STUART G. GROSS (#251019)
sgross@grosskleinlaw.com
TIMOTHY S. KLINE (#319227)
tk@grosskleinlaw.com
GROSS & KLEIN LLP
The Embarcadero
Pier 9, Suite 100
San Francisco, CA 94111
t (415) 671-4628
f (415) 480-6688

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

DAN CLARKE,

Plaintiff,

v.

PACIFIC GAS AND ELECTRIC COMPANY; and **PG&E CORPORATION**,

Defendants.

Case No. 20-cv-04629 WHO

PLAINTIFF DAN CLARKE'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY ADJUDICATION AND CROSS-MOTION FOR SUMMARY ADJUDICATION

Date: November 3, 2021
Time: 2:00 p.m.
Location: Courtroom 2, 17th Floor

The Honorable William H. Orrick

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PIER 9, SUITE 100
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NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION

PLEASE TAKE NOTICE that on September 15, 2021 at 2:00 p.m. in Courtroom 2 of the United States District Court, Northern District of California, located at 450 Golden Gate Avenue, San Francisco, CA 94102, before the Honorable William H. Orrick, plaintiff Dan Clarke ("Clarke" or "Plaintiff") will move for summary adjudication on the issue of Pacific Gas & Electric Co. and PG&E Corp.'s (collectively, "PG&E") liability for any violation of the Resource Conservation and Recovery Act ("RCRA") or Clean Water Act ("CWA") found in phase two. This motion is based upon this Notice of Motion, Motion, and Memorandum of Points and Authorities, the concurrently filed Declaration of Stuart G. Gross ("Gross Dec.") and all exhibits attached thereto; all pleadings and records on file in this case; and such oral arguments and evidence allowed at the hearing.

STATEMENT OF ISSUES TO BE DECIDED

1. Is PG&E is directly liable, as a result of the conduct of San Francisco Gas & Electric ("SFG&E") under RCRA and/or the CWA?

2. Is SFG&E, and by extension PG&E, liable for the actions of Equitable Gas Light Company ("Equitable") after August 17, 1903 because it was Equitable's corporate parent and sufficiently controlled Equitable?

3. Is SFG&E, and by extension PG&E, liable for Equitable's actions before August 1903 under one or more doctrines of successor liability?

INTRODUCTION

PG&E accepts that it succeeds to the liability of SFG&E but asks this Court to find that it has no direct or successor liability related to the Cannery Manufactured Gas Plant (the "CAN MGP"). The Court should not only reject this request, it should find, as a matter of law, the opposite: that PG&E has direct liability arising out of SFG&E's conduct and both parent and successor liability arising out of Equitable's actions.

First, there is no genuine dispute that PG&E may be found directly liable, under both RCRA and CWA, for SFG&E's operation and dismantling of the CAN MGP. PG&E's motion simply ignores the undisputed evidence showing that, after SFG&E purchased the "business,

property, and assets [of Equitable] as a whole," it produced gas using the CAN MGP for at least an approximate three-month period before partially dismantling the facility. Both the operation and dismantling necessarily involved the generation, handling, transport, and disposal of MGP waste, including discrete locations that qualify as point sources under the CWA.

Second, SFG&E's purchase of more than 90% of Equitable's stock and complete control over Equitable, ***prior*** to purchasing its business and assets—which PG&E also ignores—establishes that SFG&E is further liable for Equitable's actions as its parent.

Third, SFG&E, and by extension PG&E, is liable for the CAN MGP's contamination as the successor to Equitable's liability under three exceptions to the non-liability of asset purchasers: implied assumption of liability; mere continuation; and de facto merger.

The evidence supporting these conclusions is undisputed or indisputable; thus, Plaintiff respectfully requests that he granted summary judgment that PG&E is liable for any RCRA or CWA violation ultimately found in phase two. In the alternative, the Court should at least deny PG&E's motion, as Plaintiff's evidence establishes, at a bare minimum, genuine factual disputes.

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FACTUAL BACKGROUND

A PG&E report regarding its former MGPs observed, "[t]he dominant theme in the history of San Francisco gas utilities was the rise of new competitor companies followed by a merger with the older, more established company." Gross Dec. Ex. B (the "1987 Report") at 2.[1] The history of the CAN MGP fits within that theme, with Equitable arising as a competitor of SFG&E and then being absorbed into SFG&E through a stock purchase deal. After that absorption, SFG&E continued Equitable's business—first, through Equitable as a wholly owned subsidiary, and then as SFG&E, itself—including operation of the CAN MGP for at least a three-month period in 1903 and the continued use of Equitable's former distribution system to deliver gas to Equitable's former customers.

[1] PG&E has stipulated that all documents it produced that were created before 1998 are admissible under FRE 803(16).

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I. Competition Between SFG&E and Equitable

Equitable and SFG&E were competitors: both operated MGPs to produce gas and distribute it to customers. Gross Dec. Ex. A at 25:18-20, 26:21-24. SFG&E, formed in 1896 through the merger of two other gas companies, operated the North Beach MGP. Gross Dec. Ex. B at 4, Ex. C at 22, Ex. D at 1. Equitable, formed in 1898, began operating the nearby CAN MGP in 1900 and "was an important antagonist in the rate war then in progress [among the gas companies], because they ran pipes only in the most thickly settled streets and to the largest consumers." Gross Dec. Ex. D at 25. The CAN MGP was located at the northern terminus of Hyde Street, adjacent to the present-day locations of Fisherman's Wharf, Aquatic Park, and Ghirardelli Square. Gross Dec. Ex. A 156:2-159:6, Ex E at 12, Ex. G.

II. SFG&E Acquired Virtually All of Equitable's Stock Through a Tender Offer Open to All Equitable Shareholders

SFG&E's absorption of Equitable was achieved through a stock purchase deal that played out between February of 1903 and August 17, 1903. While the transaction involved an option agreement held by an individual named Frank Drum—who would later become a vice president of SFG&E and president of PG&E—acting as SFG&E's proxy, the transaction was, at its core, a tender offer in which all holders were offered $5 in exchange for their shares of Equitable stock.

In February of 1903, Mr. Drum entered into an agreement with Frank Pauson, the Vice President of Equitable, under which Drum obtained an option to purchase Equitable's stock shares placed into an escrow account by their holders for $5 per share, provided that a majority of Equitable's shares were tendered (the "Option Agreement").[2] Gross Dec. Ex. A 30:6-12, 31:25-36:11. Ex. H at 164-65, Ex. I, Ex. J at 544, Ex. K, Ex. L, Ex. M, Ex. N. Under the Option Agreement, any holder of Equitable shares could tender them in exchange for $5. *Id.* Over the course of the next several months, pursuant to the Option Agreement, Drum made two initial payments of $75,000 and $90,000, which were to be deducted from the eventual price paid for all the shares. Gross Dec. Ex. K, L, M. Holders of the shares placed in escrow twice received $0.70

[2] Although the parties do not possess a copy of the Option Agreement, its terms are described in contemporaneous news articles and the minutes of the SFG&E board of directors cited herein.

per share prior to the exercise of the Option, upon which they would receive the remaining $3.60 per share, if the deal closed. Gross Dec. Ex. A 84:1-85:1, Ex. M. As described in the meeting minutes of SFG&'s Board of Directors, on June 30th, 1903, Drum "sold, assigned, and set over . . . for the use and benefit of [SFG&E] all the rights of the said Drum, under the said option" in exchange for a $100,000 promissory note from SFG&E. Gross Dec. Ex. A at 60:15-63:12; 67:1-9, Ex. H at 164-65.

On August 12, 1903, SFG&E's Board of Directors voted to exercise the option authorizing the purchase all of Equitable's shares that had been placed in escrow pursuant to the Option Agreement. Gross Dec. Ex. A at 74:21-75:8, 127:11-131:11, Ex. H at 164 ("Whereas this corporation proposes to exercise said [option] and purchase said stock in accordance with the conditions thereof."). Less than a week later, on August 17, 1903, Drum, acting as SFG&E's behalf, exercised the option to purchase Equitable's stock from its erstwhile shareholders by presenting Equitable's Vice President with a cashier's check for $600,000 to cover the remaining $3.60 to be paid per share placed in escrow. Gross Dec. Ex. A at 128:15-22, Ex. M, Ex. N (news article describing stock purchase with sub-headline "OLD STOCKHOLDERS PAID IN FULL FOR SHARES," noting that "the old stockholders professed to be happy over the transfer").

As SFG&E's proxy, Mr. Drum now held 128,510 shares, or 90.6% percent, of Equitable's total 141,170 issued shares. Gross Dec. Ex. A at 132:24-133:5, Ex. O at 5-7. Accordingly, Equitable's previous board of directors resigned, and Drum immediately installed himself "and his friends" as the new board, with the exception of S.H. Tacy, who remained on as Equitable's corporate secretary. Gross Dec. Ex. W, Ex. N. Drum became Equitable's President. *Id.* at Ex. P at 1.

An August 18, 1903 news article described the purchase of Equitable's stock and reported that that Equitable's new stockholders—which SFG&E overwhelmingly comprised—would hold a meeting on August 24, 1903 to vote on the transfer of Equitable's property to SFG&E. Gross Dec. Ex. A at 83:11-86:1, 122:7-25, Ex. M. On August 19 1903, two days after Drum's exercise of the option and before the said meeting of Equitable's new stockholders, SFG&E's board of directors met and reported that its president had offered, and Equitable—now controlled by

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SFG&E—had accepted, a sum of $708,850 for "the business and property of [Equitable] as a whole." Gross Dec. Ex. Q at 166, 168.

The sum of $708,805—which SFG&E also listed, in its 1903 annual report, as the price it paid for Equitable, Gross Dec. Ex. E at 6—is equal to the number of Equitable shares outstanding in August of 1903, 141,770, multiplied by $5 per share. Gross Dec. Ex. O at 7 (number of shares). By November 1903, SFG&E owned 138,452, or about 98%, of Equitable's total 141,770 shares. Gross Dec. Ex. A at 79:25-80:6, Ex. R, Ex. D at 25. And upon SFG&E's dissolution of Equitable one year later, SFG&E held 99.8% of Equitable shares; and a sum of $915 was placed in escrow for payment of $5 per share to any remaining holders of Equitable shares upon their tender. Gross Dec. Ex. S. The $708,850 was paid to Equitable's erstwhile shareholders in exchange for their shares; and contrary to SFG&E's August 19, 1903 board meeting minutes, there is no evidence that any portion of these funds were paid to Equitable itself. Gross Dec. Ex. A at 147:21-148:19.

The same SFG&E 1903 annual report indicates that Mr. Drum was paid $100,000, in the form of promissory note bearing 5% interest, for the option by which SFG&E acquired those shares. Gross Dec. Ex. H at 165, Ex. E at 6. By the end of 1903, SFG&E's $100,000 promissory note to Drum remained outstanding. Gross Dec. Ex. E at 6-7.

III. After SFG&E Purchased of Almost All Equitable's Stock and Its Agent Became Equitable's President, SFG&E Purchased Equitable's Entire Business and Assets, "As a Whole," for Little or No Consideration

Following its exercise of the option, SFG&E—now holding over 90% of all outstanding shares of Equitable and controlling its board—essentially made a deal with itself to "purchase" Equitable's entire business and assets, "as a whole," for little or no consideration.

On August 31, 1903, Equitable and SFG&E entered into an indenture agreement whereby Equitable transferred "all the business, property, and assets . . . as a whole" to SFG&E in exchange for a stated sale price of $10. Gross Dec. Ex. A at 132:16-134:11, Ex. O (the "Indenture"). It transferred to SFG&E Equitable's leasehold interest in the property used for manufacturing gas at the CAN MGP, along with its "gas holders, tanks, machinery, equipment, and appliances of every kind." Gross Dec. Ex. A at 138:12-139:1, Ex. O. It also transferred

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Equitable's distribution system, including its "mains, service pipes, meters," that it used to distribute gas from the CAN MGP to customers. 139:2-20, Ex. O. Equitable's customers were included in the transaction, and became SFG&E's customers. Gross Dec. Ex. A at 141:10-142:18, Ex. C at 23.

As indicated above, SFG&E's 1903 annual report states that it paid $708,850 to acquire Equitable, which equals $5 for each of Equitable's 141,170 issued shares. Gross Dec. Ex. E at 6. No primary document showing a record of any payment by SFG&E to Equitable, as opposed to its shareholders, exists. Gross Dec. Ex. A at 147:21-148:19. The 1903 annual report lists the value of Equitable's former properties and assets as $445,392.75 (Gross Dec. Ex. E at 6).

IV. Immediately After SFG&E Purchases Equitable, Equitable Reduces the Value of Its Stock

On September 19, 1903, the Equitable Board of Directors, presided over by Frank Drum as President, voted to reduce the par value of Equitable's total 141,770 issued shares from $20 to $0.10. Gross Dec. Ex. A at 110:21-111:12, Ex. P at 1-3. Thereafter, the holders of 137,000 of Equitable shares—or approximately 96.6% of issued shares—voted in favor of the reduction. *Id.* at 4-5. Accordingly, as of October 30, 1903, Equitable's total stock value had been reduced to $14,177. *Id.* Equitable's resolution memorializing the event noted that, as of that date, it held less than $14,177 in debt, Gross Dec. Ex. P at 5, but there is no mention, in the resolution, of any assets, funds, or future entitlement to funds being held by the Equitable. *See* Gross Dec. Ex. P.

PG&E's person most knowledgeable testified that he believed that sometime subsequent to the August 31, 1903 Indenture Equitable—the company, not its shareholders—were to be paid $708,805 by SFG&E for the acquired business, assets, and property. Gross Dec. Ex. A at 115:17-23. He could not explain why, in that context, over 95% of Equitable's shareholders would have voted to reduce the total stock value of the company to $14,177, which is equal to just 2% of $708,805. *Id.* at 113:22-117:11.

V. Equitable Dissolved Soon After SFG&E Purchased It

On September 2, 1904, Equitable's board of directors resolved to dissolve the corporation. Gross Dec. Ex. S at 2-3. The San Francisco Superior Court entered a decree effecting the

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dissolution on October 18, 1904. *Id.* Subsequently, on October 22, 1904, the trustees of the then-dissolved Equitable sent instructions to Equitable's former treasurer regarding settling the affairs of Equitable. Gross Dec.. Ex. KK. The instructions are signed by Charles Barrett as Equitable's secretary. *Id.* at 3. Barrett was the Secretary of SFG&E in 1904. Gross Dec. Ex. E, Ex. T at 143.

VI. SFG&E Operated the CAN MGP to Produce, Distribute, and Sell Gas from the CAN MGP From August to November 1903

Upon becoming a wholly owned and controlled subsidiary of SFG&E on August 17, 1903, Equitable continued to operate the CAN MGP to produce and distribute gas. Gross Dec. Ex. A at 160:22-163:4, 171:23-174:11 (the CAN MGP was operated to produce gas without interruption from 1899 to November 1, 1903).

Immediately upon acquiring Equitable's "business, property, and assets . . . as a whole" on August 31, 1903, SFG&E itself began to provide gas to Equitable's former customers, which then became SFG&E's customers. Gross Dec. Ex. A 207:20-212:9, Ex. C at 23. SFG&E supplied those customers with gas produced from the CAN MGP before switching to gas produced from other sources on approximately November 1, 1903. *Id.*, Ex. E at 5 (the "absorption of the plant and business of" Equitable was completed on November 1, 1903), F ("[w]hen the Equitable Gas Light Company was taken over, its distributing system was connected to our own in such manner that we were enabled to shut down the plant . . . ."). SFG&E continued to use Equitable's former distribution system, which consisted of gas mains, pipes, and meters formerly used exclusively by Equitable, to supply gas until at least 1917. Gross Dec. Ex. A at 27:3-5, 139:2-20, 210:24-212:9, Ex. O, Ex. U.

On September 11, 1903, SFG&E's board of directors resolved that "[t]he Equitable branch of the business be officially known as the San Francisco Gas & Electric Company Equitable branch." Gross Dec. Ex. A at 203:2-205:3, Ex. V. SFG&E began collecting revenue from Equitable's former business on September 1, 1903 (Gross Dec. Ex. E at 7), and "harmoniz[ed]" Equitable's accounting system with its own in late 1903. Gross Dec. Ex. A at 217:13-218:20, Ex. E at 17.

SFG&E continued to employ Equitable's employees. In addition to Equitable's corporate

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secretary S.H. Tacy (Gross Dec. Ex. W, Ex. N), SFG&E continued to employ at least Equitable's former chief engineer H.M. Papst, promoting him to SFG&E's "Superintendent of Gas Manufacture." Ex. E at 4, 31 (photos of Equitable signed by Papst, dated 1900); Gross Dec. Ex. X. There is no record of SFG&E replacing Equitable's employees with its own after its acquisition of Equitable's business. Rather, SFG&E's records suggest that such employees were included in its "absorption of the plant and business" of Equitable. *Id.* at 5.

VII. SFG&E Partially Dismantled the CAN MGP During 1903 to 1905

At some point in 1903 after SFG&E connected the Equitable's distribution system to other sources of gas, SFG&E "tor[e] down" the CAN MGP's generators to move them to a different MGP. Gross Dec. Ex. A at 190:3-191:7. Ex. E at 12-13. SFG&E later moved the gas holders from the CAN MGP to its Potrero MGP in 1905. *Id.* Ex. A at198:14-199:23, Ex. Y. Besides generators and gas holders, SFG&E removed any other equipment that could "be taken out without breaking it to pieces." Gross Dec. Ex. Z at 996.

At the time of the April 1906 earthquake, which damaged the CAN MGP, SFG&E still held a leasehold interest on the Site. Gross Dec. Ex. A at 223:14-225:17, Ex. C, Ex. AA. It is unknown whether SFG&E conducted any demolition or cleanup work after the April 1906 earthquake. Gross Dec. Ex. A at 225:19-227:8. It is also unknown if SFG&E determined whether any contamination from the CAN MGP was present or cleaned up any MGP waste on the Site before selling their leasehold interest in the Site in September 1906. *Id*., 227:9-16; Ex. AA at 444-47.

VIII. The Operation of the CAN MGP Necessarily Required Equitable and SFG&E to Generate, Handle, Transport, and Dispose of MGP Waste, and Resulted in the Collection of MGP Waste in Numerous Discrete Locations

Equitable and SFG&E both generated, handled, transported, and disposed of MGP waste when operating the CAN MGP from approximately 1900 to 1903, resulting *inter alia* in MGP waste collection in discrete locations that today operate as point sources.

The CAN MGP was a type of MGP known as a "carburetted water gas plant" ("CWG plant"). Farr Dec. at ¶¶ 13. CWG plants created waste at various stages. After gas was first

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"produced" by superheating an input such as coal, it would then be passed through a variety of components designed to actively remove unwanted elements of the gas, i.e. MGP waste, including wash boxes, tar separators, scrubbers, condensers, and purifiers. *Id.* at ¶¶ 14-15. As part of the gas purification process, the components produced liquid wastes that were largely mixtures of tar, oils, and water, and solid wastes including sulfides and cyanides. *Id.* Following these purification steps, gas would be stored in a gasholder. *Id.* at ¶ 16. Because the purification process was not highly effective, additional waste tars, oils and wastewater would collect in the gasholder. *Id.* In addition, such wastes would also collect throughout MGPs' manufacturing, purifying, piping, storage, and distribution components, as it condensed out of the gas as it moved through these components of the plant. *Id.* at ¶¶ 16, 21. Drip sumps, also known as "yard drip pots" or "gas-yard drips" were located along gas-flow pipes and at process equipment and acted as collection points for such wastes. *Id.* Contemporaneous maps and pictures of the CAN MGP confirm the presence of typical CWP plant equipment, including furnaces, scrubbers, purifiers, gasholders, a pipe shop, and tool house. *Id.* ¶ 18. The CAN MGP used coal as a fuel stock for making gas, as well as crude oil as feedstock for the gas-production process. *Id.* ¶ 19.

The daily creation of wastes was intrinsic to the operation of a CWP plant. *Id.* ¶ 23. Such wastes included tars, oils, tar-oil-water emulsions, sludges, spent lime, iron oxide containing cyanides and other materials, hydrogen sulfide scrubbing wastes, ash, clinker, coke, firebrick, and building materials. *Id.* In order to run the MGP, these generated wastes must be handled, transported and disposed. *Id.* ¶ 24. On former MGP sites, significant amounts of wastes are typically present in and around pieces of gas generating, purifying, and storage equipment, as well as in on-site pipe trenches. *Id.* ¶¶ 25, 26, 34-35. In addition to these discrete sources of waste, at the time the CAN MGP was in operation, wastes were typically dumped in nearby ground or waterways in and around an MGP. *Id.* ¶¶ 27-28. At the CAN MGP, waste was likely dumped across the property, along the historical shoreline, and in the San Francisco Bay waters, which were subsequently filled in and are now land. *Id.* ¶¶ 35-36. The "refuse fill" on the eastern portion of the CAN MGP was also likely used to dump MGP wastes. *Id.* ¶¶ 29-32. These wastes are environmentally persistent and are anticipated to remain hazardous to this day. *Id.* ¶ 9.

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IX. SFG&E Handled, Transported, and/or Disposed of Waste When It Dismantled and Abandoned the CAN MGP

As described above, after SFG&E purportedly ceased using of the CAN MGP to produce gas for distribution to customers in 1903, it removed the plant's gas generators and holders and other removable equipment. Dkt. 55 at 5:6-16, Gross Dec. Ex. BB; Ex. Z at 996. In doing so, it necessarily handled the waste in those structures and either transported it elsewhere or disposed of it, most likely on and/or proximate to the site. Farr Dec. ¶¶ 34-36. Aside from the generators and gasholders, SFG&E abandoned the remainder of the CAN MGP before it was damaged in the 1906 earthquake, including the equipment and building material that would have contained MGP wastes. *Id.* at ¶ 37; Gross Dec. Ex. A at 221:17-223:7, Ex. Z at 996. These likely sources of waste, including drip sumps, pipes, and other process equipment, were simply left in place.

X. The Site Has Never Been Completely Investigated for MGP Waste

In the 1980s, in response to a report of the United States Environmental Protection Agency identifying former MGPs as environmental concerns, PG&E began investigating former MGPs in its service area. Gross Dec. Ex. A at 149:19-150:23, Ex. CC. In May 1986, PG&E sent letters to four owners of real property within the Site, including a May 9 letter to the National Park Service ("NPS"), to notify them that their property was once part used as CAN MGP, and to offer to test exposed surface soils for "gas plant residues." Gross Dec. Ex. DD. NPS then sent a May 27, 1986 letter to PG&E, stating that

> We are very much interested in obtaining soil samples for laboratory analysis. In the past, one of our employees developed a rash while digging near a piling under the building on this property. We took a soil sample and had it analyzed for creosote. The analysis revealed 6000 parts per million of creosote. As you probably know, creosote is a mixture of phenols from coal tar. We have enclosed a copy of the analysis report.

Gross Dec. Ex. EE. The attached report, dated December 1985, included a handwritten note stating "There are 6000 micrograms of creosote per gram of soil. This is a relatively high level of creosote. Above 1000 ppm is considered as a suspected source of ground water contamination." *Id.* In November 1986, PG&E sent NPS a letter attaching the results of a tests of a single "exposed surface soil" sample from the Site "for the presence of residues commonly associated

with manufactured gas plant operations." Gross Dec. Ex. FF. The testing reflected 160 parts per million of "Total PNAs." *Id.* Both the NPS and PG&E soil sample results are consistent with waste that would be expected at an MGP site. Farr Dec. ¶ 39.

PG&E did not perform further testing, and published a report describing MGP operations in its service area in 1987. Gross Dec. Ex. A at 19:22-21:18, Ex. B (the "1987 Report"). The 1987 report stated that "[Equitable] was acquired by [SFG&E] in August 1903. The [Cannery] plant subsequently was a reserve facility until it was destroyed in the April 1906, earthquake and fire." Gross Dec. Ex. B at 15. The 1987 Report did not discuss the presence of waste at the Site.

XI. PG&E Accepts Responsibility for the CAN MGP in a 1994 Settlement Approved by the California Public Utilities Commission

In 1994, PG&E entered a settlement agreement regarding its ability to charge hazardous waste cleanup expenses to ratepayers, which the California Public Utilities Commission ("CPUC") approved in a published finding. *In Re S. California Gas Co.*, 54 CPUC 2d 391 (May 4, 1994). The settlement expressly identified the CAN MGP as "a Site which has been used by [PG&E] or one of its predecessors to manufacture synthetic gas from fossil fuel," and allowed PG&E to "assign[] 90% of [certain hazardous waste cleanup] expenses [it incurred in connection with the CAN MGP] to utility ratepayers" without requiring the CPUC to approve the reasonableness of PG&E's costs. *Id.*

STANDARD OF REVIEW

Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A moving party with the burden of persuasion at trial must establish the essential elements of its claim. *S. California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003). "A moving party without the ultimate burden of persuasion at trial . . . has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000).

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ARGUMENT

I. SFG&E's Liability Is PG&E's Liability

PG&E has accepted that "it succeeds to any adjudicated liability of SFG&E with respect to the contamination of the Site." Dkt. 55, 11:28. Accordingly, SFG&E's direct and successor liability, as established herein, flows to Defendants.

II. Currently Existing Waste on the CAN MGP Site that May Present an Imminent and Substantial Endangerment and Ongoing Intermittent Discharges from Point Sources on the Site Create RCRA and CWA Liability to which PG&E May Succeed

PG&E avers, in a footnote without argument, "Clarke will have to establish, because PG&E does not concede, that Equitable could have liability under statutes that did not exist when the company existed, and the same is true for SFG&E." Dkt. 55, 18:23-24. Because PG&E failed to provide any argument in support of this averment, it is waived as a basis for its motion for summary adjudication. *See Rimes v. Noteware Dev. LLC*, No. 09-0281 EMC, 2010 U.S. Dist. LEXIS 39119, at *6 (N.D. Cal. Apr. 21, 2010) (collecting authority).

The likely reason PG&E offers no argument in favor of this point is that, as this Court has recognized on several occasions, that CWA liability may arise from past conduct as long as the resulting discharges are ongoing. *See* Dkt. No. 46 at 9 (citing *San Francisco Herring Ass'n v. Pac. Gas & Elec. Co*., 81 F. Supp. 3d 847, 860 (N.D. Cal. 2015)); *Clarke v. Pac. Gas & Elec. Co*., 501 F. Supp. 3d 774, 785 (N.D. Cal. 2020). And RCRA by its terms applies to "***past*** and present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B) (emphasis added). Moreover, as PG&E acknowledges, successor liability under RCRA and the CWA is "governed by California law," Dkt. No. 55 at 14:26, which nowhere establishes a general rule that, for successor liability to attach, the law creating the liability must have been in place when the predecessor took the actions in question. Moreover, any contrary rule would conflict with the foregoing law, as well as both the protective and remedial purposes of RCRA and the CWA, *see generally*, *Cty. of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1468 (2020), and cases establishing successor liability under the

laws, *see, e.g., Sierra Club v. El Paso Gold Mines, Inc*., 421 F.3d 1133, 1144 (10th Cir. 2005), as corrected (Oct. 21, 2005) (finding that the successor owner of a point source from which discharges continue is liable under the CWA); *Interfaith Cmty. Org. v. Honeywell Int'l, Inc*., 263 F. Supp. 2d 796, 814 (D.N.J. 2003), *aff'd*, 399 F.3d 248 (3d Cir. 2005), *cert. denied* 545 U.S. 1129 (finding that Honeywell was liable under RCRA for conduct by its no longer existing predecessor that occurred from 1895 to 1954). Thus, under PG&E's own authority, any such contrary rule under California law could not be applied here. *See Mason & Dixon Intermodal, Inc. v. Lapmaster Int'l LLC,* 632 F.3d 1056, 1061 (9th Cir. 2011). Accordingly, Plaintiff is entitled to judgment as a matter of law that PG&E can be held liable for Equitable or SFG&E's conduct that contributed to current conditions that are shown, in phase two (*see* Dkt. 37), to give rise to liability under RCRA or the CWA.

III. There Are No Genuine Issues of Fact that PG&E, Having Accepted Successor Liability for SFG&E, Has Direct Liability Under RCRA and the CWA as a Result of SFG&E's Conduct

Should it be proven, in phase two, that waste currently exists on the CAN MGP site and/or its vicinity that may present an imminent and substantial endangerment and/or that there is an ongoing discharge of pollution from a point source on the CAN MGP site to San Francisco Bay, PG&E is liable under RCRA and the CWA, respectively, as a result of the conduct of SFG&E; and Plaintiff is entitled to summary adjudication on those two issues. This is because: (A) there is no genuine issue of material fact that SFG&E generated, handled, transported, and disposed of MGP waste during its ownership of the CAN MGP; and (B) there is no genuine material issue of fact that SFG&E owned and contributed to the creation of any point source associated with the CAN MGP from which it is shown that effluent is being discharged to the Bay.

In short, PG&E is simply wrong in its assertion that "Clarke cannot show that PG&E or SFG&E operated the CAN MGP—or did anything else to cause contamination at the Site." Dkt. No. 55 at 10:5-17. Rather, there is no genuine issue of fact that SFG&E *did* operate the CAN MGP *and* took other actions subsequent thereto that give rise to PG&E's liability under RCRA and the CWA; thus, Plaintiff is entitled to summary adjudication on this issue.

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A. SFG&E Generated, Handled, Transported, and Disposed of Waste on the CAN MGP, Making PG&E Liable under RCRA

RCRA makes liable any person "who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste." 42 U.S.C. § 6972(a). The defendant or its predecessor in interest need only have been "*actively involved in* or have *some degree of control over* the waste disposal process to be liable under RCRA." *Clarke*, 501 F. Supp. 3d at 783 (quoting with added emphasis *Hinds Investments, L.P. v. Angioli*, 654 F.3d 846, 851 (9th Cir. 2011)). Plaintiff is entitled to summary judgment that SFG&E, and by extension PG&E, meets the standard for RCRA liability, for two independently sufficient reasons: (1) uncontroverted evidence shows that SFG&E operated the CAN MGP for at least some period between August 31, 1903 and November 1, 1903, during which SFG&E was involved in and controlled the waste disposal process; and (2) PG&E admits that SFG&E dismantled and moved components of the CAN MGP after November 1, 1903, which necessarily would have involved the handling, transportation, and disposal of MGP waste.

1. SFG&E Operated the CAN MGP

As detailed in Section VII in the above Factual Background, operating the CAN MGP for any amount of time necessarily created pervasive solid and liquid wastes throughout the facility, which was both actively and passively removed and disposed of as part of the gas manufacturing process. Farr Dec. ¶¶ 23-33.[3] And SFG&E, after it acquired Equitable's business and assets "as a whole" in August 1903, operated the CAN MGP to manufacture gas until at least sometime prior to November 1, 1903. Gross Dec. Ex. A at 207:20-210:23, Ex. E at 5, 12. It did so because Equitable's former customers became customers of SFG&E, Gross Dec. Ex. A at 141:22-142:18, Ex. C at 23; and, as PG&E's person most knowledgeable admitted, SFG&E needed to use the CAN MGP to produce the gas distributed to those customers until Equitable's former distribution system could be connected to a different MGP, which occurred either sometime between November 1 and December 31, 1903, Gross Dec. Ex. A 160:22-25, 162:22-24, or sometime

[3] There is no reasonable dispute that various tars, oils, contaminated water, and solid debris generated by the operation of an MGP meets the definition of both solid and hazardous waste under RCRA. *See* 42 U.S.C. §§ 6903(5) & (27); Farr Dec., ¶¶ 9-10, 12-22, 38, 41.

between August 31 and November 1, Gross Dec. Ex. A 172:5-174:18, 175:16-176:13.[4] What the exact shut off date was is immaterial, as any operation of the CAN MGP by SFG&E would have caused SFG&E to generate, handle, transport, and dispose MGP waste on site and in its vicinity, given the nature of the manufacturing process. *See* Farr Dec. ¶¶ 7, 34-35. There are no genuine issues of fact regarding this, and, thus, Clarke is entitled to summary adjudication that PG&E is liable under RCRA for any waste from the CAN MGP that may present an imminent and substantial endangerment.

2. SFG&E Removed CAN MGP Components and Abandoned the Rest

PG&E, in an attempt to avoid liability based on the foregoing facts, points to SFG&E's removal of the gas generators and gasholders from the CAN MGP in 1903 and 1905, which PG&E asserts proves that SFG&E never operated the CAN MGP. Dkt. 55 at 16:16-19. As shown above, it proves no such thing. However, it does provide another basis for PG&E's RCRA liability. These actions to remove these components of the CAN MGP (and others, see Ex. Z at 996) necessarily required SFG&E to handle the waste in those components and either transport it elsewhere or dispose of it, most likely on or proximate to the Site. Farr Dec., ¶ 36. This is because when an MGP operated, waste was not only actively collected and removed at certain points in the process but would also condense out and become entrained in the various components of the system. *Id.*, ¶ 21. Thus, for the same reason, when SFG&E abandoned the CAN MGP, *see* Gross Dec. Ex. Z at 996, it disposed of the MGP waste that it and Equitable had generated during their operation of the plant. Farr Dec. at ¶ 37. Though insufficient to determine the full extent of contamination at the Site, the two soil samples taken in the area corroborate the contamination of the site with MGP waste. Farr Dec. ¶ 39.

PG&E's authorities, which all pertain to defendants with no meaningful interaction with

[4] In light of this testimony and other evidence, PG&E's assertion that SFG&E never operated the CAN MGP should not be credited and does not create any genuine issue of fact in this regard. Indeed, the only thing that PG&E cites for this assertion is a statement from SFG&E's 1903 annual report describing the disconnection of the CAN MGP *once* Equitable's distribution system (and thus its customers) were connected to another MGP, *see* Dkt. 55 at 16:12-13, which the above cited testimony from its own witness makes clear happened sometime *after* SFG&E acquired the plant.

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wastes, are distinguishable. *See Hinds Invs.,* 654 F.3d at 848; *City of Imperial Beach v. Int'l Boundary & Water Comm'n, United States Section*, 356 F. Supp. 3d 1006 (S.D. Cal. 2018); *First San Diego Properties v. Exxon Co.*, 859 F. Supp. 1313, 1316 (S.D. Cal. 1994); *Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 854 (7th Cir. 2008). Unlike these passive Defendants, SFG&E was actively involved in the creation and disposal the CAN MGP's waste through its operation and dismantling of the facility. *See* Factual Background sections VI-XI, *supra*. This active involvement makes PG&E liable under RCRA, as a matter of law, should—as is very likely—MGP waste be discovered on or in the vicinity of the CAN MGP that may present an imminent and substantial endangerment to human health of the environment.

B. PG&E Is Liable Under CWA Because SFG&E Owned and Contributed to Point Sources of Contamination Contained in the CAN MGP

PG&E's sole argument against SFG&E's direct liability under the CWA is that SFG&E was a "mere owner[]" of the site. Dkt. No. 55 at 9-10. As an initial matter, under *El Paso Gold Mines*, succeeding to ownership of an already created point source *does* subject a person to liability. 421 F.3d at 1144-45 (distinguishing *Froebel v. Meyer*, 217 F.3d 928, 938–39 (7th Cir. 2000)—on which PG&E relies for the contrary position—on the grounds that *Froebel* dealt with CWA § 404 violation, which requires that a party have taken some action to cause the discharge, whereas a CWA § 402 violation requires only that a discharge have occurred from a point source). As discussed *supra*, all MGPs, including the CAN MGP, concentrated waste at various discrete places within the components that made them up, including at drip sumps, tar dumps, refuse disposal locations, and the like. *See* Farr, ¶¶ 15-21. Thus, when SFG&E acquired the CAN MGP it acquired these point sources of discharges of pollution into the Bay.

Those undisputed facts are enough under *El Paso Gold Mines* to establish PG&E's CWA liability for any discharge of pollution from former components of the CAN MGP to the Bay. However, they are not all. SFG&E as discussed above, while operating the CAN MGP after August 31, 1903 generated waste, portions of which would have been concentrated in these discrete point sources, *see* Farr, ¶¶ 15-21, making its involvement anything but "'purely passive,'" Dkt. 55 at 10:4 (quoting Dkt. No. 46 at 10:21). Furthermore and in addition, when

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SFG&E abandoned the CAN MGP, it further created these point sources of contamination by disposing of them *in situ*. As testified by SFG&E's Secretary a few years later, "what could not be taken out without breaking [the CAN MGP] into pieces" was abandoned by SFG&E. *See* Ex. Z at 996. To the extent some kind of active involvement in the creation of a point source is required to create CWA liability, it must be sufficient if the defendant contributed to the creation of point source by either adding waste to it or by leaving in place the thing that constitutes the point source when it abandoned the site. Here, there is no genuine issue of fact that SFG&E did both. Thus, Plaintiff is entitled to judgment as a matter of law that PG&E is liable for any discharge of pollutants to the Bay that proven, in phase 2, to emanate from a point source remaining at the CAN MGP site.

IV. SFG&E and, by Extension, PG&E Is also Liable for Equitable's Acts as Its Parent Because SFG&E Exercised Complete Control of Equitable

SFG&E is also liable as the parent of Equitable for Equitable's acts that occurred after it purchased almost all of Equitable's stock on August 17, 1903 and asserted total control over the company. Until August 31, 1903, when SFG&E took possession of the CAN MGP from Equitable and began operation of CAN MGP, itself, those actions included the generation, handling, transportation, and disposal of waste, in discrete locations and otherwise in the CAN MGP. *See* Gross Dec. Ex. A at 174:1210:7-22 (confirming that there was no break in the delivery of gas to Equitable's customers as a result of the transaction); Farr Dec., ¶¶ 15-24 (describing the generation, handling, and disposal of waste that was intrinsic to the operation of an MGP).

Both RCRA and CWA liability can attach to a parent corporation based on the acts of its subsidiary. *See United States v. Gulf Park Water Co*., 972 F. Supp. 1056, 1061 (S.D. Miss. 1997); *LeClercq v. Lockformer Co*., No. 00 C 7164, 2002 WL 908037, at *2 (N.D. Ill. May 6, 2002); *see generally United States v. Bestfoods,* 524 U.S. 51, 64 (1998). Whether it does is governed by California law. *Mason & Dixon Intermodal*, 632 F.3d at 1061.

Under California law, when a corporation exercises sufficient control over its subsidiary's activities, the subsidiary is considered the mere agency or "instrumentality" of the parent, and the parent may be liable for the subsidiary's actions. 9 Witkin, Summary 11th Corp § 19 (2021);

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Cohen v. TNP 2008 Participating Notes Program, LLC, 31 Cal. App. 5th 840, 865 (2019). For an agency or instrumentality relationship to exist, the "principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on his behalf and subject to his control." *Secci v. United Independant Taxi Drivers, Inc.*, 8 Cal. App. 5th 846, 855, (2017).

Here, the undisputed evidence shows that after Drum purchased over 90% of Equitable stock on SFG&E's behalf, on August 17, 1903, Equitable ceased to exist as entity independent of SFG&E's control. Upon that purchase, Drum immediately removed the former board members of Equitable and appointed himself its President and "his friends" as the remaining board members. Gross Dec. Ex. A 132:24-133:5, Ex. O at 5-7, Ex. P, Ex. N. Demonstrating clearly that Drum was acting on behalf of SFG&E and Equitable had no meaningful existence separate from SFG&E, one week later Equitable's new stockholders, i.e. SFG&E, voted to transfer all of Equitable's business, assets, and property to SFG&E, Gross Dec. Ex. A 83:11-86:1, 122:7-25, Ex. M; and, a week after that, on August 31, 1903, the transaction was consummated with Equitable receiving just ten dollars in exchange. Gross Dec. Ex. O.[5]

This series of undisputed events leaves no doubt that Equitable, on August 17, 1903, the day over 90% of its stock was acquired by Drum on behalf of SFG&E, became an instrumentality of SFG&E subject to its complete control. *See Cohen*, 31 Cal. App. 5th at 865; *Secci*, 8 Cal. App. 5th at 855. Thus, SFG&E is liable as a matter of law under RCRA and CWA for all of Equitable's conduct after August 17, 1903, including its continued operation of the CAN MGP until August 31, 1903 and its concomitant generation, handling, and disposal of MGP waste.

V. SFG&E, and Thus PG&E, Are Liable for Equitable's Acts as Its Successors as a Matter of Law

SFG&E, and thus PG&E, is additionally liable as a successor to Equitable's liability. Successor liability attaches to the purchasing corporation in an asset sale when: "(1) the

[5] While PG&E contests that the ten-dollar sale price listed on the Indenture is not the actual price paid by SFG&E, PG&E offers no evidence of the "actual" amount it purports SFG&E paid. Nor does PG&E explain why only $708,850—the amount SFG&E paid to Equitable's shareholders for their stock—is identified as the payment for Equitable in SFG&E's 1903 Annual Report. Gross Dec. Ex. E at 6. Accordingly, PG&E's assertion in this regard creates no genuine issue of fact.

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purchasing corporation expressly or impliedly agrees to assume the liability; (2) the transaction amounts to a 'de-facto' consolidation or merger; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) the transaction was fraudulently entered into in order to escape liability. *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 361 (9th Cir. 1997); *Ray v. Alad Corp.,* 19 Cal. 3d 22, 28 (1977). As set forth below, there is no genuine dispute that SFG&E is independently liability under the first three theories.

A. There Is No Genuine Factual Dispute that SFG&E and, by Extension, PG&E Assumed the Liabilities of Equitable Related to the CAN MGP

The manner and terms by which SFG&E acquired Equitable's shares, business, and assets constituted SFG&E's implied assumption of Equitable's liabilities related to the operation of the CAN MGP. Additionally, PG&E's own subsequent actions, beginning in the 1980s, implicitly and expressly assumed the same assumption of liabilities.

Whether a purchasing company impliedly assumed the liabilities of a selling company "depends on the facts and circumstances of each case." *United States v. Sterling Centrecorp Inc.* ("*Sterling*"), 960 F. Supp. 2d 1025, 1038 (E.D. Cal. 2013), *aff'd*, 977 F.3d 750 (9th Cir. 2020). Taking "control of the entirety of [a seller corporation's] business" is a "significant" factor that weighs in favor an implied assumption. *Id.* Accordingly, "express language" is not required in order find that a purchasing company assumed the liabilities of its target. *SCM Corp. v. Berkel, Inc.*, 73 Cal. App. 3d 49, 58 (1977). Rather, courts consider various evidence concerning the context of an asset purchase, including the "subsequent acts and conduct of the parties," in order to interpret whether the parties intended to transfer liabilities. *Fisher v. Allis-Chalmers Corp. Prod. Liab. Tr.*, 95 Cal. App. 4th 1182, 1192 (2002). And a finding of an implied assumption of liability is "more likely" where the predecessor company does not continue "as a viable corporate entity." *Ladjevardian v. Laidlaw-Coggeshall, Inc.*, 431 F. Supp. 834, 840 (S.D.N.Y. 1977);

Sterling provides an instructive discussion of the application of these principles. At issue was whether the defendant had successor liability related to its purchase of "all of [a selling company]'s assets, including all . . . property located at [a mine site], such as mining equipment and supplies." *United States v. Sterling Centrecorp, Inc.*, No. 2:08-CV-02556-MCE, 2013 WL

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3166585, at *4 (E.D. Cal. June 20, 2013), *aff'd,* 977 F.3d 750 (9th Cir. 2020) (findings of fact). The court found this transfer of liabilities to be "broad and unfettered" because it did "not exclude any liabilities from those assumed by [the defendant], and does not reserve any liability to [the seller]." *Sterling*, 960 F. Supp. 2d at 1036. The court found that the post-transaction actions of both the defendant purchaser and the seller supported the implied assumption of liability. The defendant took over the "entirety" of the seller's business, including its "management, personnel, physical location, assets, and general business operations," implying the "broad assumption" of the seller's liabilities. *Id.* at 1038, 1042. The seller, meanwhile, "dissolved soon after the transaction was completed," which "evidence[d] . . . the parties' mutual intention to transfer all liabilities to [the defendant]." *Id.* at 1038, 1043.

As in *Sterling*, the broad terms of the Indenture and SFG&E's post-Indenture conduct establish SFG&E's intention to assume all of Equitable's liabilities regarding the production, sale, and distribution of gas. Under the Indenture, the scope of Equitable's transfer to SFG&E was not limited to assets, but included "all the business, property and assets of [Equitable], as a whole." Gross Dec. Ex. O. It is of no matter that, as PG&E observes, the Indenture "did not mention assumption of liabilities." Dkt. 55 at 16:11. "[E]xpress language" is not necessary to find that a purchasing company assumed the liability "when a business or an entire line of a business' products [was] sold." *SCM Corp,* 73 Cal. App. 3d at 57-58. More importantly, as in *Sterling*, the Indenture did not exclude anything—liabilities or otherwise—from SFG&E's acquisition but rather provided for the transfer of Equitable's business "as a whole." Gross Dec. Ex. O; *see Sterling*, 960 F. Supp. 2d at 1036. SFG&E did not pick and choose which aspects of Equitable's "business, property, and assets" it would acquire, rather it expressly took them all "as a whole." As such, it obtained everything of Equitable's, including its liabilities.[6]

In addition to the Indenture's broad scope, the "subsequent acts and conduct" of SFG&E and Equitable leave no question that those parties intended to transfer liabilities regarding gas production, distribution, and sale to SFG&E. *See Fisher*, 95 Cal. App. 4th 1192. SFG&E assumed

[6] Moreover, SFG&E's Board of Directors' minutes and resolutions discussing the Indenture contain no indication of any exclusion of Equitable's liabilities. Gross Dec. Ex. H, Q, V.

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the "entirety" of the Equitable's business, which presumably included its "management, personnel, physical location, assets, and general business operations." *Sterling*, 960 F. Supp. 2d at 1038, 1042; *see* Gross Dec. at Ex. O. The indisputable evidence is that SFG&E continued to provide gas to Equitable's former customers and, to do so, SFG&E continued to operate the CAN MGP until sometime prior to November 1, 1903 after acquiring the plant from Equitable on August 31, 1903. Gross Dec. Ex. E at 5, 12. SFG&E also continued to employ Equitable's former chief engineer, H.M. Papst, promoting him to SFG&E's "Superintendent of Gas Manufacture." Gross Dec. Ex. E, X, JJ. Moreover, by acquiring Equitable's "business . . . as a whole," SFG&E became the employer of the remainder of Equitable's employees following the August 1903 Indenture, and would also have assumed Equitable's other obligations such as its supply contracts for coal, crude oil, and other inputs to the gas manufacturing process. Gross Dec. Ex. A at 178:4-179:22, Ex. O. Thus, to any outsider, there would have been no perceivable difference between the situation pre- and post-acquisition, and SFG&E took pains to encourage that perception naming the portion of SFG&E's business acquired from Equitable as the "Equitable Branch" of SFG&E. Gross Dec. Ex. A 203:2-205:3; Gross Dec. Ex. V.[7]

Indeed, SFG&E was statutorily *required* to assume Equitable's obligations to provide gas to Equitable's former customers after it acquired its distribution system. At the time of the transaction, former section 629 of the California Civil Code required that gas corporations such as SFG&E "must supply gas as required for . . . building[s]" within one hundred feet of the corporation's gas mains upon payment by the owner or occupants. *See* Gross Dec. Ex. GG. SFG&E and Equitable would have been aware of this duty, and its transfer to SFG&E, at the time of the Indenture. *Swenson v. File*, 3 Cal. 3d 389, 394 (1970) ("parties are presumed to have 'existing law' in mind at the time of execution of their agreement").

In addition to SFG&E and PG&E's subsequent conduct following the Indenture, Equitable's near-immediate dissolution in 1904 further establishes that SFG&E assumed Equitable's liabilities. *See* Gross Dec. Ex. S. As in *Sterling*, Equitable's dissolution "soon after

[7] Moreover, of course, during the period that Equitable operated the CAN MGP as SFG&E's subsidiary, it would have been even less apparent to the public that anything had changed.

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the transaction was completed" with SFG&E, coupled with SFG&E's absorption of the "entirety" of Equitable's business, supports "the parties' mutual intention to transfer all liabilities to" Equitable. *See* 960 F. Supp. 2d at 1043.[8]

PG&E's argument that SFG&E's assumption of another gas company's "bonded indebtedness" in 1903 precludes its assumption of *any* liabilities from Equitable is not credible. Dkt. 55, 15:20-25. To the extent that a separate agreement with another gas company offers any extrinsic evidence bearing on the ***mutual*** intent between Equitable and SFG&E regarding the transfer of liabilities, it is vastly outweighed by the evidence described herein regarding SFG&E (and PG&E's) assumption of Equitable's business and related liabilities regarding the CAN MGP. In any event, the lack of a similar provision in the Indenture merely reflects the fact that Equitable never issued any bonds. *See* Gross Dec. Ex. D at 25.

Nor does the Superior Court's 1904 approval of Equitable's dissolution, which does not discuss any assumption of liabilities by SFG&E, indicate that Equitable retained any liabilities. *See* Gross Dec. Ex. S. To the contrary, the fact that the court found Equitable to *lack* any liabilities further indicates that SFG&E assumed them. *Sterling*, 960 F. Supp. 2d at 1038, 1043.

Finally, PG&E's conduct and representations in the 1980's and '90s additionally establish PG&E's assumption of Equitable's environmental liabilities through its predecessor SFG&E. In 1986, PG&E sent letters to owners of real property within the site about the CAN MGP and offer to test surface soils for MGP "residues." Gross Dec. Ex. DD. Though PG&E ultimately did not remediate the site, its voluntary representations to affected property owners regarding the contamination indicates its assumption of liabilities. Then, in a 1994 settlement of a rate case before the CPUC, PG&E expressly acknowledged that the CAN MGP is "a Site which has been used by [PG&E] or one of its predecessors to manufacture synthetic gas from fossil fuel," in order to allow it to pass along related cleanup costs to rate payers. *In Re S. California Gas Co.*, 54

[8] PG&E's does not support its suggestion that *Gallagher v. Equitable Gaslight Co.*, 141 Cal. 699 (1904) indicates that Equitable continued to "take actions" regarding events before the sale of its business to SFG&E. *Gallagher* was issued in January 1904, and the reporting of the case does not include *when* it was argued before the lower or Supreme Court or *who* requested reconsideration of the case.

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CPUC 2d 391. In doing so, PG&E implicitly assumed liability for contamination of the CAN MGP, as without such liability, there would be no basis to shift such costs to its rate payers. PG&E cannot simultaneously claim Equitable's liabilities to benefit from a ratepayer cost recovery program, while disclaiming Equitable's liabilities in this litigation. As a matter of law, PG&E must be bound to its prior assumption of liability made before the CPUC.

In sum, SFG&E's assumption of Equitable's entire business and customers, along with Equitable, SFG&E, and PG&E's subsequent conduct all establish a shared intention to assume Equitable's liabilities, and Plaintiff is entitled to judgment as a matter of law on this issue.

B. There Is No Genuine Factual Dispute that SFG&E Was the Mere Continuation of Equitable

The application of the mere continuation doctrine, also referred to as the "successor corporation" doctrine, requires "equitable issues to be examined on their own unique facts . . . " *Wolf Metals Inc. v. Rand Pac. Sales, Inc.*, 4 Cal. App. 5th 698, 709 (2016). In this examination, courts will find that a purchaser corporation is a "mere continuation" of a seller corporation and thus assumes the seller corporation's liabilities when "one or both of the following factual elements [exist]: (1) no adequate consideration was given for the predecessor corporation's assets and made available for meeting the claims of its unsecured creditors; (2) one or more persons were officers, directors, or stockholders of both corporations." *Wolf Metals Inc. v. Rand Pac. Sales, Inc.*, 4 Cal. App. 5th 698, 705 (2016) (internal quotation marks omitted). As this language indicates, only one of these prongs need be satisfied, *see id.*; *Cleveland v. Johnson*, 209 Cal. App. 4th 1315, 1333 (2012). Regardless, the transaction between SFG&E and Equitable satisfies both.

1. SFG&E Did Not Pay Adequate Consideration for Equitable's Assets

PG&E premises its argument that the Indenture was a run of the mill asset on the false assertion that SFG&E paid $708,850 to Equitable for its assets. It didn't—SFG&E paid $708,850 to the Equitable's shareholders for their shares. As PG&E's own authorities make clear, the adequacy of consideration paid for assets is central determining whether successor liability attaches in the absence of a formal merger under the mere continuation doctrine, *see* Dkt. 155 at 16-18, and there is no genuine issue of material fact whether that occurred here. SFG&E, once in

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control of Equitable's board either paid Equitable $10 or nothing for Equitable's assets; either way that constituted inadequate consideration for assets that SFG&E, itself, valued at over $400,000 at the time. *See* Gross Dec. Ex. E at 6.

PG&E admits that in August 1903 SFG&E acquired approximately 90 percent of the issued shares of Equitable. Gross Dec. Ex. A at 27:6-9. PG&E also admits that $708,850 was paid to Equitable's former shareholders at the rate of $5 per share. *Id.* at 28:15-29:13. Although Drum's role as SFG&E's agent was not publicly known at the time, SFG&E's corporate records and contemporary press accounts of the transaction confirm that it was SFG&E, through Drum, who paid $5 per share to the Equitable shareholders who placed their stock in the escrow account identified in the Option Agreement. Gross Dec. Ex. A at 30:6-12, 31:25-36:11, 128:15-22, Ex. H at 164-65, Ex. I, Ex. J at 544, Ex. K, Ex. L, Ex. M, Ex. N. Not one of the press reports describes a payment made by SFG&E to Equitable for its assets.

SFG&E's 1903 annual report further establishes that the $708,850 payment was made only to Equitable's shareholders. Although the language in the annual report—"[w]e made payments therefor—Equitable Gas Light Company, in cash . . . $708,850.00"—on its own does not expressly identify to whom SFG&E made the payment, the $708,850 payment is the ***only*** payment regarding Equitable identified in the report,[9] Gross Dec. Ex. E at 6 (ellipses in original), and it is exactly the product of $5 (the option price per share) times the number of Equitable shares outstanding (141,770). *See* Gross Dec. Ex. O at 7. The significant difference between the $445,392.75 value that the annual report placed on properties and assets acquired from Equitable and the $708,850 payment *for* Equitable further indicates that SFG&E payment of the $708,850 was for Equitable's stock, and not to Equitable for its significantly less valuable property and assets. Gross Dec. Ex. E at 6. PG&E does not, and cannot, explain why the price for SFG&E's supposed asset purchase would be calculated based on the price of Equitable's stock, as opposed to the value of its assets. Thus, there is no genuine dispute that SFG&E's $708,850 payment was made to Equitable's shareholders for their share not to Equitable for its assets.

[9] Aside from the $100,000 promissory note provided to Drum, which is also listed. Gross Dec. Ex. E at 6-7.

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PG&E points to only two other pieces of evidence to support its assertion that the $708,850 was paid to Equitable itself: the 1917 trial testimony of Charles Barrett, and SFG&E's August 19, 1903 board minutes. Dkt. 55 at 18:8. Neither creates a genuine factual dispute. Barrett's testimony actually supports Plaintiff's position as it states that SFG&E paid $708,850 in cash "for the Equitable Gaslight Company . . . based on a value of $5 per share for their issued shares." Gross Dec. Ex. HH at 815. And while the August 19, 1903 SFG&E board minutes describe an of $708,850 to Equitable for its "business and property . . . as a whole," (Gross Dec.. Ex. Q) there is no primary documentation of any such a payment being made to Equitable (Gross Dec. Ex. A 147:21-148:19). Rather, as set forth above, the 1903 annual report shows only one payment of $708,850, which reflected a purchase price of $5 per share for 141,770 issued shares, and was necessarily paid to Equitable's former shareholders as reported at the time.

The Indenture's identification of $10, rather than the purported $708,850 price that PG&E claims SFG&E paid, is consistent with SFG&E's non-payment for Equitable's business and assets. It makes no difference, as PG&E's expert claims, whether the identified price of $10 was meant as a formality to show consideration and was "not meant to signify the total actual amount paid." *See* Dkt. 55-1 ¶¶ 6-7. PG&E fails to spin the fact that neither the Indenture, SFG&E's 1903 annual report, any of the multiple 1903 press reports regarding SFG&E and Equitable, nor any other document identified any payment by SFG&E for Equitable's assets. The only SFG&E payment regarding Equitable that is supported by multiple sources was for Equitable's stock, paid to Equitable's shareholders. Gross Dec. Ex. A 30:6-12, 31:25-36:11, 128:15-22, Ex. H at 164-65, Ex. I, Ex. J at 544, Ex. K, Ex. L, Ex. E at 6, Ex. M, Ex. N. Thus, there is no genuine factual dispute that SFG&E did not provide adequate—if any—consideration for Equitable's assets, including the CAN MGP. Rather, SFG&E provided consideration to Equitable's shareholders in exchange for their shares and then used the resulting control over Equitable to take its assets for virtually nothing or nothing. Plaintiff is entitled to judgment as a matter of law on this issue.

2. <u>SFG&E's Ownership of Virtually All of Equitable's Stock Satisfies Continuity of Shareholder Interest</u>

The second prong of the mere continuation test—whether "one or more persons were

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officers, directors, or stockholders of both" SFG&E and Equitable—is satisfied by SFG&E's ownership of more than 90% of Equitable's stock on the date of the Indenture.

A mere continuation occurs when the "purchaser corporation is essentially the *same entity* as the seller." Rutter, Cal. Prac. Guide Corps. Ch. 8:656-D (emphasis in original; collecting cases). Courts find that a unity of shareholder interest existing at the time of an asset sale establishes "continuity of shareholders" for the purposes of mere continuation liability. *Louisiana-Pacific Corp. v. Asarco, Inc.*, 909 F.2d 1260, 1264 fn.5 (9th Cir. 1990) *overr'd on other grounds* (continuity of shareholders exists when both the selling and purchasing companies have common shareholders at the time of the asset sale). Thus, PG&E is incorrect that continuity of shareholder interest must occur as a result of the asset purchase for liability to transfer to the purchaser. Indeed, unified ownership of purchaser and seller corporations *prior to* an asset purchase is even more indicative of continued shareholder interest where, as here, the seller corporation (Equitable) was *already* a mere instrumentality of, and owned by, the purchaser (SFG&E). *See supra* Argument section III. Because SFG&E already owned Equitable before the asset purchase, continuity of shareholders existed sufficient to satisfy this prong. *See* Gross Dec. Ex. H.[10]

Given the evidence showing SFG&E's failure to provide any (or at least not anything more than nominal) consideration for *all of* Equitable's assets and the shared ownership of SFG&E and Equitable prior to the asset purchase, all of the cases cited by PG&E, in which courts did not find mere continuation, are distinguishable. *See* Dkt. 55 at 17:12-28. These case, for the most part, address situations in which adequate consideration *was* paid. *See Katzir's Floor & Home Design, Inc. v. M-MLS.com*, 394 F.3d 1143, 1151 (9th Cir. 2004); *Franklin v. USX Corp.*, 87 Cal. App. 4th 615, 627 (2001); *Maloney v. Am. Pharm. Co.*, 207 Cal. App. 3d 282, 288 (1988); *Reno-Tahoe Specialty, Inc. v. Mungchi, Inc*., 468 F. Supp. 3d 1236, 1241 (C.D. Cal. 2020). And the only exception, *Beatrice Co. v. State Bd. of Equalization*, 6 Cal. 4th 767, 778

[10] In addition but unnecessary to the analysis, Charles Barrett acted as both SFG&E and Equitable's secretary, and at least two individuals who held both SFG&E and Equitable's stock. Dkt. 155 at 19-20.

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(1993)—which PG&E misleadingly quotes with added bracketed text that is not stated in the opinion, *see* Dkt. 155 at 17:22-24—is easily distinguishable on the grounds that: (a) once SFG&E, though Drum, acquired over 90% of Equitable stock on August 17, 1903, the two corporations never again had "separate identities," *Beatrice*, 6 Cal. 4th at 778, and (b) once SFG&E took all of Equitable's assets, property, and business "as a whole," any creditor of Equitable seeking payment therefrom would have been completely out of luck, *cf. id.* Accordingly, Plaintiff is entitled to judgment as a matter of law that SFG&E succeeds to Equitable's liabilities based on the doctrine of mere continuation as well.

C. There Is No Genuine Faction Dispute that SFG&E's Purchase of Equitable and Its Assets Amounted to a *De Facto* Merger

SFG&E, and by extension PG&E, is additionally liable for Equitable's acts because its purchase of Equitable was a de facto merger: SFG&E "absorbed [Equitable], but without compliance with the statutory requirements for a merger." *Iron Mountain*, 987 F. Supp. at 1243. Indeed, not only did PG&E repeatedly refer to the transaction as a "merger," in the 1980's (Gross Dec. Ex. II, at numerous descriptions, SFG&E's 1903 annual report describes it as an "*absorption* of the plant and business of" Equitable, Gross Dec. Ex. E at 5. And for good reason, as undisputed evidence establishes that transaction easily meets the standard for a de facto merger.

Courts typically consider the following factors in determining whether to characterize an asset purchase as a *de facto* merger:

> (1) There is a continuation of the enterprise of the seller corporation, so that there is continuity of management, personnel, physical location, assets, and general business operations.
>
> (2) There is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation.
>
> (3) The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible.
>
> (4) The purchasing corporation assumes those obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation."

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Sterling, 960 F. Supp. 2d at 1042. However, the de facto merger doctrine "rests on general equitable principles" and does not require "compliance with the statutory requirements for a merger. *Id.* at 1041 & 1043. Thus, whether a transaction constituted de facto merger should "turn on the need for fairness. . . [based on] a holistic inquiry rather than a rote factor-by-factor analysis." *Id* at 1043.[11] Such a holistic inquiry, as well as a factor-by-factor analysis, indicates that a de facto merger must be found here, as a matter law.

1. SFG&E Continued Equitable's Enterprise of Manufacturing, Distributing, and Selling Gas to the Same Customers

There is no dispute that SFG&E seamlessly continued Equitable's enterprise after acquiring its business, property, and assets "as a whole" on August 31, 1903. As discussed more fully *supra* in Argument section IV.A, SFG&E continued to operate the Equitable's former facility using Equitable's former employees in order to sell Equitable's same product (gas) to Equitable's former customers, using the name "SFG&E-Equitable Branch." *See, e.g.*, Gross Dec. Ex. A at 27:3-5, 139:2-20, 210:24-212:9 (SFG& produced gas at CAN MGP that it sold to former Equitable customers); Ex. E at 5 (Equitable's plant and business "absor[bed]" by SFG&E), J (revenue from Equitable's former business consolidated with SFG&E's). Furthermore, even once the CAN MGP did stop producing gas, SFG&E continued to use Equitable's former distribution system to provide gas to Equitable's former customers. Gross Dec. Ex. A 210:24-212:9. This situation is night and day from those described in the cases that PG&E cites, *see* Dkt. No. 55 at 23:3-24:4, and these facts easily satisfy this factor of the analysis.

2. SFG&E's Ownership of Equitable Created a Continuity of Shareholders Before and After the Asset Purchase

SFG&E's purchase, through Drum, of more than 90 percent of Equitable's shares two weeks before Equitable sold SFG&E its entire business, property, and assets for notional or no consideration satisfies the *de facto* merger factor of "continuity of shareholders." As described

[11] PG&E incorrectly asserts that *Marks v. Minnesota Mining & Mfg. Co.*, 187 Cal. App. 3d 1429, 1438 (1986), requires that "all" of five *de facto* merger factors must be satisfied. Rather, *Marks* merely "described five factors [that] indicate" a *de facto* merger occurred. *Id.*

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supra in Argument section III, SFG&E acquired Equitable's shares by purchasing Mr. Drum's rights under the Option Agreement and exercising those rights to purchase all of Equitable's shares placed by its former shareholders in an escrow account. Gross Dec. Ex. A 128:15-22, Ex. H at 164-65, Ex. M, Ex. N. Although in the typical *de facto* merger analysis, such continuity of shareholders is accomplished by "the purchasing corporation paying for the acquired assets with shares of its own stock," the same result is more directly accomplished here. Because SFG&E itself owned more than 90 percent of Equitable's shares before the Indenture, Equitable's shareholders *already were* a "constituent part of" SFG&E. *See Marks*, 187 Cal. App. 3d 1at 1438 (1986). Thus, there is no genuine dispute of fact that Equitable and SFG&E shared a continuity of shareholders, and this factor of the de facto merger analysis is satisfied.

3. Equitable Dissolved Soon After SFG&E Liquidated It

Equitable's near-immediate dissolution in 1904 further supports finding a de facto merger. Equitable dissolved in October 1904, after selling its entire business and assets to SFG&E the prior year. *See* Gross Dec. Ex. S. Equitable's dissolution occurred "as soon as legally and practically possible," particularly in light of its need to identify shareholders who had not yet claimed the $5 per share owed to them following SFG&E's stock purchase. *See* Gross Dec. Ex. KK at 1-2 (describing 183 unclaimed shares). Thus, there is no genuine dispute that Equitable "as soon as legally and practically possible." *See Sterling*, 960 F. Supp. 2d at 1042.

4. SFG&E Assumed Equitable's Obligations Needed to Continue Its Business Operations

Finally, as discussed in detail in Argument section IV.A, *supra*, when SFG&E took over Equitable's business, property, and assets "as a whole," it assumed Equitable's obligations necessary to continue Equitable's normal business operations without interruption. Specifically, SFG&E assumed Equitable's obligations related to its management, staff, equipment, and property needed to continue the operation of the CAN MGP to serve Equitable's former customers from at least August 31 to at least sometime before November 1, 1903 and, then, to continue gas distribution to those customers until at least 1917. *See* Gross Dec. Ex. A at 27:3-5, 139:2-20, 210:24-212:9, Ex. E at 5, 12, Ex. O. Further confirming SFG&E's assumption of

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Equitable's obligations, SFG&E was statutorily required to provide gas to paying residents within one hundred feet of the Equitable's former gas mains. *See* Gross Dec. Ex. GG. As such, there is no genuine dispute that SFG&E assumed Equitable's obligations "necessary for the uninterrupted continuation of [its] normal business operations." *Sterling*, 960 F. Supp. 2d at 1043

In the face of these overwhelming facts and evidence PG&E, argues that the option of a statutory merger must have existed at the time of the asset purchase to apply the de facto merger doctrine. Several problems doom this argument. First, PG&E offers no support for its claim that such a rule exists, which, if extant, would fundamentally conflict with the equitable nature of the doctrine. Indeed, the supposed inability to do something in law does not generally foreclose the ability to do so in equity; rather, equity is intended to fill in the gaps left by law. Second, PG&E fails to show that former title XV of the Civil Code (sections 628-632) or any other law would have, in fact, prohibited the merger of SFG&E and Equitable in 1903. Indeed, PG&E's own records indicate that SFG&E itself, along with other early gas companies in California, were formed "by the merging" or "merger" of two other gas companies prior to 1903. Gross Dec. Ex. II at 12, 16; Ex. D at 17, 26. Thus, this argument by PG&E cannot overcome the evidence showing, as a matter of law, that SFG&E's purchase of Equitable's business, property, and assets "as a whole" amounted to a *de facto* merger.

D. Clarke Alleges Sufficient Facts in His Complaint

As set forth above, Clarke has established PG&E's successor liability through admissible evidence. PG&E's suggestion that the Court should rule in its favor because Clarke did not *allege* each and every facts regarding successor liability is incorrect. No rule required that Plaintiff make such allegations with the level of specificity that PG&E suggests, rather Plaintiff was only required under Rule 8 to place PG&E on notice that he sought to hold it liable for the acts of its predecessors Equitable and SFG&E, which he clearly did. *See* FAC ¶¶ 27, 48-50, 62-63, 67-68, 97-98, 103, 195), Nevertheless, should the Court disagree, Plaintiff requests leave to amend.

CONCLUSION

For the foregoing reasons, Clarke requests summary judgment be entered in his favor.

GROSS & KLEIN LLP
THE EMBARCADERO
PIER 9, SUITE 100
SAN FRANCISCO, CA 94111

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GROSS & KLEIN, LLP

By: */s/ Stuart G. Gross*
STUART G. GROSS

Attorneys for Plaintiff Dan Clarke

GROSS & KLEIN LLP
THE EMBARCADERO
PIER 9, SUITE 100
SAN FRANCISCO, CA 94111