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JUDICIAL COUNCIL OF CALIFORNIA

CHAIR OF THE JUDICIAL COUNCIL

BY FAX

Coordination Proceeding Special Title (Rule 3.550) **SOUTHERN CALIFORNIA FIRE CASES**	JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4965 **SOUTHERN CALIFORNIA EDISON COMPANY AND EDISON INTERNATIONAL'S NOTICE OF HEARING ON DEMURRER; DEMURRER; MEMORANDUM OF POINTS AND AUTHORITIES** Date: October 4, 2018 Time: 1:45 p.m. Dept.: Stanley Mosk, Room 222 **Hon. Daniel J. Buckley**

NOTICE OF HEARING ON DEMURRER

TO THIS HONORABLE COURT, TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 4, 2018, at 1:45 p.m. in Room 222 of the Los Angeles Superior Court located at 111 N. Hill Street, Los Angeles, California, or as soon thereafter as the matter may be heard, Defendants Southern California Edison Company and Edison International will move for an order sustaining their demurrer without leave to amend for failure to state a cause of action, to the First Cause of Action of the Individual Plaintiffs' Master Complaint, the First Cause of Action of the Public Entity Plaintiffs' Master Complaint, and the First Cause of Action of the Subrogation Plaintiffs' Master Complaint.

DEMURRER

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendants Southern California Edison Company and Edison International hereby demur to the First Cause of Action of the Individual Plaintiffs' Master Complaint, the First Cause of Action of the Public Entity Plaintiffs' Master Complaint, and the First Cause of Action of the Subrogation Plaintiffs' Master Complaint (the "Inverse Condemnation Causes of Action") as follows:

The Inverse Condemnation Causes of Action fail to state facts sufficient to constitute causes of action. Cal. Civ. Proc. Code § 430.10(e).

This Demurrer is made pursuant to California Civil Procedure Code § 430.10 and California Rules of Court Rule 3.1320, and is based on the Notice of Hearing of Demurrer, Demurrer, Memorandum of Points and Authorities, Declaration of Moez M. Kaba and accompanying exhibits, Request for Judicial Notice, pleadings and other papers on file in this action, and upon such other matters as may be relevant and which properly may be adduced at the hearing on this matter.

Dated: August 3, 2018

Respectfully submitted,

HUESTON HENNIGAN LLP

By: _____

John C. Hueston
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Attorneys for Defendants and JCCP Respondents Southern California Edison Company and Edison International

TABLE OF CONTENTS

TABLE OF CONTENTS (cont.)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (cont.)

Page(s)

TABLE OF AUTHORITIES (cont.)

Page(s)

Statutes

TABLE OF AUTHORITIES (cont.)

Page(s)

Other Authorities

Constitutional Provisions

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

These cases arise out of wildfires that ignited in Ventura and Los Angeles Counties in December 2017, which have come to be known as the Thomas Fire and the Rye Fire (collectively, the "Fires"). Although several investigations or reviews into the causes and origins of the Fires are ongoing, Plaintiffs have sued Defendants Southern California Edison Company and Edison International (jointly, "SCE") to recover significant alleged damages.[1] At bottom, Plaintiffs contend that Southern California Edison Company's alleged negligence makes SCE liable for damages. This demurrer challenges only one of Plaintiffs' causes of action: inverse condemnation. For the reasons stated herein, SCE respectfully submits that Plaintiffs' inverse condemnation causes of action fail as a matter of law. An order granting this demurrer will still leave Plaintiffs with all their remaining claims and thus with more than ample opportunity to seek recovery for the losses alleged in the Master Complaints. Plaintiffs will not, however, have the unfair advantage that would result from the improper application of strict liability inverse condemnation principles to private utilities in California.

Inverse condemnation claims, which are a species of a Takings Clause claim, may be asserted only where (1) a "public entity," *Barham v. S. Cal. Edison Co.*, 74 Cal. App. 4th 744, 751–52 (2012), (2) "deliberately" took or damaged private property, *Customer Co. v. City of Sacramento*, 10 Cal. 4th 368, 382 (1995), (3) "for public use," Cal. Const. art. I, § 19. Here, Plaintiffs cannot satisfy any of the prerequisites to establishing inverse condemnation liability.

First, the Takings Clause is meant to provide relief to citizens against certain government action because the government is otherwise protected by sovereign immunity. SCE is not a governmental actor. Although two California appellate courts have allowed inverse condemnation

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[1] Plaintiffs' Master Complaints contain undifferentiated allegations against Southern California Edison Company and Edison International, as though they were a single entity when they are not. Though SCE does not challenge Plaintiffs' impermissible group pleading in this demurrer, it notes that Edison International had no direct involvement in the alleged acts or omissions detailed in Plaintiffs' Master Complaints, does not operate a utility, does not furnish any public goods, lacks the power of eminent domain, has no customers, is not regulated by the California Public Utilities Commission, and lacks a monopolistic franchise of any kind. Thus, Edison should not be a part of this proceeding at all.

claims to proceed against a privately-owned utility—something the California Supreme Court has never authorized—those courts did so only on the assumption that, as a so-called "public entity," the private utility defendant would have access to public funds to compensate for the imposed inverse damages. For decades, California cases have held that socialization of losses is the fundamental underpinning and constitutional justification of inverse condemnation liability. *See, e.g.*, *Holtz v. Superior Court*, 3 Cal. 3d 296, 303 (1970) ("[T]he underlying purpose of our constitutional provision in inverse—as well as ordinary—condemnation is 'to distribute throughout the community the loss inflicted upon the individual by the making of the public improvements.'"). Here, SCE has no right or unilateral power to spread its inverse costs "throughout the community," but rather must obtain permission from the California Public Utilities Commission (the "PUC") or the Federal Energy Regulatory Commission[2] for any rate increases. Critically, the PUC recently announced for the first time that it will not recognize the connection between inverse condemnation being applied to a privately-owned utility and any resulting rate increase necessary to socialize inverse condemnation losses. Because the *sine qua non* of inverse liability—the right to spread losses among the public who have benefitted from the taking—does not hold true, SCE cannot be strictly liable for Plaintiffs' inverse condemnation claims.

Second, SCE did not deliberately take Plaintiffs' property. Indeed, Plaintiffs' theory—as stated in the Complaint—is that SCE's allegedly negligent actions or omissions caused the Fires. Yet, damage is only compensable under inverse condemnation when it is the "necessary consequence" of the public improvement "as deliberately designed or constructed." C*lement v. State Reclamation Bd.*, 35 Cal. 2d 628, 641 (1950); *Sheffet v. Cty. of Los Angeles*, 3 Cal. App. 3d 720, 734 (1970). Allegations of negligence, random accidents, unintended property damage, and acts done without government authorization do not state a takings claim. Even incidental but unintended consequences of intentional actions by public entities or their agents do not give rise to inverse condemnation liability. *See, e.g., Customer Co.*, 10 Cal. 4th at 378 ("property damage incidentally

[2] SCE's rates related to the operation of its electric system are principally set by the PUC, which regulates SCE's vast distribution system. The Federal Energy Regulatory Commission's rate-setting authority is principally limited to SCE's transmission assets, which constitute a smaller component of SCE's overall system.

caused by the actions of public employees in the pursuit of their public duties" is not recoverable under inverse condemnation); *see also Miller v. City of Palo Alto*, 208 Cal. 74, 76–77 (1929) (rejecting inverse claim based on an "act of negligence" in which city employees started a fire while disposing of garbage, as such unintended fire damage furthered no "public use"); *Neff v. Imperial Irrigation Dist.*, 142 Cal. App. 2d 755, 759 (1956) (rejecting inverse condemnation claim where state employees negligently allowed a chemical to spread to plaintiffs' land because the damage to plaintiffs' land was incidental to, and not intended to further, the "public use" of drain maintenance).

Finally, the Takings Clause applies only where property is "taken or damaged *for public use*," Cal. Const. art. I, § 19 (emphasis added), which did not occur here. To establish that a taking was "for public use," a plaintiff must allege that the "destruction or damaging of property is sufficiently connected with 'public use.'" *Customer Co.*. 10 Cal. 4th at 382; *Bauer v. Ventura Cty.*, 45 Cal. 2d 276, 286 (1955) (damage must relate "to the function of the project as conceived" to be a taking). Plaintiffs do not (and cannot) claim that allegedly igniting the Fires furthered any public purpose or conferred a benefit on the community. SCE provides electricity for public use, but that does not convert wildfire damage into "damage *for public use*." Cal. Const. art. I, § 19 (emphasis added). It is irrelevant that a public improvement as a whole may have benefitted the community or may assist in the provision of a public good, the "public use" element is not satisfied by private losses incidental to the operation of public works that have no accompanying public gain. A contrary rule would eviscerate sovereign immunity (something SCE itself, as a private entity, does not have) by subjecting government entities to limitless inverse condemnation liability for all accidents traceable to their infrastructure or operations. *Belair v. Riverside Cty. Flood Control Dist.*, 47 Cal. 3d 550, 558 (1988) (rejecting exposing defendants to "open-ended, absolute liability").

For each of the foregoing reasons, Plaintiffs' inverse condemnation claims cannot proceed as a matter of law.

II. FACTUAL BACKGROUND

A. The Fires and Debris Flows

1. The 2017 California Wildfire Season

The 2017 California wildfire season was the most destructive on record. According to the California Department of Forestry and Fire Protection ("Cal Fire"), a total of 9,133 fires burned 1,248,606 acres. (Declaration of Moez M. Kaba ("Kaba Decl.") Ex. A.) This includes five of the most destructive wildfires in state history, otherwise known as the Tubbs, Nuns, Thomas, Atlas, and Redwood Valley Complex Fires. (Kaba Decl. Ex. B.) By October 20, 2017, Cal Fire was ramping up its personnel levels and calling upon firefighters from around the world to counteract the season's record devastation. (Individual Plaintiffs' Master Complaint ("Complaint"), ¶ 27.)[3] Notwithstanding the efforts of Cal Fire and other first responders, the 2017 wildfires destroyed or damaged on a state-wide basis approximately 10,000 structures, a higher tally than the previous nine years combined. (*See* Kaba Decl. Ex. A.)

2. The Thomas Fire Ignites on December 4, 2017

Plaintiffs allege that, on December 4, 2017, the Thomas Fire commenced in two separate locations—first, near KOA Campground and Steckel Park in Santa Paula, California, and second, near the top of Koenigstein Road in Upper Ojai, California. (Complaint, ¶¶ 30–32.) It is generally believed that once the Santa Paula fire began, it quickly grew out of control due to climatological and manmade factors, including extended drought conditions, powerful and persistent Santa Ana winds, and an abundance of available fuel loads consisting of highly combustible vegetation built up during years of wildland mismanagement by responsible land management agencies. (*Id*., ¶¶ 4, 28, 36, 130.) All told, the Thomas Fire burned approximately 281,000 acres and damaged or destroyed over 1,000 structures in Santa Barbara and Ventura Counties.[4] (*Id*., ¶ 39.)

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[3] Because the allegations contained in the Individual Plaintiffs', Subrogation Plaintiffs', and Public Entity Plaintiffs' Master Complaints are essentially identical (both in substance and form), SCE's Demurrer includes only citations to the Individual Plaintiffs' Master Complaint. For purposes of this demurrer only, SCE assumes the truth of Plaintiffs' allegations.

[4] Plaintiffs' Master Complaints do not allege any differences in the cause, nature, quality, intensity, longevity, or damage caused by the separate fires that they group under the "Thomas Fire" designation. For purposes of this demurrer, SCE assumes as true Plaintiffs' dubious allegations.

3. The Rye Fire Ignites on December 5, 2017

Plaintiffs allege that, on December 5, 2017, the Rye Fire started at Rye Canyon Loop in Santa Clarita, California. (Complaint, ¶ 7.) The Rye Fire ultimately burned approximately 6,049 acres and damaged or destroyed approximately six structures. (*Id.*, ¶ 9.)

4. Plaintiffs Allege SCE's Negligence Caused the Fires

Although investigations and reviews as to the origins and causes of the Fires are still ongoing, Plaintiffs allege that, as to the Thomas Fire, SCE's electrical facilities "arced" at the alleged ignition locations near Steckel Park and Koenigstein Road, sparking both fires. (Complaint, ¶¶ 31–32.) Plaintiffs also allege that the Rye Fire ignited when SCE's electrical facilities "sparked." (*Id.*, ¶ 10.) Plaintiffs do not allege that SCE deliberately started the Fires, or that arcing or sparking of electrical facilities or ignition of wildfires is a necessary consequence of SCE's activities generating and distributing electricity. Rather, Plaintiffs allege in their pleading that the "Thomas Fire" and "Rye Fire" were "a direct and legal result of the negligence, carelessness, recklessness, and/or unlawfulness of" SCE. (*Id.*, ¶ 200). Plaintiffs claim that SCE was negligent because it allegedly failed to take certain actions, such as "timely and properly maintain[ing], manag[ing], inspect[ing], and/or monitor[ing] the subject power line," "trim[ming] and/or prun[ing] vegetation so as to avoid creation of a safety hazard within close proximity of the subject power line," and "properly train[ing] and . . . supervis[ing] employees and agents responsible for maintenance and inspection of the distribution lines and/or vegetation areas near those lines." (*Id.*)

5. Plaintiffs Allege SCE's Negligence Caused the January 9, 2018 Montecito Debris Flows

Plaintiffs allege that, on January 8 and 9, 2018, heavy rain fell on the burned slopes of the mountains above Montecito. (Complaint, ¶ 53.) On the morning of January 9, 2018, debris flows were caused by this rainfall, resulting in significant property damage. (*Id.*, ¶¶ 56, 63–64, 68, 75.) According to Plaintiffs, the debris flows demolished or damaged nearly 500 structures.[5] (*Id.*, ¶ 70.)

[5] The Montecito Debris Flows also led to several fatalities. The associated wrongful death claims are not, however, subject to the doctrine of inverse condemnation, which is limited to property damage. *Customer Co.*, 10 Cal. 4th at 389 ("inverse condemnation is limited to damage to property and does not apply to damage involving personal injury").

As with the Fires, Plaintiffs allege that the Montecito Debris Flows were a result of SCE's "negligence." (*Id.*, ¶ 200.)

B. SCE Is a Privately-Owned Corporation and Cannot Spread Costs of Inverse Liability as a Matter of Right

SCE is not a governmental entity. Rather, it is a utility owned by investors (i.e., a privately-owned corporation). (Complaint, ¶ 16.) As a private entity, SCE does not have sovereign immunity like the government does. SCE, unlike a sovereign entity, lacks taxing power and has no right or entitlement to adjust its rates. It may only do so with regulatory agency approval. *See, e.g.*, Cal. Pub. Util. Code § 454(a) ("a public utility shall not change any rate or so alter any classification, contract, practice, or rule as to result in any new rate, except upon a showing before the commission and a finding by the commission that the new rate is justified"); (*cf.* Complaint, ¶ 17 ("amounts that SCE must pay in inverse condemnation can be included in their rates and spread among the entire group of rate payers")). Critically, recent events make clear that the PUC will not consider inverse condemnation losses in determining whether to allow a rate increase.

In September 2015, San Diego Gas & Electric Company ("SDG&E") applied to the PUC to recover, through a rate increase, $379 million for non-insured costs that SDG&E paid to resolve claims, including inverse condemnation claims, arising from certain 2007 wildfires. (Kaba Decl. Ex. C ("Application Decision") at 2–3.) On November 30, 2017, the PUC applied its administratively created "prudent manager" standard (which is distinct from the strict liability standard imposed by the courts under inverse condemnation) and denied SDG&E's application.[6] In so doing, the PUC

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[6] The PUC's "prudent manager" standard differs from the ordinary negligence standard in multiple important ways. The PUC has defined the prudent manager standard as the following:

> The term reasonable and prudent means that at a particular time any of the practices, methods and acts engaged in by a utility follows the exercise of reasonable judgment in light of the facts known or which should have been known at the time the decision was made. The act or decision is expected by the utility to accomplish the desired result at the lowest reasonable cost consistent with good utility practices. Good utility practices are based upon cost effectiveness, safety and expedition.

(Kaba Decl. Ex. C at 10.) Before the PUC, the utility bears the burden to "affirmatively satisfy the Commission that it acted prudently." (*Id.* at 11.) The standard is preponderance of the evidence. Compliance with industry practice alone does not establish reasonableness, as the utility "must also show it acted reasonably in light of the circumstances at the time" of any damage-causing event. (*Id.*

announced for the first time that inverse condemnation losses were irrelevant to rate setting: "Inverse Condemnation principles are not relevant to a Commission reasonableness review under the prudent manager standard." (*Id.* at 65.) Concurrently with the Application Decision, the PUC held a hearing in which PUC commissioners affirmed the PUC's policy but urged the courts to revisit the continued application of inverse condemnation to privately owned utilities that, unlike public utilities, cannot on their own initiative spread inverse condemnation costs. As Commissioner Rechtschaffen stated:

> [I]t is worth noting that the doctrine of inverse condemnation as it's been developed by the courts and applied to public utilities may be worth re-examining [because] courts applying the [doctrine] to public utilities have done so without really grappling with the salient difference between public and private utilities, which is that there's no guaranty that . . . private utilities can recover the cost from their rate payers.

(Kaba Decl. Ex. D ("PUC Hearing") at 18:14–23.) On December 26, 2017, PUC President Picker and Commissioner Guzman-Aceves filed a joint concurrence to the Application Decision, asking that the courts reconsider the rationale for applying inverse condemnation to privately-owned utilities because "the logic for applying inverse condemnation to utilities—costs will necessarily be socialized across a large group rather than borne by a single injured property owner, regardless of prudence on the part of the utility—is unsound." (Kaba Decl. Ex. E ("Application Decision Concurrence") at 1, 5.)

In July 2018, the PUC denied SDG&E's, SCE's, and Pacific Gas & Electric Company's request for rehearing of the Application Decision. (Kaba Decl. Ex. F ("Rehearing Decision").) In that denial, the PUC stated that the availability of inverse condemnation claims is for the courts, not the PUC, to decide. (*Id.* at 27 ("It is not in our purview to render determinations regarding whether inverse condemnation or other legal tort doctrines should be applied in assessing damages claims. Those issues are for the Courts, not this Commission.").)

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at 27.) Further, unlike in state court, SCE does not have a jury trial right before the PUC. *See McHugh v. Santa Monica Rent Control Bd.*, 49 Cal. 3d 348, 383 (1989) ("[T]he Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication."). The bottom line is that the prudential manager standard is nebulous and does not appear like the ordinary negligence standard in substance or form. Moreover, the PUC's prudency standard is entirely different from the strict liability standard that the plaintiffs seek in this forum for the same activities.

III. LEGAL STANDARD

A demurrer lies where "the pleading does not state facts sufficient to constitute a cause of action." Cal. Civ. Proc. Code § 430.10(e). The plaintiff "must set forth factual allegations that sufficiently state all required elements of [a] cause of action[.]" *Rakestraw v. Cal. Physicians' Serv.*, 81 Cal. App. 4th 39, 43 (2000). The court must assume the truth of all pleaded facts and judicially noticed matters, *Schifando v. City of Los Angeles*, 31 Cal. 4th 1074, 1081 (2003), but not "the truth of contentions, deductions or conclusions of law," *Webb v. City of Riverside*, 23 Cal. App. 5th 244, 251 (2018).

IV. THE INVERSE CONDEMNATION CLAIMS FAIL AS A MATTER OF LAW

California Constitution, Article I, Section 19 (the "Takings Clause") requires the government to provide "just compensation" to victims of a "taking" where private property is "taken or damaged for public use" under the state's power of eminent domain. Cal. Const. art. I, § 19; *see also* U.S. Const. amend. V. The power of eminent domain and the related doctrine of inverse condemnation imply the availability and use of public funds to compensate for what is taken for the public's use. Inverse condemnation is typically a strict liability cause of action, imposing liability regardless of the government's reasonableness or lack of fault. *Dina v. People ex rel. Dep't of Transp.*, 151 Cal. App. 4th 1029, 1049 (2007); *see also Customer Co.*, 10 Cal. 4th at 382 ("[I]nverse condemnation liability, absent fault, [is limited] to physical injuries of real property that were proximately caused by the improvement as deliberately constructed and planned."). The Takings Clause is not a substitute for common-law negligence claims involving public infrastructure. Rather, the Takings Clause concerns only deliberate government exercises of the eminent domain power and does not create "an open-ended, absolute liability rule" for public improvements. *Customer Co.*, 10 Cal. 4th at 382 (quoting *Holtz*, 3 Cal. 3d at 303–04).

Plaintiffs' inverse condemnation claims fail because (1) SCE is not a public entity because it is not entitled to socialize losses among the public as a matter of right, (2) the Fires were not a necessary consequence of deliberate action, and (3) the damage allegedly caused to Plaintiffs' property did not further a public use.

A. Loss-Spreading Is Fundamental to Inverse Condemnation Liability

For decades, California courts have held that loss-spreading is the fundamental underpinning of eminent domain and inverse condemnation liability. *See, e.g.*, *Holtz*, 3 Cal. 3d at 303 ("[T]he underlying purpose of our constitutional provision in inverse—as well as in ordinary—condemnation is to distribute throughout the community the loss inflicted upon the individual . . . to socialize the burden . . . that should be assumed by society."); *Gutierrez v. Cty. of San Bernardino*, 198 Cal. App. 4th 831, 837 (2011) (explaining that the "loss distribution premise" is the constitutional "underpinning [of] inverse condemnation"); *Barham v. S. Cal. Edison Co.*, 74 Cal. App. 4th 744, 751 (1999) ("The fundamental policy underlying the concept of inverse condemnation is to spread among the benefiting community any burden disproportionately borne by a member of that community[.]").[7]

The California Supreme Court has never held that a privately-owned utility can be liable for inverse condemnation. While the California Court of Appeal has permitted inverse condemnation claims to proceed against a privately-owned utility, critical to that holding was the explicit assumption that the utility could raise rates —distributed "throughout the community"—to recover inverse condemnation losses. *See Pac. Bell Tel. Co. v. S. Cal. Edison Co.*, 208 Cal. App. 4th 1400, 1407 (2012) (concluding that there was no evidence that the PUC would ever prevent SCE from socializing losses by "pass[ing] on damages liability" to the public through a rate adjustment); *Belair*, 47 Cal. 3d at 558 (citation omitted). This explicit assumption has now proven false. No California

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[7] *See also, e.g.*, *Bacich v. Bd. of Control of Cal.*, 23 Cal. 2d 343, 350 (1943) ("[T]he policy underlying the eminent domain provision in the Constitution is to distribute throughout the community the loss inflicted upon the individual by the making of public improvements."); *Albers v. Los Angeles Cty.*, 62 Cal. 2d 250 (1965) (inverse condemnation damages are appropriate because "the cost of such damage can be better absorbed, and with infinitely less hardship, by the taxpayers as a whole than by the owners of the individual parcels damaged"); *Bunch v. Coachella Valley Water Dist.*, 15 Cal. 4th 432, 451 (1997) ("This balancing of interests serves both the private sector and public improvement efforts by addressing the cost-spreading objective of the just compensation clause while protecting public entities from unlimited, undeserved liability that could well inhibit further construction of public works."); *Cantu v. Pac. Gas & Electric Co.*, 189 Cal. App. 3d 160, 166 (1987) ("The law of inverse condemnation, viewed broadly and in perspective, seeks to identify the extent to which otherwise uncompensated private losses attributable to governmental activity should be socialized and distributed over the taxpayers at large rather than be borne by the injured individual."); *Ellison v. San Buenaventura*, 60 Cal. App. 3d 453, 460 (1976) ("[T]he general public policy of socializing the burdens of public improvement does not call for open-ended, absolutely liability[.]").

appellate court has reviewed the application of inverse condemnation in circumstances where, as here, it is clear that a privately-owned company does not have access to public funds to compensate for a public taking as a matter of right like a true governmental entity can.

Consequently, if SCE is subject to inverse condemnation liability at all,[8] it can be only if it can spread such losses among the benefitting community as a matter of right. *Cf. Albers*, 62 Cal. 2d at 263 (explaining that inverse condemnation serves as a buffer against the risks created by public works because "the cost of such damage can be better absorbed . . . by the taxpayers as a whole than by the owners of the individual parcels damaged."). But when privately-owned corporations like SCE face inverse condemnation losses, they cannot (as Plaintiffs incorrectly and conclusorily allege) simply spread those losses by raising rates. (*See* Complaint, ¶ 16.) This is because SCE does not set its own rates; regulatory agencies do. *See, e.g.*, Cal. Pub. Util. Code § 454(a) ("a public utility shall not change any rate or so alter any classification, contract, practice, or rule as to result in any new rate, except upon a showing before the commission and a finding by the commission that the new rate is justified"). Accordingly, regulatory agencies—and only regulatory agencies—determine whether the required socialization of the inverse condemnation losses can occur. And the PUC has expressly determined that privately-owned utilities will not be entitled to a rate increase to account for inverse condemnation losses.

1. *Barham* and *Pacific Bell* Assumed That SCE Could Spread Losses

Barham and *Pacific Bell* both acknowledged that the function of inverse condemnation is to spread losses, and they assumed that privately-owned utilities like SCE could perform that function by raising rates. That incorrect assumption (that SCE could recover the cost of inverse condemnation damages by raising rates as a matter of right) is central to both courts' holdings.

Barham was the first court to hold (improperly) that a privately-owned utility could be liable for inverse condemnation. *See* 74 Cal. App. 4th at 753. The *Barham* court carefully limited its holding

[8] To be clear, because SCE is not a governmental entity that is entitled to spread costs by accessing public funds (through rate increases or otherwise), it cannot be subject to inverse liability at all. However, as explained further herein, even if an inverse claim was available against a privately-owned utility, the claim could not stand unless the damage was a necessary consequence of a deliberate action and that the taking or damage itself was for public use.

to the "factual scenario" presented there: a scenario including the court's then-untested assumption that SCE could spread inverse condemnation losses as a matter of right. *Id.* at 753 ("We are not convinced that any significant differences exist regarding the operation of publicly versus privately owned electric utilities *as applied to the facts in this case* and find there is no rational basis upon which to find such a distinction.") (emphasis added). The court underscored "[t]he *fundamental* policy underlying the concept of inverse condemnation is to spread among the benefiting community any burden disproportionately borne by a member of that community." *Id.* at 752 (emphasis added). However, now that we know SCE cannot spread losses as a matter of right, *Barham* does not support the judicial application of inverse condemnation liability created for governmental entities to a private utility like SCE.

In *Pacific Bell*, the California Court of Appeal once more permitted the application of inverse condemnation claims against a privately-owned utility. In so doing, *Pacific Bell* explicitly relied on and approved of *Barham*'s cost-spreading reasoning, stating that SCE had not furnished evidence of its inability to socialize inverse condemnation losses. 208 Cal. App. 4th at 1407 ("Edison has not pointed to any evidence to support its implication that the commission would not allow Edison adjustments to pass on damages liability during its periodic reviews."). Like the *Barham* court, the *Pacific Bell* court assumed that SCE could spread inverse condemnation losses, and that assumption was critical to the court's holding. Without that assumption, inverse condemnation does not lawfully apply.[9]

After relying on *Barham*'s holding and its assumption that a privately-owned utility could socialize inverse losses, *Pacific Bell* built on *Barham*'s loss-spreading rationale for extending inverse condemnation to a private utility. The court stated that "Edison's monopolistic or quasi-monopolistic

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[9] In a footnote, the *Pacific Bell* court also stated in dicta its belief that subjecting *municipally* owned utilities to the regulations of the PUC, including regulation of rates, would not immunize them from inverse condemnation liability under the theory that they were no longer able to spread the cost of public improvements. *Pac. Bell*, 208 Cal. App. 4th at 1407 n.6. In so doing, *Pacific Bell* properly distinguished *municipal* utilities from *private* utilities for the purposes of inverse condemnation. Even if a municipal (i.e., a publicly-owned) utility had its rates regulated by some other governmental body, inverse condemnation would still be appropriate because the municipality in question could loss-spread by exercising the taxing power or unilaterally raising its rates. Privately-owned utilities cannot exercise a taxing power or unilaterally change their rates, which is why *Pacific Bell* went to pains to note that Edison had not presented evidence that it would not be allowed to raise rates.

authority, deriving directly from its exclusive franchise provided by the state, distinguishes Edison's action from the cases it cites rejecting inverse condemnation cases against private parties who do not have such monopolistic authority from the state." 208 Cal. App. 4th at 1406.

Pacific Bell's discussion of supposed monopoly power by privately-owned utilities is, however, equally unavailing to justify *Barham's* faulty assumption that SCE could spread losses. A monopolist has "the power to control market price," i.e., it can unilaterally raise prices and therefore socialize costs. *In re IBM Peripheral EDP Devices Antitrust Litig.*, 481 F. Supp. 965, 988 (N.D. Cal. 1979), *aff'd sub nom. Transamerica Computer Co. v. Int'l Bus. Machs. Corp.*, 698 F.2d 1377 (9th Cir. 1983). Hence, imposing inverse condemnation liability on such a monopolist might satisfy *Barham*'s loss-spreading rationale. But SCE is neither a governmental entity that benefits from sovereign immunity, nor a monopolist with unilateral power to spread inverse losses by raising prices. Indeed, the regulation imposed by government agencies over SCE's rates is designed to negate any market power that SCE might be able to exercise if it were not regulated.

2. The PUC's Application Decision Invalidates the Critical Loss-Spreading Assumption of *Barham* and *Pacific Bell*

The PUC has now ruled that privately-owned utilities are not entitled to "socialize" inverse losses through rate increases because "Inverse Condemnation principles are not relevant" to a privately-owned utility's rates. (Application Decision at 65.) While the PUC indicated that some losses could be recovered if the so-called "prudent manager" standard were met, the PUC made clear that it would not permit a privately-owned utility to recover losses merely because they had been paid out as strict liability inverse condemnation damages. (*Id.*) The PUC's Application Decision therefore invalidates *Barham* and *Pacific Bell*'s stated justification for extending inverse condemnation liability to a privately-owned utility, and those decisions do not bind this Court in the instant matter. *See, e.g.*, *Gibson v. Gibson*, 3 Cal. 3d 914, 915, 923 (1971) (overruling the longstanding rule of parental immunity in tort because the rule's rationale was no longer valid); *see also Cianci v. Superior Court*, 40 Cal. 3d 903, 922 (1985) (overruling precedent where the "reasoning is unsound because its underlying premise is unsupported").

Because SCE is not entitled to socialize inverse condemnation losses as a matter of right, the constitutional justification for the doctrine is absent. Though Plaintiffs' inverse condemnation causes of action fail and must be dismissed, Plaintiffs still have an opportunity to seek recovery for the losses alleged in the Master Complaints under traditional tort and statutory causes of action. Unlike a true government entity, Plaintiffs' negligence allegations against SCE do not face the same sovereign immunity challenges that often compels plaintiffs to try to pursue a typical tort cause of action under the guise of inverse condemnation. Sustaining SCE's demurrer properly denies Plaintiffs the unmerited procedural advantages and evidentiary shortcuts that cannot fairly—or constitutionally—apply against a private entity such as SCE.

B. Plaintiffs Fail to Allege that a Deliberate Act Infringed Their Property Rights

To establish that the defendant performed the requisite "deliberate action" in the context of a public improvement, the harm caused to the plaintiff's property must have been intended by the public entity, or a "necessary consequence" of the public improvement "as deliberately designed or constructed." *Customer Co.*, 10 Cal. 4th at 383; *Clement*, 35 Cal. 2d at 641; *Sheffet v. Cty. of Los Angeles*, 3 Cal. App. 3d 720, 734 (1970). Unintended, incidental, or uncertain damage does not satisfy the "deliberate action" element. *See Customer Co.*, 10 Cal. 4th at 378 ("property damage incidentally caused by the actions of public employees in the pursuit of their public duties" is not recoverable under inverse condemnation). Nor does damage resulting from allegedly negligent maintenance or operation of a public improvement qualify as the requisite deliberate action giving rise to inverse liability. *Id.* at 382 ("damage caused by the negligent conduct of public employees or a public entity does not fall within the aegis of [the Takings Clause]").

To facilitate the government's prerogative while protecting the public, the Takings Clause "waive[s] the immunity of the state where property is taken or damaged for public purposes" but does not "subject the state to general tort liability under the theory of eminent domain." *Bauer*, 45 Cal. 2d at 283. On its face, accidental property damage caused by an uncontrolled wildfire "cannot be likened to an exercise of the power of eminent domain," and, like other allegedly negligent property damage, does not give rise to a claim for compensation under the Takings Clause. *Customer Co.*, 10 Cal. 4th at 388.

Plaintiffs allege their property rights were infringed by accidental wildfire damage. The Fires, they allege, were caused by SCE's negligent acts and omissions, including those associated with its inspection, maintenance, and operation of electrical equipment and surrounding areas. (*See, e.g.*, Complaint, ¶¶ 119, 144, 200.) But Plaintiffs do not allege, as they must to properly state an inverse condemnation cause of action, that their property was damaged as "a result of dangers *inherent in the construction of the public improvement* as distinguished from dangers *arising from the negligent operation of the improvement*." *Customer Co.*, 10 Cal. 4th at 382 (emphasis in original); *see also City of Austin v. Liberty Mut. Ins.*, 431 S.W.3d 817, 827 (Tex. App. 2014) ("It is self-evident that the fire was not the substantially certain result of the City's mere provision of electric power, nor was it necessary that it occur in order for the City to provide power to its residents. When property damage is an unintended result of the government's act or policy, it cannot be said that the property was 'taken or damaged for public use.'"). Nor do they allege that the wildfire ignition was "a deliberate act which has as its object the direct or indirect accomplishment of the purpose of the improvement as a whole." *Bauer*, 45 Cal. 2d at 285. Or that SCE "treated private damage costs, anticipated or anticipatable, but uncertain in timing or amount or both, as a deferred risk of the project." *McMahan's of Santa Monica v. City of Santa Monica*, 146 Cal. App. 3d 683, 697 (1983). Instead, Plaintiffs hope to use inverse condemnation as a shortcut to avoid having to prove actual negligence or other unreasonable conduct of the type required in tort. They cannot do so under California law.[10]

1. Accidental Fire Damage Is Not a Deliberate Taking

Fire damage is not a taking for public use within the meaning of the Takings Clause where it is not purposeful (i.e., the necessary consequence of a deliberate action). The California Supreme Court's decision in *Miller v. City of Palo Alto*, is instructive. The property owners in *Miller*, like

[10] Even where a fire is *deliberately ignited* to further a public purpose, such as weed control or long-term fire suppression (which is not the case here), inverse condemnation does not support claims where that fire escapes and accidentally damages property that the government had no intention of burning. *Thune v. United States*, 41 Fed. Cl. 49, 53 (1998) ("Liability for damage caused by an intentionally set fire which escapes . . . has traditionally been determined under tort law."). In *Thune*, for example, the Court of Federal Claims rejected an inverse condemnation claim against the U.S. Forest Service for a deliberately lit fire that had negligently escaped and damaged the plaintiff's property. *Id.* Plaintiffs do not come anywhere close to alleging that SCE deliberately ignited the Fires, nor could they.

Plaintiffs here, alleged that their property had been "damaged for public use" by a fire. 208 Cal. at 76–77. Government employees had used an incinerator to perform the "public use" of garbage disposal, but negligently disposed of the incinerated garbage, thereby igniting a fire that spread to plaintiffs' property. *Id.* The Court rejected plaintiffs' inverse condemnation claim, even though the government's use of the incinerator was deliberate, noting that plaintiffs had alleged their damage resulted from an "act of negligence" rather than deliberate action. *Id.*; *see also, e.g.*, *Bauer*, 45 Cal. 2d at 286 (citing *Miller* for the rule that negligence associated with public infrastructure is not a taking for public use); *McNeil v. City of Montague*, 124 Cal. App. 2d 326, 328 (1954) (inverse claim not stated where city employees burned weeds around city hall and the fire escaped, damaging plaintiffs' property); *W. Assur. Co. v. San Joaquin Drainage Dist.*, 72 Cal. App. 68, 75 (1925) (inverse claim not stated where public employees accidentally ignited a fire; the fire damage was not alleged to be authorized or to be "an act necessary to the doing of the work"); *Cary v. United States*, 552 F.3d 1373, 1379 (Fed. Cir. 2013) (inverse claim not stated for wildfire damage; plaintiffs did not allege that "the government intended to invade a protected property interest or that the asserted invasion was the direct, natural, or probable result of an authorized activity"). [11]

Here Plaintiffs' allegations are of the same sort that the California Supreme Court rejected in *Miller* and subsequent cases. Plaintiffs do not and cannot allege any deliberate act that infringed their property rights, relying instead on an allegation of SCE's purported negligence in the performance of its duties.[12] But "accidental acts or omissions which are careless, e.g., the allowing of fire to spread onto adjoining lands while burning weeds in levee maintenance," do not give rise to inverse condemnation claims. *Beckley v. Reclamation Bd. of State*, 205 Cal. App. 2d 734, 753 (1962). As the

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[11] Though *Miller* was decided in 1929, its "holding . . . that damage caused by the negligent conduct of public employees or a public entity does not fall within the aegis of [the Takings Clause. has been followed repeatedly and uniformly in the more than 60 years that have elapsed since that decision was rendered." *Customer Co.*, 10 Cal. 4th at 381.

[12] *Compare e.g.*, Complaint, ¶ 200 (alleging that SCE's or its employees' negligent failure to adequately inspect, maintain, repair, or operate its electrical facilities proximately caused Plaintiffs' harm)), *with Customer Co.*, 10 Cal. 4th at 378 (holding that the Takings Clause "never was intended, and never has been interpreted, to impose a constitutional obligation upon the government to pay just compensation whenever a government employee commits an act that causes loss of private property").

California Supreme Court stated in *Bauer* and repeated in *Customer Co.*, allegations of "negligent acts committed during the routine day to day operation of the public improvement" or "negligence in the routine operation having no relation to the function of the project as conceived" do not state a claim for inverse condemnation. *Bauer*, 45 Cal. 2d at 286; *Customer Co.*, 10 Cal. 4th at 382, 388.

California Courts of Appeal have similarly held that "inverse condemnation does not involve ordinary acts of carelessness in the carrying out of the public entity's program," that "negligence in the operation and maintenance" of infrastructure "does not charge a taking of property for public use under the Constitution," and that "a property owner may not recover in an inverse condemnation proceeding for damages caused by acts of carelessness or neglect on the part of a public agency." *Sheffet*, 3 Cal. App. 3d at 733–734; *accord, e.g.*, *Neff*, 142 Cal. App. 2d at 759 (inverse claim not allowed where damage was caused by chemical that was used to exterminate weeds at a public drain and the damage was not intended to further that purpose); *Hayashi v. Alameda Cty. Flood Ctrl. and Water Dist.*, 167 Cal. App. 2d 584, 591–92 (1959) (rejecting inverse claim based on "negligence in the operation and maintenance of [the entity's] property").[13] Because SCE did not deliberately damage Plaintiffs' property for a public use, Plaintiffs' inverse condemnation claims fail as a matter of law.

2. Negligent Maintenance or Operation of Infrastructure Does Not Constitute a Deliberate Action Supporting Inverse Condemnation Recovery

As a general matter, damage resulting from the negligent actions of a public entity—including maintenance or operation of public infrastructure—are not compensable under the Takings Clause. *Hayashi*, 167 Cal. App. 2d at 591–92 ("a property owner may not recover in an inverse condemnation proceeding for damages caused by acts of carelessness or neglect on the part of a public agency") (citing *Neff*, 142 Cal. App. 2d 755); *see also* 4A Julius L. Sackman & Patrick J. Rohan, *Nichols' The*

[13] Federal law under the Fifth Amendment follows the same rule. *See, e.g.*, *Harris v. United States*, 205 F.2d 765, 767 (10th Cir. 1953) ("Generally it is held that a single destructive act without a deliberate intent to assert or acquire a proprietary interest or dominion is tortious and within the rule of immunity."); *see also Keokuk & Hamilton Bridge Co. v. United States*, 260 U.S. 125, 127 (1922) ("[I]t is enough to say that this is an ordinary case of incidental damage which if inflicted by a private individual might be a tort but which could be nothing else. In such cases there is no remedy against the United States."); *Bedford v. United States*, 192 U.S. 217, 225 (1904) (no takings claim where the alleged damage was only an "incidental consequence" of a public infrastructure project).

Law of Eminent Domain § 14.16[1], at 14–372–76 (Rev. 3d ed. 1990) ("If the damage for which recovery is sought is the result of improper, unlawful or negligent construction or maintenance, recovery may not be had therefor in the [condemnation] proceeding. The owner is relegated in such case to a common-law action for damages."). Only where the public entity "has made the deliberate calculated decision to proceed with a course of conduct, in spite of a known risk [will] just compensation [ ] be owed." *Arreola v. Cty. of Monterey*, 99 Cal. App. 4th 722, 742 (2002); *McMahan's*, 146 Cal. App. 3d at 697 ("The fundamental justification for inverse condemnation liability is that the public entity, acting in furtherance of public objectives, is taking a calculated risk that damage to private property may occur."); *see also Customer Co.*, 10 Cal. 4th at 382 (damage is compensable "if the injury is a result of dangers *inherent in the construction of the public improvement* as distinguished from dangers *arising from the negligent operation of the improvement*") (citation omitted) (emphasis in original);[14] *Holtz*, 3 Cal. 3d at 302 ("public entities may be liable on an inverse condemnation theory for the alleged physical damage to plaintiffs' property proximately caused by the excavation as deliberately planned and designed without a showing of negligence"). This is because the government has made a deliberate decision to "treat[ ] private damage costs, anticipated or anticipatable, but *uncertain in timing or amount or both*, as a deferred risk of the project." *McMahan's*, 146 Cal. App. 3d at 697 (citation omitted) (emphasis added); *Sheffet*, 3 Cal. App. 3d at 733–734 ("Property is only deemed taken or damaged for a public use if the injury is a *necessary consequence* of the public project.") (emphasis added).

In *Tilton v. Reclamation Dist. No. 800*, the plaintiffs sought inverse condemnation damages, alleging that government employees damaged their property by failing to properly maintain a levee, causing the plaintiffs' property to destabilize, and their structures to slide and become unlevel. 142

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[14] As clarified by subsequent courts, this "inherent" danger standard does not subject public entities to "absolute open-ended liability" for all risks potentially implicated by a public improvement. *Belair*, 47 Cal. 3d at 558. Rather, the public entities are liable under inverse condemnation for harms that will occur, but where the "timing or amount" of these harms is uncertain. *McMahan's*, 146 Cal. App. 3d at 697. For example, when a pipe is known to have a finite life and the public agency knows it will eventually fail if not replaced, the only uncertainty is as to the "timing or amount" of damage that the pipe's failure will cause. *Id*. at 696. In contrast, Plaintiffs do not allege that SCE's electrical facilities will inevitably ignite wildfires.

Cal. App. 4th 848, 852 (2006). In sustaining the government's demurrer, the Court of Appeal explained that "damage resulting from negligence in the routine operation" of public infrastructure does not give rise to an inverse condemnation claim. *Id*. at 855 (quoting *Customer Co*., 10 Cal. 4th at 382). The *Tilton* court specifically noted that the plaintiffs did not allege, as required, that the government deliberately diverted water onto their land; rather, the plaintiffs alleged that the government negligently maintained or operated the levee, which the court held "does not charge a taking of property for public use under the Constitution." *Id*. at 856.

Here, Plaintiffs' allegations fail for the reasons articulated in *Tilton*, *Customer Co.*, *Sheffet*, and numerous other cases refusing to entertain inverse condemnation claims based on allegations of negligence. Plaintiffs do not and cannot allege that SCE deliberately ignited the Fires, or that it constructed electrical poles, lines, or facilities in "anticipat[ion]" that wildfires would necessarily result. *McMahan's*, 146 Cal. App. 3d at 697. Nor do Plaintiffs allege that wildfire damage is a "necessary consequence" of constructing, maintaining, or operating SCE's electrical grid. *Sheffet*, 3 Cal. App. 3d at 734. Instead, Plaintiffs expressly allege in conclusory fashion that SCE's *negligent* maintenance and operation of its electrical facilities and surrounding vegetation proximately caused the Fires. Such conclusory allegations are not entitled to a presumption of truth, but even if credited as true, they would still fail to state a claim for inverse condemnation.

3. The Deliberate Action Requirement Is Not Satisfied Merely Because SCE Constructed, Maintains, and Operates Electrical Infrastructure

The deliberate action requirement for a taking is not satisfied merely because SCE intentionally constructed, maintained, or operated electrical infrastructure because the Fires were neither a "necessary consequence of the public project" nor a result of the project as deliberately designed. *Id*. All infrastructure is deliberately built. So, a government entity cannot be liable for its decision to build or maintain its infrastructure because otherwise it would be subject to perpetual strict liability for all accidents traceable to the infrastructure. Such an outcome would amount to a "general repeal" of sovereign immunity. *Customer Co.*, 10 Cal. 4th at 389. The California Supreme Court has rejected a rule that would make public entities "absolute insurers" of land serviced by their infrastructure projects. *Belair*, 47 Cal. 3d at 564; *see also*, *Holtz*, 3 Cal. 3d at 303–04 (cautioning

"against an open-ended, absolute liability rule of inverse condemnation" and that "compensation, allowed too liberally, will seriously impede, if not stop, beneficial public improvements").

Plaintiffs are likely to argue that the court in *Barham* permitted an inverse claim arising out of a wildfire. Although it is true that the Court of Appeal in *Barham* reversed an inverse condemnation judgment in favor of the defendant based on accidental fire damage, that decision does not save Plaintiffs' inverse condemnation claims here. In *Barham*, "strong wind conditions caused a section . . . of power line to break," igniting a brush fire. 74 Cal. App. 4th at 748. The *Barham* court first reaffirmed that "inverse condemnation liability is limited to . . . injuries . . . caused by a public improvement as deliberately constructed and planned," *Id*. at 755, but the court then misapplied that rule failing to examine whether the infrastructure at issue was in fact deliberately constructed and planned in a manner inherently subject *to causing wildfires*, or whether the damages claimed were a *necessary consequence* of the public project, or if the damages occurred in connection with the construction of the relevant public improvements. *See id.* ("In the instant case, the damage arose out of the functioning of the public improvement as deliberately conceived, altered and maintained.").[15]

Barham misunderstood the deliberate action requirement as simply meaning that infrastructure must be built and operated deliberately, which, of course, all infrastructure is. Utility lines, roads, drainage basins, and railways are not built by accident. The court did not explain how destruction of property for miles by an uncontrolled wildfire could result from the "functioning of the public improvement as deliberately conceived." *Id.*

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[15] *Albers*'s reference to certain damages being compensable whether "foreseeable or not" does not alter *Sheffet*'s "necessary consequence" standard, nor does it imply that unintended property damage can constitute an inverse claim. *See* 62 Cal. 2d at 262. Rather, as explained by Professor Van Alstyne and confirmed by subsequent caselaw, "[f]oreseeability is more typically regarded . . . as an element of proximate cause." *Inverse Condemnation: Unintended Physical Damage*, Arvo Van Alstyne, 20 Hastings L.J. 431, 433 n.12 (1969); *see also Belair*, 47 Cal. 3d at 559 ("Our decision in *Albers*, . . . contained the seeds of confusion through its combination of 'proximate cause' terminology with the elimination of foreseeability as an element of inverse condemnation."); *Holtz*, 3 Cal. 3d at 304 n.9 ("the 'proximate causation' terminology utilized in *Albers* is potentially confusing, because the 'proximate cause' doctrine of tort law is often defined in terms of 'foreseeability'"). As SCE is not now challenging whether Plaintiffs can establish causation, "foreseeability" is not relevant to SCE's arguments here. *See Holtz*, 3 Cal. 3d at 304 n.9 ("In the instant case, however, defendants have raised no contention concerning an absence of the requisite degree of causation; we believe it proper to defer any change in language to a case which better reveals the competing considerations on the causation issue.").

Instead of considering whether negligent wildfire damage can in fact arise from power lines operating as designed and planned, *Barham* improperly relied upon dicta in two older cases involving inverse condemnation claims for fire damage: *Aetna Life & Cas. Co. v. City of Los Angeles*, 170 Cal. App. 3d 865 (1985), and *Marshall v. Dept. of Water & Power*, 219 Cal. App. 3d 1124 (1990). *See Barham*, 74 Cal. App. 4th at 753. In both *Aetna* and *Marshall*, however, the courts did not consider or decide whether the property damage resulted from a deliberate action or whether the alleged taking had been for public use. Neither *Aetna* nor *Marshall* supports the *Barham* court's misunderstanding of the deliberate action and public use requirements, and neither supports plaintiffs' claims here. Both cases also predate the California Supreme Court's reaffirmation of *Miller* and *Bauer* in *Customer Co.*, and should therefore be disregarded.[16] *People v. Banks*, 53 Cal. 2d 370, 389 (1959) ("Cases are not authority for propositions not considered."); *Meehan v. Hopps*, 45 Cal. 2d 213, 217–18 (1955) (declining to follow cases which "seem to contain an implicit ruling" supporting a party's view, but in which the relevant argument was not "put in issue or considered by the court").

This Court should follow the numerous California Supreme Court and California Court of Appeal cases holding that negligent damage caused by the performance of public duties or the operation of infrastructure is not a taking for public use. To the extent Plaintiffs argue that *Barham* suggests otherwise, that case is distinguishable and not binding on this Court. *See Auto Equity Sales, Inc. v. Superior Court of Santa Clara Cty.*, 57 Cal. 2d 450, 455 (1962) ("[D]ecisions of [the Supreme C]ourt are binding upon and must be followed by all the state courts of California."). That is particularly true where, as here, there are many appellate cases that *are* consistent with California Supreme Court precedent. *See David S. Karton, A Law Corp. v. Dougherty*, 231 Cal. App. 4th 600, 613–14 (2014) (reliance on an appellate decision was misplaced where it conflicted with a California Supreme Court precedent and with other California Court of Appeal precedents).

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[16] Like *Barham*, neither *Aetna* nor *Marshall* considered or applied the California Supreme Court's mandate in *Miller* and its progeny that "[d]amage resulting from negligence in [the] routine operation having no relation to the function of the project as conceived is not a taking for public use and thus not a basis for inverse condemnation." *Kambish v. Santa Clara Valley Water Conserv. Dist.*, 185 Cal. App. 2d 107, 111 (1960); s*ee, e.g.*, *Miller*, 208 Cal. at 76–77; *Bauer*, 45 Cal. 2d at 285–86; *Neff*, 142 Cal. App. 2d at 756–59.

C. Accidental Wildfire Damage Does Not Further a Public Use

Plaintiffs' inverse condemnation claims also fail because property damage caused by an uncontrolled fire is not damage caused to further a public use. The Takings Clause is unambiguous: for property damage to be compensable as a taking, the property must be "*damaged for public use*," Cal. Const. art. I, § 19 (emphasis added). That is, the *infringement of the plaintiff's property rights* must itself further a public purpose. To establish that the taking was "for public use," the "destruction or damaging of property" must be "sufficiently connected with 'public use.'" *Customer Co.*, 10 Cal. 4th at 382; *accord, e.g.*, *Bauer*, 45 Cal. 2d at 286 (damage must relate "to the function of the project as conceived" to be a taking). This element is not satisfied by private losses incidental to the operation of public works that have no accompanying public gain, as it is irrelevant that the public project as a whole may have benefitted the public.

To be "damage for public use," the alleged damage must "promote the ends of a public use" and be "an act necessary to the doing of the work in the performance of which" the public entity was engaged. *W. Assur. Co.*, 72 Cal. App. 68 at 74–75; *see also Customer Co.*, 10 Cal. 4th at 382 (the "destruction or damage of property" must be "sufficiently connected with 'public use'") (citations omitted). That is simply not the case here. It is irrelevant whether the underlying activity of the public entity is in furtherance of a public purpose. The relevant issue is whether the damage—i.e., the actual alleged infringement of Plaintiffs' property rights—is sufficiently connected to a public use. In *Customer Co.*, the California Supreme Court held that tear gas damage to a store and its inventory was not damage "for public use" even though officials deliberately fired the canisters for the public purpose of apprehending a felon. As the Court explained, the actual destruction of private property in that case did not itself confer a benefit on the public, even though it was associated with a collateral benefit for the public (capturing a felon). *See id.* at 375–81; *see also, e.g.*, *W. Assur. Co.*, 72 Cal. App. at 74–75 (levee construction was for a public use, but negligent fire damage was not); *McNeil*, 124 Cal. App. 2d at 328 (accidental fire damage is not damage for public use after the fire escaped, even if the fire was deliberately set for the public purpose of clearing weeds).

Plaintiffs' allegations are similar to the types of claims rejected in *Miller* and *Customer Co.* Plaintiffs allege (like the plaintiffs in those cases) that SCE provided an underlying public good or

service. *Compare* Complaint, ¶ 18 ("the purpose of conducting electricity delivery to members of the general public"), *with Miller*, 208 Cal. at 75 ("burning garbage collected within the bounds of said city"), *and Customer Co.*, 10 Cal. 4th at 388 ("the efforts of the law enforcement officers to apprehend a felony suspect"). And Plaintiffs allege (again like the plaintiffs in *Miller* and *Customer Co.*) that the defendant acted negligently in the provision of that public good or service. *Compare, e.g.*, Complaint, ¶ 137 (SCE's actions and inactions allegedly "constituted negligence"), *with Miller*, 208 Cal. at 75 (government entity "carelessly and negligently failed to take, or cause to be taken, any care or caution of any kind or character"), *and Customer Co.*, 10 Cal. 4th at 385 (government entity's conduct "constituted, at most, an act of 'routine negligence'"). Just as the *Miller* and *Customer Co.* courts found such allegations insufficient to constitute inverse condemnation, so too should this Court.

Plaintiffs' proposed interpretation of the "public use" requirement would make the government strictly liable in perpetuity for all damage traced to public infrastructure or to government employees performing their daily functions. This would turn sovereign immunity on its head. The California Supreme Court has repeatedly warned that the purpose of inverse condemnation is not to subject government entities to unbounded liability for their infrastructure projects, as such a rule would deter public improvements. *See, e.g.*, *Belair*, 47 Cal. 3d at 565 ("[A] public agency that undertakes to construct or operate a flood control project clearly must not be made the absolute insurer of those lands provided protection.").[17] Moreover, because SCE is not a governmental entity entitled to sovereign immunity, Plaintiffs may still proceed on the tort claims that they have asserted.

Plaintiffs may again rely on *Barham* to argue that SCE's provision of electricity itself satisfies the requirement that their property be taken for "public use." But *Barham* did not consider the argument SCE makes here: that, for inverse condemnation liability to apply, the property damage must relate "to the function of the product as conceived" to amount to damage for "public use." *Bauer*, 45 Cal. 2d at 286. As *Bauer* suggests, this is closely related to the deliberate action

[17] Cases in other jurisdictions have also considered and rejected Plaintiffs' theory that any damage caused by public infrastructure is a taking for public use. *See, e.g.*, *AGCS Marine Ins. Co. v Arlington Cty.*, 293 Va. 469, 474 (2017); *Electro-Jet Tool Mfg. Co., Inc. v. Albuquerque*, 114 N.M. 676 (1992).

requirement discussed above. Where the source of the damage is "an accident" or an act "resulting from carelessness" as opposed to a "deliberate act carrying with it the purpose of fulfilling one or another of the public objects of the project as a whole," the damage is not inflicted for public use. *Id.*

In contravention of *Miller*, *Bauer*, and their progeny, *Barham* based its errant finding of public use on the general purpose of the electrical facilities, rather than the damage that they caused. *See Barham*, 74 Cal. App. 4th at 754, ("the transmission of electric power through the facilities that caused damage to the Barhams' property was for the benefit of the public"). But it is not enough for the underlying government activity or infrastructure to have a public purpose, the relevant inquiry concerns the damage itself. *See, e.g.*, *Bauer*, 45 Cal. 2d at 286; *Miller*, 208 Cal. at 76–77 (municipal garbage disposal was public use, but unintentional fire resulted from carelessness not furthering that public purpose); *Hayashi*, 167 Cal. App. 2d at 591–92 (levee served public purpose of flood control, but "acts of carelessness or neglect" in maintaining levee did not further that purpose); *W. Assur. Co.*, 72 Cal. App. at 74–75 (levee construction was for a public use, but negligent fire damage did not further that use); *McNeil*, 124 Cal. App. 2d 326 (weed management was a public use, but negligent fire damage did not further that use); *see also, e.g.*, *City of Austin*, 431 S.W.3d at 827 ("On appeal, the public use asserted by appellees is 'power transmission.' But appellees do not allege or explain how the damage to their property advanced that purpose."); *Am. Family Mut. Ins. Co. v. Am. Nat'l Prop. & Cas. Co.*, 370 P.3d 319, 328 (Colo. App. 2015) ("The public purpose of an intended act (the prescribed burn) that ultimately results in an unintentional 'taking' (the wildfire) does not transfer to and supply the 'public purpose' for that taking. Stated differently, merely showing that the taking was the direct, natural, or probable consequence of the state's intended act does not necessarily establish that the taking was for a public purpose.").

Here, as in the cases cited above, Plaintiffs agree that the Fires were a random accident; they did not further the public purpose of providing electricity. Like the damage caused by the accidental fires at issue in *Miller* and *McNeil*, the wildfire damage Plaintiffs allege was not "damage for public use." Because Plaintiffs have not alleged facts satisfying the requirement that their property damage be "for public use," they have not stated a claim for inverse condemnation.

D. Because SCE Is Not a Government Agency, Applying Inverse Condemnation Liability to SCE Violates Both the Takings Clause and Its Due Process Rights

In light of SCE's status as a private corporation and inability to socialize losses, extending inverse condemnation liability to SCE would violate the Takings Clause and the Due Process Clause. SCE is a privately owned utility entitled to just compensation and due process before its own private property may be taken.

1. Extending Inverse Condemnation Liability to SCE Violates SCE's Takings Clause Rights

Permitting inverse condemnation claims to proceed against SCE violates the Takings Clause by transferring funds from one private party (SCE) to another (Plaintiffs), without proof of fault. If SCE is held strictly liable for inverse condemnation damages, SCE's money ("private property") will be taken without "just compensation."[18] Cal. Const., art. I, § 19; U.S. Const. amend. V. As the Supreme Court recognized in *Eastern Enterprises v. Apfel*, the imposition of liability can itself be a taking. *See* 524 U.S. 498, 538 (1998) (plur. op.) (holding that the government's "allocation of liability to Eastern violates the Takings Clause"). SCE's opportunity to request reimbursement through a rate increase (which can be rejected by the responsible regulatory agencies) does not change the result that the imposition of liability without a corresponding right to increase rates or receive reimbursement in another form is an unconstitutional taking. *Id.* at 531 ("Although the Act preserves Eastern's right to pursue indemnification. . . it does not confer any right of reimbursement.").

2. Extending Inverse Condemnation Liability to SCE Violates SCE's Due Process Clause Rights

The Fourteenth Amendment similarly protects against government deprivations of property that are arbitrary or irrational. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416–17 (2003) ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly

[18] SCE does not dispute its obligation to pay "just compensation" if it exercises the narrow power of eminent domain delegated to it by the State of California. But SCE has not exercised the power of eminent domain here – it has not taken any deliberate action to infringe Plaintiffs' property rights for public use. Plaintiffs' allegations amount to standard tort claims, shoehorned inappropriately into the constitutional framework of inverse condemnation.

excessive or arbitrary punishments on a tortfeasor."); *Ketchum v. State*, 62 Cal. App. 4th 957, 963 (1998) (government action violates due process when there is no "rational relationship between the State's purposes" and the scope of liability). As explained above, Plaintiffs' allegations do not support the imposition of inverse condemnation liability and have nothing in common with traditional governmental takings. Further, because SCE lacks the power to perform the loss-spreading function of the Takings Clause, allowing Plaintiffs to recover against SCE without proof of fault would shift losses from one group of private parties (the 2000 plus Plaintiffs) to another private party (SCE). Permitting Plaintiffs to recover under the Takings Clause in such circumstances—excusing Plaintiffs from the need to prove the traditional elements of a tort while depriving SCE of its right to a jury trial on liability and exposing it to attorneys' fee claims that would not apply in traditional tort claims—would be arbitrary and capricious, in violation of SCE's Due Process rights. To the extent Plaintiffs seek to pursue their allegations against SCE, they must do so under tort or statutory causes of action.

V. CONCLUSION

The issue presented in this demurrer is an important one for the parties and the state. The law around inverse condemnation has developed over many decades and has been applied in varied contexts. But there have long been certain fundamental prerequisites that must be met before inverse condemnation liability can attach. Here, those requirements have not and cannot be met. SCE cannot be held liable under inverse condemnation because, as a private company, SCE cannot socialize inverse condemnation losses as a matter of right. And whatever their cause (and Plaintiffs allege they were caused by SCE's negligence), the Fires were not a deliberate act to further a public use. For the foregoing reasons, Defendant SCE respectfully requests that the Court sustain its demurrer to Plaintiffs' inverse condemnation causes of action without leave to amend.[19]

[19] To the extent the Court overrules Defendants' Demurrer, Defendants respectfully request that the Court recommend that the issue of whether Plaintiffs state a claim for inverse condemnation be certified for interlocutory appellate review, pursuant to California Code of Civil Procedure § 166.1.

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Respectfully submitted,

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