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PACIFIC GAS AND ELECTRIC
COMPANY and PG&E CORPORATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

CASES Coordination Proceeding Special Title (Rule 3.550) PG&E "SAN BRUNO FIRE"	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 ON CAUSES OF ACTION #4: INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AND #5: BATTERY** Hearing Date: June 22, 2012 Time: 9:30 AM Dept.: 7 Judge: Hon. Steven L. Dylina

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I. INTRODUCTION

This is the second in a series of motions PG&E has filed for summary adjudication of claims relating to the tragic San Bruno pipeline explosion of September 9, 2010. The first motion addressed Plaintiffs' request for punitive damages as to most of its substantive causes of action. This motion seeks summary adjudication with respect to Plaintiffs' causes of action for intentional infliction of emotional distress ("IIED") and battery. Because this motion draws heavily on the factual discussion and legal arguments set forth in the punitive damages motion, PG&E respectfully suggests that the Court review that motion first.

PG&E has conceded its liability for negligence. It has agreed to compensate victims for all property damages and physical injuries caused by the accident, including emotional distress claims which are legally compensable. 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. But Plaintiffs' causes of action for intentional infliction of emotional distress and battery fail as a matter of law, for reasons that are broadly similar to the reasons that Plaintiffs are not entitled to punitive damages.

Plaintiffs cannot establish liability for intentional infliction of emotional distress because that cause of action requires proof of "extreme and outrageous" misconduct that either intends to harm or disregards harm that is substantially certain to occur. While the accident here was undeniably tragic, it was not the result of any "extreme and outrageous" misconduct by PG&E, and does not reflect reckless disregard of substantially certain harm. All parties agree that PG&E was unaware of the defects in Line 132 that ultimately caused the explosion, and that the pipeline operated safely for more than half a century before the tragic rupture.

Plaintiffs' battery claim fails as a matter of law for similar reasons. PG&E was not aware that the pipeline would rupture, and there is no evidence that it desired to harm Plaintiffs or acted with knowledge that harm was substantially certain.

This Court should grant PG&E's motion and dismiss these two claims. Doing so will simplify these cases by clearing away unnecessary and unmeritorious causes of action, and will assist the parties as they move forward towards settlement, or trial, confined to the narrow

question of compensatory damages for negligence.

II. LEGAL ARGUMENT

Plaintiffs allege that PG&E is liable for intentional infliction of emotional distress and battery. To prevail here, PG&E must demonstrate "that there is no triable issue of material fact and that [it] is entitled to judgment as a matter of law." (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 525 [89 Cal.Rptr.3d 801] [citation omitted].) To defeat this motion, Plaintiffs must present "competent and admissible evidence" that would allow a reasonable jury to find PG&E liable by a preponderance of the evidence. (*Id.*; see also Code Civ. Proc., § 437c, subds. (c), (d).)[1]

As explained more fully below, summary adjudication is warranted as to both causes of action. PG&E incorporates by reference the facts and legal arguments set forth in its Motion for Summary Adjudication Regarding Punitive Damages ("Punitive Damages Motion"), the Separate Statement of Undisputed Material Facts ("Separate Statement"), and the accompanying declarations, filed contemporaneously herewith.

A. The Court Should Grant Summary Adjudication on the Intentional Infliction of Emotional Distress Cause of Action.

Plaintiffs allege that PG&E is liable for IIED because it "maintain[ed] an extremely dangerous, old, and defective gas line below a densely populated area." (Complaint ¶ 93.) This cause of action requires proof that the defendant engaged in extreme and outrageous conduct, either intending to cause harm or recklessly disregarding a substantial certainty that harm would result. That standard of outrageousness is even more stringent than the "despicable" misconduct that is required before punitive damages may be imposed. Safely operating aging infrastructure without incident for 50 years before an unprecedented, unanticipated, and undesired accident does not meet that standard, as a matter of law.

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[1] Plaintiffs thus may *not* rely upon the same body of evidence cited in 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 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].)

1. IIED Requires Extreme and Outrageous Conduct Recklessly Disregarding A Substantial Certainty of Harm.

To prevail on their IIED claim, Plaintiffs must establish three elements: "(1) extreme and outrageous conduct by defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903 [2 Cal.Rptr.2d 79] [citation omitted].) For purposes of this motion, PG&E contests only Plaintiffs' ability to satisfy the first of these elements.

Whether a reasonable jury could find that alleged misconduct qualifies as "outrageous" is a question of law for the court. (*Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 534 [61 Cal.Rptr.3d 304].) Conduct is not "outrageous" unless it is "so 'extreme as to exceed all bounds of that usually tolerated in a civilized community.'" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-51 [95 Cal.Rptr.3d 636] [citation omitted]; see also CACI 1602.) It must be so beyond the pale that "recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" (*Ess v. Eskaton Props., Inc.* (2002) 97 Cal.App.4th 120, 130 [118 Cal.Rptr.2d 240][citation omitted].) Crucially, the degree of outrageousness required for IIED liability is *even higher* than what is necessary to prove "despicable" conduct for purposes of imposing punitive damages.[2] In *McMahon v. Craig* (2009) 176 Cal.App.4th 1502 [97 Cal.Rptr.3d 555], for example, the defendant violated instructions, lied about what she had done, and showed indifference to the consequences of her actions. *Id.* at pp. 1507-08. The court denied the owner's claim of IIED against the veterinarian. It explained that while these acts "might be viewed as fraudulent and despicable conduct supporting punitive damages," they nevertheless did not meet the even higher standard of outrageousness. *Id.* at p. 1517.

[2] (See *McMahon v. Craig* (2009) 176 Cal.App.4th 1502, 1517 [97 Cal.Rptr.3d 555] ["it is 'not . . . enough that the defendant['s] conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort'"] [citation omitted]; *Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 496 [76 Cal.Rptr.2d 540] [same]; *Pardi v. Kaiser Permanente Hosp., Inc.* (9th Cir. 2004) 389 F.3d 840, 852.)

A plaintiff can satisfy the scienter requirement for IIED by showing that the defendant acted either with the "intention of causing . . . emotional distress" or with a "reckless disregard of the probability of causing" such distress. (*Christensen v. Superior Court*, *supra*, 54 Cal.3d at p. 903 [citation omitted].) The first approach requires that the outrageous conduct was specifically and intentionally "directed at the plaintiff." (*Id.*; see also *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001-02 [25 Cal.Rptr.2d 550].) The second requires that the defendants carried out their misconduct with actual knowledge of both (1) the "presence" of the particular plaintiffs and (2) a "substantial certainty" that the plaintiffs would suffer harm. (*Christensen*, at p. 906; *Potter*, at pp. 974, 1003.)

As these rules make clear, "[i]t is not enough that the conduct be intentional and outrageous. It must be conduct directed at the plaintiff, or occur in the presence of a plaintiff of whom the defendant is aware. Past decisions of this court have invariably presupposed that the defendant's misconduct was directed to and intended to cause severe or extreme emotional distress to a particular individual or, when reckless disregard was the theory of recovery, that the defendant directed the conduct at, and in conscious disregard of the threat to, a particular individual." (*Id.* 54 Cal.3d at p. 903.) Moreover, where the theory is reckless disregard, the plaintiff generally must be present at the time the outrageous conduct occurs. "Where reckless disregard of the plaintiff's interests is the theory of recovery, the presence of the plaintiff at the time the outrageous conduct occurs is recognized as the element establishing a higher degree of culpability [which justifies IIED recovery]." (*Id.* at 905-06.)[3]

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[3] These principles have been consistently applied. (See, e.g., *Potter v. Firestone Tire & Rubber Co.*, *supra*, 6 Cal.4th at pp. 1002-03 [Firestone's disposal of toxic waste at a landfill, leading to contamination of ground water, was insufficient for IIED if Firestone merely "had to realize" that the eventual discovery of the toxic contamination "by [any person] drinking the contaminated water would almost certainly result in their suffering severe emotional distress," barring a showing that "Firestone actually knew of these particular plaintiffs and their consumption of the water, and nevertheless sent prohibited wastes to [the landfill] despite a realization that plaintiffs would almost certainly suffer severe emotional distress upon their discovery of the facts."] [quoting trial court]; see also *Avila v. Willits Envtl. Remediation Trust* (9th Cir. 2011) 633 F.3d 828, 844, cert. den. (2011) 132 S.Ct. 120 [181 L.Ed.2d 44] [rejecting the argument that because defendant "spilt chemicals in the middle of town and knew what it was doing to the residents," plaintiff could satisfy IIED requirements]; *Catsouras v. Dept. of Cal. Highway Patrol* (2010) 181 Cal.App.4th 856, 875 [104 Cal.Rptr.3d 352] ["Case law shows that 'if reckless conduct is the basis for recovery, the plaintiff is usually present at the time of the conduct and is known by the defendant to be present.'"] [quoting *Christensen v.*

These requirements are "rigorous, and difficult to satisfy." (*Yurick v. Superior Court* (1989) 209 Cal.App.3d 1116, 1129 [257 Cal.Rptr. 665] [quoting Prosser & Keeton, *Torts* (5th Ed. 1984) § 12, pp. 60-61].) "Unless the defendant's acts are truly outrageous"—and unless the defendant is truly aware of a specific and substantially certain danger to these particular plaintiffs—"an action for intentional infliction of emotional distress will not lie." (*Molko v. Holy Spirit Ass'n* (1988) 46 Cal.3d 1092, 1142 [252 Cal.Rptr. 122] [en banc] [citation omitted].)

2. The Pipeline Explosion Was A Product of Human Error, Not Extreme or Outrageous Misconduct that Recklessly Disregarded Any Known Risk to Plaintiffs.

Plaintiffs cannot make out a case for IIED, because (1) PG&E's conduct was not "extreme and outrageous," and (2) it was neither intentional, nor reckless, nor undertaken with any substantial certainty that it would cause Plaintiffs harm.

a. "Extreme And Outrageous" Conduct. Nothing in PG&E's overall course of conduct was "extreme and outrageous." (*Christensen v. Superior Court*, *supra*, 54 Cal.3d at p. 903 [citation omitted].) The undisputed evidence shows that the rupture of Segment 180 was caused by a short segment of pipe, installed in 1956, that unbeknownst to PG&E contained a defective interior seam weld. (Declaration of Robert D. Caligiuri ("Caligiuri Decl.") ¶ 27; Declaration of John Lyons ("Lyons Decl.") ¶ 21, Ex. 20, National Transportation Safety Board Metallurgical Group Chairman Factual Report at 7.) All parties to this case agree that PG&E did not become aware of the defects until *after* the September 2010 rupture. (See Plaintiffs' Response to Special Interrogatories Nos. 386, 398, 410 [acknowledging that the defects "remained undetected" from time pipe was installed until after the accident].)

As PG&E explains in its Punitive Damages Motion, it simply is not possible at this point in time for anyone to determine why the missing seam weld was not detected in 1956. (See Punitive Damages Motion at Section II.B.2.) Plaintiffs contend that PG&E was at fault for installing the defective pipe, and PG&E has conceded its responsibility for using the pipe in

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Superior Court, *supra*, 54 Cal.3d at p. 905]; *Fonseca v. City of Fresno* (E.D. Cal. Jan. 9, 2012, No. 1:10-cv-00147 LJO DLB) 2012 WL 44041, at *17 ["A plaintiff may recover for the intentional infliction of emotional distress if the defendant is aware of the presence of the plaintiff, yet engages in outrageous conduct in reckless disregard to the probability that it will cause the plaintiff severe emotional distress"].)

order to compensate the victims of this accident. (Lyons Decl., Ex. 2 Joint Case Management Conference Statement at 1-2 (Dec. 14, 2011).) Plaintiffs have *no* evidence suggesting that any PG&E employees did anything that could satisfy the "outrageousness" standard for IIED, which is even harder to meet than the requirement of "despicable" conduct for punitive damages. (*McMahon v. Craig* (2009), *supra*, 176 Cal.App.4th at 1517; see also *Cont'l Cas. Co. v. Superior Court* (1987) 190 Cal.App.3d 156, 161 [235 Cal.Rptr. 260] [distinguishing negligence from "outrageous, socially objectionable conduct"]; Punitive Damages Motion at Section II.C [discussing despicability].)

Plaintiffs point to various supposed shortcomings in PG&E's maintenance and operation of Segment 180 over the years. (Complaint ¶ 93.) None of these other theories can establish outrageous conduct, for essentially the same reasons that they do not constitute malice or oppression for punitive damages purposes under Civil Code section 3294, subdivision (c). (Punitive Damages Motion at Section II.C.) PG&E was completely unaware of the defective welds, and it also consistently acted with good faith—which precludes any finding of "outrageous" conduct. (See, e.g., *Trear v. Sills* (1990) 69 Cal.App.4th 1341, 1357-58 [82 Cal.Rptr.2d 281] [not outrageous for psychotherapist to suggest incorrectly but in good faith that patient has been abused by family member]; *Melorich Builders, Inc. v. Superior Court* (1984) 160 Cal.App.3d 931, 936-37 [207 Cal.Rptr. 47] [good faith reliance on advice of counsel is "complete defense to a claim of extreme and outrageous conduct"].)[4]

Although PG&E has recognized some of its past practices were inadequate, PG&E's efforts to promote pipeline safety and minimize risks establish that its conduct was—as a matter of law—*not* outrageous. Over the years, PG&E relocated and replaced portions of lines as necessary to promote the safe transmission of gas to its customers. (Lyons Decl. ¶ 13, Ex. 12, Transmission Line Replacement Program; ¶ 14, Ex. 13, Pipeline Replacement Program Transmission Line Risk Analysis Revision III; ¶ 15, Ex. 14, Gas Pipeline Replacement Program;

[4] Not even bad faith is enough, on its own, to render conduct "outrageous" for IIED purposes. (See *Coleman v. Rep. Indem. Ins. Co.* (2005) 132 Cal.App.4th 403, 409, 417 [33 Cal.Rptr.3d 744] [bad faith delay or denial of insurance claim not outrageous].)

Declaration of Eric Montizambert ("Montizambert Decl.") ¶ 11, Ex. 3, Geologic Hazard Evaluations for Gas Transmission Line 109 and 132 in San Bruno.) It led the industry in phasing out older pipelines, developed risk management systems to promote safety and reliability, performed regular leak surveys, and conducted extensive direct assessments of its pipelines (including Line 132). (*Id.*; Declaration of Robert Fassett ("Fassett Decl.") ¶¶ 2, 3, 7; Montizambert Decl. ¶ 10, Ex. 2, Risk Management Program. Since 2000, PG&E spent tens of millions of dollars to maintain and upgrade Line 132. (Declaration of Joseph W. Martinelli ("Martinelli Decl.") ¶ 10.) In fact, the capital and maintenance expenditures on Line 132 exceeded PG&E's average per-mile expenditures elsewhere in its system. (Martinelli Decl. ¶ 11.) Moreover, when Segment 180 tragically and unexpectedly ruptured in September 2010, PG&E's employees worked fervently to stop the flow of gas and help firefighters halt the blaze and minimize the damage. (Lyons Decl. ¶ 9, Ex. 8, Deposition of Edward Sickinger ("Sickinger Dep.") 80:3 – 83:23, 92:6 – 94:16; ¶ 6, Ex. 5, Deposition of Michael Hickey ("Hickey Dep") 75:6 – 77:25, 206:11 – 211:15.)

These PG&E efforts to operate its pipeline safely show that its conduct was not "despicable" under Civil Code section 3294, subdivision (c).[5] It follows *a fortiori* that the conduct was not "outrageous" for IIED purposes. (See *McMahon v. Craig*, *supra*, 176 Cal.App.4th at p. 1517.) And though these safety measures did not ultimately prevent the accident, PG&E's failure to do more does not constitute "outrageous" conduct. (See, e.g., *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 165, fn. 5 [216 Cal.Rptr. 661] [en banc] [merely negligent failure to provide medical care insufficient for IIED]; *Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 210 [185 Cal.Rptr. 252] [passive failure of police to intervene was not

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[5] (See, e.g., *Lackner v. North* (2006) 125 Cal.App.4th 1188, 1212-13 [37 Cal.Rptr.3d 863] [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]; *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1051-52 [117 Cal.Rptr.2d 685] [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 [no despicable conduct when defendant construction firm placed safety devices along affected stretch of road throughout construction period].)

"extreme and outrageous"]; *Fuentes v. Perez* (1977) 66 Cal.App.3d 163, 166-67, 172 [136 Cal.Rptr. 275] [not outrageous for contractor to repeatedly refuse to repair roof it had removed, despite forecast and onset of heavy rainstorm].)

In short, Plaintiffs lack any evidence by which they could prove at trial that PG&E's conduct was outrageous. That alone is sufficient reason to grant PG&E's Motion for Summary Adjudication on IIED. Indeed, courts in other states have regularly rejected IIED claims brought in connection with pipeline accidents. (See, e.g., *Miss. Valley Gas Co. v. Estate of Walker* (Miss. 1998) 725 So.2d 139, 149 [pipeline explosion caused by failure to detect leak when employee did not follow company procedures was not outrageous]; *Green v. Qwest Servs. Corp.* (Colo. Ct. App. 2006) 155 P.3d 383, 386-87 [gross negligence leading to gas line explosion not outrageous].)

b. "Reckless Disregard." Plaintiffs do not contend that PG&E intentionally caused them emotional distress; rather, they allege that PG&E acted with "reckless disregard" of the probability that emotional distress would result from its misconduct. (Complaint ¶ 94.)[6] As noted above, this theory of liability requires proof that PG&E was actually aware of both (1) the presence of these particular Plaintiffs on the scene, and (2) a "substantial certainty" that Plaintiffs would suffer harm. (*Christensen v. Superior Court*, *supra*, 54 Cal.3d at p. 906; *Potter v. Firestone Tire & Rubber Co.*, *supra*, 6 Cal.4th at pp. 974, 1003.)

There is no evidence that PG&E was aware of, and ignored, any "substantial certainty" that this accident would occur to these plaintiffs. As noted above, the parties agree that PG&E did not know about the defective longitudinal weld until it ruptured in September 2010. (Plaintiffs' Response to Special Interrogatories Nos. 386, 398, 410 [conceding that the defects "remained undetected" until the rupture].) Line 132, and Segment 180 in particular, operated safely and without incident for more than half a century. This was an unexceptional length of pipeline in a system containing thousands of miles of pipe. Plaintiffs can offer no evidence that PG&E *knew*—much less knew with a *substantial certainty*—that Segment 180 would rupture

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[6] In any event, there is no evidence—none whatsoever—that PG&E somehow intended to cause the explosion of Line 132 and to inflict emotional distress on Plaintiffs.

and cause these Plaintiffs to suffer emotional distress.[7] Indeed, the type of accident in this case was unprecedented. (Declaration of John Zurcher ("Zurcher Decl.") ¶ 25.)

B. The Court Should Grant Summary Adjudication on the Battery Cause of Action.

Plaintiffs also bring a claim for battery. Battery is an "intentional, unlawful and harmful contact by one person with the person of another."[8] (*Fluharty v. Fluharty* (1997) 59 Cal.App.4th 484, 497 [69 Cal.Rptr.2d 244] [citation omitted]; see also CACI 1300.) PG&E is entitled to summary adjudication because no reasonable jury could find that the pipeline explosion was intentional.

Battery requires "an intent to bring about physical contact." (*Ellis v. D'Angelo* (1953) 116 Cal.App.2d 310, 314 [253 P.2d 675] [citation omitted]; see also CACI 1300.) That intent is present where a defendant (1) desires to bring about the harmful contact or (2) knows it "to be substantially certain to result (regardless of desire)." (*Gomez v. Acquistapace* (1996) 50 Cal.App.4th 740, 746 [57 Cal.Rptr.2d 821] [citation omitted]; see also CACI 1320.) Subjective awareness of a possibility or *even a probability* of injury does not suffice. Rather, the defendant must either have had as his purpose the harmful contact with the plaintiff or have been "substantially certain that a battery would result." (*Austin B. v. Escondido Union Sch. Dist.*

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[7] As explained more fully in PG&E's Punitive Damages Motion, it was perfectly reasonable for PG&E to assume that the pipeline could be operated safely. (Punitive Damages Motion at Section II.C.) After all, Line 132 had held up for more than five decades without incident, and PG&E had taken numerous precautions to assure its safety (along with that of all of its pipelines). (Declaration of Edward Stracke ¶¶ 15, 16; 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; Martinelli Decl. ¶ 10.) Indeed, the federal government itself has concluded that pipelines with a long track record of safe operation are likely to remain safe—which is why it has historically exempted such pipelines from new testing requirements. (*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); General Order 112 § 104.3, State of California Rules Governing Design, Construction, Testing, Operation, and Maintenance of Gas Gathering, Transmission, and Distribution Piping Systems.)

[8] Contact is unlawful if the plaintiff does not consent to it. (*Barouh v. Haberman* (1994) 26 Cal.App.4th 40, 45-46 [31 Cal.Rptr.2d 259].)

(2007) 149 Cal.App.4th 860, 871 [57 Cal.Rptr.3d 454] [quoting CACI 1320].)[9]

Of course there is no evidence that PG&E affirmatively *desired* Line 132 to explode. Nor—as explained above and in its Punitive Damages Motion—did PG&E know that the explosion was "substantially certain." (*Gomez v. Acquistapace*, *supra*, 50 Cal.App.4th at p. 746 [citation omitted]; *supra* at Section II.A.2.b; Punitive Damages Motion at Section II.C; Zurcher Decl. ¶ 25.) This pipeline explosion was a tragic accident that no one could have expected. Plaintiffs' battery claims thus fail as a matter of law.

III. CONCLUSION

For the foregoing reasons, PG&E respectfully asks this Court to grant its motion for summary adjudication with respect to Plaintiffs' claims for IIED and battery.

DATED: April 6, 2012

Respectfully submitted,

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[9] (See also, e.g., Rest.2d Torts, § 8A, com. b ["As the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes mere recklessness"]; *id.* § 18 com. e ["It is not enough to make the act intentional that the actor realize that it involves any degree of probability of a harmful or offensive contact . . . , less than a substantial certainty that it will so result"].)