any dispute among experts that is material to the certification factors. *See Ellis*, 657 F.3d at 982–83.

By leaving unresolved Plains' challenges to Rupert's analysis, and glossing over the problems identified by Tucker, the district court improperly "'failed to resolve the critical factual disputes centering around [predominance].'" *Id.* Plaintiffs offered no reasoned explanation for how Rupert's regression analysis could show classwide injury and causation, and Plains' expert demonstrated there was none. "Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands." *Hydrogen Peroxide*, 552 F.3d at 323.

Nor could the district court simply take it on faith that "whatever faults that may exist in Rupert's data and calculations" would later be cured because "Rupert will likely do additional work." (ER7; Order 6.) As noted above, individual liability issues cannot be relegated to a damages trial. A party's "assurance to the

court that it intends or plans to meet the [Rule 23] requirements is insufficient," *Hydrogen Peroxide*, 552 F.3d at 318, and neither Plaintiffs nor Rupert have pointed to concrete developments or modifications that would fill the gaps in his model.

Having failed to investigate Rupert's model adequately, the district court committed precisely the error the Supreme Court warned about in *Comcast*: It certified an Oil Industry Subclass based upon a theory of economic harm that does not match Plaintiffs' proposed Subclass. In *Comcast*, plaintiffs initially proffered four theories of antitrust injury, backed by an expert model for calculating damages on a classwide basis. *See* 569 U.S. at 31–32, 36. The district court allowed only one of plaintiffs' four theories to proceed, however, and the expert admitted that his "model did not isolate damages resulting from" that one remaining antitrust theory. *Id.* at 32.

The Supreme Court ultimately reversed the district court's class certification decision. It held that "at the class-certification stage ... , any model supporting a 'plaintiff's damages case must be consistent with its liability case.'" *Id.* at 35 (citation omitted). The Court rejected the notion that the viability of plaintiffs' damages model was a "merits" issue, concluding that this "reasoning flatly contradicts our cases requiring a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim." *Id.* Because "[t]here [was] no

question that the model failed to measure damages resulting from the particular antitrust injury on which petitioners' liability in this action is premised," and failed to exclude injuries "caused by factors unrelated to an accepted theory of antitrust harm," the certification was erroneous. *Id.* at 36, 38.

The certification order here suffers from the same defects. The model is both under- and over-inclusive. Plaintiffs' proposed Subclass encompasses both existing employees and businesses supporting the platforms and onshore facilities, but Rupert's model addresses only employees. As to employees, the model estimates a 34 percent decline in oil industry employment based upon a prediction that but for the pipeline shutdown, Santa Barbara would have experienced an *increase* in employment. (ER283–84; CR 376 ¶¶ 28–31.) Rupert's 34 percent lost-employment figure accordingly includes expected *new* hires—that is, workers who would have been hired in the industry, but were not hired due to Line 901's shutdown. (*See* ER284; *id.* ¶ 30.) But these workers are *not* members of Plaintiffs' proposed subclass, which, broad as it is, is limited to people already "*employed* … as of May 19, 2015." (ER4; Order 3 (emphasis added).)

Because the model does not purport to show economic injury as to a significant portion of the Subclass and sweeps *non-Subclass* members within its determinations, it "falls far short of establishing" injury or damages on a classwide basis. *Comcast*, 569 U.S. at 34. Even as to the employee Subclass members it

addresses, the model cannot establish injury or "measure damages resulting from the [pipeline shutdown]," and cannot isolate employees who suffered harms "caused by factors unrelated to [those events]." *Id.* at 36, 38.

If anything, Rupert's model confirms that class treatment would be inappropriate here even if economic harm were relegated to "calculating damages." (ER15; Order 14.) This is not a situation where Plaintiffs have shown that "variations [in the amount of Subclass members' damages] can be determined according to a *universal mathematical or formulaic calculation*, obviating the need for evidentiary hearings on each individual [Subclass members'] claim." *Motor Vehicles*, 522 F.3d at 23 (emphasis added). Because the Subclass members' relationships to Plains are marked by variation, rather than uniformity, the court would have to try their claims individually just to determine who was damaged and to what extent. That distinguishes the present case from *Leyva* and its progeny, where this Court was willing to tolerate individualized damages issues because the class members' "damages could feasibly and efficiently be calculated once the common liability questions [were] adjudicated" using defendants' "computerized payroll and time-keeping database." 716 F.3d at 514; *see also Jimenez*, 765 F.3d at 1167 ("[A] methodology for calculation of damages that [cannot] produce a class-wide result [is] not sufficient to support certification.").

* * *

Whether driven by the district court's framing errors or its failure to take a rigorous look at Rupert's model, the court's analysis of the various "predominance" issues related to injury, proximate causation, and damages were fundamentally flawed, and its certification order should be vacated.

II. The District Court Erred As A Matter Of Law In Holding That The Existence Of A "Special Relationship" Could Be Decided Based On Common Evidence

The district court also erred as a matter of law in determining that common issues predominated on the second "vital issue[]" concerning certification: "[W]hether a special relationship between Plaintiffs and Defendants exist[ed]" for purposes of the economic loss doctrine. (ER12; Order 11). Under that doctrine, a defendant generally "owes no duty to prevent purely economic loss to third parties under any negligence theory." *S. Cal. Gas Leak Cases*, 18 Cal. App. 5th 581, 587 (2017), *petition for review granted* 411 P.3d 526 (2018). Where, as here, a plaintiff is not claiming physical injury or property damage, a defendant's duty of care to prevent economic losses arises only if the plaintiff can prove that it has a "special relationship" with the defendant. *See, e.g.*, *J'Aire Corp*, 24 Cal. 3d at 804.

To determine whether such a "special relationship" exists, courts balance multiple factors, including "(l) 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." *Id.*; *see also Bily*, 3 Cal. 4th at 399–407.

The district court found that the named oil industry Plaintiffs could not satisfy the first factor of the *J'Aire* test, which asks whether Plains' transportation of oil through Line 901 was specifically "intended to affect" Plaintiffs. (ER51; CR 350 at 15.) It nevertheless allowed the Plaintiffs' negligence claims to proceed past summary judgment after concluding that the absence of the first factor was not dispositive, and that it was required to weigh all the factors. (ER53–59; *id.* at 17–23.) The court subsequently certified the Oil Industry Subclass on the theory that a "contractual relationship tying [Subclass members] to the oil industry" was sufficient common evidence from which to determine whether a classwide "special relationship" exists. (ER13; Order 12.)

The district court abused its discretion in certifying the Subclass on this theory. First, the court committed legal error in allowing the negligence claims to proceed despite finding that none of the named Plaintiffs could satisfy the first *J'Aire* factor. Second, even assuming there was a basis under California law to allow the claims to proceed, the existence of a "special relationship" raises individualized issues that overwhelm common ones. Nor does the requirement that Subclass members have some contractual tie to the oil industry ensure a common

answer to the "special relationship" question—it simply begs Plaintiff-specific questions about the nature of each contractual relationship.

A. The District Court's Finding That The Named Plaintiffs Cannot Show That Plains' Operation Of Line 901 Was "Intended To Affect" Them Should Have Been Dispositive of Their Negligence Claims

In ruling on Plains' motion for summary judgment as to the named Plaintiffs, the district court found that "the first [*J'Aire*] factor is not satisfied." (ER51; CR 350 at 15.) The court carried forward this ruling in its certification order, assuming—with no further analysis—that Plaintiffs could not satisfy this factor on a classwide basis. In deciding to allow the claim to proceed in the face of this determination, the court erred as a matter of law.

California courts have repeatedly held that no "special relationship" can exist that could give rise to a duty to prevent purely economic losses unless the defendant's conduct was intended to affect the plaintiff. *See, e.g.*, *Ott v. Alfa-Laval Agri, Inc.*, 31 Cal. App. 4th 1439, 1455–56 (1995) (failure to establish the "intended to affect" factor "precludes a finding of 'special relationship' as required by *J'Aire*"); *Greystone Homes, Inc. v. Midtec, Inc.*, 168 Cal. App. 4th 1194, 1228–31 (2008) (defendant's sale of plumbing fittings "was not intended to affect" homebuilder plaintiff; "this conclusion is dispositive of the *J'Aire* analysis.").

One California Court of Appeal recently observed: "No [California] 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 factor"—*i.e.*, that the transaction was "intended to affect" the plaintiff. *S. Cal. Gas Leak Cases*, 18 Cal. App. 5th at 590 (collecting cases).[2] Federal courts have reached the same result. *See, e.g.*, *Dubbs v. Glenmark Generics Ltd.*, 2014 WL 1878906, at *6 (C.D. Cal. May 9, 2014) (no special relationship where plaintiff failed to establish that defendant's "manufacture and distribution of the allegedly negligently packaged birth control pills [] was intended to affect him").

The district court nevertheless allowed Plaintiffs' negligence claims to proceed on the basis of a single California case, *Alereza v. Chicago Title Co.*, 6 Cal. App. 5th 551, 560–62 (2016). But *Alereza* had no occasion to decide whether the first *J'Aire* factor was dispositive; it concluded that *all* the factors counseled against a duty of care. No California court has interpreted *Alereza* as holding that a duty of care can arise without the first factor being satisfied. The district court also cited an unpublished decision of this Court, *Kalitta Air, L.L.C. v. Central Texas Airborne Sys., Inc.*, 315 F. App'x 603 (9th Cir. 2008). But this Court merely held that the district court erred by considering only *J'Aire*'s *third* factor (concerning "the degree of certainty that the plaintiff suffered injury")—which says nothing about whether the absence of the *first* factor is dispositive.

[2] The California Supreme Court is reviewing the application of California's economic loss rule in *Southern California Gas Leak Cases*. The case is fully briefed and awaiting oral argument. *See* Case No. S246669 (Cal.).

The district court committed legal error in even allowing Plaintiffs' negligence claims to proceed to class certification where Plaintiffs failed to show that Plains' conduct was "intended to affect" them, and the district court's decision should be reversed on this basis alone. *See Yokoyama*, 594 F.3d at 1092–93 (district court erred when it decided class certification based on an incorrect understanding of state law).[3]

B. The Existence Of A "Contractual Relationship" Tying Putative Subclass Members To The Oil Industry Is Not Sufficient Common Evidence To Determine Whether The *J'Aire* Factors Are Satisfied On A Classwide Basis

The district court recognized that the Oil Industry Subclass represents "a diverse collection of parties potentially scattered across the globe." (ER13; Order 12.) It includes employees, contractors, and subcontractors that worked on the offshore oil platforms and onshore facilities in Santa Barbara County, and also all of the contractors and subcontractors, and all of their employees, who "provide[d] supplies … or services" to those platforms and facilities. (ER4; Order 3.) There is no requirement that any Subclass member have a contract or any relationship at all *with Plains*; rather the class is limited only by some contractual link to the offshore platforms or onshore facilities that delivered oil into Plains' pipeline. As a result,

[3] This Court may resolve the present appeal on this ground because Plains raised the "intended to affect" argument in its opposition to class certification. (CR 389 at 19.) *See Culbertson v. Lykos*, 790 F.3d 608, 627 (5th Cir. 2015) ("We may consider arguments not ruled upon by the district court so long as they were raised below.").

Plains estimates that the number of "suppl[y]" and "service" providers in the Subclass could number into the *thousands*, including not just oil platform operators, but also, for example, cleaning service providers, copy machine repair service providers, landscaping companies, and national telecommunications companies. (ER1142, 1143–45; CR 389-4 ¶¶ 29, 31–32.)

Despite acknowledging this Subclass member diversity, the district court certified the Oil Industry Subclass, concluding that the existence of *some* contract for the provision of goods or services to platforms and facilities—or the Subclass members' employment by such a contractor—was sufficient common evidence to resolve the "special relationship" inquiry on a classwide basis. That conclusion was an abuse of discretion, for several reasons.

To start, analyzing the various factors relevant to the "special relationship" inquiry will plainly depend on individualized evidence. For example, the mere existence of a contract cannot determine "the degree of certainty that the plaintiff suffered injury." *J'Aire*, 24 Cal. 3d at 804. To satisfy this factor, the oil industry Plaintiffs must show they have suffered some "nonspeculative" harm. *Aas v. Superior Ct.*, 24 Cal. 4th 627, 646 (2000), *superseded by statute on other grounds as stated in McMillin Albany LLC v. Superior Ct.*, 4 Cal. 5th 241 (2018); *see also id.* (concluding that where plaintiffs cannot show "appreciable, nonspeculative,

present injury," it is difficult to imagine what other factors [in the *J'Aire* test], singly or in combination, might justify the court in finding liability").

But as noted above, and as the district court itself recognized, the Oil Industry Subclass indisputably includes members who were not injured. (ER15; Order 14.) Indeed, even on Plaintiffs' own expert's theory, some 66 percent of jobs in the Santa Barbara oil industry were unaffected by the pipeline shutdown. And the Subclass also encompasses businesses with contracts, such as those for the provision of utilities, pest control, or telecommunications services, that were likely unaffected by the pipeline shutdown. (ER1146–47, 1149–53; CR 389-4 ¶¶ 35–38, 41–47.)

At a minimum, the analysis of this "certainty of injury" factor *depends* on the *individualized circumstances* of the particular business or employee. For example, the inquiry looks very different for a Subclass contractor who provided intermittent services to offshore platforms under a contract and was paid in full, (ER1147; *id.* ¶ 36), than for a contractor that did all of its work on an offshore platform that was closed after the Line 901 shutdown. And the inquiry likewise looks very different for an employee of an offshore operator (like Exxon) who lost her job after the platform was shutdown than for an Exxon employee who was merely transferred, or an employee of a contractor that provides services to not just offshore platforms, but also to many other businesses.

Determining the closeness of connection between putative Subclass members' alleged economic injuries and Plains' conduct would require similar individualized inquiries. *J'Aire*, 24 Cal. 3d at 804 (requiring consideration of "the closeness of the connection between the defendant's conduct and the injury suffered"). This factor is not satisfied when the plaintiffs' alleged harm is only remotely connected to the defendants' alleged negligence. *See Alereza*, 6 Cal. App. 5th at 561 (finding no special relationship where "a cascade of errors by several different individuals … finally led to the claimed damages," and "several independent errors separated Chicago Title's negligent acts from the ultimate financial losses later claimed by Alereza"). The fact that a Subclass member has a contract with some third party to provide goods or services to oil platforms, or has an employment relationship with such a contractor, cannot guarantee that the Subclass as a whole will have the requisite close connection. To the contrary, the sheer scope of the class *ensures* that these contracts and relationships will vary.

For example, it is self-evident that an oil industry contractor that did all of its business on the platforms has a closer connection to Plains' operation of Line 901 than a contractor who provided only incidental services—like cleaning services and copy machine repair—to the platforms or to a subcontractor. (ER1143–44; CR 389-4 ¶ 31.) It is equally obvious that an employee who worked on a platform and was terminated in the immediate aftermath of the pipeline shutdown could claim a

much closer connection to Plains' operation of Line 901 than an employee at the cleaning services contractor for that rig or an employee at Verizon, which provided phone and Internet services to the rig. (ER1136–38; *id.* ¶¶ 19–22.) Given these substantial differences among Oil Industry Subclass members, class certification of the Subclass on the basis of a mere "contractual relationship" was inappropriate.

Finally, the mere existence of *some* contractual or employment relationship tying a Plaintiff to the oil industry does not make it equally "foreseeabl[e]" that each Subclass member would suffer harm as a result of the pipeline spill. The foreseeability of economic harm to a contractor working full time on the platform is manifestly different from the foreseeability that a national telecommunications company contracted to provide Internet access will suffer financial harm. Treating the risk of harm to all Subclass members as equally foreseeable would render the economic loss rule a nullity, as most *any* downstream harm—no matter how remote—could arguably qualify as "foreseeable." *See Bily*, 3 Cal. 4th at 399 ("[T]here are clear judicial days on which a court can foresee forever and thus determine liability but *none* on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for [an] injury." (emphasis added)).

In any event, even assuming, as the district court suggested (ER13; Order 12), that "[f]oreseeability is … a one-size-fits-all proposition," that is insufficient

to answer the "special relationship" question on a classwide basis. As the California Supreme Court has explained, "permitting recovery of economic damages by all foreseeable plaintiffs would expose defendants to risks no less arbitrary and unacceptable than those presently existing." *Thing v. LaChusa*, 48 Cal. 3d 644, 663 (1989). That is, "[f]orseeability proves too much…. Although it may set tolerable limits for most types of physical harm, it provides virtually no limit on liability for nonphysical harm." *Id.* (internal quotation marks omitted). As a result, "[i]t is apparent that reliance on foreseeability of injury alone in finding a duty, and thus a right to recover, is *not adequate* when the damages sought are for an intangible injury." *Id.* at 663–64 (emphasis added).

The district court found that the existence of contracts between Subclass members and third parties overcame these individualized issues. That holding is contrary to California law in at least two respects. First, the mere existence of a contract—without more—is not enough to establish a "special relationship" sufficient to overcome the economic loss rule. In *Quelimane Co. v. Stewart Title Guar. Co.*, 19 Cal. 4th 26 (1998), for example, the California Supreme Court applied the *J'Aire* factors and determined that a title insurance company did not have a special relationship with real estate companies that gave rise to a duty of care. *Id.* at 58–60. The Court reached this conclusion despite the fact that all of the plaintiffs had *contracts* to sell the properties for which the defendants refused

to issue title insurance. As the California Supreme Court explained: "In the business arena it would be unprecedented to impose a duty on one actor to operate its business in a manner that would ensure the financial success of transactions *between third parties*." *Id.* at 59 (emphasis added). And it went on to hold: "With rare exceptions, a business entity has no duty to prevent financial loss to others with whom it deals directly. A fortiori, it has no greater duty to prevent financial losses to third parties who may be affected by its operations." *Id.*

While the certification order does not resolve the merits issue of whether Plains owes a duty of care to every person or company within the Subclass, the district court's proposal to resolve that question based on the fact that the employees and businesses have varying contractual relationships connecting them to the oil industry threatens the kind of sweeping imposition of a duty of care that *Quelimane* rejected. At a minimum, determining whether Plains owed any duty to Subclass members requires a factor-by-factor inquiry. And as described above, that factor-by-factor inquiry implicates numerous individualized—not common—questions.

The district court's "contract" theory of classwide proof is legally deficient for a second reason, as well. As *J'Aire* makes clear, the "special relationship" exception allows "a plaintiff [to] recover for loss of expected economic advantage through the negligent performance of a contract although the parties were not in

contractual privity." 24 Cal. 3d at 804. What the "special relationship" exception therefore presumes is the existence of a contract between *the defendant* and a third party that gives rise to the injured plaintiff's right to recover its purely economic losses. *See, e.g.*, *Adelman v. Assoc. Int'l Ins. Co.*, 90 Cal. App. 4th 352, 363 (2001) ("[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 ... , then liability will be imposed on the defendant for his or her negligent failure to carry out the obligations undertaken in the contract." (emphasis added)). Here, however, there is no classwide proof of any such contractual relationship *with Plains*. Instead, the district court's "contract" theory relies only on contracts between *Subclass members* and third parties—which say nothing about whether Plains owes particular Subclass members a duty of care.

At bottom, then, there is no common evidence from which to determine whether Plains had a "special relationship" with, and therefore owed a duty of care to, all Oil Industry Subclass members. The mere existence of a contractual or employment relationship tying the diverse array of businesses and individuals that make up the Subclass members to the oil industry is insufficient. *See Quelimane*, 19 Cal. 4th at 59; *cf. Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 546 (9th Cir. 2013) (holding that predominance inquiry requires "balanc[ing] … individual and common issues," and reversing certification of employee class where district

court had relied on a common internal policy "to the near exclusion of other factors relevant to the predominance inquiry"). To conclude otherwise would transform Plains into a general insurer of business losses. Both California law and the policies justifying the economic loss rule forbid this result. *See Quelimane*, 19 Cal. 4th at 59; Restatement (Third) of Torts § 7, cmt. b (justifying the economic loss rule because "the victims of economic injury can often *protect themselves* effectively by means other than a tort suit," including, for example, "obtain[ing] first-party insurance against their losses" (emphasis added)).

CONCLUSION

The Court should reverse the district court's decision to certify the Oil Industry Subclass.

DATED: November 2, 2018

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CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1 that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 13,972 words. In accordance with Ninth Circuit Rule 32-1(e), this brief is also accompanied by a signed, completed copy of the Ninth Circuit's Form 8.

DATED: November 2, 2018

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Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 18-55850

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Signature of Attorney or Unrepresented Litigant [/s/ Fred A. Rowley, Jr.] Date [Nov 2, 2018]

("s/" plus typed name is acceptable for electronically-filed documents)

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendants/Appellants Plains All American Pipeline, L.P., *et al.* state that they are not aware of any case pending in this Court that should be deemed related to this appeal.

CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2018, I electronically filed Defendants/Appellants Plains All American Pipeline, L.P., *et al.*'s Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

DATED: November 2, 2018

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