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1 **I. INTRODUCTION**

2 Ultimately, even assuming Plaintiffs' allegations of the events and liability
3 are true, they do not justify adding a claim for punitive damages, as the allegations
4 of Sodexo Management, Inc.'s ("Sodexo") conduct are based purely in negligence
5 and the incident at issue was a single event in an 18-year period. The conduct at
6 issue here does not rise to the level that the Plaintiffs acknowledge they must
7 demonstrate, i.e., "despicable" conduct with a "willful and conscious disregard of
8 the rights or safety" of the Marine recruits, which requires something far more than
9 unreasonableness, negligence, gross negligence, or even recklessness. At its core,
10 this is a negligence claim for which punitive damages are not available.

11 Since 2002, Sodexo has contracted with the United States Marine Corps to
12 provide food services at several military bases in California. (*See*, Deposition of
13 David Bowser, at p. 34:12-14, attached as Exhibit 1 to the Declaration of Robert C.
14 Carlson in support hereof, ("Carlson Dec.")) In 2017, Sodexo prepared and served
15 beef patties manufactured by Cargill Meat Solutions Corporation ("Cargill") and
16 distributed by US Foods, Inc. ("US Foods") at mess hall 569 at the Marine Corp
17 Recruit Depot ("MCRD") and at mess hall 3120 at the Edson Range at Camp
18 Pendleton. Plaintiffs allege the beef patties manufactured by Cargill, delivered by
19 US Foods, and cooked and served by Sodexo at the lunch meal, known as
20 "Hamburger Saturdays," on October 21, 2017 contained *E. coli* and caused the
21 Plaintiffs to experience foodborne illnesses and injuries resulting therefrom.

22 As part of the contract between Sodexo and the Marine Corps, the Marine
23 Corps controls the recipes that Sodexo makes, including the hamburger recipe at
24 issue here, along with the mandated meal service schedule to be followed by
25 Sodexo. (*See*, Deposition of David Bowser, at pp. 22:1-9, 157:1-12, attached as
26 Exhibit 1 to Carlson Dec.) For 18 years, Sodexo policies and procedures for
27 preparing and cooking the hamburger meals have remained unchanged. (*See*,
28 Deposition of Richard Kassabian, at pp. 40:5-41:4, as 30(b)(6) witness, attached as

Exhibit 3 to Carlson Dec.) Sodexo has competently and safely served hundreds of millions of meals, including millions of hamburgers for the Marine Corps. Plaintiffs' allegations are limited to the serving of allegedly undercooked hamburgers on a single day out of those millions of meals served for almost two decades. Punitive damages are not and cannot be available to Plaintiffs here.

II. PLAINTIFFS' MOTION FOR LEAVE SHOULD BE DENIED, AS PUNITIVE DAMAGES ARE NOT AVAILABLE

California Courts are understandably wary of permitting punitive damage claims, repeatedly confirming that punitive damages are "never awarded as a matter of right; they are not favored by the law and they should be granted with the greatest of caution; [and] they will be allowed only in the clearest of cases." (*Henderson v. Security Nat'l Bank*, 72 Cal.App.3d 764, 771, 140 Cal. Rptr. 388 (1977) [citations omitted].) This matter is not one of those cases.

California Civil Code section 3294 codified "the universally recognized principle that 'the law does not favor punitive damages and they should be granted with the greatest caution.'" (*Dyna-Med, Inc. v. Fair Employment and Housing Comm.*, 43 Cal.3d 1379, 1392, 241 Cal. Rptr. 67 (1987), citing *Beck v. State Farm Mut. Auto. Ins. Co.*, 54 Cal.App.3d 347, 355, 126 Cal. Rptr. 602, 607 (1976).) Mere unreasonable conduct may not be redressed by punitive damages; the purpose of punitive damages is to punish a person for outrageous conduct. "Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of ... *such a conscious and deliberate disregard of the interests of others that his conduct may be called willful or wanton.*" (*Bell v. Sharp Cabrillo Hosp.*, 212 Cal.App.3d 1034, 1045-46, 260 Cal. Rptr. 886, 892 (1989) [emphasis in original; citations omitted].)

For an award of punitive damages, it is insufficient to show only that a defendant's conduct was negligent, grossly negligent, or even reckless. (*Id.* at p. 1044.) The conduct must reach the "level of outrage and reprehensibility" to justify

1 a punitive damage award. (*Flyer's Body Shop Profit Sharing Plan v. Ticor Title*
 2 *Ins. Co.*, 185 Cal.App.3d 1149, 1155, 230 Cal. Rptr. 276, 279 (1986).) Indeed,

3 Punitive damages are appropriate if the defendant's acts are
 4 reprehensible, fraudulent or in blatant violation of law or policy.
 5 The *mere carelessness or ignorance of the defendant does not*
 6 *justify the imposition of punitive damages*. Unhappily, as a
 7 society, we must tolerate without added retribution these all too
 8 common lapses in ourselves. Punitive damages are proper only
 9 when the tortious conduct rises to levels of *extreme indifference* to
 10 the plaintiff's rights, a level which decent citizens should not have
 11 to tolerate.

12 (*Id.* at pp. 1154-55 [emphasis added].)

13 The cases interpreting section 3294 make it clear that in order to
 14 warrant the allowance of punitive damages that act complained of
 15 must not only be wilful in the sense of intentional, but it must also
 16 be *accompanied by aggravating circumstances*, amounting to
 17 malice. The malice required implies an act conceived in a spirit of
 18 mischief or with criminal indifference towards the obligations owed
 19 to others. There must be an intent to vex, annoy or injure. Mere
 20 spite or ill will is not sufficient; and *mere negligence, even gross*
 21 *negligence is not sufficient to justify an award of punitive*
 22 *damages*.

23 (*Ebaugh v. Rabkin*, 22 Cal.App.3d 891, 894, 99 Cal. Rptr. 706, 708 (1972)
 24 [citations omitted; emphasis added].)

25 As noted by Plaintiffs, Sodexo has had a Regional Garrison Contract with the
 26 Marine Corps, under which Sodexo provided foodservices for the Marine Corps,
 27 since 2002. (*See*, Motion, at 8:9-12.¹) For 18 years, Sodexo has been responsible
 28 for the food services in the garrisons and mess halls. For purposes of this motion
 only and without admitting liability or waiving any arguments, assuming Plaintiffs'
 allegations of the events are true, they do not justify relief, as the claimed incident
 occurred on a single day in an 18-year period. This can be best described as

¹ Note that Plaintiffs' inclusion of the amount of the contract is a clear attempt to
 improperly bring Sodexo's financial condition into this matter, which is wholly
 inappropriate.

1 nothing but an ordinary negligence claim for which punitive damages are not
2 available.

3 In all of the meals served both at mess hall 569 and 3120, other than those at
4 issue herein, there have been no cases of confirmed foodborne illness and that is
5 true for all of the other military installations serviced by Sodexo. (*See e.g.*,
6 Deposition of Sodexo 30(b)(6) Witness, Richard Kassabian, at p. 13:21-23,
7 attached as Exhibit 3 to Carlson Dec.)

8 Q. This E. coli outbreak was a one-off event in Sodexo's history,
9 wasn't it?

10 A. To the best of my knowledge, yes.

11 *See also*, Deposition of David Bowser [who had worked with Sodexo since 2003,
12 and was the Sodexo District Manager responsible for mess hall 569], at pp. 146:23-
13 147:4, attached as Exhibit 1 to Carlson Dec.:

14 Q. David, up to this E. coli outbreak, had you ever worked at a food
15 service establishment that experienced a foodborne illness
16 outbreak?

17 A. Never.

18 Q. So you've never experienced an E. coli outbreak, obviously.

19 A. No, I have not.

20 Indeed, Plaintiffs point out that 3,045 hamburgers were prepared at mess hall
21 569 for lunch on the "Hamburger Saturday" at issue. (*See*, Motion, at 8:3-4.)
22 Multiplying that number for each "Hamburger Saturday" results in over 150,000
23 hamburgers being prepared each year at this location alone. Extending that over the
24 15 years leading up to the alleged incident, over 2,000,000 hamburgers were
25 prepared without incident at this location and in excess of another million when the
26 burgers cooked at mess hall 3120 are added. This single alleged occurrence does
27 not and cannot justify a claim for punitive damages.

28 ///

1 Notably missing from Plaintiffs' points and authorities is any case where
2 punitive damages were permitted in the context of foodborne illness or with facts
3 even remotely similar to those at issue here. The reason for this is obvious: the
4 conduct involved, even if true, can only be described, at its worst, as negligent,
5 grossly negligent, or reckless, none of which permit punitive damages. Indeed, the
6 cases cited by Plaintiffs with regard to punitive damages confirm that in no way can
7 punitive damages be awarded in the instant matter.

8 In *Snyder v. Enterprise Rent-A-Car Co. of San Francisco (ERAC-SF)*, 392
9 F.Supp.2d 1116 (N.D. Cal. 2005), survivors of a pedestrian who was killed when
10 she was struck by a driver with a suspended license as he was driving a rented
11 vehicle sued the car rental company and sought punitive damages. Denying a
12 motion for summary judgment on the punitive damage claims, the Court set forth
13 the facts defeating the motion that showed the defendant "chose to run the risk that
14 the losses caused by such drivers being involved in accidents would be less than the
15 cost of verifying licenses." (*Id.* at p. 1130.) The evidence showed that the
16 defendant knew the cost of verifying licenses would be \$1; knew of an internal
17 study confirming 7% of renters had invalid licenses and concluding that running
18 license checks would be efficient and economical; and, despite that, chose to "pass
19 this risk to an insurance company" as it was cheaper to the defendant. (*Id.* at pp.
20 1129-1130.) These facts are very different than those presented in the instant
21 matter. The *Snyder* defendant intentionally placed its own financial interests ahead
22 of peoples' lives. There are no such allegations in this action; only allegations that
23 on one day out of 18 years, Sodexo may have been negligent, but even if grossly
24 negligent or reckless in preparing hamburgers that were allegedly contaminated
25 when they were manufactured by Cargill and then delivered to Sodexo.

26 In *Angie M. v. Superior Court*, 37 Cal.App.4th 1217, 44 Cal. Rptr.2d 197
27 (1995), the facts are abhorrent as they were in *Snyder*, and similarly distinguishable
28 from our facts. There, the Court denied a motion to strike punitive damages where

1 a minor brought an action against a 48-year-old physician seeking general, special,
 2 and punitive damages for unlawful seduction and childhood sexual abuse,
 3 intentional infliction of emotional distress, negligent infliction of emotional
 4 distress, and battery. The allegations included the doctor giving the child alcohol
 5 and drugs, and inducing her trust with knowledge of her dysfunctional family and
 6 other vulnerabilities due to his role as a physician and knowing that she was
 7 particularly susceptible to emotional harm. These are the circumstances for which
 8 punitive damages can be claimed; where the circumstances are “‘base,’ ‘vile,’ or
 9 ‘contemptible.’” (*Id.* at p. 1228.) Although by no means belittling the alleged
 10 damages at issue here, negligently preparing hamburgers for one meal simply does
 11 not rise to the level of base, vile, or contemptible conduct required to assert punitive
 12 damages.

13 *George F. Hillenbrand, Inc. v. Insurance Co. of North America*, 104
 14 Cal.App.4th 784, 128 Cal. Rptr. 2d 586 (2002), is an insurance bad faith action
 15 where the carrier breached its covenant of good faith and fair dealing by instituting
 16 frivolous litigation against its insured. In an attempt to avoid the costs associated
 17 with its duty to defend, the carrier sued its insured and argued it had no duty to
 18 indemnify or defend, hoping it might get the trial court to agree and thus avoid
 19 paying defense costs. In so doing, *the carrier concealed* its evidence of damage to
 20 other property triggering the duty to defend, improperly furthering its own financial
 21 interests while recognizing that its conduct subjected plaintiffs to economic and
 22 emotional hardship, and suing its insured in spite of its knowledge of facts giving
 23 rise to the duty to defend. In the world of insurance coverage and a carrier’s duties
 24 owed to its insureds, this is the conduct “which is so vile, base, contemptible,
 25 miserable, wretched or loathsome that it would be looked down upon and despised
 26 by ordinary decent people.” (*Id.* at p. 609.)

27 Plaintiffs cite to *Pfeifer v. John Crane, Inc.*, 220 Cal.App.4th 1270, 164 Cal.
 28 Rptr. 3d 112 (2013) to argue that punitive damages may be awarded “in a products

1 liability action if the plaintiff shows that the defendant placed the product on the
2 market in willful and conscious disregard of the safety of consumers and others.”
3 (See, Motion, at p. 18:19-23.) Notably, although Plaintiffs have pled a cause of
4 action against Sodexo for strict products liability, Sodexo was not supplying any
5 product or placing a product on the market for consumers, such that it is instead
6 facing claims of negligence. Nonetheless, the facts of the *Pfeifer* case also confirm
7 that punitive damages would never be permitted here, as that case involved placing
8 products containing asbestos into the marketplace with knowledge of the dangers,
9 warning its workers but not other users of those dangers, where certain operations
10 “performed on the products released concentrations of asbestos fibers ‘many
11 thousands’ greater than ordinary background levels.” (*Pfeifer, supra*, 164 Cal.
12 Rptr. 3d at p. 136.)

13 Plaintiffs then rely on *Woolstrum v. Mailloux*, 140 Cal.App.3d Supp.1, 190
14 Cal. Rptr. 729, 732 (1983), citing *Nolin v. National Convenience Stores, Inc.*, 95
15 Cal. App.3d 279, 157 Cal. Rptr. 32, 37 (1979), for the proposition that malice can
16 be found when “the evidence is such that, despite defendant’s denial of a conscious
17 disregard of a probable known danger, it is reasonably and obviously inferable that
18 defendant must have known of the danger and its extent and decided to disregard
19 it.” (See, Motion, at p. 21:2-18.)

20 Like the instant action, *Woolstrum* involved a “garden variety negligence
21 action” with facts that were “ludicrously insufficient” to justify punitive damages.
22 (*Woolstrum, supra*, 190 Cal. Rptr. at p. 733.) Also like the instant action, the
23 incident giving rise to the claim – there, a farmer’s inadequate repair of fence, and
24 here, allegedly failing to properly cook hamburgers – is common and does not
25 justify punitive damage claims. Indeed, the following excerpt from *Woolstrum*,
26 while lengthy, could easily apply to the instant action and provides an explanation
27 as to why punitive damages are unavailable to Plaintiffs in this negligence action:

28 ///

1 This case is a striking illustration of the necessity of trial and
 2 appellate courts exercising the vigilance of a hawk in properly
 3 confining juries to their assigned role in negligence cases where
 4 punitive damages are claimed, as they are now in a burgeoning
 5 percentage of cases. Except for automobile accident cases, punitive
 damages are now sought in the majority of all negligence cases, as
 any harried law and motion trial judge can attest.

6 Many of the evils of our system of allowing juries unfettered
 7 discretion in awarding, in negligence cases, punitive damages (and
 8 the amount thereof) have been pointed out by courts and
 commentators.

9
 10 The law does not favor the imposition of punitive damages. They
 should only be allowed in the “clearest of cases.”

11 ...
 12 The deterrent effect of punitive damages in a case of ordinary
 13 negligence is dubious because negligence is by definition
 14 unintentional. Forceful arguments have been made that the remedy
 of punitive damages, in negligence cases, should be abolished.

15 ...
 16 Conduct which may be characterized as unreasonable, negligent,
 17 grossly negligent or reckless does not satisfy the highly culpable
 18 state of mind warranting punitive damages. Conduct which
 warrants punitive damages must be of “such severity or shocking
 character [as] warrants the same treatment as accorded to willful
 misconduct – conduct in which defendant intends to cause harm.”

19 ...
 20 The misuse of punitive damages can become intolerable.

21 (*Id.* at pp. 734-735 [citations omitted].)

22 Plaintiffs also reference the *Woolstrum* Court’s citation of *Nolin v. National*
 23 *Convenience Stores, Inc.*, 95 Cal.App.3d 279, 157 Cal. Rptr. 32 (1979). The
 24 *Woolstrum* Court explained that the evidence in *Nolin* “is a light year away” from
 25 the facts presented therein. (*Id.* at p. 735.) The defendant in *Nolin* operated self-
 26 service gasoline pumps, and “was repeatedly advised by his employees over a four
 27 to five month period of a malfunction in the nozzle of one pump which caused the
 28 pump to overflow when in use, spilling gasoline[; ...] defendant was advised of two

1 separate incidents of *people slipping and falling in the pump area prior to the*
 2 *plaintiff's fall[; and removed] warning signs placed at the pumps and to stop*
 3 *advising patrons of hazards...*" (*Id.* at p. 732 [emphasis in original].) Again, at
 4 issue here is a single incident over an 18-year period. The *Woolstrum* facts
 5 involving a defendant's direction that its employees remove safety warnings,
 6 putting its patrons in harms' way, are light years away from any facts relating to
 7 Sodexo's policies, procedures, training, and cooking methods. Thus, *Woolstrum*
 8 provides no basis for permitting claims for punitive damages, here.

9 Plaintiffs provide a truncated summary of their next cited punitive damage
 10 case: *Taylor v. Superior Court*, 24 Cal.App.3d 890, 157 Cal. Rptr. 693 (1979),
 11 stating that a person who drinks and drives would be subject to punitive damages as
 12 it demonstrates a conscious and deliberate disregard of the interests of others.
 13 However, reviewing the facts of *Taylor* shows that this is no ordinary case. The
 14 defendant there was a known alcoholic with a habit of driving under the influence
 15 and had a history of extensive prior accidents, convictions, and was on probation
 16 for driving under the influence (with directives regarding his driving and drinking
 17 habits, which he ignored and violated).

18 As was evident by these facts, "Something more than the mere commission
 19 of a tort is always required for punitive damages. There must be circumstances of
 20 aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on
 21 the part of the defendant, or such a conscious and deliberate disregard of the
 22 interests of others that his conduct may be called willful or wanton." (*Id.* at pp.
 23 695-696.) Courts "likewise rejected suggestions in earlier cases that mere reckless
 24 disregard or misconduct would be sufficient to sustain an award of punitive
 25 damages, because 'The central spirit of the exemplary damage statute, the demand
 26 for evil motive, is violated by an award founded upon recklessness alone.'" (*Id.* at
 27 p. 696.) Plaintiffs' claims against Sodexo are based in negligence, but even if based
 28 in gross negligence or recklessness, there is simply no heightened level of evil

1 motive here.

2 Finally, Plaintiffs cite *Romo v. Ford Motor Co.*, 99 Cal. App.4th 1115, 122
3 Cal. Rptr. 139 (2002), *expressly affirmed on all grounds except federal*
4 *constitutional issues* at 113 Cal.App.4th 738 (2003), to assert the position that
5 malice is “satisfied by evidence that the manufacturer marketed a product with the
6 knowledge that ‘it could kill people[.]’” (*See*, Motion at 23:11-20.) However, the
7 facts of the case are much more complicated than that. In discussing the design
8 defect, it was noted that defendant was “strongly motivated” to market the vehicle
9 “and knew they could not do so if they followed the routine practice of
10 preproduction testing and development.” (*Romo, supra*, 99 Cal.App.4th at p.
11 1144.) The defendant “decided to disregard established policies by which the
12 defendant had determined that crush resistance needed to be higher,” and even later
13 tested (after choosing to skip testing to bring the vehicle to the market faster)
14 showed the design was defective and did not meet its own safety standards. (*Id.* at
15 p. 1145.) The defendant placed its own financial interests ahead of the safety of
16 consumers. These facts are in stark contrast to the incident in this case, where it is
17 alleged that in one day of 18 years worth of food service, hamburgers were
18 undercooked causing foodborne illnesses.

19 As noted by the *Woolstrum* Court, and is strikingly accurate here, conduct
20 which may be characterized as unreasonable, negligent, grossly negligent or
21 reckless does not satisfy the highly culpable state of mind warranting punitive
22 damages. Conduct which warrants punitive damages must be of such severity or
23 shocking character as warrants the same treatment as accorded to willful
24 misconduct – conduct in which defendant intends to cause harm. No such conduct
25 exists on behalf of Sodexo here. Accordingly, Plaintiffs’ motion should be denied.

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III. THE FACTS HERE DO NOT SUPPORT A CLAIM FOR PUNITIVE DAMAGES

The evidence and facts set forth in Plaintiffs' motion negate any reasonable basis to allow a claim for punitive damages. At most, the evidence shows unreasonable, negligent, grossly negligent, or reckless conduct. The purpose of punitive damages is to punish and deter, "for the sake of example and by way of punishing the defendant," which simply is unavailable here. (*See*, Civ. Code, § 3294(a).) Punitive damages are only available where the defendant's culpability "is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." (*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 419.) The facts included in Plaintiffs' own motion fail to show reprehensible conduct that must be punished or deterred.

The main theme of Plaintiffs' argument is that Sodexo knew of the risks involved in cooking beef and failed to take precautionary measures including proper procedures and training of its staff, to avoid those risks. However, Plaintiffs' own supporting declarations negate this argument. Aubre Dunkleberger confirms she was trained and instructed on the cooking and safety measures involved:

20. I recall learning to take temperatures at a meeting with Dave Bowser, although I do not recall when this meeting took place. **He and a few managers brought all the cooks together and told us how to fill out temperature logs and how to take temperatures. Mr. Bowser instructed us to take the temperature of burgers** by inserting the thermometer tip into the center of the patty at an angle.

21. The HACCP logs for recording temperatures were set up so that we could record a temperature for every batch as well as the time, but most of the time I would just write temperatures on a blank piece of paper. I would try to record the temperature, the

1 time it was taken, and roughly how many patties were in the batch.²

2 ...
 3 24. We would take whatever we recorded temperatures on and
 4 either put it on the chief cook's desk or give it to our manager. If I
 5 had to stay throughout lunch, I would put my temperature notes on
 6 the chief cook's desk. However, **because I know someone who**
 7 **turned in their temperature notes and got in trouble because**
 8 **they were subsequently lost, I would usually give my papers**
 9 **directly to the manager on duty to make sure he got it.**

10 (See, Declaration of Aubre Dunkleberger, at pp. 2-3 (Doc 161-2) [emphasis
 11 added].)

12 Erik Salcido similarly declared, stating that he was also instructed and did
 13 perform temperature batch testing as well as being reminded to wash his hands:

14 15. When I removed the patties, I placed them into a metal pan that
 15 I kept to the side of the grill. **Once I cleared the grill surface of**
 16 **patties, I would "batch test" those burgers by temperature**
 17 **testing one of the hamburgers in the pan.** I would write my
 18 temperature test records on scratch paper obtained from the chief
 19 cook's office or, sometimes, I would just write the temperatures on
 20 piece of cardboard torn from the hamburger patty box.

21 16. No one ever checked the temperatures I wrote down or asked
 22 for them. I never had to turn in my temperatures to any manager or
 23 other staff. The only "check" I ever experienced was **a manager**
 24 **generally reminding staff, verbally, to "make sure you're batch**
 25 **temping."**

26 19. On hamburger days, grill operators usually did not perform any
 27 other duties outside of cooking the hamburger patties. The only
 28 exception to this was an instance where Dave Bowser wanted grill
 operators to also assemble the burgers – adding melted cheese and
 placing the patties on buns – before placing them in the hotbox,
 without the aid of any other staff. This only went on for a short
 time because of how chaotic it made the hamburger cooking
 process. **During that time, someone from food safety asked me**

² But note that the governing Tri-Service Food Code does not actually require the use of any such written logs. See, Deposition of Heidi Snyder, at pp. 45:9-12, attached as Exhibit 5 to the Carlson Dec.

1 **if I was washing my hands between each time I cooked patties**
 2 **and before I assembled the hamburgers.** I informed him that I
 3 was trying to, but that it was impossible to keep track.

4 (See, Declaration of Erik Salcido, at pp. 2-3 (Doc 161-3) [emphasis added].)

5 Rebecca Dunkleberger confirmed this requirement as well:

6 17. The patties were not thick enough for cooks to be able to insert
 7 the thermometers, so in order to gauge the temperature of the
 8 burgers I would stack the first three burgers from the batch on my
 9 spatula and insert the metal stem thermometer down through the
 10 middle of the stack. **I did this once for every batch of patties I**
 11 **cooked. I was instructed by the chief cook to only take one**
 12 **temperature per batch to save time. I would then record this**
 13 **temperature in the HACCP log, which was kept by the grill.**

14 (See, Declaration of Rebecca Dunkleberger, at p. 2 (Doc 161-5) [emphasis added].)

15 These declarations alone show that Plaintiffs' theory falls squarely within the
 16 realm of negligent conduct, as Sodexo did in fact train and instruct its cooks on
 17 hamburger temperature taking and food safety. At most, Plaintiffs' argument
 18 supports a theory of negligence with respect to how the cooks performed their jobs.

19 In their Motion, Plaintiffs rely on the declarations of Dr. Richard Raymond
 20 and Kirk Smith, which are replete with inappropriate statements, falsehoods and
 21 baseless, inadmissible opinions. Although not necessarily at issue with this Motion,
 22 many of those statements would be required to be excluded pursuant to Federal
 23 Rules of Evidence 401, 702, and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*
 24 (1993) 509 U.S. 579. Without formally addressing each and every flaw with the
 25 declarations, as is not necessary given the current context, Sodexo must bring these
 26 issues to the Court's attention.

27 ///

28 ///

///

///

1 For example, at paragraph 18 of his Declaration, when describing the
 2 cooking of hamburgers at the mess hall, Richard Raymond, M.D., states that
 3 Sodexo “never should have undertaken this endeavor in the first place.”³ Despite
 4 this, Dr. Raymond has no experience in military food service in general or in the
 5 very specific Marine Corps mission to feed 2,000 to 5,000 recruits within very short
 6 meal sittings, using Marine Corps required menus and recipes – including the
 7 Marine Corps’ “Hamburger Saturday” menu provided to Sodexo by the Marine
 8 Corps as part of its Regional Garrison contract. Thus, Dr. Raymond has no basis
 9 for such a conclusion. More disturbing is Dr. Raymond’s “anger” set forth in
 10 paragraphs 46 and 47 of his declaration, which appears to be intended to inflame
 11 the Court and substitute his purported outrage over cooking techniques for the
 12 missing elements of any ‘base,’ ‘vile,’ or ‘contemptible’ conduct that would justify
 13 a prayer for punitive damages.

14 A further example of Dr. Raymond’s inaccurate and disingenuous statements
 15 is found in paragraph 38 of his declaration, in which he states under penalty of
 16 perjury that Sodexo’s former District Manager, Bowser testified that “Mess Hall
 17 569’s number one goal was to ‘not interfere with the training schedule.’” The
 18 actual deposition quote is: “Our number one mission there was to provide quality,
 19 safe food to the recruits and not interfere with training schedules.” (*See*, Deposition
 20 of David Bowser at pp. 92:24-93:1, attached as Exhibit 1 to Carlson Dec.)

21 Similarly, in paragraph 40 of Dr. Raymond’s declaration, he discusses
 22 Sodexo’s response to Plaintiff’s interrogatory 25, which addresses the methods

23 ³ Notably, the Marine Corps’s level of control, including over the facilities, the
 24 recipes, and the schedule, implicate the Government Contractor Defense – a federal
 25 common law defense applicable when an independent contractor working for the
 26 federal government faces tort liability for an alleged defect in connection with a
 27 product which is produced under a military contract to military specifications.
 28 (*Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988); *Jackson v. Deft Inc.*, 223 Cal.App.3d 1305, 1319 (1st Dist. 1990).) Plaintiffs’ criticism within its Motion and the Declaration of Dr. Raymond, that even trying to serve the 3000 burgers at a meal was an unacceptable undertaking is naïve where the mission and manner of serving the Marine Corps recruits was non-negotiable.

1 Sodexo used to kill pathogens in ground beef. Dr. Raymond quotes Sodexo's
2 response to the interrogatory simply as follows: "SODEXO contractually requires
3 its suppliers like Cargill to provide untainted product..." Dr. Raymond goes on to
4 state in paragraph 40 of his declaration that "In other words, Sodexo felt they did
5 not need to answer the question because they assumed the ground beef was
6 pathogen free." However, Dr. Raymond failed to identify or quote Sodexo's full
7 response to the interrogatory, which states: "General food handling and cooking
8 guidelines contained in SODEXO's HACCP plan, the Tri-Service Food Guide, and
9 other applicable regulations specify a minimum final temperature for ground beef
10 of 155 deg. F. for 15 seconds, or an instantaneous temperature of 158 deg. F." (*See*,
11 Deposition of Carlos Menes, at pp. 143:1-15, 143:19-21, attached as Exhibit 7 to
12 Carlson Dec.)

13 Dr. Raymond's obfuscation of the actual Sodexo deposition testimony and
14 interrogatory responses should call into question the reliability of his opinions.

15 In addition to the unprofessional and improper declaration of Dr. Raymond,
16 Plaintiffs also include an only slightly less objectionable declaration by Kirk Smith,
17 Manager of the Foodborne, Waterborne, Vectorborne, and Zoonotic Diseases
18 Section at the Minnesota Department of Health. Plaintiffs cite to Mr. Smith's
19 declaration in support of their argument that the source of the outbreak was
20 contaminated ground beef patties manufactured by Cargill and prepared by Sodexo.
21 Because the Plaintiffs seek to use their consultants' opinions as a basis for their
22 amendment, at least a few examples of the lack of foundation and admissibility of
23 these opinions are warranted.

24 First, Mr. Smith refers to an online news article in support of his opinions,
25 yet fails to provide any information, foundation, or verification of this source. This
26 would never pass the threshold of Federal Rules of Evidence, Rule 703. Second,
27 Mr. Smith references conversations with "Charlie Cook" and a memorandum Mr.
28 Cook wrote as sources for his opinions. Besides an initial reference, there is no

1 identification of Charlie Cook; no indication of Mr. Cook's qualifications; and no
2 recitation or summary of any information provided by Mr. Cook to Mr. Smith
3 regarding Sodexo's use of ground beef. As to the memorandum Mr. Cook
4 apparently authored and provided, Mr. Smith again fails to identify the author's
5 qualifications or provide the actual memorandum.

6 Regardless of the declarations being objectionable and inadmissible, they do
7 nothing to assist Plaintiffs here in establishing a level of reprehensible conduct that
8 would justify the pursuit of punitive damages in this negligence action.

9 Furthermore, in contrast to the highly charged statements within the
10 Plaintiffs' motion and certainly within their proffered supporting declarations,
11 Sodexo's culpability in this case is far from certain. Plaintiffs allege that their
12 illnesses were caused by Sodexo's negligent failure to adequately cook ground beef
13 patties according to mandated temperatures and cooking times. Despite an
14 intensive investigation by the CDC as supported by branches of the Marine Corps,
15 Navy and Army Vets, the CDC's published report *did not* find any statistical
16 association between the hamburgers served on October 21, 2017 and the Plaintiffs'
17 illnesses. Indeed, the CDC report ultimately concluded that no individual beef
18 dishes or other identified food sources were significantly associated with the ill
19 recruits. Rather, it only suggested a possible relationship between ill recruits and
20 undercooked beef (it did not use the word "hamburgers") based on interviews
21 conducted more than a month after the outbreak. The CDC report also discussed
22 other potential causes of the outbreak, including poor recruit hygiene.

23 Liability issues are further complicated by the Marine Corps challenges with
24 providing adequate rodent control at the aging MCRD mess hall. Although not
25 referenced in the Plaintiffs' motion, significant evidence exists regarding rodent
26 infestations at the Marine Corps' mess facility, where rats are known transmitters of
27 *E. coli*, as well as noted issues with Marine recruit hygiene conditions. (See,
28 Deposition of David Bowser, at pp. 142:4-10, attached as Exhibit 1 to Carlson

1 Dec.; Deposition of Andrew Jassick, at pp. 235:21-236:5, attached as Exhibit 2 to
2 Carlson Dec.; Deposition of Heidi Snyder, at pp. 105:13-18, attached as Exhibit 5
3 to Carlson Dec.; and Deposition of Jason Boothe, at pp. 154:16-21, attached as
4 Exhibit 6 to Carlson Dec.) It is the Marine Corps, not Sodexo, which has the pest
5 control responsibility at the subject mess halls. Thus, the liability issues in the case
6 are far more nuanced than the Plaintiffs suggest in their motion, which issues
7 further dilute the picture painted in the Plaintiffs' motion.

8 In contrast to Plaintiffs' picture of purported disregard by Sodexo, there is
9 much evidence to demonstrate that Sodexo took its food safety responsibilities very
10 seriously, taking robust preventative measures to reduce the risks of foodborne
11 illness and to ensure food safety. Sodexo developed its own Hazard Analysis
12 Critical Control Point (HACCP) Plan which complies with the Tri-Service Food
13 Code applicable on Marine Corps bases. Indeed, Sodexo's own HACCP Plan is
14 more stringent than the Tri-Service Food Code. (*See*, Deposition of Carlos Menes,
15 at pp. 143:1-15; 143:19-21; 150:22-152:9, attached as Exhibit 7 to Carlson Dec.)
16 The detailed and comprehensive plan includes a policy for the cooking of ground
17 beef, which did not change through the contract period. (*See*, Declaration of
18 Richard Kassabian as 30(b)(6) witness, at pp. 40:5-41:4, attached as Exhibit 3 to
19 Carlson Dec.; and Deposition of Richard Kassabian as an individual, at pp. 148:25-
20 149:8, attached as Exhibit 4 to Carlson Dec.) This policy requires the cooks to
21 ensure that the ground beef reaches an internal temperature of 155 degrees for at
22 least 15 seconds. Sodexo provides initial training to all of its cooks regarding all of
23 its HACCP policies including its ground beef cooking policy. Sodexo also
24 provides monthly safety training to its employees. Sodexo's HACCP policies are
25 routinely reviewed during these monthly meetings.

26 Both mess halls where "Hamburger Saturday" was on the menu are subject to
27 rigorous inspection and audits, conducted both by Sodexo and by various
28 governmental entities. The audits conducted by Sodexo and its auditors are

1 painstaking and thorough. Sodexo's Quality Control manager, Jason Boothe,
 2 testified that he has personally audited mess hall 569 literally hundreds of times
 3 [51:11-15]. He discussed the following types of audits at 569 during his deposition:

- 4 • Monthly SoSafe Food Safety Audit [108:1-4]
- 5 • Menu Compliance/Food Safety Compliance [107:11-16]
- 6 • Monthly Safety Walkthroughs [107:17-23]
- 7 • Biweekly Acceptable Performance Level (APL) [136:6-137:16]
- 8 • Comprehensive Annual Review [60:15-19]
- 9 • Monthly Safety Audit [139:25-140:4]
- 10 • Biannual Safety Audit [140:5-10]
- 11 • Sharp Audit [140:13-20]

12 (*See*, Deposition of Jason Boothe, attached as Exhibit 6 to Carlson Dec.) These
 13 inspections and audits primarily focus on whether the facilities are in compliance
 14 with Sodexo's safety policies, including its food safety policies.

15 In addition to Sodexo's audits, the Marine Corps, Navy Preventative
 16 Medicine Unit ("PMU"), Army Veterans, and third party auditors (such as Quiet
 17 Excellence) all conducted audits on Sodexo's performance. Sodexo brought in
 18 Quiet Excellence on its own accord to assess its operations and personal
 19 relationships to help improve food safety, quality, and sanitation. (*See*, Deposition
 20 of Jason Boothe at pp. 166:22-24, 167:22-24, 186:19-23, 211:15-18, attached as
 21 Exhibit 6 to Carlson Dec.) These are *not* the actions of a company that has a
 22 disregard for food safety.

23 In terms of the Marine Corp's assessment of Sodexo's performance, a March
 24 23, 2018 audit/review of Sodexo's work is instructive. This Contractor
 25 Performance Assessment Report ("CPAR") was prepared by the Marine Corps at a
 26 time shortly after the subject *E. coli* outbreak. The Marine Corps assessing official
 27 was Nicholle Clinton, who is the Marine Corps' Installation Command West Coast
 28 Contracting Officer in charge of overseeing Sodexo's work at that subject mess

1 halls for the Regional Garrison II contract. When she prepared this report in early
 2 2018, she had full knowledge of the government’s investigation into the 2017 *E.*
 3 *coli* outbreak. Nevertheless, she gave Sodexo a “Very good” rating as to Quality.
 4 She discussed in the report a recent recognition of mess hall 569 as a “Star
 5 performer” by the Navy’s PMU unit. The recommendations section of the report is
 6 telling. It was prepared by Officer Clinton *after* the *E. coli* outbreak, and yet she
 7 recommended Sodexo for future contracts with the Marine Corps. (*See*, Contractor
 8 Performance Assessment Report, at pp. 2, 5, attached as Exhibit 8 to Carlson Dec.)

9 Lastly and most importantly, the Plaintiffs’ motion fails to address the most
 10 compelling evidence that Sodexo did not engage in despicable conduct with a
 11 willful and conscious disregard for the safety of others. Sodexo started serving
 12 hamburgers at these mess halls in 2002 and continued to serve hamburgers until
 13 October 2018. During that time period, Sodexo has served millions of hamburgers
 14 to Marine recruits. Its ground beef cooking policy, training methods, inspection
 15 and audit procedures have been essentially the same from the inception of the
 16 contract until October 2018, and there have been no other allegations of any
 17 foodborne illnesses, despite millions of meals served. (*See*, Deposition of Richard
 18 Kassabian as 30(b)(6) witness, at pp. 40:5-41:4, attached as Exhibit 3 to Carlson
 19 Dec.; and Deposition of Richard Kassabian as an individual witness, at pp. 148:25-
 20 149:8, attached as Exhibit 4 to Carlson Dec.)

21 **IV. PLAINTIFFS’ COMPARISONS TO JACK IN THE BOX** 22 **COOKING ARE MISPLACED**

23 In their Motion and supporting declarations, Plaintiffs repeatedly rely on the
 24 *E. coli* outbreak at a Jack in the Box restaurant in the 1990s as a relevant
 25 benchmark to establish their claims. A detailed description of one fast food
 26 restaurant’s policies and procedures with respect to cooking hamburgers is
 27 irrelevant to whether Sodexo’s conduct supports the Plaintiffs’ punitive damages
 28 claim. Comparing individual patron orders from a walk-up fast-food restaurant to

1 the completely dissimilar operations of the mess halls with the strict mandates of a
 2 Marine Corps food service contract is inapposite.

- 3 • Jack in the Box uses specialty equipment and their HACCP plan relies
 4 upon a *precise amount of time* and a *precise griddle surface temperature*
 5 rather than the temperature of the *food* – that is the program for their Jack
 6 in the Box HACCP plan but that is not appropriate for all types of food
 7 service. Indeed, Jack in the Box must monitor its griddle surface
 8 temperature because, unlike Sodexo, Jack in the Box only measures the
 9 temperature of the hamburger patties three times a day. (*See*, Deposition
 10 of Heidi Snyder, at pp. 77:23-78:15, attached as Exhibit 5 to Carlson
 11 Dec.)
- 12 • At MCRD and the Edson Range mess halls, the actual building and
 13 equipment, including the griddles, are supplied by the Marine Corps for
 14 Sodexo to use. Neither mess hall is equipped with the specialty fast-food
 15 style griddle, surface temperature and timing equipment that is used for
 16 that fast-food type of meal preparation for the limited numbers of patrons
 17 at a Jack in the Box restaurant. The Marine Corps griddles Sodexo was
 18 required by the contract to use did not have a temperature gauge on them.
 19 (*See*, Deposition of Andrew Jassick, at p. 127:11-17, attached as Exhibit 2
 20 to Carlson Dec.)
- 21 • Based upon the different type of equipment and the completely different
 22 scale of food preparation, Sodexo's HACCP plan relies upon the
 23 temperature of food rather than the temperature of the griddles or a
 24 precise time requirement. (*See*, Deposition of Jason Boothe, at p. 88:19-
 25 23, attached as Exhibit 6 to Carlson Dec.)
- 26 • While specifics are unknown and undoubtedly vary by store, time of year,
 27 time of day and scores of other factors, it seems reasonable to assume
 28 that the typical Jack in the Box restaurant is serving perhaps dozen(s) –
 not thousands – of meals within a short meal period;
- In contrast, at MCRD, the Marine Corps recruit count varies from
 approximately 2,000 to 5,000 recruits for each and every meal at the mess
 hall. (*See*, Deposition of Andrew Jassick, at p. 20:3-5, attached as Exhibit
 2 to Carlson Dec.)
- At MCRD, the platoons must eat within about a 20 minute period. (*See*,
 Deposition of David Bowser, at p.22:1-9, attached as Exhibit 1 to Carlson
 Dec.)

Plaintiffs' strained comparison of two completely different cooking methods
 and HACCP plans for two markedly different food service operations in an effort to

1 demonstrate willful disregard, falls short. The bottom line is that Sodexo has
2 demonstrated a remarkable food safety record over an 18-year service period.

3 These facts simply do not rise to the level of conduct required to allow a
4 claim for punitive damages.

5 **V. PLAINTIFF FAILS TO ALLEGE FACTS SUFFICIENT TO**
6 **ESTABLISH RATIFICATION OF THE PURPORTEDLY**
7 **DESPICABLE BEHAVIOR**

8 If a plaintiff wishes to pursue punitive damages against a corporate
9 defendant, he or she must show that an officer, director or managing agent
10 authorized or ratified the conduct supporting the punitive damage allegation.
11 (*White v. Ultramar, Inc.*, 21 Cal.4th 563, 571-572 (1999); *College Hospital, Inc. v.*
12 *Superior Court (Crowell)*, 8 Cal.4th 704, 723-724(1994).)

13 California Civil Code section 3294(b) specifically provides:

14 An employer shall not be liable for [punitive] damages . . . based
15 upon acts of an employee of the employer, unless the employer had
16 advance knowledge of the unfitness of the employee, and employed
17 him or her with a conscious disregard of the rights or safety of
18 others or authorized or ratified the wrongful conduct for which the
19 damages are awarded or was personally guilty of oppression, fraud,
20 or malice. **With respect to a corporate employer, the advance
knowledge and conscious disregard, authorization, ratification
or act of oppression, fraud or malice must be on the part of an
officer, director, or managing agent of the corporation.**

21 [Emphasis added].

22 The term “managing agent” is defined in CACI No. 3945 as follows:

23 An employee is a “managing agent” if he or she exercises
24 substantial independent authority and judgment in his or her
25 corporate decision making such that the employee’s decisions
26 ultimately determine corporate policy.

27 ///

28 ///

1 There is no allegation in the proposed amended complaints which even
 2 mentions the involvement of an officer or director of Sodexo Management, Inc. As
 3 to the purported involvement of a Sodexo managing agent, the amended complaints
 4 simply mention in paragraph 35 that Sodexo's Food Safety Director had knowledge
 5 that a STEC infection could cause serious injury; and paragraph 42 states that
 6 Sodexo's Food Safety Director lacked personal knowledge of the hamburger
 7 preparation processes at mess hall 569. Such weak statements do not come close to
 8 the statutory requirement that a plaintiff plead and prove that a managing agent of
 9 Sodexo authorized or ratified egregious/outrageous behavior sufficient to support a
 10 punitive damages claim. As such, the proposed amended complaints fail to allege
 11 any facts which could support a punitive damages claim against Sodexo as a
 12 corporate defendant. Accordingly, Plaintiffs' motion should be denied.

13 **VI. LEAVE IS NOT JUSTIFIED UNDER FRCP 15(a)(2)**

14 Pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure,
 15 amendments that are not a matter of course, require the court's leave or the written
 16 consent of the opposing party. Leave to amend should be given freely "when
 17 justice so requires" (Fed. R. Civ. P. 15(a)(2)), but justice would not be served by
 18 the proposed amendments.

19 Leave to amend here should be denied where at most, when stripped of
 20 hyperbole, the evidence involves whether Sodexo had safe policies and procedures
 21 in place and whether the trained cook staff adequately cooked the allegedly
 22 contaminated hamburgers to the required temperature for the required amount of
 23 time – on this one day in an 18-year period of time.

24 **VII. CONCLUSION**

25 This is a case that, *if factually true*, would at most involve ordinary
 26 negligence. Even if it was conduct described as grossly negligent, it is not conduct
 27 that rises to the level of outrage and reprehensibility, extreme indifference,
 28 aggravating circumstances, vile, base, contemptible, miserable, wretched, or

1 loathsome conduct necessary to assert punitive damages. Accordingly, Sodexo
2 respectfully requests Plaintiffs' Motion be denied.

3 DATED: July 31, 2020

Respectfully,

4 KOELLER, NEBEKER, CARLSON &
5 HALUCK, LLP

6
7 By: Robert C. Carlson /s/

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