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COMPANY and PG&E CORPORATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

Coordination Proceeding Special Title (Rule 3.550) PG&E "SAN BRUNO FIRE" CASES	JCCP No. 4648 A TORT ACTIONS **DEFENDANTS PACIFIC GAS AND ELECTRIC COMPANY AND PG&E CORPORATION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR SUMMARY ADJUDICATION REGARDING PUNITIVE DAMAGES** Hearing Date: June 22, 2012 Time: 9:30 AM Dept.: 7 Judge: Hon. Steven L. Dylina

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I. INTRODUCTION

This case arises from the tragic events of September 9, 2010, when a gas pipeline operated by Pacific Gas and Electric ("PG&E") suddenly and unexpectedly ruptured within a residential neighborhood in the City of San Bruno. The rupture triggered an explosion and a fire, resulting in the loss of life, significant injury, and extensive property damage. The apparent cause of the accident was a weld defect in a short section of the pipeline that had been installed in 1956.

PG&E accepts responsibility for this tragic accident, and has publicly apologized to the citizens of California and specifically the residents of San Bruno, cooperated with multiple federal and state investigations, and committed more than a hundred million dollars to rebuilding the City of San Bruno. It has also pledged—both publicly and in these proceedings—to compensate all victims of the tragedy for their losses. This motion does not change that pledge in any way. PG&E has admitted that "its use of transmission pipe on Line 132 beginning in 1956 with a defective weld was negligent and this negligence was a proximate cause of the rupture of the pipe on September 9, 2010." (See Declaration of John J. Lyons ("Lyons Decl.") Ex. 2, Joint Case Management Conference Statement (Dec. 14, 2011) at 1-2.)

One of the Company's highest priorities is resolving the claims of those affected by this tragic accident. PG&E intends to continue its efforts to achieve this goal and it has filed this motion not to diminish in any way the impact of this accident on those people affected. This motion addresses a narrow question: whether Plaintiffs can present evidence sufficient to meet the stringent requirements for an award of *punitive* damages under California law. PG&E does not want the narrowness of the focus of this motion to suggest that it has not learned a broader lesson from this tragic accident. The events of September 9th have led PG&E to recognize that its gas transmission business can and must be focused more sharply on public safety. The Company also recognizes that whatever standards the pipeline safety laws established, and however the pipeline industry may have functioned in the past, PG&E must do better.

To obtain punitive damages, Plaintiffs must establish—by clear and convincing evidence—that PG&E has committed "malice," "oppression," or "fraud" as defined in California

Civil Code Section 3294. The California Supreme Court has made clear that the law disfavors punitive damages, and that they are available only in rare and extraordinary circumstances where the defendant has acted with an "evil motive." (See generally *Dyna-Med, Inc. v. Fair Emp't & Hous. Comm'n* (1987) 43 Cal.3d 1379, 1392 [241 Cal.Rptr. 67]; *Taylor v. Super. Ct.* (1979) 24 Cal.3d 890, 894-95 [157 Cal.Rptr. 693] [citation omitted].) Punitive damages may not be awarded when the misconduct at issue is the product of recklessness, negligence, or carelessness. Rather, Plaintiffs must present evidence establishing either *intentional* misconduct or conduct that *deliberately* fails to avoid known probable harmful consequences. This latter form of conduct must also be "despicable"—that is, "so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people." (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1210 [37 Cal.Rptr.3d 863] [citation omitted].)

The pipeline that ruptured operated safely and without incident for more than five decades, and all parties to this case agree that the weld defect remained undetected until the tragic accident in 2010. Plaintiffs have not presented, and cannot present, any evidence that suggests any despicable, deliberate failure to remedy known problems—let alone evidence that a reasonable jury could find to meet the California requirement of *clear and convincing evidence*. This terrible pipeline accident was just that—an accident. It was the product of negligence and human error, not "evil motive" or any deliberate wrongdoing. There is no evidence that PG&E ever knew that the pipe was defective, and the Company made extensive good-faith efforts over the decades to promote safety and avoid accidents, while managing 50,000 miles of underground natural gas pipe throughout California. Although Plaintiffs may point to the accident itself to argue that PG&E's efforts were ineffective, there is no evidence that the tragedy was anything other than the result of human error. California law forbids punitive damages in cases of carelessness, negligence, or even recklessness.

Likewise, the fervent response of PG&E employees to stem the flow of gas immediately after the rupture is not a basis for punitive damages. PG&E's employees worked to stop the release of gas, halt the fire, and contain the damage as much as possible. There was no malice, oppression, or fraud in these efforts.

For all of these reasons, this Court should grant PG&E's motion for summary adjudication. The possibility of an unpredictable, legally unjustified punitive award is interfering with the parties' ability to value these cases and conclude reasonable settlements, delaying compensation to the injured parties, and requiring both sides to expend enormous resources preparing for trials that—in light of PG&E's concession of liability for negligence—should be unnecessary or confined to the relatively straightforward issue of the amount of damages Plaintiffs have suffered. A ruling by this Court on the availability of punitive damages will serve the interests of justice and clear the way for PG&E to fulfill its commitment to compensate the victims of this tragedy.

II. THE COURT SHOULD GRANT SUMMARY ADJUDICATION AGAINST PLAINTIFFS' REQUEST FOR PUNITIVE DAMAGES

Plaintiffs seek punitive damages on virtually all of their causes of action.[1] Summary adjudication is warranted with respect to such damages if "no reasonable jury could find the plaintiffs' evidence to be clear and convincing proof of malice, fraud or oppression." (*Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1053 [90 Cal.Rptr.3d 453]; see also Code Civ. Proc., § 437c, subds. (f)(1), (p)(2); Civ. Code, § 3294.)

To defeat this motion, Plaintiffs must demonstrate that at trial they would be able to negate, with clear and convincing evidence, "the hypothesis that the tortious conduct was the result of a mistake of law or fact, honest error of judgment, over-zealousness, mere negligence or other noniniquitous human failing." (*Food Pro Int'l, Inc. v. Farmers Ins. Exch.* (2008) 169 Cal.App.4th 976, 994 [89 Cal.Rptr.3d 1] [citation omitted].) Indeed, even gross negligence or recklessness is not enough to trigger punitive damages. (*G.D. Searle & Co. v. Super. Ct.* (1975) 49 Cal.App.3d 22, 31-32 [122 Cal.Rptr. 218].) To make the requisite showing, Plaintiffs must rely exclusively on evidence that is admissible at trial. (See *Vineyard Springs Estates, LLC v.*

[1] (See Lyons Decl. Ex. 1, Complaint at ¶ 84 (hereinafter "Complaint") [survival], ¶ 91 [negligence], ¶ 97 [intentional infliction of emotional distress], ¶ 102 [battery], ¶ 108 [ultrahazardous activity], ¶ 123 [continuing private nuisance], ¶ 134 [permanent private nuisance], ¶ 151 [continuing public nuisance], ¶ 164 [permanent public nuisance], ¶ 171 [trespass].)

Super. Ct. (2004) 120 Cal.App.4th 633, 642-43 [15 Cal.Rptr.3d 587]; Code Civ. Proc., § 437c, subds. (c), (d).)[2]

A. California Law Authorizes Punitive Damages Only in Extraordinary Cases Involving Intentional Harm or Conduct So Despicable That It Is Equivalent to Intentional Harm.

California law allows punitive damages only "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." (Civ. Code, § 3294, subd. (a).) "This provision codifies the universally recognized principle that '[the] law does not favor punitive damages and they should be granted with the greatest caution.'" (*Dyna-Med, Inc. v. Fair Emp't & Hous. Comm'n*, *supra*, 43 Cal.3d at pp. 1391-92 [citation omitted] [alteration in original]; see also, e.g., *Dumas v. Stocker* (1989) 213 Cal.App.3d 1262, 1266 [262 Cal.Rptr. 311] ("[P]unitive damages constitute a windfall, create the anomaly of excessive compensation, and are therefore not favored in the law.").)

Section 3294 defines malice as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civ. Code, § 3294, subd. (c)(1).) Similarly, oppression is "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ. Code, § 3294, subd. (c)(2).) Fraud is "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (Civ. Code, § 3294, subd. (c)(3).)

By design, the standards for malice, oppression, and fraud are hard to meet—especially when the plaintiff lacks proof that the defendant intended to cause harm. (See *Lackner v. North*,

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[2] Plaintiffs thus may *not* rely upon the body of evidence cited in their Response to Defendant Pacific Gas and Electric Company's First Set of Special Interrogatories, (Lyons Decl. Ex. 3 ("Plaintiffs' Response to Special Interrogatories")), as much of that evidence would be inadmissible at trial. (See, e.g., 49 U.S.C. §1154(b) (barring use of National Transportation Safety Board Accident Reports in any civil action); Pub. Util. Code, § 315 (barring use of reports filed by or with the California Public Utilities Commission); Evid. Code, §1200, subd. (b) (barring hearsay evidence); Evid. Code, §1101, subd. (a) (barring evidence of prior misconduct); *Holdgrafer v. Unocal Corp.* (2008) 160 Cal.App.4th 907, 911-12 [73 Cal.Rptr.3d 216] (barring evidence of dissimilar prior conduct to establish punitive damages).)

supra, 135 Cal.App.4th at p. 1212 (noting rarity of punitive damages awards for unintentional torts).) In cases involving unintentional harm, the statutory definitions of malice and oppression require proof that the defendant's conduct was *both* (1) undertaken with "conscious disregard" of the rights or safety of others and (2) despicable. Civ. Code, § 3294, subds. (c)(1), (2).

To show conscious disregard of the rights or safety of others, a plaintiff must "establish that the defendant was aware of the probable dangerous consequences of his conduct, and that he willfully and deliberately failed to avoid those consequences." (*Taylor v. Super. Ct.*, *supra*, 24 Cal.3d at pp. 895-96.) Because the test "calls upon the jury to assess the defendant's *actual state of mind*[,] it is not satisfied by characterizing his conduct as unreasonable, negligent, grossly negligent or reckless." (*Seimon v. S. Pac. Transp. Co.* (1977) 67 Cal.App.3d 600, 607 [136 Cal.Rptr. 787] [emphasis in original].)[3] "The central spirit of the exemplary damage statute, the demand for evil motive, is violated by an award founded upon recklessness alone." (*G.D. Searle & Co. v. Super. Ct.*, *supra*, 49 Cal.App.3d at p. 32.) The defendant must have actual knowledge of the "probability of injury," not merely of the "possibility" of dangerous consequences. (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 816-17 [174 Cal.Rptr. 348].) Thus, here Plaintiffs cannot simply rely on the obvious fact that operating a gas transmission pipeline by its nature involves the possibility of an accident, which can cause serious injuries including death.

To qualify as "despicable," conduct must be "so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people." (*Lackner v. North*, *supra*, 135 Cal.App.4th at p. 1210 [citation omitted]; *see also* CACI No. 3940 [same].) The California legislature added this despicability requirement to Section 3294 in 1987 to impose a "new" and "additional" "substantive limitation on punitive

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[3] (See also *Coll. Hosp., Inc. v. Super. Ct.* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898] (noting that Section 3294 reflects the *Taylor* formulation); *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 402 [185 Cal.Rptr. 654] (reiterating *Taylor* formulation); *Mock v. Mich. Millers Mut. Ins. Co.* (1992) 4 Cal.App.4th 306, 330-32 [5 Cal.Rptr.2d 594] (confirming that Section 3294 requires defendant's actual knowledge of probability of harm to others and rejecting instruction based on constructive knowledge); *Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61 [29 Cal.Rptr.2d 615] (relying on *Taylor* and *Mock*); CACI No. 3940 (incorporating *Taylor* formulation).)

damage awards" *beyond* the "conscious disregard" requirement. (*Coll. Hosp., Inc. v. Super. Ct.* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898].) Indeed, a defendant can deliberately ignore known dangers to others—and can even act in bad faith—without committing "despicable" conduct under Section 3294. (*Lackner v. North*, *supra*, 135 Cal.App.4th at p. 1211 [citing cases].)

A *corporation* is liable for punitive damages only if the malice, fraud, or oppression was committed by one of its "officer[s], director[s], or managing agent[s]." (Civ. Code, § 3294, subd. (b).)[4] Managing agents are "corporate employees who exercise substantial independent authority and judgment in their corporate decision making so that their decisions ultimately determine corporate policy." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 566-67 [88 Cal.Rptr.2d 19].) "Corporate policy" encompasses only "formal policies that affect a substantial portion of the company and that are the type likely to come to the attention of corporate leadership." (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 715 [101 Cal.Rptr.2d 773].)

Punitive damages may also be imposed for the acts of lower-level corporate employees, but only if an officer, director, or managing agent "demonstrates an intent to adopt or approve, oppressive, fraudulent, or malicious behavior by [the] employee in the performance of his job duties." (*Coll. Hosp., Inc. v. Super. Ct.*, *supra*, 8 Cal.4th at p. 726.) Such ratification "requires actual knowledge of the conduct and its outrageous nature" by the corporate policymaker. (*Id.*)

Plaintiffs seeking punitive damages must prove malice, oppression, or fraud—as well as corporate ratification and any other elements required by Section 3294(b)—by the "stringent" standard of clear and convincing evidence. (*Am. Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1049 [117 Cal.Rptr.2d 685]; see also *Barton v. Alexander*

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[4] Civil Code Section 3294(b) provides that:

> An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

Hamilton Life Ins. Co. (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].) This standard imposes a "heavy burden" that is "far in excess of the preponderance sufficient for most civil litigation." (*Sutter Health v. UNITE HERE* (2010) 186 Cal.App.4th 1193, 1211 [113 Cal.Rptr.3d 132] [quotation marks and citation omitted].) As the California Supreme Court has explained, it requires "a finding of high probability, based on evidence so clear as to leave no substantial doubt [and] sufficiently strong to command the unhesitating assent of every reasonable mind." (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552 [110 Cal.Rptr.2d 412] [internal quotation marks and citation omitted] [alteration in original]; *Scott v. Phoenix Schools, Inc.* (2009) 175 Cal.App.4th 702, 715 [96 Cal.Rptr.3d 159].) The burden applies to a motion for summary adjudication with respect to punitive damages, where a judge "must view the evidence presented through the prism of the substantive [clear and convincing] evidentiary burden." (*Food Pro Int'l, Inc. v. Farmers Ins. Exch.*, *supra*, 169 Cal.App.4th at p. 994 [citation omitted] [alteration in original].; *Basich v. Allstate Ins. Co.* (2001) 87 Cal.App.4th 1112, 1121 [105 Cal.Rptr.2d 153, 159].)

Together, these rules reflect the "extraordinary nature" of punitive damages. (*Dyna-Med, Inc. v. Fair Emp't & Hous. Comm'n*, *supra*, 43 Cal.3d at p. 1389.) They make the defendant's "evil motive" the touchstone for such relief (*Taylor v. Super. Ct.*, *supra*, 24 Cal.3d at p. 895), and allow for corporate liability only when the company's leaders or their policies are actually responsible for the reprehensible misconduct.[5] Punitive damages are unavailable when plaintiffs cannot prove all of the necessary facts by clear and convincing evidence.

B. The Pipeline Accident Was The Product of Human Error, Not Deliberate Wrongdoing.

To defeat PG&E's motion for summary adjudication, Plaintiffs must show, by clear and

[5] (See generally *Taylor v. Super. Ct.*, *supra*, 24 Cal.3d at p. 895 (calling requirement of "evil motive" the "central spirit" of Section 3294); *G.D. Searle & Co. v. Super. Ct.*, *supra*, 49 Cal.App 3d at p. 31 ("[S]ection 3294 views evil motive as the central, essential factor in the malice which justifies an exemplary award."); *Roby v. McKesson Corp.*, *supra*, 47 Cal.4th at p. 715 (explaining that it is the "broad authority" exercised by senior corporate leadership "that justifies punishing an entire company for an otherwise isolated act of oppression, fraud, or malice").)

convincing evidence, that senior corporate employees either intended to cause harm or despicably and deliberately failed to avoid harm that they knew was probable. There is no such evidence. The September 2010 San Bruno pipeline rupture was an accident, caused by missing longitudinal welds inside three short lengths of pipe that were installed in 1956. It simply is not possible to know, today, why those missing welds were not detected at the factory or in the field. PG&E has agreed to accept responsibility for the accident and concede liability for negligence in this case. But Plaintiffs have conceded that PG&E had no actual knowledge of the pipe's deficiencies until the pipe ruptured nearly 55 years later, up until which time the pipe had functioned safely and without incident. The undisputed facts make clear that there is no evidence—still less *clear and convincing* evidence—that the rupture resulted from any act which was malicious, oppressive, or fraudulent under Section 3294.[6]

1. PG&E Employees Installed 23 Feet of Defective Pipe When Relocating Segment 180 in 1956.

PG&E is one of the largest combination natural gas and electric utilities in the United States. (Declaration of Eric Montizambert ("Montizambert Decl.") ¶ 3.) Incorporated in 1905 and headquartered in San Francisco, the Company and its 19,000 employees transmit and deliver energy throughout 70,000 square miles of Northern and Central California. (Montizambert Decl. ¶¶ 4-6.) PG&E operates and maintains over 140,000 circuit miles of electric distribution lines, along with close to 50,000 miles of natural gas distribution and transmission pipelines. (Montizambert Decl. ¶¶ 7-8.) This extensive logistical network allows PG&E to provide energy service to more than 15 million Californians each and every day. (Montizambert Decl. ¶ 6.)

PG&E operates three gas transmission pipelines serving the San Francisco Peninsula—Lines 101, 109, and 132. (Declaration of Edward Stracke ("Stracke Decl.") ¶ 3.) All three of these pipelines originate at the Milpitas Terminal and follow different routes snaking up the Peninsula, each terminating in San Francisco roughly 50 miles to the north. (Stracke Decl. ¶ 3.)

[6] In accordance with California Civil Procedure Code Section 437c, PG&E relies throughout only on undisputed facts, drawing all reasonable inferences in Plaintiffs' favor. PG&E reserves its right to challenge all facts and inferences that Plaintiffs assert at trial.

The Peninsula system included six cross ties that connected the three transmission lines and allowed gas to flow between them. (Stracke Decl. ¶ 3.) The gas in these pipelines typically flows from south to north. (Stracke Decl. ¶ 3.)

PG&E built Line 132—the accidental rupture of which was responsible for the tragic events at issue in this case—in the 1940s. (Stracke Decl. ¶ 5.) The vast majority of Line 132 consists of individual long sections of steel pipe, ranging from 24 to 36 inches in diameter. (Stracke Decl. ¶ 4.) These pipes were manufactured using different types of longitudinal welds, including double submerged arc welds (DSAW), single submerged arc welds (SSAW), seamless welds (SMLS), and electric resistance welds (ERW). (Stracke Decl. ¶ 4.) DSAW pipes should have longitudinal weld seams on both the exterior and interior of the pipes, whereas seamless pipes have no seams at all. (Declaration of Robert D. Caligiuri ("Caligiuri Decl.") ¶¶ 23, 25.)

Line 132 was originally constructed by connecting each of these individual sections of pipe together, end-to-end, using "girth" welds extending around the circumference of each pipe. (Stracke Decl. ¶ 4.) Pipe manufacturers finish the longitudinal welds before providing pipe to the purchaser. (Caligiuri Decl. ¶ 23.)

The original records of Line 132's construction in the 1940s are not all available today, over six decades later. But PG&E has identified at least 18,000 pages of documents, including procurement orders for the pipe, accounting records, specifications, foreman journal entries, and radiography receipts. (Stracke Decl. ¶ 5.) They show that PG&E took important safety precautions before installing the pipe. For example, the records indicate that (1) the pipes were tested for leaks using a variety of standard methods; (2) sampling was done consisting of approximately 10 percent of the girth welds which were x-rayed at the construction site and inspected according to formal set of PG&E standards; and (3) numerous welds were rejected for use in the pipeline for quality control reasons. (Stracke Decl. ¶¶ 5-6, Ex. 1.)

Line 132 is divided into more than 300 different individual segments, some stretching hundreds to thousands of feet in length. (Stracke Decl. ¶ 4.) The September 2010 accident at issue here involved Segment 180, a 1,742-foot portion of Line 132 lying under the Crestmoor neighborhood of the City of San Bruno. (Stracke Decl. ¶ 9.) Originally installed in the 1940s,

Segment 180 was relocated in 1956 in order to accommodate a new residential housing development. (Stracke Decl. ¶¶ 5, 7, Ex. 2, G.M. No. 136471.) PG&E employees performed the relocation. (Lyons Decl. ¶ 8, Ex. 7, Deposition of Frank Maffei ("Maffei Dep.") 90:12 – 91:11, 95:1-16.)

PG&E's engineering records indicate that Segment 180 consisted of API 5LX Grade X52 DSAW pipe. (Stracke Decl. ¶ 18, Ex. 7, GasTransmissionSystemRecordsOII_DR_CPUC_004-Q11.) In the case of DSAW pipe, flat steel is rolled and curved into a cylindrical shape. (Caligiuri Decl. ¶ 23.) Manufacturers then use machine welding equipment to weld a seam along the longitudinal length of the pipe. *Id.* The machine completes two different welds—one along the outside of the pipe followed by a second weld along the inside of the pipe. *Id.* DSAW pipe is used on a substantial portion of gas transmission pipelines throughout the United States. (Declaration of John Zurcher ("Zurcher Decl.") ¶ 24.) It is widely recognized as safe and reliable, both by the pipeline industry as well as by federal and state regulators. (Zurcher Decl. ¶ 25; 49 C.F.R. § 192.113 (designating DSAW pipe as having a joint efficiency factor of 1.0, equivalent to seamless pipe, recognizing that the weld is as strong as the adjoining metal).)

A pipe with API 5LX Grade X52 specification can withstand internal gas pressure of well upwards of 1,300 psig. (Caligiuri Decl. ¶ 17 n.1.) The catastrophic failure of a DSAW pipeline due to a small pressure increase, after more than 50 years of service and at operating pressures less than a third of its strength rating, is unheard of in the history of onshore gas pipeline operation since reporting on incidents began. (Zurcher Decl. ¶ 25.) Yet, it is this sequence of improbable events that Plaintiffs contend supports a claim of punitive damages against PG&E.

One small subsection of Segment 180—only 23 out of 1,742 feet[7]—was ultimately the cause of the September 2010 accident. That small section consisted of six shorter pipe segments, known as "pups," which were welded together. (Lyons Decl. ¶ 20, Ex. 19, PG&E's Response to Plaintiffs' Requests for Admission, Set Two, Nos. 16 and 17, dated November 17, 2011 (hereinafter "PG&E's Response to Plaintiffs' Requests for Admission").) In the 1940s and the

[7] Segment 180 was 1,851 feet when installed in 1956. A replacement project in 1961 reduced Segment 180 to 1,742 feet. (Stracke Decl. ¶ 9.)

1950s, steel mills often constructed full-length pipe by welding together individual pups. (Caligiuri Decl. ¶ 19.) There was nothing inappropriate about that practice, according to contemporaneous industry standards and regulations.[8] (Zurcher Decl. ¶ 16.) Shorter lengths of pipe were also used to navigate hilly terrain or bends and curves. (Caligiuri Decl. ¶ 19.)

Here, however, unbeknownst to PG&E, three of the six pups possessed only the exterior portion of the longitudinal weld, and not the interior weld that is standard in DSAW pipe. (Caligiuri Decl. ¶ 27, Lyons Decl. ¶ 21, Ex. 20, National Transportation Safety Board Metallurgical Group Chairman Factual Report (hereinafter "NTSB Metallurgical Report") at 7.)[9] The parties agree that the weld defects "remained undetected" for decades, until shortly after the September 2010 accident. (See Plaintiffs' Response to Special Interrogatories Nos. 386, 398, 410.)

The bottom line is that in 1956, PG&E employees installed a 23-foot section of pipe that did not satisfy the Company's specifications when they relocated Segment 180 in San Bruno. The pups missing an interior weld should not have been used to construct Segment 180. PG&E's pipe order specifications in the 1940s did not contemplate a piece of DSAW pipe missing an interior weld. (Stracke Decl. ¶ 11, Ex. 4, PG&E's Specifications for Pipe Purchase Order 7R-61963; ¶ 12, Ex. 5, PG&E's Specifications for Pipe for Purchase Order 7R-66858.) The use of pups with defective seam welds was flatly contrary to both PG&E practice and recognized industry standards. (*Id.*; see Zurcher Decl. ¶ 16.)

However, there is no direct evidence, much less clear and convincing evidence, that PG&E was responsible for creating these defects or was aware of them at the time of the San Bruno tragedy. PG&E did not manufacture the pipe; the Company purchased its pipe materials from third parties, and it has never operated its own mills or otherwise had the capacity to manufacture such pipes on its own. (Lyons Decl. ¶ 10, Ex. 9, Deposition of Charles Tateosian

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[8] Indeed, the practice is still allowed according to API Standard 5L (Specification for Line Pipe).

[9] The pups were also short, ranging from 3.5 to 4.7 feet in length. (PG&E's Response to Plaintiffs' Requests for Admission No. 17.) PG&E's pipe order specifications, however, required that any pups in a longer section of pipe be at least five feet in length. (Stracke Decl. ¶ 12, Ex. 5, PG&E's Specifications for Pipe for Purchase Order 74-66858.)

("Tateosian Dep.") 542:7-10; Caligiuri Decl. ¶ 17.) And there is no evidence that PG&E was aware that Segment 180 was defective at the time of its installation in 1956.

Unfortunately, despite an extensive search for the records for this 1956 relocation project, no documents describe in detail the construction of the relocated pipe. (Stracke Decl. ¶ 8.) One witness has suggested that the division that supervised this construction project had a fire at its offices several years later and many unspecified documents were destroyed in that fire, but the exact nature of these documents is unknown. (Lyons Decl. ¶ 7, Ex. 6, Deposition of Robert Jefferies ("Jefferies Dep.") 71:14 – 73:4.) Whatever other documents may have contained, however, there is no reason to believe that they revealed the existence of a missing weld in the pipe used in the rerouting project.

To the contrary, all of the available evidence suggests that the PG&E employees who installed it were unaware of the defects. Plaintiffs questioned a former employee, Frank Maffei, who was involved in the 1956 job and recalled crawling through the pipe. (Maffei Dep. 62:5 – 63:17.) He testified that he did not observe anything amiss (and never noticed the longitudinal weld defect). (*Id.*)

These PG&E employees reasonably would have also assumed that the pipes had been tested by their manufacturer for longitudinal seam weld defects. PG&E and industry practice at the time required manufacturers to hydrostatically test pipes—*before* delivery—to ensure their compliance with relevant specifications. (Stracke Decl. ¶ 11, Ex. 4, PG&E's Specifications for Pipe Purchase Order 7R-61963; *Id.* ¶ 12, Ex. 5, PG&E's Specifications for Pipe for Purchase Order 7R-66858; Zurcher Decl. ¶ 17.) There is also evidence that PG&E hired independent companies to inspect manufactured pipe it had purchased and required its suppliers to fix any defects prior to installation. (Stracke Decl. ¶ 13, Ex. 6, Report of the Inspection of 30 Inch Pipe by Moody Engineering Company.) The PG&E employees installing Segment 180 would have known of these practices and there would have been no reason for them to conduct their own independent tests and inspections of the pipe for a seam defect.

Plaintiffs have raised the theoretical possibility that PG&E employees could have welded the pups in the field themselves, in which case they may have had an opportunity to conduct a

visual inspection and notice the missing interior weld. (See Plaintiffs' Response to Special Interrogatories Nos. 1, 2.) But there is no available evidence supporting that hypothesis, or supporting the further speculation that any PG&E director, officer, or senior manager knew about and ratified any such violation of PG&E's policies. Even when the burden of proof is merely a preponderance of the evidence, Plaintiffs "cannot avoid summary [adjudication] by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a triable issue of fact." (*Dollinger DeAnza Assocs. v. Chi. Title Ins. Co.* (2011) 199 Cal.App.4th 1132, 1144 [131 Cal.Rptr.3d 596] [citation omitted].) Such speculation certainly cannot satisfy the burden of producing evidence "so clear as to leave no substantial doubt [and] sufficiently strong to command the unhesitating assent of every reasonable mind." (*Conservatorship of Wendland*, *supra*, 26 Cal.4th at p. 552 [internal quotation marks and citation omitted] [alteration in original].)

It simply is not known, half a century later, exactly what happened and what tests were or were not performed. But Plaintiffs bear the burden of proof on punitive damages by clear and convincing evidence, and under that standard "the absence of an affirmative record documenting [PG&E's] consideration of these issues simply does not show that [PG&E's] actions . . . were malicious." (*Food Pro Int'l, Inc. v. Farmers Ins. Exch.*, *supra*, 169 Cal.App.4th at p. 995.) Here, there is no evidence that any PG&E employee was actually aware of the missing weld. Nor is there evidence that any PG&E director, officer, or senior manager knew of, or affirmatively approved, the use of non-compliant pipe in Segment 180. Indeed, Plaintiffs themselves have acknowledged that the pipe defects "remained undetected" until after the 2010 accident. (Plaintiffs' Response to Special Interrogatories Nos. 386, 398, 410.)

2. PG&E Operated The Pipeline Safely Without Discovering The Defects Until September 2010.

In the decades between PG&E's installation of Segment 180 in 1956 and the tragic accident in 2010, Segment 180 operated safely and without significant incident. (Stracke Decl. ¶ 14.) Largely because of this proven safety record, there is no evidence that any PG&E official ever acquired actual knowledge that Segment 180 contained the defective welds, or that it posed

a heightened threat to public safety.

Throughout this period, the undisputed evidence shows that PG&E took important steps to enhance the safety of its pipelines, both with respect to Line 132 and more broadly. For example, during this time, PG&E repaired or replaced various sections on all its gas transmission pipelines as needed. (Lyons Decl. ¶ 13, Ex. 12, Transmission Line Replacement Program.)

In the mid-1980s, PG&E became one of the first companies to implement—voluntarily—a Gas Pipeline Replacement Program ("GPRP") to phase out older pipelines, which included those segments of transmission lines that used outdated welding techniques (such as oxyacetylene welds, bell-bell chill ring welds, and bell and spigot welds) and were located in areas with a greater risk to public safety in the event of an incident. (Lyons Decl. ¶ 14, Ex. 13, Pipeline Replacement Program Transmission Line Risk Analysis Revision III; ¶ 15, Ex. 14, Gas Pipeline Replacement Program.) This project was undertaken with considerable assistance from the global engineering firm, Bechtel, which (i) collected information concerning all of PG&E's pipelines, (ii) integrated the information into a computer database and (iii) developed an algorithm for prioritizing pipe replacements. (Lyons Decl. ¶ 14, Ex. 13, Pipeline Replacement Program Transmission Line Risk Analysis Revision III; Lyons Decl. ¶ 17, Ex. 16, Gas Pipeline Replacement Program – Gas Transmission Priority Analysis Report.) The GPRP was approved by the CPUC, and PG&E filed updates about its progress annually.[10]

PG&E also surveyed and made replacements along transmission lines in order to account for liquefaction and took precautions in the event of earthquakes. Following the Loma Prieta Earthquake in 1989, PG&E and outside contractors it hired conducted additional seismic surveys to ensure the safety of its transmission pipelines during a future earthquake. (Lyons Decl. ¶ 18, Ex. 17, Review of the Transmission Priority Analysis (1994 Revision) for the Gas Pipeline Replacement & Rehabilitation Program.) As a result of these efforts, PG&E replaced numerous sections of pipe near certain fault areas. (Montizambert Decl. ¶ 11, Ex. 3, Geologic Hazard Evaluations for Gas Transmission Line 109 and 132 in San Bruno.)

[10] PG&E's filings with the CPUC regarding the GPRP are publicly available at http://www.cpuc.ca.gov/PUC/events/110208_docs.htm.

In the early 2000s, PG&E became an early adopter of the risk management approach to maintaining the safety and reliability of its pipelines. (Declaration of Robert Fassett ("Fassett Decl.") ¶¶ 2, 3; Montizambert Decl. ¶ 10, Ex. 2, Risk Management Program.) The risk management approach allowed PG&E to evaluate a multitude of threats to its pipelines and represented a significant advance from its earlier GPRP program. (*Id.*) Instead of focusing on a singular threat to certain types of pipelines, PG&E created risk algorithms that factored in the relative risk faced by all of its pipelines. (*Id.*) PG&E was also viewed by federal regulators as being a leading pipeline company in its use of External Corrosion Direct Assessment ("ECDA"). In 2003, federal pipeline regulators visited PG&E to learn about PG&E's use of ECDA and viewed a live demonstration of PG&E's ECDA process. (Fassett Decl. ¶ 7.)

PG&E also performed pipeline leak surveys. (Fassett Decl. ¶ 6; Stracke Decl. ¶ 16.) It installed a computer-based Supervisory Control and Data Acquisition ("SCADA") system, to monitor and control the pressure of gas flowing through its pipelines, in 1998. (Declaration of Keith Slibsager ("Slibsager Decl.") ¶ 2.) It made continuous upgrades to its SCADA system throughout the years. (*Id.*)

PG&E has had a detailed set of emergency response procedures in place for years. (Declaration of Michael Peterson ("Peterson Decl.") ¶ 2., Ex. 1, Emergency Operations Plan for Emergency Operations Center; ¶ 3, Ex. 2, Company Emergency Plan.) Those procedures are updated annually, incorporating input from all departments of PG&E. (*Id.* ¶ 3.) These procedures are also updated to include any lessons learned during annual training exercises or any other event where the emergency procedures are used. (Peterson Decl. ¶¶ 4, 5.) PG&E has specific Gas Emergency Response Plans that are updated annually and employees receive training on them annually. (Lyons Decl. ¶ 5, Ex. 4, Deposition of John Corona ("Corona Dep.") 35:4 – 41:17.)

PG&E's efforts related to Line 132 were also extensive and thorough. PG&E replaced and relocated portions of Line 132 in every decade from the 1950s until September 2010. (Stracke Decl. ¶ 15.) Replacement work was done as part of the GPRP and the evaluation of seismic risks. (*Id.*; Lyons Decl. ¶ 15, Ex. 14, Gas Pipeline Replacement Program; Montizambert

Decl. ¶ 11, Ex. 3, Geologic Hazard Evaluations for Gas Transmission Line 109 and 132 in San Bruno.) From the year 2000 until September 9, 2010, PG&E spent tens of millions of dollars on Line 132. (Declaration of Joseph W. Martinelli ("Martinelli Decl.") ¶ 10.) PG&E also conducted leak surveys of Line 132 and addressed issues discovered. (Stracke Decl. ¶ 16; Lyons Decl. ¶ 9, Ex. 8, Deposition of Edward Sickinger ("Sickinger Dep.") 57:5 – 58:23; Martinelli Decl. ¶ 17.) PG&E's capital and maintenance expenditures on Line 132 exceeded its average per-mile expenditures elsewhere in the system. (Martinelli Decl. ¶ 11.)

PG&E also complied with federal pipeline safety regulations when setting the maximum allowable operating pressure ("MAOP") for Line 132 at 400 psig.[11] The regulations, promulgated in 1970, contain what is known as the "Grandfather Clause." (See 49 C.F.R. § 192.619.) The regulations required hydrostatic testing for newly constructed pipelines, but the "Grandfather Clause" allows operators of pipelines constructed before 1970 to utilize the highest known operating pressure obtained in the five-year period preceding July 1, 1970. (49 C.F.R. § 192.619(a)(3).) That regulation was based on the sensible premise that manufacturing defects usually reveal themselves in operation, and if a pipeline had been successfully operated at a certain pressure for a substantial period of time there is every reason to believe that it can be operated at that pressure going forward.[12] Line 132 had attained an operating pressure high of 400 psig on October 16, 1968. (Stracke Decl. ¶ 10, Ex. 3, Milpitas Terminal Maximum Operating Pressure Log for Line 101, 109, 132.)

In 2002, Congress passed the Pipeline Safety Improvement Act. (Pub.L.No. 107-355 (Dec. 17, 2002) 116 Stat. 2985.) The Act and its subsequent implementing regulations imposed

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[11] The MAOP is the pressure a pipeline is permitted to operate at under federal regulations. PG&E has used a separate term—maximum operating pressure ("MOP")—to refer to the pressure which Line 132 should operate at (375 psig) because it was tied to Line 109, whose MAOP was 375 psig.

[12] (See *Pipeline Safety: Pipeline Integrity Management in High Consequence Areas (Gas Transmission Pipelines),* 68 Fed. Reg. 69788, 69791 (Dec. 15, 2003); *Establishment of Minimum Standards,* 35 Fed. Reg. 13248, 13255 (Aug. 19, 1970).) California regulations enacted in 1961 likewise exempted pre-existing pipelines from otherwise-applicable requirements to conduct hydrostatic testing. (See General Order 112 § 104.3, State of California Rules Governing Design, Construction, Testing, Operation, and Maintenance of Gas Gathering, Transmission, and Distribution Piping Systems.)

an array of new requirements on pipeline operators to conduct risk analysis and establish integrity management programs for their pipelines. (*Id.*) PG&E worked hard to implement the new requirements, in consultation with others in the industry, including by:

- Developing a detailed baseline assessment plan ("BAP") of potential pipeline risks and a plan for assessment of those risks for all covered segments as defined in the legislation (Fassett Decl. ¶ 4, Ex. 1, Integrity Management Program Baseline Assessment Plan for Pacific Gas & Electric Company);
- Developing a set of Risk Management Procedures (Fassett Decl. ¶¶ 2-3);
- Inspecting hundreds of miles of gas transmission pipeline, with an emphasis on those in high-population areas (Fassett Decl. ¶ 5);[13]
- Conducting ECDA of Line 132 in both 2003-2004 and 2008-2009 (Stracke Decl. ¶ 17);
- Preparing an analysis, pursuant to 49 C.F.R. § 192.935(c), of the potential efficacy of utilizing automatic shutoff valves ("ASVs") and/or remote control valves ("RCVs") (Declaration of Daniel Menegus ("Menegus Decl.") ¶ 5, Ex. 4, Memorandum re: ASV & RCV Consideration Guideline.). PG&E installed or maintained approximately 300 such valves throughout its transmission system. (Menegus Decl. ¶ 4.)[14]

As part of this work, PG&E began its baseline assessment of Line 132 in 2003, in which the line was analyzed for numerous risks including internal and external corrosion, manufacturing threats, construction threats, third party damage, and outside forces. (Fassett Decl. ¶ 4.)

The entirety of Line 132 was analyzed during an assessment conducted in 2003 and 2004.

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[13] Under 49 C.F.R. § 192.921, operators were required to complete pipeline assessments for 50 percent of high-population areas by December 17, 2007, with the remaining pipes to be assessed by December 17, 2012. By June 30, 2010, PG&E had completed assessments of approximately 750 miles of pipeline in such areas (out of a total of 1,021 miles). (Fassett Decl. ¶ 5.)

[14] In determining whether to install RCVs and ASVs, PG&E understood itself to be exercising the discretion expressly granted by 49 C.F.R. § 192.935(c).

(Lyons Decl. ¶ 11, Ex. 10 Deposition of Sara Peralta (Rough) ("Peralta Dep.") 10:7 – 12:25, 15:4 – 16:18; Fassett Decl. ¶ 4, Ex. 1, Integrity Management Program Baseline Assessment Plan for Pacific Gas & Electric Company.) During this assessment, engineers from PG&E walked lengths of Line 132 and compared the Company's records to physical locations to create a map and survey of the line. (Peralta Dep. 13:19 – 14:18.) At this time, the engineers pulled and collected records of Line 132 work and inspections of the line as revealed in PG&E's databases. (Peralta Dep. 10:7-10, 13:19 – 14:15.) Thereafter, sections of the line were excavated to determine the extent to which corrosion was affecting the pipeline, and PG&E employees simultaneously assessed the specifications of the pipe. (Peralta Dep. 14:16-18; Stracke Decl. ¶ 17.) Based on PG&E's available records, the selection of direct assessment as the assessment method for Line 132, and Segment 180 in particular, was entirely appropriate and not impeded by budgetary constraints. (Martinelli Decl. ¶¶ 13, 15, 16.)

PG&E's efforts to maintain accurate records for Line 132 occasionally fell short. For example, though PG&E's engineering records indicate that Segment 180 consisted of API 5LX Grade X52 DSAW pipe 30 inches in diameter, a separate set of accounting records characterized the pipe as "sml." (Stracke Decl. ¶ 18, Ex. 7, Data Response to CPUC 004-Q11.) It now appears that someone creating the accounting records erroneously and inexplicably included the notation "sml" in the records, while also including the material code for DSAW pipe. Later in the 1970s, PG&E created the Pipeline Survey Sheet for Line 132 to document the details of each pipe segment on Line 132. (*Id.*) The employee creating the Pipeline Survey Sheet for Segment 180 apparently consulted the accounting records, saw the "sml" notation, and incorrectly listed the pipe as "seamless" instead of "DSAW." (*Id.*) Another PG&E employee later copied the incorrect information from the Pipeline Survey Sheet to the Geographic Information System ("GIS") database that PG&E constructed in the 1990s. (*Id.*)

Importantly, there is no indication that this data entry error led to any decisions that impacted safety. Regardless of whether Segment 180 was listed as "seamless" or "DSAW," both

types of pipes have a joint efficiency factor of 1.0,[15] meaning that the weld is considered as strong as the pipe material itself. Therefore, when PG&E conducted its baseline assessment analysis looking for manufacturing threats on Line 132 in 2003, Segment 180 did not pose a manufacturing weld defect threat, which would have been true for either a seamless or DSAW pipe designation. In short, the clerical "sml" error had no bearing on the substantive analysis of Line 132's risk, since the industry and federal regulations consider DSAW equivalent to seamless in strength.

In sum, despite PG&E's good-faith efforts to monitor, and enhance, the safety of Line 132 over the years, the underlying weld defects in the pups located on the 23-foot stretch of Segment 180 never came to light. (Plaintiffs' Response to Special Interrogatories Nos. 386, 398, 410 (noting that defects "remained undetected" until 2010).) From 1956 up until the time of the accident, PG&E monitored and maintained Line 132, as it monitors and maintains the rest of its transmission pipeline network, and addressed defects that it discovered. But as far as PG&E was aware, Segment 180 was a reliable pipe that had operated safely for more than half a century.

3. PG&E Maintained the Maximum Operating Pressure on Line 132.

Prior to the promulgation of the Pipeline Safety Improvement Act regulations, in particular 49 C.F.R. § 192.917(e)(3), PG&E and other companies in the gas pipeline industry knew that the need for priority assessments on pipelines would be established by reference to the preceding five years of operating pressure data. (Zurcher Decl. ¶¶ 27, 28.) To maintain the maximum operating pressure on Line 132 and ensure maximum operational flexibility, PG&E, in similar fashion to other pipeline operators, raised the pressure on Line 132 to approximately 400 psig in 2003 prior to the effective date of the regulations, and then again in 2008.[16]

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[15] Longitudinal joint factors are determined under 49 C.F.R. § 192.113. The joint factor is then used to determine the design pressure for a steel pipe under 49 C.F.R. § 192.105.

[16] Following the enactment of the PSA and its regulations, companies in the industry initially believed that the maximum operating pressure for a pipeline segment would be established on a continuous basis by the maximum experienced in the preceding five years. (Zurcher Decl. ¶ 27.) Under that interpretation, it was necessary to re-prove the pipeline's ability to operate at its MAOP at least once every five years, or the calculated MOP would continually decrease over time, requiring unnecessary reductions in pressure. Regulators have since clarified that PG&E's (and other companies') interpretation of the regulations was too

(Montizambert Decl. ¶ 15, Ex. 7, Pacific Gas & Electric Application for Clearance: PenLinesMOP; ¶ 16, Ex. 8, Pacific Gas & Electric Application for Clearance: No. MIL-02-08; Zurcher Decl. ¶¶ 27, 28.) Each time, there were clear directions not to exceed that pressure. (Montizambert Decl. ¶ 15, Ex. 7, Pacific Gas & Electric Application for Clearance: PenLinesMOP; ¶ 16, Ex. 8, Pacific Gas & Electric Application for Clearance: No. MIL-02-8; Lyons Decl. ¶ 12, Ex. 11, Deposition of Todd Arnett ("Arnett Dep.") 186:14-17.) This process was conducted without incident on both occasions. PG&E reported to the CPUC in February 2011 that the actual highest pressure reading on a monitor at Milpitas—38 miles from the rupture—exceeded 400 by 0.7 psig in 2008 and 2.7 psig in 2003.[17] (Montizambert Decl. ¶ 14, Ex. 6, Letter to Paul Clanon.) A supervising engineer has clearly testified that he understood the 2008 increase to be to 400 psig, the same level as the MAOP. (Arnett Dep. 79:3-20.) There is no indication that pressure exceeded 400 psig at the rupture site. (PG&E's Response to Plaintiffs' Requests for Admission No. 92.) None of these incidents led PG&E to doubt the reliability of Segment 180, still less to discover the defective pups that had been incorporated in that segment decades earlier.

4. PG&E Responded To The Rupture By Working Actively And In Good Faith To Mitigate Its Effects.

On September 9, 2010, PG&E employees and a contractor were performing electrical work in connection with the replacement of the back-up power supply system at the Milpitas Terminal. (Lyons Decl. ¶ 23, Ex. 22, National Transportation Safety Board Operations Group Chairman Factual Report (hereinafter "NTSB Operations Report"), at 4.) PG&E procedures require advance approval for maintenance work that can potentially impact gas pressure, flow, quality, or SCADA monitoring of the pipelines. (Montizambert Decl. ¶ 13, Ex. 5, Utility Work Procedure WP4100-10.) PG&E employees had obtained such approval, indicating at the time

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stringent and that in fact the MOP was established permanently in 2003 by reference to the five years preceding the promulgation of the regulation. (Peralta Dep. 132:8-14.)

[17] PG&E's Response to Plaintiffs' Requests for Admission No. 92 stated that on December 11, 2003, Line 132 was pressurized to 402.2 psig at Milpitas Terminal. The pressure high on Line 132 on December 11, 2003 was 402.7 psig at Milpitas Terminal.

that they did not believe the work would interrupt gas service along the pipeline. (Slibsager Decl. ¶ 3, Ex. 1, Application for Gas Clearance.)[18]

In the course of the electrical work, a local control panel at the Milpitas Terminal unexpectedly lost power. (NTSB Operations Report at 4; Lyons Decl. ¶ 24, Ex. 23, NTSB Interview Transcript of Oscar Martinez 10:7-14.) As a result, erroneous low pressure signals began to register on Line 132's regulating valve controllers. This caused the valves to open fully and increase the flow of gas through the pipeline. (NTSB Operations Report at 4.) At 5:22 pm, the SCADA alarm center began registering numerous alarms. (NTSB Operations Report at 4.) PG&E gas control technicians and SCADA operators worked diligently to resolve these alarms. (NTSB Operations Report at 6, 7.) Despite reducing the pressure set points on valves at Milpitas to reduce the line pressure, at approximately 6:04 pm, the gas pressure flowing from Milpitas Terminal peaked at 396 psig—considerably higher than normal, but still below Line 132's MAOP of 400 psig. (NTSB Operations Report at 8.)

At 6:11 pm, Segment 180 catastrophically ruptured. The underlying cause of the break was the weld defect in the first of the six pups installed in the pipeline decades earlier. (Caligiuri Decl. ¶ 28.) It now appears that a ductile tear originating in the defective weld had significantly reduced the strength of the pup's longitudinal seam. (Caligiuri Decl. ¶ 31.) The increase in pipeline pressure to 386 psig, below Line 132's MAOP of 400 psig, may have helped precipitate the rupture but would clearly not have caused the rupture absent the defect in the weld.[19]

The rupture of Segment 180 created an immediate explosion and a large fireball caused by the ignition of escaping gas. (Declaration of Frank E. Hagan ("Hagan Decl.") ¶ 19.) A gas fire raged from a large crater at the intersection of Earl Avenue and Glenview Drive, in San Bruno. (Hagan Decl. ¶¶ 15, 19.) The results of an analysis of this explosion and fire show that

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[18] Pursuant to PG&E Work Procedure 4100-10, the system clearance request was submitted on August 19, 2010, and approved on August 27. (Slibsager Decl. ¶ 3, Ex. 1, Application for Gas Clearance.) Contrary to PG&E policy, however, the request form did not identify the specific "Clearance Supervisor" who would oversee the project (instead it listed "TBD"), and it lacked certain details concerning the work plan. (*Id.*; Montizambert Decl. ¶ 13, Ex. 5, Utility Work Procedure WP4100-10.)

[19] Plaintiffs have asserted that the sudden rise in pipeline pressure was an immediate cause of the rupture. For purposes of this motion only PG&E does not contest Plaintiffs' assertion.

within five minutes of the rupture, the vast majority of devastation had occurred and the rate of gas feeding the fire had decreased by 75 percent from its peak. (Hagan Decl. ¶¶ 24, 27.) Once the rupture occurred, PG&E could not have prevented any of these effects and immediate catastrophic consequences.

Immediately upon learning of the rupture and explosion, PG&E employees began working fervently to shut off the flow of gas and bring the fire to a halt as quickly as possible. (Sickinger Dep. 80:3 – 83:23, 92:6 – 94:16; Lyons Decl. ¶ 6, Ex. 5, Deposition of Michael Hickey ("Hickey Dep.") 75:6 – 78:25; 206:11 – 211:15.) Following established PG&E procedures, they diagnosed the source of the explosion as a rupture on Line 132 and identified the valves necessary to end the flow of gas. (Corona Dep. 35:4 – 41:17; Hickey Dep. 91:7 – 98:18.) By 7:45 pm, PG&E employees had manually shut off the necessary valves and closed one of Line 132's RCVs. (NTSB Operations Report at 9-10; Hickey Dep. 91:7 – 98:18; Sickinger Dep. 92:6 – 94:16.) With the rupture isolated, firefighters were then able to bring the blaze fully under control. Throughout this process, the evidence is undisputed that PG&E employees worked closely and cooperatively with the firefighters and other emergency responders to mitigate the harm caused by the explosion. (Corona Dep. 90:3 – 97:21; 115:24 – 117:25.)

5. PG&E Has Accepted Responsibility And Pledged to Compensate The Victims.

The effects of the pipeline rupture accident were undeniably tragic. Eight people died, many more were injured, and dozens of homes suffered extensive damage.

PG&E has apologized and accepted responsibility for the tragedy. (Declaration of M. Kirk Johnson ("Johnson Decl.") ¶ 3, Ex. 1, PG&E Press Release, September 13, 2010; ¶ 6 and Ex. 2, PG&E Letter.) Shortly after the accident, PG&E established a Rebuild or Purchase Program for those San Bruno residents whose homes were destroyed or significantly damaged. (Johnson Decl. ¶ 4.) PG&E has also committed to pay up to $50 million to fund replacement and repair of the City's infrastructure and other costs related to the accident. (Johnson Decl. ¶ 5; ¶ 7, Ex. 3, PG&E Press Release, June 2, 2011.) Additionally, PG&E has committed to pay San

Bruno up to $70 million in restitution to support the San Bruno community's efforts to recover. (Johnson Decl. ¶ 8, Ex. 4, PG&E Press Release, March 12, 2012.) PG&E has also cooperated extensively with investigatory efforts by the National Transportation Safety Board and the California Public Utilities Commission, and has announced its intent to incorporate into its plans their recommendations for improving pipeline safety. (Johnson Decl. ¶ 9, Ex. 5, PG&E Press Release, August 30, 2011; ¶ 9, Ex. 6, Pacific Gas and Electric Company's Comments on the Independent Review Panel Report, July 15, 2011.)

PG&E has also conceded its liability for negligence, and has agreed to compensate the victims of the accident; this compensation will surely run into the hundreds of millions of dollars. (See Joint Case Management Conference Statement at 1-2 (Dec. 14, 2011).)

C. Plaintiffs' Theories Supporting Its Request For Punitive Damages Fail As A Matter Of Law.

Given PG&E's admission of liability for negligence, and its commitment to compensate Plaintiffs for their injuries, the primary issue remaining in the case is whether Plaintiffs can satisfy the extremely high threshold for punitive damages under California law. As a matter of law, they cannot.

Plaintiffs' Complaint and 656-page Response to Special Interrogatories accuse PG&E of scores of individual acts of misconduct, while also asserting in conclusory fashion an entitlement to punitive damages. Because they cannot demonstrate by clear and convincing evidence that *any* of PG&E's alleged conduct—examined individually *or* collectively—satisfies Section 3294, their request for punitive damages fails.

Plaintiffs' request fails for four overarching reasons. *First*, there is simply no evidence that PG&E "*intended* . . . to cause injury to the plaintiff" under the statutory definitions of malice or fraud. (See Civ. Code, § 3294, subds. (c)(1), (3) [emphasis added].) Plaintiffs cannot meet their burden of providing affirmative proof—still less proof "so clear as to leave no substantial doubt [and] sufficiently strong to command the unhesitating assent of every reasonable mind"—of intentional misconduct. (*Conservatorship of Wendland*, *supra*, 26 Cal.4th at p. 552 [internal quotation marks and citation omitted] [alteration in original]; see also *Food Pro Int'l, Inc. v.*

Farmers Ins. Exch., *supra*, 169 Cal.App.4th at p. 994.) PG&E's proactive measures to promote pipeline safety over the years—together with its efforts to contain the explosion and limit the damage as much as possible when the rupture occurred—make clear that the rupture and the ensuing harm were *not* intentional. (See *supra* at Sections II.B.2 – II.B.4.)[20]

Second, the undisputed facts establish that PG&E did not "conscious[ly] disregard" a known probability of harm to Plaintiffs' rights or safety. (Civ. Code, § 3294, subds. (c)(1), (2).) To satisfy this demanding standard, Plaintiffs must establish by clear and convincing evidence both (1) that PG&E "was aware of the probable dangerous consequences of [its] conduct," and (2) that it "wilfully and deliberately failed to avoid those consequences." (*Taylor v. Super. Ct.*, *supra*, 24 Cal.3d at pp. 895-96.) They can do neither.

Most importantly, the parties agree that PG&E lacked any actual awareness that the seams on the section of pipe were defective, from the time of installation through September 2010. (See *supra* at Sections II.B.1. – II.B.4; Plaintiffs' Response to Special Interrogatories Nos. 386, 398, 410 (conceding that the defects "remained undetected" until the rupture).) Without such awareness, Plaintiffs cannot possibly establish the requisite "*conscious* disregard." (Civ. Code, § 3294, subds. (c)(1), (2) [emphasis added].) There certainly is no clear and convincing evidence that PG&E knew that a tragic explosion would be the "probable" consequence of operating a pipeline segment that, after all, held up for over five decades without significant incident. (*Grimshaw v. Ford Motor Co.*, *supra*, 119 Cal.App.3d at pp. 816-17; *supra* at Section II.B.2.)

It was reasonable for PG&E to assume that the pipeline's integrity had been proven by long experience. In fact, the federal government reached the same conclusion—in 1970 and

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[20] PG&E is not liable for fraud for two additional reasons. *First*, there was no "intentional misrepresentation, deceit, or concealment of a material fact *known* to the defendant." (Civ. Code, §3294, subd. (c)(3) [emphasis added].) As explained in detail above, PG&E did not have any actual knowledge that a portion of Segment 180 included defective pipes. (See *supra* at Sections II.B.1 – II.B.2; Plaintiffs' Response to Special Interrogatories Nos. 386, 398, 410.) For punitive damages purposes, fraud cannot be based on a negligent misrepresentation. (*Reid v. Moskovitz* (1989) 208 Cal.App.3d 29, 32 [255 Cal.Rptr. 910].) *Second*, Plaintiffs have not alleged fraud with the particularity required by California law. (See *Lehto v. Underground Constr. Co.* (1977) 69 Cal.App.3d 933, 944 [138 Cal.Rptr. 419] (facts and circumstances of fraud must be set out clearly, concisely, and with particularity).)

again in 2003—when it issued regulations exempting pipelines that had operated safely without incident from certain testing requirements. (See *supra* at Section II.B.2.) PG&E's analysis was in line with how the gas pipeline industry treated the regulations and its own pipelines. Given its lack of knowledge of any specific threat, PG&E's testing and safety practices over the years did not "conscious[ly] disregard" risks posed by the pipe. (See, e.g., *Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61-62 [29 Cal.Rptr.2d 615] (no "conscious disregard" when defendant failed to test defective seatbelts under conditions that it did not know were unsafe).)[21]

Third, nothing in PG&E's overall course of conduct with respect to Segment 180 was "despicable." (Civ. Code, § 3294, subds. (c)(1), (2).) The company's conduct was not perfect—which is why PG&E has conceded its own negligence liability here. No reasonable jury, however, could find clear and convincing evidence of despicable malice from this record. The undisputed facts establish that PG&E's errors reflected at worst "carelessness," "ignorance," and/or "negligence"—none of which can justify punitive damages. (*Lackner v. North*, *supra*, 135 Cal.App.4th at pp. 1210, 1213.)[22] Even gross negligence or recklessness is not enough to support an award of punitive damages. And, however PG&E's errors are characterized, no one could say that they were "so vile, base, contemptible, miserable, wretched or loathsome that [they] would be looked down upon and despised by ordinary decent people." (*Id.* at 1210 [citation omitted].)

The Company's efforts to promote pipeline safety, avoid accidents, and minimize the harm caused by the rupture also negate any potential liability under Section 3294. As California courts have repeatedly recognized, such efforts to avoid or mitigate harm can establish—as a

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[21] Nor can Plaintiffs show by clear and convincing evidence that PG&E "willfully and deliberately failed" to avoid the explosion. (*Taylor v. Super. Ct.*, *supra*, 24 Cal.3d at pp. 895-96.) Indeed, the undisputed facts establish that—far from "deliberately fail[ing]" to avoid the accident—PG&E tried first to prevent the accident, and then to mitigate its harmful consequences. (See *supra* at Sections II.B.2, II.B.4.)

[22] (See also, e.g., *Hoch v. Allied-Signal, Inc.*, *supra*, 24 Cal.App.4th at pp. 61-62 (holding that failure to test defective seatbelts for "inertial unlatching" was not despicable as a matter of law); *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1287-88 [31 Cal.Rptr.2d 433] (vacating award of punitive damages when conduct was not despicable as a matter of law); *Flyer's Body Shop Profit Sharing Plan v. Ticor Title Ins. Co.* (1986) 185 Cal.App.3d 1149, 1154 [230 Cal.Rptr. 276] (same).)

matter of law—that particular conduct is *not* despicable.[23]

Finally, Plaintiffs have not alleged that any of these specific acts constitutes malice, oppression, or fraud; in fact, they essentially concede that none satisfies Section 3294 on its own. Instead, Plaintiffs argue that PG&E's actions justify punitive damages when considered *collectively*.[24] But the state of mind required for punitive damages by statute cannot be aggregated in this fashion. Allegations of disconnected conduct that would, at worst, constitute negligence—committed by different people and separated in time by multiple decades—do not add up to malice, oppression, or fraud.

For each of these overarching and independent reasons, PG&E's course of conduct does not justify punitive damages under Section 3294. Under no reasonable view of the facts could Plaintiffs supply clear and convincing evidence that PG&E's conduct exceeded the extraordinary threshold required for punitive damages under California law. And for similar reasons, an award of punitive damages in these circumstances would violate the Due Process Clause of the U.S. Constitution.[25] The rest of this section provides a closer analysis of Plaintiffs' distinct theories, further explaining why each fails as a matter of law.

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[23] (See, e.g., *Lackner v. North*, *supra*, 135 Cal.App.4th at pp. 1212-13 (noting that efforts "to protect or minimize the injury to the plaintiff" can disprove despicability and holding that a reckless snowboarder did not act despicably due to last-moment effort to avoid collision); *Am. Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton*, *supra*, 96 Cal.App.4th at pp. 1051-52 (no despicable conduct when defendant attorney deliberately breached fiduciary duty to client but then took subsequent action to minimize harm); *Allen v. Sully-Miller Contracting Co.* (2000) 80 Cal.App.4th 245, 259-60 [95 Cal.Rptr.2d 142], revd. on other grounds, (2002) 28 Cal.4th 222 [120 Cal.Rptr.2d 795] (no despicable conduct when defendant construction firm placed safety devices along affected stretch of road throughout construction period); see also *Mayfield v. Johnson* (Miss. 1967) 202 So.2d 630 [adopted by *Lackner v. North*, *supra*, 135 Cal.App.4th at pp. 1212-13] (rejecting claim for punitive damages against a reckless driver who at the very last moment tried, unsuccessfully, to avoid a collision with the victim).)

[24] (Plaintiffs' Response to Special Interrogatories No. 2 ("Plaintiffs do not contend that any one single act was malicious, fraudulent, and/or oppressive; rather, Plaintiffs contend that PG&E's acts and omissions collectively demonstrate conduct by PG&E that constitute[s] malicious fraud or oppression under California law"); see also *id.* at Nos. 386, 398, 410 (identifying array of specific acts alleged to constitute malice, oppression, and/or fraud).)

[25] Due process precludes any award of punitive damages where the defendant's conduct was not reprehensible. (See *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 418-24 [123 S.Ct. 1513, 155 L.Ed.2d 585]; *BMW of N. Am. v. Gore* (1996), 517 U.S. 559, 574-81 [116 S.Ct. 1589, 134 L.Ed.2d 809].)

1. PG&E's Installation Of The Defective Pipe Was Not Malicious, Oppressive, or Fraudulent.

Plaintiffs argue that punitive damages against PG&E are warranted due to the original installation of the defective pups in 1956. In particular, they assert that the pipe "did not conform to PG&E's or other known specifications," that PG&E "overlooked or ignored" industry standards for quality control and welding, and that its allegedly inadequate quality control "led to the installation and commissioning of a defective pipe that remained undetected until the accident—fifty-four years later." (Plaintiffs' Response to Special Interrogatories Nos. 386, 398, 410.)

PG&E has agreed to accept responsibility for its use of transmission pipe on Line 132 with a defective weld, and for the tragic consequences that followed on September 9, 2010. But Plaintiffs have no evidence—let alone clear and convincing evidence—that PG&E's installation of the defective pipe reflected any "conscious disregard" for safety or was *despicable*. (See *supra* at Section II.B.1.) It simply is not possible for any of us to know, more than fifty years later, precisely how the defective length of pipe was assembled or what steps PG&E employees took to inspect it before installing the pipe in 1956. The testimony of a former PG&E employee indicates hydrostatic testing was conducting on pipe from this project. (Jefferies Dep. 40:4 – 63:12.)

Plaintiffs do not genuinely contend that the PG&E employees *knew* of the defect and installed the pipe anyway, and they certainly have not offered anything that a jury could regard as *clear and convincing evidence* of such knowledge. Plaintiffs cannot even prove that PG&E's conduct rose to the level of gross negligence or recklessness, but even if they could (by clear and convincing evidence) that would not be sufficient for punitive damages. (*Lackner v. North*, *supra*, 135 Cal.App.4th at pp. 1210, 1213.) While the installation of defective pipe fell short of PG&E's own standards, no one could seriously characterize any PG&E employee's conduct as "vile, base, contemptible, miserable, wretched or loathsome." (*Id.* at 1210 [citation omitted].)[26]

[26] Plaintiffs are wrong to assert that PG&E "overlooked or ignored … generally accepted industry quality control and welding standards in 1956." (Plaintiffs' Response to Special Interrogatories Nos. 386, 398, 410.) This assertion appears to refer to the American

In any event, PG&E would not be liable for punitive damages related to the installation of the defective pups no matter what the workers in the field did or knew in 1956. Section 3294(b) allows punitive damages to be assessed against a corporation only if an "officer, director, or managing agent of the corporation" authorized or ratified the misconduct. Here the pups were installed by PG&E field employees, none of whom exercised "substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine[d] corporate policy." (*White v. Ultramar, Inc.*, 21 Cal.4th at pp. 566-67.) It is undisputed that installation of the pups lacking an interior weld contravened PG&E policy. (See *supra* at Section II.B.1.) And plaintiffs can point to no evidence, let alone clear and convincing evidence, suggesting that any corporate policymaker ever knew about or ratified any deviations from that policy that may have occurred. (See *Barton v. Alexander Hamilton Life Ins. Co.*, *supra*, 110 Cal.App.4th at p. 1644.)

2. PG&E's Operation And Maintenance Of The Pipe Was Not Malicious, Oppressive, or Fraudulent.

For over five decades, Segment 180 operated safely and without incident. (*Supra* at Section II.B.2.) Plaintiffs claim they are entitled to punitive damages on various grounds relating to the operation and maintenance of the pipe over that period, including (1) PG&E's failure to move the pipeline to a more sparsely populated area (without identifying where), (2) its recordkeeping practices, (3) its operation of the pipeline at allegedly excessive internal gas pressures, (4) its decisions regarding whether and how to test the pipeline to ensure continued

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Standards Association B31.8 1955 code, a purely voluntary guideline adopted in 1955 by one industry group that recommended hydrostatic testing of newly-installed pipelines which would operate at more than 30% of SMYS. But (1) this guideline was never incorporated into federal or state law (Zurcher Decl. ¶ 18); (2) it is not clear that in 1955 this segment of pipeline was intended to be operated at more than 30% of SMYS (Zurcher Decl ¶ 17); (3) hydrostatic testing did not reflect widespread industry practice as of 1956 and PG&E may not have adopted those provisions for this project (Zurcher Decl. ¶ 17); (4) there is little reason to think that conducting a hydrostatic test would have revealed the defects in the pups (Caligiuri Decl. ¶ 22); and (5) there is evidence that PG&E's employees did hydrostatically test pipe from this project (Jefferies Dep. 40:4 – 63:12). Moreover, any failure to hydrostatically test Line 132, even if proved, would not have been despicable, particularly as there is no evidence that it was motivated by anything other than "'a mistake of law or fact, honest error of judgment, over-zealousness, mere negligence or other noniniquitous human failing.'" (*Food Pro Int'l, Inc. v. Farmers Ins. Exch.*, *supra*, 169 Cal.App.4th at p. 994 [citation omitted].)

safe operation, and (5) its purported underfunding of pipeline safety. (See generally, e.g., Complaint ¶¶ 59-63, 88; Plaintiffs' Response to Special Interrogatories Nos. 386, 398, 410.) For all of the general reasons set forth above—and for additional reasons noted below—none of Plaintiffs' various theories can justify punitive damages.

a. *Pipeline Relocation*. Plaintiffs suggest that PG&E had a duty "to move the gas line to a more sparsely populated area," in light of the growth of San Bruno in the decades following the installation of Line 132 in 1956. (Complaint ¶ 88.) But federal regulations expressly allow pipelines in populated areas[27]—and for good reason, as otherwise major metropolitan areas like San Francisco and New York would have to forego gas service. It would be improper to impose tort liability—let alone punitive damages—on PG&E for its continued operation of a gas pipeline that safely and successfully served millions of consumers over five decades.

b. *Recordkeeping*. PG&E acknowledges that its Journal Voucher, Pipeline Survey Sheet, and GIS database erroneously showed that Segment 180 consisted of seamless pipe, although the Journal Voucher shows the correct material code. (See *supra* at Section II.B.2.) As discussed previously, however, the evidence is undisputed that even if the records *had* accurately identified Segment 180 as DSAW pipe rather than seamless, they would not have flagged the defective pups, which remained undetected until after the September 2010 rupture. (See *supra* at Section II.B.2; Plaintiffs' Response to Special Interrogatories Nos. 386, 398, 410.) Moreover, the baseline assessment and threat identification process for Line 132 after 2003 would have been identical for seamless and DSAW pipe (both having a joint efficiency coefficient of 1.0), therefore the clerical error had no impact on that process. In short, the recordkeeping error was not a cause of the underlying accident—and it provides no basis for the imposition of punitive damages.

Moreover, there is no evidence that this clerical error was either committed or ratified by any of PG&E's directors, officers, or managing agents, as required by Section 3294(b). Nor is

[27] (See 49 C.F.R. § 192.5 (defining class location); 49 C.F.R. § 192.903 (defining "high consequence area"); 49 C.F.R. § 192.907 (permitting continued operation in high consequence areas subject to implementation of an integrity management program).)

there evidence that the error was due to anything other than, at most, the "carelessness," "ignorance," or "negligence" of the PG&E employees who created the company's records (and failed to consult its original engineering records). (*Lackner v. North*, *supra*, 135 Cal.App.4th at pp. 1210, 1213; see generally *supra* at Section II.B.4.)

Plaintiffs also assert that the general lack of records for the rerouting project on Line 132 (particularly as-built drawings for the 1956 rerouting project) is evidence of malicious conduct by PG&E. (Plaintiffs' Response to Special Interrogatories Nos. 2, 5.) First, it is important to note that in 1956 there were no laws or regulations concerning the maintenance of such pipeline records.[28] (Zurcher Decl. ¶ 29.) Moreover, particularly in light of the evidence of possible loss through an accidental fire, the lack of records concerning Segment 180 cannot be presumed to be anything other than inadvertence or negligence at worst. (Jefferies Dep. 71:14 – 73:4.) This inadvertence or negligence in preserving as-built or other construction records dating back to 1955 is not evidence of despicable conduct and certainly is not "clear and convincing" evidence to defeat a motion for summary adjudication. In addition, there is no logical connection between any lost records and the rupture. Plaintiffs cannot seriously contend that the as-built drawings and other construction records would have revealed that Segment 180 was missing an interior weld in three of the pup sections. Plaintiffs therefore cannot prove (let alone by clear and convincing evidence) that the lost construction records would have had any material impact on PG&E's subsequent operation and maintenance of the pipe.

c. *Operating Pressure*. Plaintiffs claim that PG&E illegally elevated the internal gas pressure of Line 132 to and above its MAOP of 400 psig. (Plaintiffs' Response to Special Interrogatories No. 89.) These claims are factually and legally incorrect, and do not support a claim for punitive damages. A pipeline operator is permitted to operate within the MAOP of the pipeline at any time for any reason. If the actual pressure experienced in 2003 and 2008 on Line 132 exceeded the MAOP by an extremely small margin (402.7 and 400.7 psig respectively), it

[28] (See General Order 112 § 104.3, State of California Rules Governing Design, Construction, Testing, Operation, and Maintenance of Gas Gathering, Transmission, and Distribution Piping Systems. General Order 112 did not take effect in California until 1961.)

was purely accidental. PG&E only intended to raise the pressure to 400 psig. (Montizambert Decl. ¶ 15, Ex. 7, Pacific Gas & Electric Application for Clearance: PenLinesMOP; ¶ 16, Ex. 8, Pacific Gas & Electric Application for Clearance: No. MIL-02-08.) There is no evidence that PG&E integrity management personnel were even aware that it had raised the pressure over 400 psig until long after the pressure increases. Minor pressure fluctuations like these are not uncommon (Zurcher Decl. ¶ 28), and an event exceeding MAOP by less than 1% is not even a reportable event under the federal regulations. (See 49 C.F.R. § 191.23(a)(5).) PG&E certainly had no engineering reason to think that increasing the operating pressure to 400 psig (or within 3 psig of that pressure) would endanger the integrity of Segment 180. As far as PG&E was aware, Segment 180 consisted of DSAW (or seamless) pipe capable of handling up to 1,300 psig. (*Supra* at Section II.B.2.) The pressure at issue here did not come close to that level.

In short, the pressure increases on Line 132 in 2003 and 2008 did not reflect conscious disregard of any known danger or probable harmful consequences, but were a routine aspect of pipeline operations consistent with widespread industry standards. (See *Taylor v. Super. Ct.*, *supra*, 24 Cal.3d at pp. 895-96.)

d. *Testing.* Plaintiffs challenge PG&E's purported failure to conduct hydrostatic testing of Line 132. (Plaintiffs' Response to Special Interrogatories at No. 49.) Plaintiffs assume without evidence that the line was not tested in 1956. The fact that no one can locate pressure test records going back 55 years is not the equivalent of proof, by clear and convincing evidence, that the test was not conducted. In fact, testimony from a former PG&E employee indicates that Segment 180 may have been hydrostatically tested. (Jefferies Dep. 40:4 – 63:12.) And even if Plaintiffs could prove that no testing occurred, the failure to test would have been at worst negligence—not malice or conscious disregard of known probable harm.

The "Grandfather Clause" in federal safety regulations expressly authorized pre-1970 pipelines to continue operating *without* hydrostatic testing. (See 49 C.F.R. § 192.619(a)(3).)[29]

[29] (See also *Pipeline Safety: Pipeline Integrity Management in High Consequence Areas (Gas Transmission Pipelines)*, 68 Fed. Reg. 69788, 69791 (Dec. 15, 2003); *Establishment of Minimum Standards*, 35 Fed. Reg. 13248, 13255 (Aug. 19, 1970).)

Many pipelines in the United States were installed prior to 1970, and many of these have not been hydrostatically tested because they have used the grandfathering provisions provided by statute. (Zurcher Decl. ¶ 21.)

Plaintiffs may claim that hydrostatic testing was required under 49 C.F.R. § 192.917(e)(3), which took effect February 14, 2004,[30] because the pressure experienced in 2008 allegedly exceeded MOP as used in that regulation. But that provision requires priority assessment, *i.e.* hydrostatic testing or inline inspection, only if a covered segment in a pipeline is operated above the maximum operating pressure experienced "during the five years preceding identification of the high consequence area." (49 C.F.R. § 192.917(e)(3).) It is undisputed that the pressure experienced in 2003 was higher than in 2008, and within five years—so the regulation was clearly not triggered by the pressure increase in 2008. (The regulation was not in effect as of the time of the 2003 pressure high.) Regardless, at worst the evidence indicates that PG&E employees had a good faith interpretation of the regulation that hydrostatic testing was not required because PG&E did not exceed the five year MOP high. Even if PG&E's understanding was incorrect, a misunderstanding of law is not malicious. (See *Lackner v. North*, *supra*, 135 Cal.App.4th at p. 1212.) And in any event PG&E had no reason to think that hydrostatic testing was ever actually necessary to ensure the safety of Line 132. (See *supra* at Sections II.B.1, II.B.2; see also *Hoch v. Allied-Signal, Inc.*, *supra*, 24 Cal.App.4th at pp. 61-62 (failure to conduct additional tests not malicious without knowledge of specific probable dangers).) PG&E took affirmative steps to validate Line 132 using ECDA, which was appropriate by industry standards and regulations. (*See supra* at Section II.B.2; Zurcher Decl. ¶ 22).

e. *Allocation of Financial Resources.* Plaintiffs have repeatedly challenged PG&E's budgetary decisions, arguing vaguely that its "corporate culture emphasized profits over safety." (Plaintiffs' Response to Special Interrogatories Nos. 386, 398, 410; see also Complaint ¶¶ 41-48.) There is zero evidence that PG&E was aware of the defects that caused this accident at the

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[30] (See *Pipeline Safety: Pipeline Integrity Management in High Consequence Areas (Gas Transmission Pipelines)*, 69 Fed. Reg. 2307 (Jan. 15., 2004).)

time it constructed its budgets, or that it made any decisions with respect to Segment 180 for financial reasons. (See *supra* at Sections II.B.1, II.B.3; Plaintiffs' Response to Special Interrogatories Nos. 386, 398, 410.) And PG&E cannot be faulted for allegedly diverting funds that could theoretically have corrected a problem of which it was unaware. That is especially true given that the record shows that PG&E devoted millions of dollars to promoting pipeline safety and fixing problems on Line 132 of which it *did* become aware over the years. (Martinelli Decl. ¶¶ 10, 14, 17.) PG&E's pipeline replacement analysis identified and ranked segments by comparative risk and consequence and undertook to address those before addressing lower risk segments. (Lyons Decl. ¶ 14, Ex. 13, Pipeline Replacement Program Transmission Line Risk Analysis Revision III.) There is no evidence that Segment 180 was ever on that list and there was no known reason it should have been. PG&E certainly did not "willfully and deliberately" ignore known pipeline risks related to these sections of Line 132 (*Taylor v. Super. Ct.*, *supra*, 24 Cal.3d at pp. 895-96), and its budgets were, as a matter of law, not despicable. Plaintiffs' unsupported speculation about PG&E's motives is not evidence that "command[s] the unhesitating assent of every reasonable mind," and no reasonable jury could conclude that PG&E's financial budgeting leaves "no substantial doubt" that the company committed malice, oppression, or fraud. (*Conservatorship of Wendland*, *supra*, 26 Cal.4th at p. 552 [citation omitted].)

Moreover, Plaintiffs' broad disparagement of PG&E's perceived "corporate culture" as a matter of law cannot establish malice or oppression as to the events at issue. (Plaintiffs' Response to Special Interrogatories Nos. 386, 398, 410.) The Supreme Court has made crystal clear that punitive damages may only be imposed, consistent with due process, for specific acts of misconduct and not on the basis of generalized allegations that the defendant is an "unsavory . . . business." (*State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 423 [123 S.Ct. 1513, 155 L.Ed.2d 585]; see also *Holdgrafer v. Unocal Corp.*, *supra*, 160 Cal.App.4th at p. 928.) Plaintiffs make precisely such generalized allegations here.

3. PG&E's Emergency Planning Was Not Malicious, Oppressive, Or Fraudulent.

Plaintiffs raise an additional set of challenges to PG&E's allegedly defective emergency planning and preparedness. In particular, they highlight (1) the use of manual valves on Line 132, (2) PG&E's emergency response protocols, and (3) its alleged failure to learn lessons from prior safety incidents. (See generally Complaint ¶¶ 18-33.) None of these theories could justify punitive damages.

In addition to the points already made above (see *supra* at Sections II.C, II.C.1), none of the alleged shortcomings in emergency planning *caused* the September 2010 explosion. The vast majority of the damage occurred within minutes of the explosion (see *supra* at Section II.B.4), and therefore no set of emergency procedures could have prevented the vast bulk of the harm. Because of the disconnect between PG&E's allegedly deficient emergency planning and the victims' injuries, punitive damages based on that planning are inappropriate here. (See *Magallanes v. Super. Ct.* (1985) 167 Cal.App.3d 878, 889 [213 Cal.Rptr. 547] ("[I]t must be certain that the wrongdoer being punished because of his conduct actually caused the plaintiff's injuries.") [citation omitted]).

Apart from the lack of causation, Plaintiffs' varied assertions do not add up to a plausible theory of malice or oppression under Section 3294. No reasonable jury could find, by clear and convincing evidence, that PG&E's contingency planning was despicable or marked by any conscious disregard of known dangers.

a. *Pipeline Valves.* Plaintiffs suggest that if PG&E had used additional ASVs and RCVs—instead of manual valves—it would have been able to "reduce[] the amount of time taken to stop the flow of gas and isolate the rupture." (Plaintiffs' Response to Special Interrogatories Nos. 386, 398, 410.) PG&E's decision not to install additional ASVs and RCVs was clearly reasonable. In 2004, federal regulations authorized pipeline operators to exercise discretion over whether to install such valves, based on their own respective risk analyses weighing both safety and efficiency concerns. (49 C.F.R. § 192.935(c).) PG&E conducted the necessary analysis. (Menegus Decl. ¶ 5, Ex. 4, Memorandum re: ASV & RCV Consideration

Guideline.) It also maintained roughly 300 ASVs and RCVs throughout its pipeline system, including several on Line 132. (Menegus Decl. ¶ 4.) It chose not to replace all of the manual valves on Line 132, concluding (based on a separate analysis) that additional ASVs and RCVs would provide few additional safety benefits in the case of an accident.[31]

This decision was not malicious or oppressive under Section 3294(c). PG&E followed federal policy and carefully weighed the competing concerns of safety and efficiency. It ultimately concluded that a balanced approach—replacing some manual valves, but not all—would best serve the array of valid objectives. This approach was consistent with industry practice.[32] (Zurcher Decl. ¶ 35.) Indeed, Plaintiffs concede that the majority of relevant gas pipelines in the United States do not employ the use of such valves. (Plaintiffs' Response to Special Interrogatories Nos. 41 – 48.) PG&E's exercise of reasoned judgment—particularly in the face of scientific uncertainty concerning the efficacy of ASVs and RCVs—precludes imposition of punitive damages.[33]

b. *Emergency Procedures*. Plaintiffs claim that PG&E "lacked detailed and comprehensive procedures for responding to a large scale emergency." (Plaintiffs' Response to Special Interrogatories Nos. 386, 398, 410.) This is indisputably false: At the time of the rupture, PG&E had in place (1) alarm response procedures, (2) crisis management procedures, (3) emergency communication procedures, and (4) gas emergency procedures. (Montizambert Decl. ¶ 12, Ex. 4, PG&E Gas SCADA System Alarm Limits Policy and Procedures; Peterson

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[31] (See Menegus Decl. ¶ 3, Ex. 1 at 15., Ex. 2 at 16, and Ex. 3 at 13 (determining that Line 132 had "no unique conditions or characteristics which may lead one to believe that the length of time necessary to respond to a rupture will increase the likelihood of harm to population around the pipeline").)

[32] (See, e.g., *Wagner v. Clark Equip. Co.* (Conn. 1997) 700 A.2d 38, 48-49 (no reckless disregard of safety justifying punitive damages when forklift manufacturer chose not to install certain pedestrian-warning devices because "such devices were not universally accepted by the industry and were not required under applicable safety standards"); *Taylor v. Mooney Aircraft Corp.* (E.D.Pa. 2006) 464 F. Supp. 2d 439, 448-49 (no willful or wanton conduct justifying punitive damages when airplane manufacturer complied with FAA regulations and incorporated a device used by a majority of the industry).)

[33] (See, e.g., *Henderson v. United Parcel Serv.* (N.Y.App. Div. 1998) 252 A.D.2d 865, 866-67 (punitive damages unjustified because research on the effectiveness of the devices was incomplete and the devices were not required by "established standards").)

Decl. ¶ 2, Ex. 1, Emergency Operations Plan for Emergency Operations Center; ¶ 3, Ex. 2, Company Emergency Plan; Corona Dep. 34:21 – 41:17.) These procedures were thorough, detailed, in writing, and broadly consistent with industry standards and practice. (*Id.*; Zurcher Decl. ¶ 33.) While Plaintiffs may find fault with the details of these various procedures, no reasonable jury could find it "'so clear as to leave no substantial doubt'" that PG&E's plans were the product of malice, oppression, or fraud. (*Conservatorship of Wendland*, *supra*, 26 Cal.4th at p. 552 [citation omitted].)

c. *Prior Accidents.* Plaintiffs highlight multiple prior PG&E accidents, involving different pipelines with different defects, alleging that the company failed to enhance safety precautions and improve emergency planning in their wake. (Complaint ¶¶ 19-33.) Most—and perhaps all—of these prior incidents will be inadmissible at trial. Plaintiffs cannot seek punitive damages on the basis of conduct that is unrelated and dissimilar to the September 2010 accident directly at issue. (See *Holdgrafer v. Unocal Corp.*, *supra*, 160 Cal.App.4th at pp. 927-34 (holding that such evidence violates federal due process and state evidentiary rules).)

4. PG&E's Conduct Immediately Before And During The Accident Was Not Malicious, Oppressive, Or Fraudulent.

Plaintiffs argue that (1) PG&E's failure to obtain proper clearances to perform the work at the Milpitas Terminal, and (2) its allegedly slow and ineffective response to the rupture, explosion, and ensuing fire support their claim for punitive damages. Neither of these claims bolsters their case that PG&E acted with malice, oppression, or fraud.

a. *Work Procedures for Milpitas Repairs.* PG&E acknowledges that its employees who submitted and approved the Milpitas work request did not fully comply with PG&E's Work Procedure 4100-10. (See *supra* at n.18.) Specifically, the employees erred in failing to provide sufficient details on the clearance application. But their violation of PG&E policy is not a sufficient basis for imposing punitive damages liability on PG&E. Neither employee was an officer, director, or managing agent capable of "determin[ing] corporate policy, as required by Section 3294(b). (*White v. Ultramar, Inc.*, *supra*, 21 Cal.4th at pp. 566-67; see also *Roby v. McKesson Corp.*, *supra*, 47 Cal.4th at pp. 714-15.) Nor, for that matter, did their failure to

provide sufficient detail on the clearance form constitute a despicable and deliberate decision to avoid probable dangers to the public. This sort of carelessness is a far cry from the "evil motive" necessary to sustain punitive damages. (*Taylor v. Super. Ct.*, *supra*, 24 Cal.3d at pp. 895-96.)

b. *Crisis Response.* Plaintiffs further allege that PG&E's response to the explosion was "sluggish" and ultimately contributed to the extent of the harm. (Complaint ¶ 54.) But Plaintiffs ignore the indisputable fact that PG&E employees successfully identified the source of the explosion, turned off the flow of gas, and worked with firefighters and emergency responders to minimize the scope of the damage. (See *supra* at Section II.B.4) These employees did their best to react to a crisis situation unfolding at breakneck speed. (*Id.*) Taken as a whole, their efforts are at least sufficient to preclude any jury finding of malice, oppression, or fraud by clear and convincing evidence. (See, e.g., *Lackner v. North*, *supra*, 135 Cal.App.4th at pp. 1212-13; *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton*, *supra*, 96 Cal.App.4th at pp. 1051-52.)

5. Plaintiffs Cannot Rely On A "Collective Acts" Theory To Overcome Their Inability To Establish Scienter For Any Individual Act.

Plaintiffs concede—for all of the reasons set forth above—that none of their individual allegations of misconduct constitutes malice, oppression, or fraud under Section 3294 as a matter of law. (See Plaintiffs' Response to Special Interrogatories at No. 1 ("Plaintiffs do not contend that any one single act was malicious, fraudulent, and/or oppressive…").) They therefore argue that PG&E's actions justify punitive damages when considered *collectively*. (*Id.*) To the extent this "collective acts" theory tries to aggregate individual acts of negligent conduct to satisfy the rigorous scienter requirements for malice, oppression, or fraud, it fails as a matter of law.

Section 3294(c)(1), (2), and (3) specify the particular states of mind that the defendant must possess in order to become liable for punitive damages. The statute unambiguously requires the defendant to have the requisite state of mind at the time he or she commits the misconduct. (See, e.g., Civ. Code, § 3294, subd. (c)(1) (defining malice in part as "despicable conduct *which is carried on … with* a willful and conscious disregard of the rights or safety of others") [emphasis added]; *Magallanes v. Super. Ct.*, *supra*, 167 Cal.App.3d at p. 888 (courts

evaluating malice or oppression must "determin[e] … the state of mind of the particular defendant *while committing the alleged wrongful act*") [emphasis added].)[34] That requirement ensures that punitive damages are imposed only for acts committed with an actual "evil motive." (*Taylor v. Super. Ct.*, *supra*, 24 Cal.3d at p. 895.) Plaintiffs appear to urge this Court to find that PG&E acted with malice, even though it cannot establish that *any* of the company's acts were "carried on … with a willful and conscious disregard of the rights or safety of others." (Civ. Code, § 3294, subd. (c)(1).) This approach plainly violates the statute.

It also defies common sense. A person who is always well-intentioned—and who remains truly unaware of the harmful consequences of his negligent conduct—*never* acts with malice or oppression. A person who does not intentionally misrepresent, deceive, or conceal *never* commits fraud. The statutory scienter requirements cannot be met by adding up a series of distinct actions that were at worst merely negligent, particularly when those acts are alleged to have been committed by different people over the course of many decades. Plaintiffs are simply trying to throw together a diverse set of potentially negligent acts, unconnected by actor or time period.

This Court should reject Plaintiffs' attempt to evade the plain meaning of Section 3294(c). And for similar reasons, an award of punitive damages in these circumstances would violate due process. The Supreme Court has made clear that a punitive award must be narrowly focused on the particular conduct that justifies punitive damages, not other acts that individually would not be sufficient as a matter of law. (*State Farm Mut. Automobile Ins. Co. v. Campbell*, *supra*, 538 U.S. at p. 423.) Plaintiffs cannot establish, by clear and convincing evidence, that PG&E either intended harm or deliberately failed to avoid the known dangerous consequences of its conduct. Plaintiffs' "collective acts" theory is no stronger than the

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[34] (See also Civ. Code, §3294, subd. (c)(1) (malice includes "conduct which is intended by the defendant to cause injury to the plaintiff"); Civ. Code, §3294, subd. (c)(2) (oppression requires requires "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights"); Civ. Code, §3294, subd. (c)(3) (fraud requires "intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury").)

individual acts on which it relies, and it fails as a matter of law.

III. CONCLUSION

On the narrow issue presented in this motion, whether Plaintiffs may properly obtain punitive damages, the evidence is overwhelming that they cannot. The undisputed evidence establishes that the rupture was caused by a piece of defective pipe that unexpectedly failed almost 55 years after installation. All parties acknowledge that there is no evidence that PG&E actually knew of the existence of the defective pipe prior to the accident. Thus, the facts conclusively establish that the tragedy resulted from human error, and PG&E has taken responsibility for that error.

The persons affected by this accident should be fully compensated and PG&E has agreed to do that and wishes to do so expeditiously. Punitive damages recovery, however, is disfavored under the law and the facts here do not establish a permissible basis for them. Under no evaluation of the facts is there clear and convincing evidence of malice, oppression, or fraud. The accident was just that—an accident. The Court should resolve this open issue so that the remaining claims may be efficiently resolved.

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Respectfully submitted,

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