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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
PACIFIC GAS AND ELECTRIC
COMPANY,
Defendant.

Case No. 14-cr-00175-TEH-1

**ORDER DENYING DEFENDANT’S
MOTION TO STRIKE
SURPLUSAGE IN THE
INDICTMENT**

INTRODUCTION

In a Superseding Indictment (the “Indictment”) filed on July 30, 2014, the United States charged Defendant Pacific Gas and Electric Company (“PG&E”) with one count of obstructing a National Transportation Safety Board (“NTSB”) investigation, and twenty-seven counts of violating the Natural Gas Pipeline Safety Act (“PSA”). (Docket No. 22). In the Indictment, the Government also sought an alternative fine under 18 U.S.C. § 3571(d). On August 8, 2014, Defendant Pacific Gas and Electric Company filed a motion to strike allegedly surplus language in the Indictment. (Docket No. 33). On September 22, 2014, the Court heard oral arguments on this matter. After carefully considering the parties’ submissions and oral arguments, the Court now DENIES PG&E’s motion to strike surplusage for the reasons set forth below.

BACKGROUND

On September 9, 2010, a gas line owned and operated by PG&E ruptured, causing a fire that killed eight people and injured fifty-eight others. Additionally, the fire damaged 108 homes, thirty-eight of which were completely destroyed. Ind. ¶ 5. In July of 2014, a Grand Jury returned a superseding indictment charging PG&E with twenty-seven counts of violating the Pipeline Safety Act, and one count of obstructing the Government’s investigation of the explosion and PG&E’s Integrity Management program.

1 The Indictment contains one paragraph (Paragraph 5 under “Introductory
2 Allegations”) that explicitly describes the explosion:

3 On September 9, 2010, at approximately 6:11 p.m., a portion of
4 Line 132 (Segment 180) ruptured in a residential neighborhood
5 of the City of San Bruno (the “San Bruno explosion”). Gas
6 escaping from the rupture ignited, causing a fire that killed
7 eight people and injured 58 others. The fire also damaged 108
8 homes, 38 of which were completely destroyed.

9 The remaining references to the San Bruno explosion in the Indictment refer to it in the
10 context of PG&E’s activities preceding the explosion and as the subject of a subsequent
11 investigation that PG&E allegedly obstructed. Ind. ¶¶ 22, 34, 35, 43, 45, 50, 61.

12 The National Transportation Safety Board began an investigation the day after the
13 explosion, which examined the cause of the explosion, the characteristics and history of
14 the failed pipeline, the adequacy of PG&E’s emergency response, and PG&E’s operations.
15 The investigation revealed a number of deficiencies in PG&E’s record keeping, Integrity
16 Management program, and maintenance practices as they related to various sections of the
17 pipeline - including Line 132, the line that ruptured in San Bruno. Ind. ¶¶ 54-60. These
18 alleged deficiencies form the basis of the criminal charges against PG&E for violating the
19 Natural Gas Pipeline Safety Act.

20 Count One of the Indictment charges PG&E with obstructing the NTSB
21 investigation into the San Bruno explosion, in violation of Title 18, United States Code
22 § 1505. Counts Two through Twenty-Eight charge PG&E with various violations of the
23 Natural Gas Pipeline Safety Act. For the purpose of determining the maximum alternative
24 fine pursuant to Title 18, United States Code § 3571(d), the Indictment also alleged that
25 PG&E derived gross gains from its misconduct in the amount of approximately \$281
26 million, and that victims suffered losses of approximately \$565 million. Ind. ¶ 76.

27 **LEGAL STANDARD**

28 An indictment must be a “plain, concise, and definite written statement of the
essential facts constituting the offense charged” Fed. R. Crim. P. 7(c). “On the

1 defendant’s motion, the court may strike surplusage from the indictment” *Id.* at 7(d).
2 “The purpose of Rule 7(d) is to protect a defendant against prejudicial or inflammatory
3 allegations that are neither relevant nor material to the charges.” *United States v. Ramirez*,
4 710 F.2d 535, 544-45 (9th Cir. 1983); *see also* Fed. R. Crim. P. 7 advisory committee’s
5 note. The decision to strike surplusage is subject to the district court’s discretion. *United*
6 *States v. Laurienti*, 611 F.3d 530, 546 (9th Cir. 2010); *United States v. Terrigno*, 838 F.2d
7 371, 373 (9th Cir. 1988).

8 An indictment is sufficient if it: (1) contains the elements of the offense charged and
9 fairly informs a defendant of the charge against which he must defend; and (2) contains
10 sufficient facts to allow a defendant to raise a double jeopardy bar to subsequent
11 prosecutions arising from the same actions. *United States v. Lazarenko*, 564 F.3d 1026,
12 1033 (9th Cir. 2009). Under the Alternative Fines Act (“AFA”), the government must
13 prove to a jury beyond a reasonable doubt any facts used to establish a fine greater than the
14 statutory maximum. *See Southern Union Co. v. United States*, 132 S.Ct. 2344, 2348-49
15 (2012).

16
17 **DISCUSSION**

18 **1. The Indictment’s References to the Explosion are Relevant**

19 PG&E contends that references to the explosion are irrelevant to the charges
20 returned by the Grand Jury and will serve only to prejudice the trial. Mot. at 4 (Docket
21 No. 33). Federal Rule of Criminal Procedure 7(d) provides a trial court with the discretion
22 to strike surplusage from an indictment in order “to protect a defendant against prejudicial
23 or inflammatory allegations that are neither relevant nor material to the charges.”
24 *Terrigno*, 838 F.2d at 373 (quotation marks omitted); Fed. R. Crim. P. 7(d) advisory
25 committee’s note. Therefore, language in an indictment that is relevant to the charges is
26 not surplusage, and a court need not balance relevance against prejudice in deciding a
27 motion to strike. *See United States v. Laurienti*, 611 F.3d 530, 546-47 (9th Cir. 2010)
28 (“Even if the use of the word “unlawful” could be considered prejudicial, we hold that the

1 district court nevertheless did not abuse its discretion because the allegation was
2 relevant.”); *United States v. Graves*, 5 F.3d 1546, 1550 (5th Cir. 1993) (“For language to
3 be struck from an indictment, it must be irrelevant, inflammatory, and prejudicial.”).

4 Although the Ninth Circuit has not fully articulated the applicable relevance
5 standard in the context of surplusage, it has implied that “relevance” for indictment
6 purposes is a fairly broad standard, repeatedly affirming district courts’ decisions not to
7 strike surplusage on relevance grounds. In *Laurienti*, a case about securities fraud, the
8 Ninth Circuit upheld the use of the adjective “unlawful” in an indictment to describe
9 certain sales practices, even though the conduct was not unlawful per se, because the
10 government intended to prove unlawfulness at trial. 611 F.3d at 547 (“The
11 characterization . . . was relevant, because the government sought to prove that . . . the
12 practices were indeed unlawful.”).

13 In *Terrigno*, the Ninth Circuit upheld an indictment’s description of embezzled
14 funds as “destined for the ‘poor and homeless,’” along with other somewhat prejudicial
15 details, because such facts were “essential” to proving intent and conversion. 838 F.2d at
16 373. Although the court described these facts as “essential,” this does not seem quite
17 accurate – the government needed to prove that the defendant converted the funds from
18 some other purpose, not that the funds were specifically destined for the especially
19 sympathetic “poor and homeless.” Rather, the court’s holding is best understood as
20 applying a broad and permissible definition of relevance at the grand jury stage.

21 The Ninth Circuit has also stated in dicta that “surplusage” includes the “language
22 of an indictment [that] goes beyond alleging elements of the crime,” and that the inclusion
23 of such surplusage “must not be allowed to prejudice a defendant in the context of his
24 case.” *United States v. Jenkins*, 785 F.2d 1387, 1392 (9th Cir. 1986). The court in
25 *Jenkins*, however, was not addressing a motion to strike surplus language, but was rather
26 addressing the separate question of whether surplus language in an indictment *must be*
27 *proven at trial*. *Id.* At no point does *Jenkins*, or the cases upon which it relies, refer to
28 Federal Rule of Criminal Procedure 7, the rule at issue here. In fact, it is obvious that

1 *Jenkins* is talking about a different kind of surplusage than that which is described in Rule
 2 7. The surplusage described in *Jenkins* requires only that the language go “beyond
 3 alleging elements of the crime,” without respect to whether it is prejudicial. Accordingly,
 4 the court in *Jenkins* determined that because the government’s allegation was not an
 5 element of the charged offense, it was therefore surplusage, even though it was *not*
 6 prejudicial. *See id.* at 1392 (“[A]ppellants here make no claim that the indictment failed to
 7 inform them fully of the charges against them or that they were otherwise prejudiced by
 8 the allegations of government insurance. Nor could they, on these facts. . . . [T]he
 9 language was surplusage that did not have to be proved at trial. Its inclusion was
 10 harmless.”). Given that the purpose of striking surplusage under Rule 7(d) is to protect a
 11 defendant against irrelevant allegations that may be *prejudicial*, *Jenkins*’ dicta should not
 12 be interpreted as laying out the standard for relevance under Rule 7(d).

13 Courts in other circuits have “strictly construed [this standard] against striking
 14 surplusage,” and such motions are rarely granted. *United States v. Jordan*, 626 F.2d 928,
 15 930 n.1 (D.C. Cir. 1980); *see also United States v. Eisenberg*, 773 F. Supp. 662, 700
 16 (D.N.J. 1991) (“It is an exacting standard which is met only in rare cases.”). On the other
 17 hand, when considering whether to strike potentially surplus language, the district court
 18 should be mindful that the prosecution “may not use the indictment as a vehicle to
 19 persuade the jury that the crime alleged has great and hidden implications.” *United States*
 20 *v. Brighton Bldg. & Maint. Co.*, 435 F. Supp. 222, 230-31 (N.D. Ill. 1977).

21 PG&E identifies a district court case from Virginia that found the relevance
 22 standard for surplusage to be narrower than the evidentiary standard of relevance
 23 articulated by Federal Rule of Evidence 401. Mot. at 5; Reply at 4 (Docket No. 37) (citing
 24 *United States v. Cooper*, 384 F. Supp. 2d 958, 960 (W.D. Va. 2005)). PG&E contends that
 25 language is irrelevant under Rule 7 where it is “unnecessary in making out a *prima facie*
 26 pleading of the violation.” Mot. at 5 (quoting *Cooper*, 384 F. Supp. 2d at 960) (internal
 27 quotation marks omitted). In *Cooper*, the district court explained that because the standard
 28

1 of relevance for purposes of surplusage is narrower than the evidentiary standard, some
2 facts that might be relevant at trial might be “irrelevant” surplusage in an indictment. *Id.*

3 The appropriate standard of relevance is discussed in the context of each of the
4 charges below.

5
6 **a. References to the explosion in the context of the obstruction charge**

7 A criminal obstruction charge under 18 U.S.C. § 1505 has three elements: (1) there
8 must be a proceeding pending before a department or agency of the United States; (2) the
9 defendant must be aware of the pending proceeding; and (3) the defendant must have
10 “intentionally endeavored corruptly to influence, obstruct or impede the pending
11 proceeding.” *United States v. Price*, 951 F.2d 1028, 1030-31 (9th Cir. 1991).

12 In previous obstruction cases, courts have declined to strike allegedly surplus
13 background information where it provided context for the defendant’s conduct. *See, e.g.,*
14 *United States v. Poindexter*, 725 F. Supp. 13, 35-37 (D.D.C. 1989) (declining to strike
15 background paragraphs about the relationship between the U.S. and Iran, the fact that
16 hostages were held in Lebanon, and the seizure of the American embassy, as it “would be
17 difficult, if not impossible, for the jury to understand defendant’s allegedly false statements
18 and obstruction without that background”).

19 The relevance of identifying the subject of the investigation goes beyond merely
20 providing context. The specific intent required for obstruction of justice under the
21 applicable statute is that PG&E must have acted “corruptly,” meaning that “the act must be
22 done with the purpose of obstructing justice.” *U.S. v. Laurins*, 857 F.2d 529, 536-37 (9th
23 Cir. 1988). Because the Government must prove this criminal *purpose* beyond a
24 reasonable doubt at trial, the subject and scope of the investigation is directly relevant,
25 regardless of the standard of relevance applied by the Court. It would be exceedingly
26 difficult for a jury to determine the *mens rea* of PG&E’s obstructive actions without
27 knowing the nature of the investigation and the potential consequences of an adverse
28 finding by the NTSB, which would provide a strong motivation for obstruction.

1 PG&E argues that the subject of the NTSB investigation is unnecessary, and
 2 therefore irrelevant under the *Cooper* standard, because the Government need only prove
 3 that there was an ongoing investigation. Mot. at 9. The Ninth Circuit’s decision in
 4 *Terrigno* reveals that this cannot be right. As previously described, the appellate court in
 5 that case found the indictment’s explanation that the converted money was originally
 6 “destined for the ‘poor and homeless’” was both “material” and “relevant,” despite the fact
 7 that the originally intended use of the funds was not technically an element of the *prima*
 8 *facie* case for embezzlement. *Terrigno*, 838 F.2d at 373. The court reasoned that this
 9 detail was nonetheless “necessary” to prove the defendant’s intent to convert the stolen
 10 funds. *Id.* Here, while the subject of the NTSB investigation is not technically an element
 11 of the *prima facie* case for obstruction, it is similarly necessary to prove PG&E’s intent to
 12 obstruct the ongoing investigation. Absent a compelling reason to do otherwise, this Court
 13 applies the Ninth Circuit’s reasoning in *Terrigno* and denies PG&E’s motion to strike
 14 references to the explosion in the context of the obstruction charge.

15
 16 **b. References to the explosion in the context of the PSA violations**

17 It is a federal crime to “knowingly and willfully” violate the regulatory
 18 requirements of the Natural Gas Pipeline Safety Act (PSA). 49 U.S.C. § 60123. Counts
 19 two through twenty-eight of the Indictment allege that PG&E knowingly and willfully
 20 failed to properly test and keep records for its pipelines as required by the PSA. Ind. ¶¶
 21 62-75.

22 Whether the Indictment’s references to the explosion are relevant (non-surplusage)
 23 or irrelevant (potential surplusage) to the alleged PSA violations depends on the applicable
 24 standard of “relevance.” Under the narrow *Cooper* standard identified by PG&E,
 25 references to the explosion would be irrelevant, and therefore potentially surplus, because
 26 the explosion itself is not an element of the PSA violations. Conversely, under the broader
 27 evidentiary standard of relevance, the explosion may be relevant non-surplusage, as a
 28 subsequent pipeline explosion makes it at least somewhat more likely that the pipeline was

1 improperly maintained, especially because explosions such as the one in San Bruno are the
2 very consequence of poor maintenance and monitoring contemplated by the institution of
3 the Pipeline Safety Act.¹ See Opp'n at 15; 49 U.S.C. § 60102 (“The purpose of this
4 chapter is to provide adequate protection against risks to life and property posed by
5 pipeline transportation and pipeline facilities by improving the regulatory and enforcement
6 authority of the Secretary of Transportation.”). Moreover, given the stakes at issue in gas
7 pipeline maintenance, the fact of an explosion may be relevant in addressing PG&E’s
8 mental state regarding its maintenance program and pipeline safety precautions. Further,
9 despite PGE’s allegations to the contrary, the PSA section of the Indictment fairly implies
10 a causal relationship between the PSA violations and the San Bruno explosion. For
11 example, the Indictment states, “At no time between installation of [Segment 180] and the
12 San Bruno explosion did PG&E check or confirm whether its records accurately reflected
13 the data relevant to assessing the integrity of Segment 180, even though PG&E knew that
14 GIS contained incomplete and inaccurate data.” Ind. ¶46.

15 The Court declines to follow *Cooper*’s narrow standard of relevance for surplusage
16 purposes. As discussed above, the approach in the Ninth Circuit has been to use a broader
17 standard than the one articulated by the out-of-circuit court in *Cooper*. Because the Court
18 finds that the Indictment’s references to the San Bruno explosion are relevant to the PSA
19 allegations, it therefore declines to strike them from those portions of the Indictment.

20 The Court nonetheless recognizes the potential for prejudice in such references if
21 improperly presented at trial. Given the deaths, injuries, and property damage that resulted
22 from the explosion, and were reported by the media, it is common sense that these
23 references might prejudice a jury. Discussion of the explosion may confuse the issues at
24 trial, resulting in a conviction of PG&E not for the PSA violations or obstruction charge,
25 but for the subsequent explosion instead. For this reason, the Court anticipates that there
26 will be an extensive process of conducting voir dire, litigating motions *in limine*, and

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28 ¹ This is not an order on a motion *in limine*, and the discussion herein should not be taken
as an evidentiary ruling in any way.

1 carefully crafting jury instructions as this case moves to trial. Through this process, the
2 Court can adequately limit any prejudicial effect of the references in the Indictment at trial.

3 In addition to the prejudice the references to the explosion will create at trial, PG&E
4 objects to the prejudicial effect of the Indictment through pre-trial media reports. PG&E
5 contends that allowing references to the explosion to remain in the Indictment facilitates
6 the media's coverage of this case as a prosecution primarily for PG&E's role in the
7 explosion, as opposed to a pipeline maintenance violation and obstruction charge. PG&E
8 argues that surplusage in the Indictment "operates much like an extrajudicial statement in
9 its likely impact and potential prejudice" because "indictments are public documents
10 that . . . often are widely reported through the media." Mot. at 17 (citing *Cooper*, 384 F.
11 Supp. 2d at 961). However, it is unreasonable to believe that striking references to the
12 explosion from the PSA allegations, in part or in whole, will change the way the media
13 reports on the impending trial – the press has already made the connection between the
14 explosion and this prosecution. Striking such references from the entire Indictment would
15 be detrimental to an understanding of the other criminal allegations, and striking these
16 references from the PSA section alone would do little to alleviate this alleged pre-trial
17 prejudice.

18
19 **2. The Indictment is Legally Sufficient**

20 Federal Rule of Criminal Procedure 7(c)(1) requires that an indictment "be a plain,
21 concise, and definite written statement of the essential facts constituting the offense
22 charged." "An indictment is sufficient if it: (1) contains the elements of the offense
23 charged and fairly informs a defendant of the charge against which he must defend; and (2)
24 enables him to plead an acquittal or conviction in bar of future prosecutions for the same
25 offense." *United States v. Lazarenko*, 564 F.3d 1026, 1033 (9th Cir. 2009) (internal
26 quotations omitted). Further, it is generally sufficient for the indictment to set forth the
27 charged offense in the words of the statute itself. *United States v. Johnson*, 804 F.2d 1078,
28 1084 (9th Cir. 1986). The government is not required to disclose the theory of its case or

1 the entirety of the supporting evidence in the indictment, only the essential facts necessary
2 to put the defendant on notice of the nature of the charges. *United States v. Buckley*, 689
3 F.2d 893, 897 (9th Cir. 1982).

4 As discussed below, the Indictment here is sufficient for both the charged offenses
5 and the alternative fine penalty.

6
7 **a. The Indictment is sufficient for the PSA and obstruction charges**

8 PG&E argues that the Indictment here is insufficient because it fails “to facilitate
9 the proper preparation of a defense and to ensure that the defendants [will be] prosecuted
10 on facts presented to the Grand Jury.” Mot. at 3 (citing *United States v. Cecil*, 608 F.2d
11 1294, 1296-97 (9th Cir. 1979)). This argument is unconvincing. Over the course of
12 sixteen pages, the Indictment goes into great detail about PG&E’s PSA obligations and
13 alleged failure to properly monitor and maintain its pipeline, including the segment that
14 ruptured in San Bruno, as well as PG&E’s obstruction of the subsequent investigation. *See*
15 Ind. ¶¶ 3-60. These details comprise the “essential facts” underlying the charges brought
16 by the Government. No additional facts are needed for PG&E to respond to the PSA and
17 obstruction charges, as the explosion itself is not an element of those offenses.

18 Also, it is difficult to see how the description of the explosion in the Indictment
19 could make it difficult for PG&E to prepare a defense to the obstruction and PSA charges,
20 as PG&E is likely better informed than anyone regarding the facts of the explosion. PG&E
21 argues that it needs to know whether or not to defend against causation arguments at trial.
22 However, as already noted, the explosion is not an essential element of the obstruction or
23 PSA charges, so PG&E can prepare its defense to those charges without addressing
24 causation. Moreover, under *Buckley*, PG&E does not have a right to know exactly how the
25 Government will prove its case.² The Court finds that the Indictment fairly informs PG&E

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28 ² Even so, PG&E already knows that the Government will make causation arguments for
the Alternative Fines Act penalty, as discussed below. The Government has made clear its
intention to prove causation, both in its opposition and in open court.

1 of the obstruction and PSA charges against it by sufficiently alleging all of the essential
2 elements of those offenses.

3 Additionally, while the full extent of the Grand Jury’s exposure to facts relating to
4 the explosion is unknown, it is clear from the Indictment that the Grand Jury was presented
5 with and considered such facts in arriving at the present charges. The Indictment includes
6 the description of the explosion previously quoted from the Introductory Allegations, and
7 the date of the explosion, September 9, 2010, is referenced throughout the Indictment as
8 the end-date for the alleged criminal activities. *See, e.g.*, Ind. at ¶¶ 5, 54, 63, 65. Further,
9 the Alternative Fines Act penalty is clearly predicated on the damage resulting from the
10 explosion, as it specifies an amount of damages incurred by victims. Ind. ¶ 76.

11 PG&E relies on *Russell v. United States*, 369 U.S. 749 (1962), to argue that the
12 Indictment did not plead sufficient facts under the Fifth and Sixth Amendment guarantees
13 of grand jury review. Mot. at 5. This reliance is misplaced. *Russell* was a McCarthy-era
14 case wherein members of the press refused to answer vague questions at a congressional
15 hearing, and the government subsequently failed to allege that the questions were pertinent
16 to the subject matter of the hearing – an *essential element* of the offense. 369 U.S. at 755.
17 The Court reversed the defendants’ convictions, because the government’s failure to
18 convince a grand jury of this essential element resulted in an indictment that was
19 insufficient under the Fifth Amendment, and also failed to inform the defendant of the
20 nature of the charges against him as required by the Sixth Amendment. *Id.* at 760, 764-68.
21 For the reasons already discussed, the Indictment in this case shows that the Grand Jury
22 adequately alleged the essential facts of the relevant offenses.

23

24 **b. The Indictment is sufficient for the Government’s alternative fine**

25 In order to obtain a fine greater than the statutory maximum for a particular offense,
26 the government must prove to a jury at trial, beyond a reasonable doubt, facts establishing
27 the appropriateness of the fine. *See Southern Union Co. v. United States*, 132 S.Ct. 2344,
28 2348-49 (2012).

1 PG&E argues that the Alternative Fines Act penalty sought in the Indictment is
2 legally insufficient because it: (1) fails to allege the essential facts justifying an alternative
3 fine; (2) does not provide a basis for the calculation of the requested fine amount; and (3)
4 does not provide a proximate causal connection between the charges in the Indictment and
5 the damages alleged. Mot. at 12. The Court finds that the essential facts are sufficiently
6 alleged, the basis for the calculation is easily inferred, and there is no proximate cause
7 requirement at the Indictment stage.

8 In relevant part, the Indictment states:

9 With respect to the charges in this Superseding Indictment, for
10 the purposes of determining the maximum alternative fine,
11 pursuant to Title 18, United States Code, Section 3751(d), the
12 defendant, PACIFIC GAS AND ELECTRIC COMPANY,
13 derived gross gains of approximately \$281 million, and the
14 victims suffered losses of approximately \$565 million.

15 Ind. ¶ 76. Although the essential facts relating to the AFA allegation are scattered among
16 the earlier sections of the Indictment, they are present, and provide sufficient notice to
17 PG&E of the nature of the allegation. Paragraph 76 of the Indictment describes the origin
18 of the “derived gross gains” and the losses that the “victims suffered” by providing that
19 these were consequences “[w]ith respect to the charges in [the] Superseding Indictment.”
20 The derivation of the gross losses suffered by the victims is clear - Paragraph 5 explains
21 that the San Bruno explosion caused a fire resulting in the death of eight people and the
22 injury of fifty-eight others, as well as causing damage to 108 homes, thirty-eight of which
23 were complete destroyed.

24 Additionally, the figure of “\$281 million in gains” alleged in Paragraph 76 was
25 apparently taken from PG&E’s submissions to the California Public Utilities Commission
26 as the amount the company plans to spend to bring the pipeline system into compliance
27 with federal regulations. Opp’n at 19. Consequently, this must be a reasonable calculation
28 of the amount saved by PG&E’s alleged failure to comply with the PSA as charged in the
Indictment. Because avoided costs of compliance can be used to form the basis of a gross
gain for purposes of the AFA, this number is sufficiently supported by the alleged PSA

1 violations, which the Indictment repeatedly identifies as being motivated by economic
 2 considerations. *See United States v. BP Products North America Inc.*, 610 F. Supp. 2d
 3 655, 695-96, 728 (S.D. Tex. 2009) (accepting a plea agreement, over the objection of
 4 victims, where the government and defendant agreed on an alternative fine that was equal
 5 to twice the defendant’s avoided costs of compliance).

6 PG&E also attempts to create a requirement that AFA allegations explicitly allege
 7 proximate cause, relying heavily on *United States v. Sanford Ltd.*, 878 F. Supp. 2d 137
 8 (D.D.C. 2012). However, *Sanford* does not supply the support PG&E needs. First, that
 9 decision concerned a motion *in limine*, not a motion to strike surplusage; the court in that
 10 case had previously denied defendants’ motion to strike, and it did not disturb that
 11 decision. *Id.* at 141-43. In fact, the AFA language of the indictment upheld by the court in
 12 *Sanford* generally tracks the language of the statute, much like the language of the
 13 Indictment in this case. *See id.* at 141. The court rejected defendants’ revived
 14 “insufficient indictment” argument in the motion *in limine*, denying that motion to the
 15 extent the government would use financial data to prove a motive for the offense and
 16 financial gain under the AFA. *Id.* at 153-54. Moreover, the *Sanford* court discussed the
 17 government’s need to prove proximate cause *to the jury at trial*, not to the grand jury in the
 18 indictment. *See id.* at 147, 152. *Sanford* simply does not stand for the heightened
 19 indictment standard that PG&E claims. It certainly does not require the Grand Jury or the
 20 Government to use the magic words “proximate cause” when charging an Alternative
 21 Fines Act penalty.

22 Finally, the Court notes that PG&E’s arguments are mutually exclusive. PG&E
 23 simultaneously complains that the factual allegations for the increased fine are too vague,
 24 while also complaining that even minimal references to the San Bruno explosion in the
 25 Indictment are irrelevant and prejudicial. Consequently, PG&E’s position demands further
 26 reference to the explosion, while PG&E implores the Court to remove all references to the
 27 explosion. PG&E cannot have it both ways. Because the existing references to the
 28 explosion are essential to the obstruction charge and AFA allegations, striking them from

1 the Indictment is untenable despite any argument made about their “surplus” nature in
2 relation to the alleged PSA violations. The explosion must be referenced in some portions
3 of the Indictment, and it would provide only *de minimis* mitigation of prejudice to
4 unjustifiably remove it from others. PG&E may be right that after allowing such
5 references the Court cannot “un-ring” the “bell” of associating the charged conduct with
6 the explosion. *See* Mot. at 11. Unfortunately for PG&E, that fact cuts both ways.

7

8 **CONCLUSION**

9 Because the Indictment’s references to the San Bruno explosion are relevant to the
10 obstruction, PSA, and AFA allegations that the Government intends to prove at trial, the
11 references are not surplusage, and the Court declines to strike them. Furthermore, the
12 Court finds that the Indictment sufficiently alleges all charges, as well as the basis for any
13 penalty under the Alternative Fines Act. Accordingly, PG&E’s motion to strike surplusage
14 is DENIED.

15

16 **IT IS SO ORDERED.**

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18 Dated: 09/29/2014



THELTON E. HENDERSON
United States District Judge

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