Filed 11/14/19 LAOSD Asbestos Cases CA2/4

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| LAOSD ASBESTOS CASES. | |
| MARY MALEK et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>CHEVRON U.S.A. Inc., et al.,<br><br>Defendants and Respondents. | B270957<br><br>JCCP No. 4674<br>(Los Angeles County<br>Super. Ct. No. BC580695) |

APPEALS from judgments of the Superior Court of Los Angeles County, Emilie H. Elias, Judge. Affirmed.

Weitz & Luxenberg, Benno Ashrafi and Josiah Parker; The Arkin Law Firm and Sharon J. Arkin for Plaintiffs and Appellants Mary Malek and Mozhgan Malek, as successor in interest to Farid Malek.

King & Spalding, Peter A. Strotz, Steven D. Park, Ethan P. Davis, Vincent Tremonti and Ashley C. Parrish (*pro hac vice*) for Defendants and Respondents Chevron U.S.A. Inc. and Texaco Inc.

Valinoti, Specter & Dito, Ronald Specter and Mark Anthony Rodriquez, for Defendant and Respondent ConocoPhillips Company.

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## INTRODUCTION

This lawsuit is one of a number of coordinated asbestos actions filed in the Superior Court of Los Angeles County. (Code Civ. Proc., § 404.) Farid Malek died from mesothelioma after working almost 30 years at the Abadan oil refinery in Iran. Appellants are Mary Malek, Mr. Malek's surviving spouse, and Mozhgan G. Malek, his successor in interest. The trial court granted summary judgment in favor of Chevron U.S.A. Inc., Texaco Inc. (collectively, Chevron/Texaco) and ConocoPhillips Company (CPC), finding as a matter of law that these respondents did not owe a duty of care to Mr. Malek or his spouse. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND[1]

Iran nationalized its oil assets in 1951, eliminating the British government's majority ownership. The National Iranian Oil Company (NIOC) was formed in 1952 "to own and supervise all oil assets in Iran, including the Abadan refinery," which had been in operation since 1912. NIOC,

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[1] This section primarily relies on undisputed facts in the moving parties' separate statements in support of their motions for summary judgment. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 ["Facts not contained in the separate statement do not exist"].) Where appropriate, we have supplemented the undisputed facts with references to the 1954 Agreement, upon which appellants base their claims, as well as certain allegations in appellants' operative pleading, the first amended complaint (FAC). (*Castillo v. Barrera* (2007) 146 Cal.App.4th 1317, 1324 ["'A defendant moving for summary judgment may rely on the allegations contained in the plaintiff's complaint, which constitute judicial admissions. As such they are conclusive concessions of the truth of a matter and have the effect of removing it from the issues'"].)

Appellants did not respond with an unequivocal "undisputed" to several of the fact statements included in this section of the opinion. However, responsive separate statements that ignore, go beyond moving parties' undisputed facts, or include only arguments and legal conclusions do not create triable issues of material fact. (*Page v. MiraCosta Community College Dist.* (2009) 180 Cal.App.4th 471, 479, fn. 2 (*Page*).)

however, "had no access to the global oil markets because the British had dominated them for the [previous] half century and were unwilling to cooperate after their expulsion from the region."

In 1954, NIOC and the government of Iran jointly entered into a comprehensive contract (1954 Agreement) with eight international oil companies, the "consortium members." Consortium members included Gulf Oil Corporation, Standard Oil Company (New Jersey), Standard Oil Company of California, and the Texas Company. Respondents Chevron U.S.A. and Texaco are successor corporations to these signatory entities (collectively, Chevron/Texaco).

The 1954 Agreement "was expressly intended to benefit the Iranian [g]overnment." One recited goal was "to increase the production and sale of Iranian oil, and thereby to increase the benefits flowing to the Iranian nation from said oil."

The 1954 Agreement provided for the formation of a number of corporations. Two such entities—the Iranian Oil Exploration and Producing Company (IOEPC) and Iranian Oil Refining Company (IORC)—were designated as the "Operating Companies" for the Iranian enterprise. In Article 3A of the 1954 Agreement, the consortium members "jointly and severally guarantee[d] the due performance by the Operating Companies of their respective obligations under this Agreement." Article 4 of the 1954 Agreement listed and "strictly limited" the "rights, powers and obligations of the

Operating Companies as well as the nature and extent of the supervision to be exercised by Iran and NIOC . . . to what is clearly stated in this Article."[2] The operating companies' contractual obligations were expressly owed only to "to Iran and NIOC" and included the duty "to conform with good oil industry practice . . . in operating the . . . refinery . . . ."

Article 17 of the 1954 Agreement gave NIOC control of all "non-basic operations," defined in part as "the provision, maintenance and administration of [identified] ancillary services," including "[m]edical and health services." Article 18 required consortium members to purchase crude oil from NIOC and gave them the right to purchase natural gas as well. Consortium members were permitted to assign these rights and obligations to subsidiary entities, referred to in the 1954 Agreement as "trading companies."

In 1955, consortium members entered into a "Participation Agreement," which created yet another entity, Iranian Oil Participants Ltd. (IOP). IOP was a holding company, and IOEPC and IORC were its wholly owned subsidiaries.[3] Each consortium member was allocated shares in IOP and granted the right to appoint at least one

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[2] The 1954 Agreement exceeded 50 pages in length and consisted of two Parts. Article 4 was one of 51 Articles in Part I.

[3] See footnote 1. Appellants labeled this fact as "disputed" in their responsive separate statement, but then admitted, "IOEPC and IORC were wholly owned subsidiaries of IOP."

member on the IOP's Board of Directors. Collectively, the consortium members' allocations were less than 50 percent.

Gulf Oil Corporation, Standard Oil Company (New Jersey), Standard Oil Company of California, and the Texas Company, through separate corporate entities they formed, sold a portion of their IOP shares to companies that were not signatories to the 1954 Agreement, including the San Jacinto Petroleum Corporation, which in turn transferred its shares to San Jacinto Eastern. Respondent ConocoPhillips Company (CPC) eventually acquired this interest.

The 1954 Agreement contemplated a 25-year lifespan. In 1973, however, NIOC formed a new entity, the Oil Services Company of Iran (OSCO). "IORC transferred its employees to OSCO . . . , and OSCO replaced IORC as the operator of the Abadan refinery."

Farid Malek, an Iranian citizen, worked at the Abadan refinery between 1951 and 1979. He emigrated to the United States and settled in California in 1981. After the mesothelioma diagnosis, he and his spouse, Mary Malek, sued more than 40 named defendants for his injuries and her loss of consortium. Many of the named defendants were directly involved in the procurement or installation of asbestos products in the refinery; respondents were not. Against respondents, the FAC alleged causes of action for negligence based on a failure "to ensure that the Abadan refinery was operating in accordance with good oil industry practice and sound engineering principles; strict liability; premises owner/contractor liability; negligence based on joint

venture/single business enterprise; alter ego liability on the basis that IOP, IOEPC, and IORC were respondents' alter egos; and loss of consortium. Appellants sought general and punitive damages.

The parties engaged in extensive discovery. Given Mr. Malek's terminal illness, appellants proposed a shortened time for notice of defense summary judgment motions in exchange for respondents' agreement not to oppose appellants' request for trial preference. The parties so stipulated; the trial court granted appellants' request and scheduled the trial within 120 days, as required by Code of Civil Procedure section 36, subdivision (f).[4] The trial court's order noted appellants' agreement to waive the statutory notice period for summary judgment motions.

Chevron and Texaco's joint motion for summary judgment/summary adjudication of issues (SJ/SAI) was scheduled for hearing several days before CPC's motion. Appellants obtained a one-week continuance of each hearing date and a four-day trial continuance to conduct discovery necessary to respond to the declarations and points raised in respondents' moving papers. (§ 36, subd. (f).) On the last day to do so, as extended by the first continuance, appellants, who opposed the SJ/SAI motions on the merits, also sought a second continuance of the defense motions. The trial court did not rule on the second continuance requests in advance of the hearings.

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[4] All undesignated statutory references are to the Code of Civil Procedure.

The parties focused their merits arguments on whether respondents, who did not manufacture, procure, or install any asbestos products in the Abadan refinery, nevertheless owed appellants a duty of care to protect Mr. Malek from asbestos exposure during his employment. Respondents' evidence negating a duty of care shifted the burden to appellants. Appellants contended "good oil industry practice" required workplace safety standards sufficient to ensure that workers did not suffer from harmful asbestos exposure. Appellants asserted respondents fell below this standard of care by negligently operating and/or controlling the Abadan refinery directly, as a result of obligations imposed by the 1954 Agreement, or indirectly, through one or more of the "three alternative and distinct theories" of enterprise liability-joint venture, agency, and alter ego.[5] Additionally, appellants argued Mr. Malek was a third party beneficiary of the 1954 Agreement and entitled to enforce the "good oil industry practice" obligation against respondents in their roles either as operators of the Abadan refinery or guarantors of the operators' contractual duties. Finally, and regardless of any third party beneficiary status, appellants maintained the 1954 Agreement was a contract

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[5] "Enterprise liability" is another term for alter ego liability. (*Gopal v. Kaiser Foundation Health Plan, Inc.* (2016) 248 Cal.App.4th 425, 432.) The term does not apply to liability based on joint venture or agency.

for services and a triable issue of material fact existed as to whether respondents negligently performed under it.

In addition to the terms of the 1954 Agreement, appellants relied heavily on the declaration of Kenneth S. Garza, "a Texas licensed Asbestos Consultant" and "Certified Industrial Hygienist." The expert's opinions concerned only the entities "that operated and managed the Abadan oil refinery." Garza concluded those companies "did not take well-known and industry-standard precautions to ensure the safety of employees working with and around asbestos-containing materials [and] . . . violated workplace safety standards known to industry in general . . . and the oil industry in particular, since the 1930's." In reaching his conclusions, Garza quoted from a number of professional publications he reviewed, but had not authored, and cited Occupational Safety and Health Agency (OSHA) asbestos regulations enacted in 1971.

Garza did not establish that OSHA regulations applied to Iranian refinery operations. Objections to those portions of his declaration that recited text from technical and professional publications authored by others, but not themselves offered in evidence, were sustained.

The trial court granted the summary judgment motions, finding appellants failed to raise any triable issues of material fact and, as a matter of law, respondents owed no duty of care.[6] In its written orders granting summary

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[6] Chevron/Texaco also argued they were entitled to summary judgment based on the "political question

judgment, the trial court addressed allegations that respondents "owned, controlled, or operated the Abadan Refinery premises;" "the 1954 government agreement was intended to benefit Farid Malek;" and the alter ego, agency, and joint venture allegations. With these rulings, the derivative claims for loss of consortium and punitive damages fell as well.

Judgments in favor of respondents were entered. These appeals followed.[7] Farid Malek died during the pendency of the appeals, and Mozhgan G. Malek was substituted in his place as successor in interest.

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doctrine." The trial court rejected this theory. This aspect of the trial court's ruling has not been challenged, and we do not address it further.

Although CPC's corporate predecessors did not sign the 1954 Agreement, appellants contended they–and ultimately, CPC–assumed the obligations of consortium members when they acquired a minute fraction of IOP stock. The trial court disagreed: "[Appellants] fail to raise a triable issue as to the chain of liability from San Jacinto Eastern to CPC. The evidence is insufficient to show an unbroken chain of liability." Because we conclude CPC negated a duty of care as a matter of law, there is no need to address this issue.

[7] The Maleks first challenged the summary judgments via petitions for extraordinary relief; this court summarily denied them. (B268929, B268931.)

## DISCUSSION

### I. Governing Principles[8]

#### *A. Standard of Review*

On appeal from a summary judgment, our review of the record is de novo. The defendant in a negligence action is entitled to summary judgment if it demonstrates "one or more elements of [each] cause of action, even if not separately pleaded, cannot be established." (§ 437c, subd. (p)(2); *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) We "strictly construe the papers of the moving party and liberally construe those of the opponent." (*WYDA Associates v. Merner* (1996) 42 Cal.App.4th 1702, 1709.)

#### *B. Summary Judgment*

A party seeking summary judgment must state the material facts in a separate statement, and the opposing party is required to respond in the same format. (§ 437c, subd. (b).) The moving and responsive separate statements also must identify the supporting admissible evidence. (*Ibid.*)

The trial court's analysis begins with the moving party's separate statement. The trial court may consider all

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[8] Several months after the FAC was filed, the coordination judge ruled that California law applies in the Malek matter. The ruling was challenged by a codefendant; this court summarily denied the petition for extraordinary relief.

"direct, circumstantial and inferential evidence" (*Scheiding v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, 83) to determine whether the moving party has made "a prima facie showing of the nonexistence of any triable issue of material fact" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*)). "A prima facie showing is one that is sufficient to support the position of the party in question. . . . No more is called for." (*Id.* at p. 851.)

A moving party that satisfies this burden "causes a shift, and the opposing party is then subjected to a burden of production of [its] own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar*, *supra,* 25 Cal.4th at p. 850.) Once the moving party has caused the burden to shift, the opposing party cannot simply stand on its pleadings, but must respond with admissible evidence that demonstrates the existence of one or more triable issues of material fact. (§ 437c, subd. (p)(2).) To the extent the opposing party seeks to base evidentiary disputes "on arguments or characterizations about the legal sufficiency of facts and documents . . . or statements that go beyond the assertedly undisputed fact, they are ineffective to create triable issues." (*Page, supra,* 180 Cal.App.4th at p. 479, fn. 2.)

### *C. Contract Interpretation*

De novo review of the summary judgments includes our independent analysis of written agreements. As appellants readily acknowledge, the interpretation of the 1954

Agreement is a matter "*for this* C*ourt,*" and is not the proper subject of expert testimony. Moreover, "[o]n appeal from a summary judgment based on a trial court's interpretation of a contract, we are not bound by that interpretation (1) if there is no extrinsic evidence concerning its interpretation, (2) if there is no conflict in such evidence, or (3) if, as here, the conflicting extrinsic evidence is of a written nature only. In these three situations, the trial court is in no better interpretive position than are we to construe the summary judgment-determinative agreement." (*Department of Forestry & Fire Protection v. Lawrence Livermore National Security, LLC* (2015) 239 Cal.App.4th 1060, 1066.)

Written agreements may contain both "recitals" and "covenants." Covenants determine the parties' "legal rights and obligations." (*Emeryville Redevelopment Agency v. Harcros Pigments, Inc.* (2002) 101 Cal.App.4th 1083, 1101 (*Emeryville Redevelopment*).) By contrast, "[r]ecitals are given limited effect even as between the parties." (*Ibid.*) "Ordinarily, recitals are only preliminary in nature and will not, of themselves, be considered binding obligations on the parties or an effective part of their agreement unless referred to in the operative portion of their agreement." (*First Bank & Trust Co. v. Vill. of Orland Hills* (Ill.Ct.App. 2003) 787 N.E.2d 300, 308 (*First Bank*).)

### *D. Negligence*

Every negligence cause of action has three elements: a legal duty to use due care, breach of that duty, and an injury

proximately caused by the breach. (*Lichtman v. Siemens Industry Inc.* (2017) 16 Cal.App.5th 914, 920 (*Lichtman*).) "Recovery in a negligence action depends as a threshold matter on whether the defendant had '"a duty to use due care toward an interest of [the plaintiff's] that enjoys legal protection against unintentional invasion."' [Citations.] We review de novo whether this '"essential prerequisite"' to recovery is satisfied." (*Southern California Gas Leak Cases* (2019) 7 Cal.5th 391, 397-398, fn. omitted.)

A duty of care may be created by "statute, contract, or the relationship of the parties." (*National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc.* (2009) 171 Cal.App.4th 35, 45.) The special relationship necessary to "give[] rise to a duty to take affirmative action to protect another may be created by contract, or by a statute or government regulation." (*Suarez v. Pacific Northstar Mechanical, Inc.* (2009) 180 Cal.App.4th 430, 438.) Special relationships also are recognized under common law.[9] (*Seo v. All-Makes Overhead Doors* (2002) 97 Cal.App.4th 1193, 1203.)

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[9] The common law special relationship doctrine typically applies to impose a duty on a defendant to take affirmative action to protect the plaintiff from the criminal conduct of a third party. (See, e.g., *Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, 411-412 [Scouts owed a duty of care to protect a scout from sexual abuse by an adult volunteer Scout leader]; *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 250 (*Delgado*) [special relationship existed where the defendant had actual notice of an "impending

The general rule is that persons are "obligated to exercise due care in [their] own actions so as to not to create an unreasonable risk of injury to others." (*Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 716.) This is particularly so "in cases involving traditionally compensable forms of injury–like physical harm to person or property." (*Southern California Gas Leak Cases*, *supra*, 7 Cal.5th at p. 398.) For example, being in possession of real property, ""[with its attendant right to control conditions on the premises is a sufficient basis [to impose on a defendant] an affirmative duty to act."" (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158 (*Kesner*); Civ. Code, § 1714.) Conversely, "[a] defendant cannot be held liable for the defective or dangerous condition of property which it did not own, possess, or control. Where the absence of ownership, possession, or control has been unequivocally established, summary judgment is proper." (*Isaacs v. Huntington Mem'l Hosp.* (1985) 38 Cal.3d 112, 134.)

In some circumstances, as in the management of one's own property, a duty of care is presumed. (*Southern California Gas Leak Cases, supra,* 7 Cal.5th at p. 398.) California law, however, "does not . . . impose a presumptive

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assault" on the plaintiff]; *Morris v. De La Torre* (2005) 36 Cal.4th 260, 277 [special relationship existed, but triable issue of fact as to whether restaurant breached the duty by failing to call 911 during a criminal assault on the plaintiff]; *Melton v. Boustred* (2010) 183 Cal.App.4th 521, 531 [party host not in a special relationship with guests].)

duty of care to guard against any conceivable harm that a negligent act might cause." (*Id.* at p. 399.) In situations where a duty of care is not presumed, the rules and analyses are more complicated. (*Peredia v. HR Mobile Services, Inc.* (2018) 25 Cal.App.5th 680, 684 (*Peredia*) [the defendant, a safety consultant retained expressly to assist with "workplace safety obligations," was not entitled to summary judgment where fact questions existed as to the "scope of [its] undertaking and the "duty [of care] that may have arisen from the undertaking"]; *Lichtman, supra,* 16 Cal.App.5th at pp. 921, 924 [the defendant, who contracted with a city to maintain battery backup systems in traffic signals, but failed to install batteries in a unit, did not negate as a matter of law duty of care owed to plaintiff motorist injured in nighttime intersection collision during a power outage]; *Mukthar v. Latin American Security Service* (2006) 139 Cal.App.4th 284, 291 [*Mukthar*] [the defendant did not negate as a matter of law duty of care owed to the plaintiff, whose assault by a customer, "was precisely the kind of harm" the defendant security company contracted with the plaintiff's employer to protect against]; *Dekens v. Underwriters Laboratories Inc.* (2003) 107 Cal.App.4th 1177, 1187-1188 (*Dekens*) [the defendant negated as a matter of law duty of care owed to the plaintiffs where there were no fact questions as to whether the defendant "undertook the responsibility to guarantee [the decedent's] safety from cancer-causing asbestos through its process of testing and

certifying small appliances as safe from injury due to fire, electrical shock, or injuries from sharp protruding objects"].)

## II. Appellants' Request for a Second Continuance of the Summary Judgment/Summary Adjudication of Issues Motions

### *A. Background*

The parties stipulated to hearing dates for the SJ/SAI motions. Before the oppositions were due, appellants filed an ex parte application for brief continuances to accommodate the depositions of seven defense witnesses who submitted declarations in support of the motions. The declaration by appellants' counsel offered no details, but simply advised additional discovery was "essential" because the 1954 Agreement "and the duties and liability that flow from that agreement to operate and run the Abadan Refinery, and the use of asbestos at the refinery, including the use of asbestos by product manufacturers, suppliers and contractors at the Abadan Refinery, is the crux of [appellants'] entire case." The trial court continued the motions for one week and the trial, which had been set on a preferential basis, for four days.

Two of the seven defense declarants, Carter Conlin (on behalf of Chevron/Texaco) and Mark Aebi (on behalf of CPC), were deposed on the very dates that appellants' oppositions, as extended, were due. Although appellants timely opposed the SJ/SAI motions on the merits, they also sought a second continuance to submit the expedited deposition transcripts

for these two witnesses. According to appellants' counsel, there were discrepancies between Conlin's and Aebi's declarations and deposition testimony.[10]

Appellants' counsel declared a direct contradiction concerning Conlin's employment status created "a disputed issue of fact, [making it] essential that the [Chevron/Texaco] motion be continued or . . . denied . . . so that the supplementally-submitted deposition transcript can be considered by this Court in ruling on the motion." Appellants' counsel listed several admissions elicited from Aebi during his deposition, e.g., he was not CPC's custodian

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[10] In his declaration, Conlin stated he did not work for Texaco during the time he was "seconded" to IORC. After Conlin's deposition, appellants' counsel advised the trial court the witness testified that "he remained an employee of Texaco" during his seconding stint.

At the time CPC filed its summary judgment motion, Aebi was the company's manager for risk management and remediation. He averred in support of CPC's motion that he had "access to the corporate records of CPC" and "oversaw" the company's search of those records. He never stated that he personally conducted any corporate record searches or that he was CPC's custodian of records. One primary purpose for Aebi's declaration was the verification of the 1954 Agreement as a document maintained by CPC "in the regular course" of its business." Appellants, who relied heavily on the 1954 Agreement, never disputed its authenticity. CPC also relied on Aebi's declaration to state as an undisputed fact that it, not Aebi, "conducted historical research" and did not locate any documents that would support appellants' allegations.

of records and he did not actually perform the records search. From this, appellants' counsel concluded "an essential material fact asserted by defendant cannot be substantiated by the evidence submitted . . . [and CPC's] motion [should] be continued . . . or . . . denied . . . so that the supplementally-submitted deposition transcript can be considered by this Court in ruling on the motion."

The trial court did not immediately rule on either continuance request. It denied both requests in the order granting the summary judgment motions. The rulings noted appellants never lodged copies of the Conlin or Aebi deposition transcripts with the trial court, the attorney declarations "fail[ed] to identify potential testimony that would alter the outcome of summary judgment," and there was "insufficient time and justification" to continue the trial, previously scheduled on a statutory preference basis.

### *B. Analysis*

Section 437c, subdivision (h) requires the trial court to deny or continue an SJ/SAI motion if the opposing party's declarations demonstrate that "facts essential to justify opposition may exist but cannot, for reasons stated, be presented." Here, appellants asked to continue the motions only to give them time to present certified deposition transcripts at the hearings. Neither attorney declaration averred the deposition testimony included "essential" facts. For that reason, the declarations did not trigger the mandatory provisions of section 437c, subdivision (h).

Appellants implicitly acknowledge a continuance was not compelled under section 437c, subdivision (h), by arguing it "is *technically* true" that the second continuance request was addressed to the trial court's discretion. (*Hamilton v. Orange County Sheriff's Dept.* (2017) 8 Cal.App.5th 759, 765 ["When a party opposing a summary judgment motion does not satisfy the section 437c, subdivision (h) criteria, the granting of a continuance request is discretionary with the trial court, upon a showing of good cause"].) We will "not disturb the exercise of a trial court's discretion unless it appears that there has been a miscarriage of justice. . . . The burden is on the party complaining to establish an abuse of discretion." (*Mahoney v. Southland Mental Health Assocs. Medical Group* (1990) 223 Cal.App.3d 167, 170.) Factors a trial court may consider in evaluating whether good cause has been demonstrated include "(1) how long the case has been pending; (2) how long the requesting party had to oppose the motion; (3) whether the continuance motion could have been made earlier; (4) the proximity of the trial date or the 30-day discovery cutoff before trial; (5) any prior continuances for the same reason; and (6) the question whether the evidence sought is truly essential to the motion." (*Chavez v. 24 Hour Fitness USA, Inc.* (2015) 238 Cal.App.4th 632, 644.)

Appellants did not satisfy their burden. As the trial court ruled, the declarations made no attempt to demonstrate the deposition testimony "would alter the outcome of summary judgment." Although given time to do

so, appellants failed to submit the deposition transcripts. At appellants' behest and for good cause, the trial of this action was set on a preferential basis. By statute, the trial court was prohibited from granting a second continuance without "a showing of good cause in the record." (§ 6, subd. (f).) The attorney declarations did not demonstrate good cause, and appellants' counsel did not address the continuance request on the record at either hearing. The trial court acted well within its discretion in denying the requests for second continuances.

## III. Appellants' Multiple Negligence Theories

Appellants' negligence theories fall into two categories.[11] The first group is based on general negligence and premises liability. Appellants rely on the 1954 Agreement itself, as well as joint venture and agency principles, to argue that respondents controlled operations at the Abadan refinery, where Farid Malek was exposed to asbestos.[12] As appellants acknowledge, "Establishing who

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[11] Appellants no longer contend respondents are liable on a strict products liability theory.

[12] Appellants dropped alter ego allegations against Chevron/Texaco and fail to persuade this court that an alter ego theory of liability against CPC retains viability. Appellants note only that the FAC includes alter ego allegations and "claim that CPC is liable for the [c]onsortium because its predecessor was, and CPC inherited its interests." But appellants' allegations are not evidence.

has the 'right to control' premises, or the operations on a premises, is critical because it determines who has the duty to warn or protect others from a dangerous condition on the premises, or that arises out of operations on the premises." However, unless appellants raise a triable issue of material fact as to whether respondents controlled the Abadan refinery, either directly or through a joint venture or agency relationship with IOP and IORC, no duty of care is owed to appellants under a premises liability theory of negligence. (*Kesner, supra,* 1 Cal.5th at p. 1158.)

The second category of negligence theories is based on the 1954 Agreement. Appellants contend respondents owed them a duty of due care as a result of Mr. Malek's status as a third party beneficiary of the 1954 Agreement or respondents' guaranty of the operating companies' obligation "to conform with good oil industry practice" at the Abadan

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(*Aguilar, supra,* 25 Cal.4th at p. 849.) Appellants support their alter ego arguments as to CPC with two citations, but neither decision involves alter ego liability (*Ray v. Alad Corp.* (1977) 19 Cal.3d 22, 34 [a defendant that "acquires a manufacturing business and continues the output of its line of products . . . assumes strict tort liability for defects in units of the same product line previously manufactured and distributed by the entity from which the business was acquired"]; *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 252 [appellate panel criticized the defendants seeking summary judgment for purporting to reserve the right to later challenge the admissibility of facts it deemed undisputed and for proffering new evidence in its reply]).

refinery. Even if the intended beneficiary theory fails, appellants assert the 1954 Agreement created a special relationship between respondents and the Abadan refinery workers. Under this theory, appellants maintain respondents, although not responsible for the presence of asbestos at Abadan, operated or controlled the refinery and specifically undertook the responsibility to protect workers from asbestos exposure.

### *A. Appellants did not raise a triable issue of material fact under general negligence, premises liability, joint venture, or agency theories*

#### 1. Respondents were not the "operating companies"

"Operating companies" is a defined term in the 1954 agreement. It expressly refers only to IOEPC and IORC. By definition, respondents were not the "operating companies."

Appellants' arguments to the contrary in this court cannot contradict their trial court admissions. In purporting to dispute Chevron/Texaco's material fact statement number 6 ("Under the [1954] Agreement–IORC, not the western oil companies–operated the Abadan Refinery . . ."), appellants admitted the operating companies, not respondents, managed and controlled the Abadan Refinery. Appellants responded with highlighted excerpts from the 1954 Agreement: "First, in direct conflict with the stated 'fact,' the 1954 Agreement specially provided that ***'the Operating***

***Companies . . .*** *shall determine and* **have full and effective management and control of all their operations.'** 'The nature and extent of the foregoing rights, powers and obligations of the Operating Companies as well as the nature and extent of the supervision to be exercised by Iran and NIOC ***shall be strictly limited to what is clearly stated in this Article*** [Article 4]**."**[13]

### 2. Respondents were not joint venturers with the operating companies

Alternatively, appellants maintain respondents effectively were in control of refinery operations as part of a joint venture with IOP and IORC. Respondents presented evidence that negated the existence of a joint venture, shifting the burden to produce evidence to appellants. (§ 437c, subd. (p)(2).) Appellants failed to counter with any evidence sufficient to raise a triable issue of material fact. We conclude from our independent review of the record that no joint venture was formed.

#### *a. Applicable law*

"[T]here is no certain and all-inclusive definition" for a joint venture. (*Holtz v. United Plumbing & Heating Co.* (1957) 49 Cal.2d 501, 506.) Courts recognize "three basic elements [for] a joint venture: the members must have joint

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[13] Appellants repeat this admission in their opening brief, where they note, "the other Operating company, [IORC], was tasked with the day-to-day operations of the Abadan refinery."

control over the venture (even though they may delegate it), they must share the profits of the undertaking, and the members must each have an ownership interest in the enterprise." (*Simmons v. Ware* (2013) 213 Cal.App.4th 1035, 1051-1052.) The profit shares and ownership interests need not be equal. (*Scottsdale Ins. Co. v. Essex Ins. Co*. (2002) 98 Cal.App.4th 86, 91.) The existence of a joint venture may present a question of fact or law. If "there is no conflicting extrinsic evidence concerning the interpretation of the contract creating the relationship, the issue is one of law." (*County of Riverside v. Loma Linda University* (1981) 118 Cal.App.3d 300, 313.)

"A joint venture . . . resembles a partnership in that its members associate together as coowners of a business enterprise, agreeing to share profits and losses." (9 Witkin, Summary of Cal. Law (11th ed. 2017), Joint Venture, § 12, p. 599.) Courts typically apply general partnership law to a joint venture. (*Ibid.*) One precept of partnership law is that, "in the usual case . . . a partnership does not continue to exist after the formation of a corporation" to carry on the partners' business. (*Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1157 (*Persson*).) Also, when a partnership "merges" into a corporate entity, the former partners are left with "only the rights, duties and obligations of shareholders. (*Ibid.*)

There is an exception to these rules when partners or joint venturers have "a preincorporation agreement to continue the partnership notwithstanding the formation of

the corporation." (*Eng v. Brown* (2018) 21 Cal.App.5th 675, 702-703 (*Eng*); *Persson*, *supra*, 125 Cal.App.4th at p. 1159.) In other words, if the parties contemplate the corporate entity will simply be a convenient way to operate, courts will disregard the corporate structure. However, "[i]n the absence of a preincorporation agreement or evidence the corporate form was disregarded, shareholders in a duly formed corporation operating in accordance with legal requirements do not become de facto partners." (*Persson*, at p. 1159; see also *Mindenberg v. Carmel Film Productions, Inc.* (1955) 132 Cal.App.2d 598, 602 (*Mindenberg*) [where a corporation is formed pursuant to the parties' agreement, corporate formalities are respected, and the business is operated as a corporate entity, there is no joint venture absence evidence "the corporation was used as a blind or sham, or as an agency of the stockholders"].)

### *b. Analysis*

In boilerplate responses to a number of undisputed statements, appellants stated Chevron/Texaco were "engaged in an enterprise which properly imposes agency/alter ego/joint venture liability . . . As such, in reality, [Chevron/Texaco] did, for all intents and purposes, themselves 'operate' the Abadan Refinery. As to CPC, appellants repeatedly asserted that "[i]n return for the obligation to 'undertake the ***operation and management*** of . . . the Abadan refinery,' the Consortium members obtained an 'equitable sharing of the profits resulting from

the product and refining and sale of Iranian oil' and the Consortium members were provided with 'the prospect of reasonable rewards necessary to justify the commitment of ***their*** resources and facilities."

These statements are argument, not evidence. Standing alone, they do not create triable issues of material fact. (*Page, supra,* 180 Cal.App.4th at p. 479, fn. 2.)

The preamble to the 1954 Agreement includes one page of "Whereas" recitals. They include the following: "[T]he Parties are agreed that said companies should undertake the operation and management of certain of the oil properties . . . including the Abadan refinery" and "[the parties] are agreed upon an equitable sharing of the profits resulting from the production and refining and sale of Iranian oil as hereinafter set forth."[14] These statements, which are not referred to or developed in the covenant portion of the 1954 Agreement, are classic examples of

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[14] In the trial court, appellants conceded for the purposes of the summary judgment motions that respondents did not share in the profits or losses of the Abadan refinery. On appeal, appellants take a contrary position, noting the 1954 Agreement gave respondents the right to Iranian oil at favorable prices, resulting in "handsome profits" and the sharing of "profits of the undertaking." (Emphasis deleted.) The argument is raised for the first time on appeal and is not supported by any legal authority; we do not consider it. (*Bhatt v. State Dept. of Health Services* (2015) 133 Cal.App.4th 923, 933 ["a party who fails to raise an issue in the trial court has therefore waived the right to do so on appeal"].)

preliminary recitals. They did not bind the parties (*Emeryville Redevelopment, supra,* 101 Cal.App.4th at p. 1101), and they had no legal effect (*First Bank, supra,* 787 N.E.2d at p. 308). The recitals did not raise a triable issue of material fact as to the existence of a joint venture.

There is no "joint venture" language in the covenant portion of the 1954 Agreement. Instead, that document sets forth in great detail how a series of corporations will be formed, what they will be called, and what their respective roles will be in order to "increase the production and sale of Iranian oil." Beyond the 1954 Agreement, appellants have not invited our attention to any evidence in the record that suggests the various corporations were shams or that the words of the agreement meant anything other than their plain meaning. (*Eng, supra,* 21 Cal.App.5th at pp. 702-703; *Mindenberg, supra,* 132 Cal.App.2d at p. 602.)

Even if an agreement provides for the sharing of profits and losses and the right to control the enterprise, it will lose its joint venture character once the parties form corporate entities to operate the business, unless evidence demonstrates the parties intended to, and did, disregard corporate structures. (*Persson, supra,* 125 Cal.App.4th at p. 1157; *Eng, supra,* 21 Cal.App.5th at pp. 702-703.) Appellants ignore the law that insulates shareholders from responsibility for corporate acts and seek instead to transform all corporations into de facto joint ventures; they may not do so.

### 3. The operating companies were not respondent's agents

Citing *Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523 (*Sonora Diamond Corp*.), appellants next contend that where one corporation exerts such "pervasive and continual" control over another corporation, the law views the latter entity as the mere agent of the former. Under this theory, appellants contend that respondents, as principals, may be liable for the negligence of their agents, the operating companies.

To support this argument, appellants rely on Article 49 of the 1954 Agreement, which provides that before the expiration of the 23rd year of the contract, the IOEPC, "acting for the [c]onsortium members" and the consortium members, "acting through the [IOEPC] may seek to extend the term of the 1954 Agreement. Appellants assert this grant of authority for a specific and limited purpose must be viewed as "expressly establish[ing] [an] agency relationship, at least with respect to the operation of the Abadan refinery." We do not agree.

We interpret the 1954 Agreement "as a whole and [ascertain the parties' intent] from the consideration of the entire contract, not some isolated portion." (*County of Marin v. Assessment Appeals Bd.* (1976) 64 Cal.App.3d 319, 325; see also Civ. Code, § 1641.) The 1954 Agreement contractually obligated the consortium members to spearhead the creation of specific, interrelated corporate structures to maximize Iranian oil production, ensure no foreign government ever

again regained a controlling ownership interest in Iran's petroleum assets, and still offer protections to foreign oil companies that invest in the enterprise by offering them favorable pricing on petroleum product purchases that would be resold "in Iran for export from Iran."

Nothing in the 1954 Agreement supports the notion that the Iranian government was involved in an elaborate charade to permit foreign oil companies to maintain control of Iran's petroleum assets, including the Abadan refinery, through subsidiary entities. Yet, based on a solitary provision in the 1954 Agreement, appellants apply a broad brush and characterize respondents as the corporate parents of IOP and IORC. However, appellants do not attempt to explain how this one clause constitutes "pervasive and continual" control of the Abadan refinery. They do not support the claim with any other facts or relevant law. The contention also runs counter to the Participants' Agreement, which confirms that, all told, the consortium members did not have a controlling interest in IOP.

Appellants had the burden to raise a triable issue of material fact as to the existence of agency relationships; they failed to do so. As a matter of law, the operating companies were not respondents' agents.

#### 4. Respondents did not control or operate the Abadan refinery

Appellants concede respondents did not own the Abadan refinery; they failed to raise a triable issue of

material fact as to whether respondents operated or controlled the facility. Accordingly, no duty of care to appellants was presumed or owed under general negligence or premises liability theories. (*Kesner, supra,* 1 Cal.5th at p. 1158.) Appellants' alternative premises liability theories similarly fell when they failed to present any evidence that raised a triable issue of material fact concerning the existence of joint venture or agency relationships with the operating companies.[15]

### *B. As a matter of law, respondents negated a duty of care under contract-based theories*

#### 1. Mr. Malek and his coworkers were not intended third party beneficiaries of the 1954 Agreement

Almost 150 years ago, Civil Code section 1559 codified the common law principle that a third party may enforce a contract "made expressly for [its] benefit." "The effect of the section is to exclude enforcement by persons who are only incidentally or remotely benefited." (*Lucas v. Hamm* (1961)

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[15] As to Chevron/Texaco, the trial court also found summary judgment was appropriate because appellants "fail[ed] to plead that [these respondents] are being sued for the acts of their subsidiary trading companies who were the actual shareholders of IOP." Appellants' arguments on this point are confusing and not adequately developed. We do not consider them. (*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52.) In any event, the trial court and this court have addressed the agency allegations on the merits.

56 Cal.2d 583, 590.) An intended beneficiary, however, may enforce a contract by suing for tort damages. (*Id.* at p. 589.)

The Supreme Court recently visited the subject of intended-versus-incidental beneficiaries in order "to formulate useful, general principles to identify those circumstances in which a third party should be permitted to maintain an action for an alleged breach of a contract to which it is not a contracting party, as distinguished from the usual instance in which only the contracting parties may bring an action under the contract." (*Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, 828 (*Goonewardene*).) The Court held a third party "may bring a breach of contract action against a party to a contract only if the third party establishes not only (1) that it is likely to benefit from the contract, but also (2) that a motivating purpose of the contracting parties is to provide a benefit to the third party, and further (3) that permitting the third party to bring its own breach of contract action against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties." (*Id.* at p. 821.)

The "motivating purpose" factor is key. It is not enough that the third party "will in fact generally benefit" from the contract; rather, the third party must demonstrate "the contracting parties [had] a motivating purpose to benefit the third party, and not simply knowledge that a benefit to the third party may follow from the contract." (*Goonewardene, supra,* 6 Cal.5th at p. 830.) Additionally,

"'[t]here is an important analytical distinction between contracting for a benefit to an outsider and granting a right to sue for breach to that outsider.'" (*Id.* at p. 836.)

Under *Goonewardene's* analysis, appellants could not maintain an action against respondents for breach of contract resulting in tort damages. Although Mr. Malek and all Iranian employees at the Abadan refinery generally benefitted from the 1954 Agreement, nothing in that document supports the conclusion that a benefit to them, as opposed to the government of Iran, was a motivating purpose. Appellants presented no extrinsic evidence to suggest anything other than an incidental benefit to Mr. Malek and his countrypersons.

*Martinez v. Socoma Cos.* (1974) 11 Cal.3d 394 (*Martinez*) provides additional support for this conclusion. *Martinez* involved private corporations that contracted with the federal government to employ and train disadvantaged individuals. Plaintiffs, on behalf of employees the contracts were designed to benefit, filed a putative class action against several of the corporations that accepted federal funding, but failed to follow through with their contractual obligations. (*Id.* at p. 399.) The Supreme Court agreed plaintiffs were "[u]nquestionably . . . among those whom the Government intended to benefit through defendants' performance of the contracts." (*Id.* at p. 401.) However, that fact did not give plaintiffs intended beneficiary status when such programs [were] intended to "accomplish[] a larger public purpose," such as "alleviat[ing] national unemployment." (*Ibid.*)

The undisputed facts in this case are analogous. The 1954 Agreement promoted the employment of Iranian citizens as one means to reduce Iran's dependence on foreign companies in the oil industry. As in *Martinez, supra,* 11 Cal.3d 394, the incidental benefit to workers such as Mr. Malek did not give rise to an independent right to pursue individual claims as third party beneficiaries of the 1954 Agreement.

### 2. No duty of care arose based on the guaranty provision in the 1954 Agreement

Respondents' guaranty is found in Article 3A of the 1954 Agreement. There, the consortium members agreed to "jointly and severally guarantee the due performance by the [o]perating [c]ompanies of their respective obligations under this Agreement." The operating companies' obligations were set forth in Article 4 and expressly owed only to Iran and NIOC. One such obligation was "to conform to good oil industry practice and sound engineering principles applicable and appropriate to operations under similar conditions in conserving the deposits of hydrocarbons, in operating the oilfield and refinery and in conducting development operations."

Appellants contend good oil industry practice encompassed worker safety. They urge respondents, as guarantors of good oil industry practice, are liable in tort for unsafe conditions at the Abadan refinery. For this theory to

succeed, however, appellants must be intended third party beneficiaries of the 1954 Agreement. (*The H.N. & Frances C. Berger Foundation v. Perez* (2013) 218 Cal.App.4th 37, 46 [only intended third party, and not incidental, beneficiary of surety agreement between defendant and another entity could enforce its terms].[16]) They are not, however; and this theory of liability retains no viability.

### 3. No duty of care arose based on a negligent undertaking/special relationship theory

Appellants' remaining contention is, in today's parlance, a mash-up of legal theories. Appellants contend the 1954 Agreement created a special relationship between them and respondents and formed the basis for a duty of care owed by respondents. Appellants primarily cite opinions where a defendant entered into a services contract with someone other than the plaintiff and negligently performed, resulting in pure economic losses. (*Biakanja v Irving* (1958) 49 Cal.2d 647, 651; *J'Aire Corp v. Gregory* (1979) 24 Cal.3d 799, 802; *North American Chemical Company v. Superior Court* (1997) 59 Cal.App.4th 764, 774.) Other than solidifying the precept that the breach of a contract for services may give rise to an action in tort, these decisions are of limited assistance in our analysis of whether

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[16] California law does not distinguish between guarantors and sureties. (Civ. Code, § 2787.)

a duty of care was owed in a lawsuit involving personal injuries.

*Eads v Marks* (1952) 39 Cal.2d 807 was a personal injury action; but the duty of care there stemmed from a contract between the defendant and the plaintiff, who sued in his individual capacity and as the guardian ad litem for his injured minor child. A duty of care for personal injuries also was based on a contract in *Mintz v. Blue Cross of California* (2009) 172 Cal.App.4th 1594. In *Mintz*, however, the contract was for health insurance; and the alleged tortfeasor was acting in its capacity as the agent of the plaintiff's insurer. (*Id.* at p. 1611.)

There was no contract in *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764. The duty of care there arose from a traffic accident caused by the defendant's negligent operation of its own property. (Civ. Code, § 174.)

Although appellants describe this theory of recovery in terms of a "special relationship," the special relationship doctrine typically applies to determine whether the defendant has a duty of care to affirmatively act to prevent criminal conduct by a third party. (See fn. 9, *ante*.) Appellants' argument for the creation of a duty of care falls more in line with the negligent undertaking theory of liability. (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612 (*Artiglio*); Rest.2d Torts, § 324A.)

Under the negligent undertaking theory, respondents, although not responsible for the presence of asbestos in the Abadan refinery, may be liable to appellants if they

undertook "to render services necessary for [appellants'] protection, but negligently perform[ed] that undertaking." (*Dekens, supra,* 107 Cal.App.4th at pp. 1179-1180.) For the reasons that follow, however, appellants did not present any evidence that raised a triable issue of material fact as to the existence or scope of an undertaking by respondents. Accordingly, respondents negated as a matter of law any duty of care under this common law negligence theory.

"A finding of liability to third persons under the negligent undertaking theory 'requires evidence that: (1) the actor undertook, gratuitously or for consideration, to render services to another; (2) the services rendered were of a kind the actor should have recognized as necessary for the protection of third persons; (3) the actor failed to exercise reasonable care in the performance of the undertaking; (4) the actor's failure to exercise reasonable care resulted in physical harm to the third persons; and (5) *either* (a) the actor's carelessness increased the risk of such harm, or (b) the actor undertook to perform a duty that the other owed to the third persons, or (c) the harm was suffered because either the other or the third persons relied on the actor's undertaking.' (*Paz v. State of California* (2000) 22 Cal.4th 550, 559 (*Paz).*)

As the Supreme Court has explained, "'in order for liability to be imposed upon the actor'" under a negligent undertaking theory, "'he must specifically have undertaken to perform the task that he is charged with having performed negligently, for without the actual assumption of

the undertaking there can be no correlative duty to perform that undertaking carefully.'" (*Artiglio*, *supra,* 18 Cal.4th at pp. 614-615; see also *Delgado, supra,* 36 Cal.4th at p. 249 ["the scope of any duty assumed depends upon the nature of the undertaking."])

The threshold issue is whether respondents undertook a general responsibility for the safety of Abadan refinery workers and, if so, was the undertaking "broad enough to cover Mr. [Malek's] injury?" (*Dekens, supra,* 107 Cal.App.4th at p. 1184.) Because appellants failed to raise a triable issue of material fact as to whether respondents controlled or operated the Abadan refinery, no such undertaking could be based on that predicate. Nor could an undertaking be based on Article 4F(1) of the 1954 Agreement. Pursuant to that contractual clause, the operating companies–not respondents–owed Iran and NIOC the obligation "to conform with good oil industry practice and sound engineering principles applicable and appropriate to operations under similar conditions in conserving the deposits of hydrocarbon, in operating the oilfields and [R]efinery and in conducting development operations." Nothing in Article 4F(1) or any other provision of the 1954 Agreement contained an agreement by respondents to assume responsibility for worker safety or protect workers from exposure to asbestos. (Contrast, e.g., *Peredia, supra,* 25 Cal.App.5th at p. 701 [the plaintiff's employer engaged the defendant for the specific purpose of developing and implementing workplace safety training and protocols, but fact issues as to "the precise

nature and extent of [the defendant's] undertaking" precluded summary judgment in its favor]; *Lichtman, supra,* 16 Cal.App.5th at pp. 925-926 [a specific purpose of a city's contract with the defendant was to ensure that traffic signals would be equipped with battery backup systems and remain operational during power outages]; and *Mukthar, supra,* 139 Cal.App.4th at p. 291 [the plaintiff's employer contracted with the defendant to prevent "precisely the kind of harm" the plaintiff suffered].)

Despite the apparent clarity of the contractual provisions detailing the operating companies' obligations to Iran and NIOC, the trial court properly considered the admissible portions of appellants' expert's declaration.[17] (*Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1351 [even where no ambiguity appears on the face of a contract, courts are expected to review extrinsic evidence to determine whether there is "more than one possible meaning to which the language of the contract is . . . reasonably susceptible"].) Appellants contend Garza's declaration raised a triable issue of material fact as to whether respondents undertook the responsibility not only to generally guarantee worker safety at the Abadan refinery workers, but also to specifically protect workers from harmful asbestos exposure.

Garza's declaration did not address this pivotal question, however. Garza had no knowledge concerning the

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[17] As already noted, the trial court sustained respondents' objections to a significant portion of Garza's declaration. Appellants do not challenge these evidentiary rulings.

intention of the parties when the 1954 Agreement was negotiated. Garza focused on the meaning of "good oil industry practices;" but the trial court sustained objections to the professional and technical authorities upon which he relied, leaving Garza with opinions "unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion." (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117 [an "'expert opinion is worth no more than the reasons upon which it rests.'"].) Accordingly, Garza's opinions as to "good oil industry practices" and oil industry operations in any location–much less Iran–during the mid-to late-20th century had no evidentiary value.

As an industrial hygienist, Garza was competent to provide opinions concerning OSHA. But he relied on OSHA regulations promulgated in 1971, 17 years after the 1954 Agreement was signed and 20 years after Mr. Malek began working at the Abadan refinery. Garza made no effort "to connect the facts with the ultimate conclusion." (*Jennings v. Palomar Pomerado Health Systems, Inc.*, *supra*, 114 Cal.App.4th at p. 1117)

In any event, Garza's focus on the meaning of "good oil industry practice" essentially put the cart before the horse. A promisor's potential liability under a negligent undertaking theory depends on his "specifically undertak[ing] to perform the task that he is charged with having performed negligently, for without the actual assumption of the undertaking there can be no correlative

duty to perform that undertaking carefully.'" (*Artiglio*, *supra*, 18 Cal.4th at pp. 614-615.) This was a threshold issue, and appellants did not meet their burden.

## CONCLUSION

Every possible theory of liability proposed by appellants originates with the 1954 Agreement. By its express terms, the 1954 Agreement did not identify respondents as operating or being in control of the Abadan refinery. As a matter of law, respondents were not in a joint venture with the owners or operators of Abadan and did not act as agents of the owners or operators. Accordingly, general negligence and premises liability theories were foreclosed.

As an incidental beneficiary of the 1954 Agreement, Mr. Malek lacked standing to enforce any of the contract's terms, including respondents' guaranties of them. Appellants' proffered extrinsic evidence to demonstrate that "good oil industry practice" included general workplace safety and specific protections from hazardous asbestos exposure -- even if effective for that purpose -- bypassed the duty issue. It did not raise a triable issue of material fact as to the existence of a duty of care. Respondents were entitled to summary judgment.

## DISPOSITION

The judgments are affirmed. Respondents are awarded their costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.**

DUNNING, J.*

We concur:

MANELLA, P. J.

COLLINS, J.

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* Retired Judge of the Orange Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.