UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 15-4113 PSG (JEMx)	Date	April 17, 2018
Title	Keith Andrews et al. v. Plains All American Pipeline, L.P. et al.		

Present: The Honorable	Philip S. Gutierrez, United States District Judge

Wendy Hernandez	Not Reported
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings (In Chambers): Order GRANTING Plaintiffs' renewed motion for class certification and DENYING Defendants' motion to strike

Before the Court is a renewed motion for class certification of a real property subclass filed by Plaintiffs Keith Andrews; Tiffani Andrews; Baciu Family LLC; Robert Boydston; Captain Jack's Santa Barbara Tours, LLC; Morgan Castagnola; The Eagle Fleet, LLC; Zachary Frazier; Mike Gandall; Alexandra B. Geremia; Jim Guelker; Jacques Habra; iSurf, LLC; Mark Kirkhart; Mary Kirkhart; Richard Lilygren; Hwa Hong Muh; Ocean Angel IV, LLC; Pacific Rim Fisheries, Inc.; Sarah Rathbone; Community Seafood LLC; Santa Barbara Uni, Inc.; Southern Cal Seafood, Inc.; TracTide Marine Corp.; Wei International Trading Inc.; and Stephen Wilson ("Plaintiffs"). *See* Dkt. # 428 ("*Mot.*"). Defendants Plains All American Pipeline, L.P. and Plains Pipeline, L.P. ("Defendants") oppose the motion, *see* Dkt. # 440 ("*Opp.*"), and Plaintiffs replied, *see* Dkt. # 452 ("*Reply*"). Defendants also filed a motion to strike the declarations of Randall Bell and Igor Mezić. *See* Dkt. # 430 ("*MTS*"). Plaintiffs oppose this motion to strike, *see* Dkt. # 446 ("*MTS Opp.*"), and Defendants replied, *see* Dkt. # 451 ("*MTS Reply*"). The Court finds the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. Having considered the moving papers, the Court **GRANTS** Plaintiffs' renewed motion for class certification and **DENIES** Defendants' motion to strike.

I. Background

A. Factual History

This action stems from the May 2015 Santa Barbara oil spill, an incident that has been extensively recounted in the Court's prior orders in this action.

On May 19, 2015, Defendants' on-shore pipeline ("the Pipeline") ruptured, resulting in a release of at least 140,000 gallons of crude oil that reached to the Pacific Ocean. *Mot.* 1:23–25. Plaintiffs allege that this "thick crude oil, laced with toxic additives," was "[t]ransported south

and east by ocean currents" and "washed up onto coastal beaches during the peak summer beach season." *Mot.* 1:24–2:2; *see also Second Amended Complaint*, Dkt. # 88 ("*SAC*"), ¶¶ 37, 49–50; *Declaration of Igor Mezić*, Dkt. # 300-4 ("*Mezić Decl.*"), ¶ 43; *Declaration of Randall Bell*, Dkt. # 300-3 ("*Bell Decl.*"), ¶¶ 15–17, 32. Plaintiffs argue that "[a]s a result, property owners and lessees were unable to use and enjoy their beachfront properties and private beach easements." *Mot.* 2:2–4.

B. Procedural History

In the aftermath of the oil spill, and as early as June 1, 2015, plaintiffs started to file class action complaints with the Court. On November 9, 2015, the Court consolidated many of the cases into this lead case and administratively closed all other related cases. *See* Dkt. # 40. The operative pleading in this lead case is now the Second Amended Complaint ("SAC"), filed on April 6, 2016. *See SAC*.

On August 22, 2016, Plaintiffs moved to certify four subclasses: (1) the fisher and fish industry subclass, which would include commercial fishers and fish sellers affected by the closure of fish areas in the Pacific Ocean and damage to those fisheries; (2) the property owner subclass, which would include those class members who own or lease ocean-proximity property impacted by the oil from the spill and who, as a result, lost the use and enjoyment of their properties; (3) the oil industry subclass, which would include oil workers and oil supply businesses dependent on the Pipeline for their commercial livelihood; and (4) the business tourism subclass, which would include businesses that lost revenue because of reduced tourism caused by the oil spill. *See* Dkt. # 122, at 2:11–20.

The Court granted in part and denied in part Plaintiffs' first motion for class certification. *See* Dkt. # 257 ("*First Class Order*"). Although it certified the fisher subclass ("the Fisher Subclass"), it determined that "Plaintiffs ha[d] not shown that common questions predominate over uncommon questions for the proposed property owner, oil industry, and tourism subclasses," and concluded that these subclasses did not satisfy Federal Rule of Civil Procedure 23(b)'s predominance requirement. *Id.* at 22, 29.

On July 12, 2017, Plaintiffs again moved to certify an oil industry subclass and a real property subclass. *See* Dkt. # 300. The Court again granted in part and denied in part this motion, certifying the oil industry subclass ("the Oil Industry Subclass") but declining to certify a real property subclass. *See* Dkt. # 419 ("*Second Class Order*"). The Court concluded that the proposed real property subclass, although "more tightly defined" than the "expansive" and "broadly defined" subclass proposed in Plaintiffs' first class certification motion, nevertheless "present[ed] individualized issues that preclude[d] predominance." *Id.* at 17–18. The Court

noted that the properties to be included in the proposed subclass "span[ned] 165 miles of coastline" and "var[ied] substantially with respect to location, proximity to water, accessibility of nearby beaches, construction quality, and other characteristics." *Id.* at 19. Although Plaintiffs claimed that their "updated expert analysis" addressed concerns about individualized inquiries, the Court concluded that this new approach did "not sufficiently distinguish between what might be vastly different properties, which would require individualized causation and injury assessments based on use and other factors." *Id*. This "problem of common evidence [was most] pronounced with regards to properties within one-half mile of the beach," due to the wide range of variation that those properties might feature. *Id.* at 20.

However, the Court also expressed its belief, given that "real property owners impacted by the oil spill would have little success prosecuting their claims individually," that "a viable real property subclass offers the best chance of remedy for impacted property owners." *Id.* at 21. Accordingly, the Court offered the following guidance:

> [T]he Court would likely certify a subclass consisting only of (1) residential beachfront properties on beaches that experienced oiling and (2) residential properties with a private easement to beaches that experienced oiling. As Plaintiffs' counsel observed at oral argument, common questions as to the various causes of action alleged predominate with respect to these two groups. . . . The Court noted above that the value and nature of the beach amenity would be too varied between beachfront properties and inland properties; that issue would be less pronounced if the subclass consisted only of properties that actually touched the shoreline. *Where* the oil was distributed, and *how much* oil invaded the properties, are questions that are subject to common proof, but only if the subclass is restricted to beachfront properties and properties with easements.

Id. (emphases in original).

Plaintiffs now move again to certify a real property subclass ("the Real Property Subclass" or "the Subclass"), defined as follows:

> Residential beachfront properties on a beach and residential properties with a private easement to a beach (collectively "Included Properties") where oil from the 2015 Santa Barbara oil spill washed up, and where the oiling was categorized as Heavy, Moderate or Light, as identified in [an attached exhibit].

Mot. 2:8–13.

II. Legal Standard

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (citing *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). "In order to justify a departure from that rule, a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Dukes*, 564 U.S. at 348–49 (internal quotation marks omitted).

In a motion for class certification, the burden is on the plaintiffs to make a prima facie showing that class certification is appropriate, *see In re N. Dist. of Cal. Dalkon Shield IUD Liab. Litig.*, 693 F.2d 847, 854 (9th Cir. 1982), and the Court must conduct a "rigorous analysis" to determine the merit of plaintiffs' arguments. *General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982). Plaintiffs must be prepared to "prove" that there are "*in fact*" sufficiently numerous parties or that common questions exist, and frequently this will require some "overlap with the merits of the plaintiff's underlying claim." *Dukes*, 564 U.S. at 350 (emphasis in original). Rule 23 does not, however, grant the court license to "engage in free-ranging merits inquiries at the certification stage." *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013). "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.* (citing *Dukes*, 564 U.S. at 351 n. 6).

Federal Rule of Civil Procedure 23 governs the maintenance of class actions in federal court. Rule 23(a) ensures that the named plaintiffs are "appropriate representatives of the class whose claims they wish to litigate." *Dukes*, 564 U.S. at 349. Plaintiffs must satisfy all of Rule 23(a)'s four requirements—numerosity, commonality, typicality, and adequacy—and at least one of the requirements of Rule 23(b). *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979–80 (9th Cir. 2011).

III. Discussion

A. Defendants' Motion to Strike

The Court will first consider Defendants' challenges to Plaintiffs' experts. *See In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 548 (C.D. Cal. 2014). Defendants move to strike the expert opinions of Igor Mezić and Randall Bell. *See generally MTS.*

Federal Rule of Evidence 702 governs the admissibility of expert opinion. *See* Fed. R. Evid. 702(b)–(d). Expert opinion is admissible if it is based on sufficient facts or data, if it is the

product of reliable principles and methods, and if the expert reasonably applies the principles and methods to the facts of the case. *See id.*; *see also City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1043 (9th Cir. 2014). The Rule 702 factors are broadly summarized as requiring "reliability, relevancy, and assistance to the trier of fact." *In re ConAgra Foods*, 302 F.R.D. at 549 (citing *Sementilli v. Trinidad Corp.*, 155 F.3d 1130, 1134 (9th Cir. 1998)). The expert opinion must involve scientific or technical knowledge. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993).

In conducting this preliminary assessment, the trial court is vested with broad discretion. *See United States v. Espinosa*, 827 F.2d 604, 611 (9th Cir. 1987) ("The decision to admit expert testimony is committed to the discretion of the district court and will not be disturbed unless manifestly erroneous."). "The trial court must act as a 'gatekeeper' to exclude junk science that does not meet Federal Rule of Evidence 702's reliability standards by making a preliminary determination that the expert's testimony is reliable" and relevant. *Ellis*, 657 F.3d at 982. Moreover, at the class certification stage, "it is not enough for the district court to determine the admissibility of the expert testimony at issue; rather, the Court must be mindful to weigh the persuasiveness as well." *See P.P. v. Compton Unified Sch. Dist.*, No. CV 15-3726-MWF (PLAx), 2015 WL 5752770, at *7 (C.D. Cal. Sept. 29, 2015). In the case of Plaintiffs' experts, it is Plaintiffs' burden to prove by a preponderance of the evidence that the expert's testimony meets these admissibility requirements. *See Lust By & Through Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996).

i. Igor Mezić

Igor Mezić, Ph.D., is the co-founder and Chief Technology Advisor of AIMdyn, Inc. and a professor at the University of California, Santa Barbara, whose research and work involve fluid flow processes. *See Mezić Decl.* ¶¶ 1, 11. He describes the assignment he received from Plaintiffs as follows: "to determine, to a reasonable degree of scientific certainty, where the oil from the [the Pipeline] spill flowed in the ocean, including: (1) what geographic area it covered; (2) where it became submerged; (3) where it washed ashore; and (4) the extent to which submerged oil reemerged onto the surface areas of the ocean." *Id.* ¶ 3. Mezić developed a methodology in which data derived from the spill was used to first determine the initial distribution of oil in near-shore regions; using other data, he determined where and when oil became submerged, and then established the actual path the oil traveled through the ocean. *See id.* ¶ 33. Using this approach, Mezić claims that he "was able to provide an hour-by-hour analysis, allowing [him] to determine to a reasonable degree of scientific certainty where (and when) the oil travelled, became submerged, and washed ashore, and the extent to which unbeached oil has reappeared on the shoreline." *Id.* ¶ 34. Mezić verified his analysis with other data on where oil was identified after the spill, including National Oceanic and Atmospheric

Administration flyover data and Shoreline Cleanup Assessment Technique ("SCAT") data. *See id.* ¶ 36.[1] Because the Real Property Subclass is restricted to properties where oiling occurred, Mezić's conclusions are foundational.

Defendants challenge Mezić's declaration and findings with two primary arguments: one, that he "has not determined which properties in the proposed class oil reached," instead promising to conduct that work in the future; and two, that his model is unreliable because it shows "oil reaching vast stretches of coastline where ground observations, aerial overflights and fingerprint results show no such oil." *MTS* 1:13–28.

As a threshold matter, the Court notes that Mezić previously offered testimony relating to an earlier iteration of his work in this case. *See* Dkt. # 128; *First Class Order* at 8. Defendants moved to strike Mezić's testimony at that time, claiming it was "unreliable, incomplete, and unqualified"; that his model "fail[ed] to account for oil that was cleaned up or removed from the shoreline before it reached the ocean"; and that he was "not qualified to implement the complex analysis needed to determine exactly where the oil traveled." *First Class Order* at 8. The Court rejected these arguments, concluding that "Mezić's methodology meets the *Daubert* standard" and that "given the information before the Court about Mezić's methodology and his qualifications and past experiences, the Court [could not] say that Mezić's declaration [was] unreliable or that his methodology propose[d] an unreasonable application of the facts available in this case." *Id.* at 9. It is true, as Defendants emphasize, that the Court did not previously approve the current iteration of Mezić's work. *See MTS Reply* 1:2–24. However, the Court's prior reasoning is still valid, and it concludes once again that Mezić's declaration satisfies the requirements imposed upon it at this stage of litigation.

Mezić's model is detailed and, as this Court previously noted, was created by an experienced scientist whose "methodology [has] proven acceptable to the scientific community." *First Class Order* at 9; *see also Mezić Decl.* ¶¶ 7–12, Ex. A. The model maps where oil from the Pipeline traveled after entering the ocean, taking into account wind, currents, and other relevant processes. *See Mezić Decl.* ¶ 33. The model also applied an algorithm to determine where oil washed up onto the shore. *See id.* ¶¶ 47, 51. Mezić has explained that, during the liability phase of trial, he will input into his model the locations of the properties included in the Real Property Subclass; once these properties are inputted, he will be able to identify the quantity of oil that washed up on individual parcels. *See Declaration of Leila J. Noël*, Dkt. # 447, ¶ 4, Ex. C

[1] The SCAT program, Mezić explains, involve "[m]ethods for conducting shoreline assessments and incorporating the results into the decision-making process for shoreline cleanup and subsequent analysis of the extent of oil spills." *Id.* ¶ 37. It is based on human observations and "has become an integral component of spill response," including the responses to the *Exxon Valdez* and Deepwater Horizon spills. *Id.* ¶¶ 37–39.

(Deposition of Igor Mezić) 14:15–22, 15:13–17 ("*Mezić Dep.*"). He will use available tide data and SCAT observations to determine the concentration and duration of oiling at or above the mean high tide line. *See Mezić Dep.* 18:13–25.

Given the analysis Mezić has already performed, the detailed explanations of his future calculations, and his qualifications and experiences, the Court concludes once again that it cannot agree with Defendants that his declaration is unreliable or that his methodology is unreasonable.

Much of Defendants' criticism stems from the fact that portions of Mezić's analysis have yet to be completed. However, it is acceptable at this stage to rely on a study that is subject to future refinement and development. *See Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 843 (9th Cir. 2001) (finding a district court's exclusion of an ongoing, unfinished study was "an abuse of discretion" and "clear error"); *City of Pomona*, 750 F.3d at 1044 (quoting *Daubert*, 509 U.S. at 590) ("[S]cientific methods that are subject to 'further testing and refinement' may be generally accepted and sufficiently reliable. There are 'no certainties in science.'"); *In re ConAgra Foods*, 302 F.R.D. at 552–53 (contrasting an expert who "provides no damages model at all" with one who "present[ed] a structure or framework [that could be used] to analyze the actual" data) (alterations in original); *cf. Pedroza v. PetSmart, Inc.*, No. ED CV 11-298-GHK (DTBx), 2013 WL 1490667, at *3 (C.D. Cal. Jan. 28, 2013) (striking declaration where the expert "fail[ed] to provide any specific information about the methodology of his proposed survey, much less provide sufficient information for [the court] to evaluate the methodology's soundness"). Here, Mezić has supplied his model and described in sufficient detail the future work that will be done. That is sufficient.

Defendants also challenge Mezić's results, suggesting that they conflict with real-world evidence. *See MTS* 7:17–10:4. This, however, questions the weight of Mezić's testimony, not the soundness of his methodology. Whether Mezić's results are correct, or whether Defendants' experts provide more accurate models, is an issue for trial, not on a motion to strike at the class certification stage. *See City of Pomona*, 750 F.3d at 1049 (citing *United States v. Sandoval-Mendoza*, 472 F.3d 645, 654 (9th Cir. 2006)) ("Where two credible experts disagree, it is the job of the fact finder, not the trial court, to determine which source is more credible and reliable."); *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969–70 (9th Cir. 2013) ("Basically, the judge is supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions merely because they are impeachable. The district court is not tasked with deciding whether the expert is right or wrong, just whether his testimony has substance such that it would be helpful to a jury."); *In re Montage Tech. Grp. Ltd. Sec. Litig.*, No. 14-cv-00722-SI, 2016 WL 1598666, at *9 (N.D. Cal. Apr. 21, 2016) (quoting *Daubert*, 509 U.S. at 595) ("The Court is instructed to focus 'on the principles and methodology' employed by the expert and 'not

the conclusions they generate.'"); *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 495 (C.D. Cal. 2012) (concluding that "at the class certification stage," the *Daubert* analysis is limited to determining "whether an expert's opinion was sufficiently reliable to admit for the purpose of proving or disproving Rule 23 criteria, such as commonality and predominance").

The Court will therefore consider Mezić's declaration for purposes of Plaintiffs' class certification motion and so **DENIES** Defendants' motion to strike Mezić's declaration.

ii. Randall Bell

Randall Bell, Ph.D., is a real estate economist and licensed appraiser who serves as the principal and CEO of Landmark Research Group, LLC, a consulting firm that specializes in real estate damage economics. *See Bell Decl.* ¶¶ 1, 3–4. He was tasked with investigating "how damages to the owners and lessees of residential properties impacted by the [the Pipeline] spill can be calculated, and whether such damages can be calculated on a subclass-wide basis through, for example, mass appraisal techniques." *Id.* ¶ 13. He concluded that the "oil spill resulted in an effective loss of the amenities for which residential property owners and lessees pay a premium to live on or near the ocean." *Id.* ¶¶ 15, 17–18, 51–56.

The Court first notes that it previously approved of Bell's mass appraisal methodology. *See First Class Order* at 13 (declining to "exclude Bell as an expert given his qualifications and the wide acceptance of his mass appraisal methodology"); *see also Turner v. Murphy Oil USA, Inc.*, No. Civ.A. 05-4206, 2006 WL 91364, at *5 (E.D. La. Jan. 12, 2006) (noting that mass appraisal is a "generally-accepted methodology" in similar case). And as Plaintiffs note, Bell "has refined his analysis in the intervening eighteen months by identifying specific parcels affected by [Defendants'] oil, comparing his results to industry literature and media reports, and confirming and cross checking through real world analysis." *MTS Opp.* 21:14–17.

Much of Defendants' motion to strike Bell's testimony focuses on his survey data. *See MTS* 19:1–24:3. Bell conducted this survey "to evaluate the amount of oiling before users would stop going to the beach." *Bell Decl.* ¶¶ 43–47, Ex. 13. The Court shares Defendants' concerns with and skepticism towards Bell's survey; in particular, the stylized footprint graphics he used to represent beach oiling, which might have misled beachgoers as to how an oiled beach would actually appear. *See MTS* 21:6–22:24; *Bell Decl.*, Ex. 13. However, the Court does not consequently conclude that Bell's testimony should be stricken. The survey data is but one facet of Bell's mass appraisal methodology; it was intended to be a cross check, not the basis for his conclusions. *See Declaration of Juli Farris*, Dkt. # 401, ¶ 2, Ex. A (Deposition of Randall Bell) 248:22–249:3. Should Defendants choose to challenge this survey data during trial, they are free to do so. However, whether or not the results are ultimately persuasive is a question of weight

rather than admissibility, and need not be resolved in order to admit Bell's declaration. *See In re ConAgra Foods*, 302 F.R.D. at 552 (quoting *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1188 (9th Cir. 2002)).

In addition, Defendants contend that Bell's testimony should be stricken because he does not measure a legally compensable form of damages. *See MTS* 24:4–25:20. This is, however, a merits question that similarly need not be considered at this time. *See Amgen*, 568 U.S. at 466.

In short, Defendants have not provided persuasive arguments that change the Court's previous conclusion that Bell is a qualified expert and that his mass appraisal methodology is sufficiently reliable for purposes of admissibility. Therefore, the Court also **DENIES** Defendants' motion to strike Bell's declaration.

B. Plaintiffs' Renewed Motion for Class Certification

Plaintiffs move to certify the Real Property Subclass under Rule 23(b)(3). *See Mot.* 2:6–13. In addition to meeting the requirements of Rule 23(a), Rule 23(b)(3) also requires the Court to find that (1) "questions of law or fact common to class members predominate over any questions affecting only individual members" and (2) "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3) (referring to the dual requirements as "predominance" and "superiority"). Rule 23(b)(3) specifically mandates that the Court consider "the likely difficulties in managing a class action." *Briseno v. ConAgra Foods*, 844 F.3d 1121, 1126 (9th Cir. 2017). The Court will first consider the requirements of Rule 23(a) before examining predominance and superiority.

i. Rule 23(a) Factors

The Court will consider each of the four requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy—in turn.

a. Numerosity

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). There is no fixed number which satisfies the numerosity requirement; it "requires examination of the specific facts of each case and imposes no absolute limitations." *General Tel. Co. of Nw., Inc. v. Equal Emp't Opportunity Comm'n*, 446 U.S. 318, 330 (1980). In general, however, "courts find the numerosity requirement satisfied when a class includes at least 40 members." *Rannis v. Recchia*, 380 F. App'x 646, 651 (9th Cir. 2010).

Plaintiffs estimate that the Subclass "includes thousands of coastal real private property owners and lessees." *Mot.* 3:3–5; *see also Bell Decl.* ¶ 48. Numerosity is therefore easily satisfied.

b. Commonality

Under Rule 23(a)(2), Plaintiffs must show that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This means that the class members' claims must "depend on a common contention." *Dukes*, 564 U.S. at 350. "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation." *Id*. "[E]ven a single [common] question will do." *Id.* at 359 (internal quotation marks omitted). Thus, Rule 23(a)(2) requires not just a common question, but one that is "capable of classwide resolution." *Alcantar v. Hobart Serv.*, 800 F.3d 1047, 1052 (9th Cir. 2015).

Plaintiffs note that "[t]he key common liability questions for this proposed Subclass are the same as those raised by the certified Fisher and Oil Industry Subclasses: whether [Defendants] acted negligently, recklessly, and/or maliciously with regard to the design, inspection, repair, and/or maintenance of the Pipeline." *Mot.* 3:9–14. The Court agrees with these comparisons and reasserts its conclusion that class litigation will produce at least one common answer. *See First Class Order* at 25; *Second Class Order* at 7–8. The commonality requirement is therefore satisfied.

c. Typicality

Rule 23(a)(3) requires that the named Plaintiffs' claims be typical of the claims of the class. *See* Fed. R. Civ. P. 23(a)(3). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). The danger that this requirement is meant to guard against is whether "absent class members will suffer if their representative is preoccupied with [claims or defenses] unique to it." *Ellis*, 657 F.3d at 984. To meet the typicality requirement, plaintiffs must therefore establish that other class members have the same or similar injury as them; that the action is based on conduct that is not unique to them as the named plaintiffs; and that other class members have been injured by the same course of conduct. *See id*.

The Real Property Subclass consists of owners and lessees of private residential property located on, or with direct deeded access to, beaches that experienced oiling. All of the named

Plaintiffs in the Subclass—Baciu Family LLC, Alexandra Geremia, Jacques Habra, and Mark and Mary Kirkhart—own or rented residential property that is either on or has deeded access to the affected coastline. *See Bell Decl.* ¶ 33; *Declaration of Ronald MacLeod*, Dkt. # 124-15, ¶ 1; *Declaration of Alexandra B. Geremia*, Dkt. # 124-8, ¶ 1; *Declaration of Jacques Habra*, Dkt. # 124-11, ¶ 1; *Declaration of Mary Kirkhart*, Dkt. # 124-13, ¶ 1. Accordingly, the Court agrees that the named Plaintiffs' "injuries and damages are typical of the Subclass," *Mot.* 4:1, and so typicality is satisfied.

d. Adequacy

Rule 23(a)(4) requires Plaintiffs to show that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Representation is adequate when the class representatives do not have any conflicts of interest with other class members, and the Court is confident that the representative plaintiffs will prosecute the action "vigorously on behalf of the class." *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1031 (9th Cir. 2012). A district court should evaluate whether the class representatives have a sufficient stake in the outcome of the litigation, and whether the class representatives have interests antagonistic to the unnamed class members. *See Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 390 (9th Cir. 1992). In addition, the district court should inquire into the zeal and competence of class representatives' counsel. *See id*.

Plaintiffs assert that "the proposed Subclass representatives . . . ha[ve] volunteered to represent the Subclass and [are] committed to pursuing this litigation." *Mot.* 4:9–11. The Court does not see, and Defendants do not suggest, any reason to doubt this contention, or to find conflicts between the named Plaintiffs or between them and other members of the Subclass. In addition, the Court has already appointed Class Counsel to represent other certified subclasses in this action. *See First Class Order* at 21; *Second Class Order* at 9. Adequacy is thus satisfied.

ii. Predominance

Because the Real Property Subclass satisfies the four requirements of Rule 23(a), the Court will now move on to the predominance and superiority requirements of Rule 23(b)(3).

The Rule 23(b)(3) predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). "Predominance is a qualitative rather than a quantitative concept. It is not determined simply by counting noses: that is, determining whether there are more common issues or more individual issues, regardless of relative importance." *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014). The predominance inquiry is "far more demanding" than the

commonality requirement of Rule 23(a). *See Amchem*, 521 U.S. at 623–24. Although a court may compare the number of uncommon questions to the number of common ones as a proxy for predominance, the court must ultimately assess the significance of the uncommon questions in the overarching dispute and the ability to manage a trial of common claims. *See id.* "Implicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).

Plaintiffs argue that predominance is satisfied for three primary reasons: because liability is a common inquiry, *see Mot.* 5:8–25; because injury is a predominantly common inquiry, *see id.* 5:24–6:21; and because damages are susceptible to common proof, *see id.* 6:22–7:15.

a. Liability

In previously denying certification of a real property subclass, the Court nevertheless determined that "[l]iability as to each cause of action is [] a Subclass-wide and not an individualized issue, or at least is ascertainable as to large subsets of the Subclass." *Second Class Order* at 18. Defendants now dispute this conclusion for two reasons.

First, Defendants suggest that, contrary to Plaintiffs' assertion that they possess a model to show "where the oil from [Defendants'] Pipeline went, and to what degree, along the California coastline," *Mot.* 5:15–16, Mezić's model cannot in fact accomplish this goal. *See Opp.* 4:19–5:5. However, as discussed in Part III.A.i above, the Court is satisfied for purposes of certification that Mezić's methodology is reliable, and he has explained the means by which he will refine his model to show which properties experienced oiling. Should Defendants choose to challenge the validity of Plaintiffs' evidence at trial, they are free to do so. But those objections as to the weight and probativeness of the model and the evidence it produces do not change the Court's previous conclusion: "*Where* the oil was distributed, and *how much* oil invaded the properties, are questions that are subject to common proof." *Second Class Order* at 21 (emphases in original). As Plaintiffs note, "to the extent [Defendants wish] to present oiling evidence to dispute a particular class member's claim for damages, it can present this evidence in the ordinary course at the damages phase." *Reply* 3:13–16. There is, consequently, no barrier to Defendants' ability to challenge liability as to individual class members—they will have the opportunity to introduce evidence not only contesting Mezić's model, but also challenging whether oiling occurred on individual properties, which ensures that Defendants are not "deprive[d] . . . of [their] ability to litigate individual defenses." *Tyson Foods, Inc. v.*

Bouaphakeo, 136 S. Ct. 1036, 1047 (2016). Establishing liability is thus a common inquiry subject to subclass-wide proof.[2]

Second, as Defendants note, the predominance inquiry implicates each of Plaintiffs' claims. *See Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011) ("Considering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action."). Although this analysis "will frequently entail overlap with the merits of the plaintiff's underlying claim," *Comcast Corp. v. Behrend*, 569 U.S. 27, 33–34 (2013) (internal quotation marks omitted), the Court will not "engage in free-ranging merits inquiries at the certification stage." *Amgen*, 568 U.S. at 466. Defendants contend that "[f]or each of their claims Plaintiffs have failed to meet their burden of showing that essential elements can be shown by common proof." *Opp.* 10:17–20. The Court disagrees with Defendants' assertion.

For example, because a claim for trespass requires the plaintiff to show physical intrusion onto her property, *see Wilson v. Interlake Steel Co.*, 32 Cal. 3d 229, 232–33 (1982), Defendants' arguments as to this claim mirror those already addressed in this order: that Mezić's model cannot demonstrate which properties were invaded by oil, and that individualized issues of invasion therefore preclude common proof. *See Opp.* 10:21–13:8. Accordingly, for the reasons discussed above, this argument is unpersuasive. The Court is satisfied that common issues predominate as to the trespass claim. Mezić's qualifications and methodology are acceptable; he has demonstrated the means through which his model will show which properties experienced oiling, and Defendants will have the opportunity to counter the results with their own data and findings. As the Court previously concluded, "[I]f oil invaded these properties and easements, then subclass members would have viable trespass" claims. *Second Class Order* at 21. Because this required invasion can be demonstrated with common proof in the form of Mezić's

[2] In arguing that individualized liability inquiries preclude predominance, Defendants primarily rely on a series of employment cases. *See, e.g.*, *Wal-Mart Stores*, 564 U.S. at 367; *Myers v. Hertz Corp.*, 624 F.3d 537, 551 (2d Cir. 2010); *Senne v. Kansas City Royals Baseball Corp.*, 315 F.R.D. 523, 583 (N.D. Cal. 2016). However, at least one analogous oil spill case has questioned whether the analysis in an employment case like *Wal-Mart Stores* is applicable to a case like this. *See In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mex., on Apr. 20, 2010*, 910 F. Supp. 2d 891, 923 (E.D. La. 2012) ("In contrast to [*Wal-Mart Stores*], in which the Court held that the cause of plaintiffs' injuries varied with respect to the manager to whom each was assigned, and how each manager interacted with the plaintiff in question, here each class member traces his injury directly to the same genesis—a single well blowout stemming from the same operative causes.").

model—subject, of course, to challenges from Defendants—predominance is satisfied as to Plaintiffs' trespass claim.[3]

Defendants' challenge to Plaintiffs' claim under the Oil Spill Prevention and Response Act ("OSPRA") centers on the degree of injury required to state a viable cause of action. *See Opp.* 13:21–14:27. However, once again, this argument "actually demonstrates why class treatment is *appropriate* as to liability," *Second Class Order* at 18 (emphasis in original), because it constitutes a common legal question that will apply across the Subclass. The merits of Plaintiffs' position need not be resolved at this stage; it is sufficient that this legal question predominates as to the Subclass and is amenable to a common answer.

Likewise, Defendants' arguments as to Plaintiffs' ultrahazardous liability, private nuisance, nuisance per se, public nuisance, and negligence claims, *see Opp.* 15:1–19:25, also demonstrate why subclass-wide treatment is appropriate. For example, whether or not oiling of the sort experienced by the Subclass members is the type of harm that an ultrahazardous activity would be expected to produce is a common legal question. It does not, as Defendants assert, "require[] a property-specific analysis." *Id.* 16:12–14. Similarly, whether oiling itself is actionable, whether loss of access to a public beach is actionable, whether area-wide loss of property value is actionable, and other issues relating to Plaintiffs' nuisance claims are legal questions that are subject to common, subclass-wide resolution. Lastly, as to the negligence claim, Defendants argue that "[t]o the extent Plaintiffs are seeking to recover economic damages uncoupled from physical damage, the economic loss rule would bar the claim unless they can prove a special relationship." *Id.* 18:22–24. This is, again, a merits question that is amenable to a common legal answer and does not require individualized inquiries.

In short, common legal questions as to liability predominate across the Real Property Subclass.

b. Injury and Damages

In terms of injury and damages, Defendants primarily contend that variation precludes predominance:

[T]hese properties, spanning 165 miles of coastline, vary substantially with respect

[3] Defendants also suggest that easement holders cannot maintain a cause of action for trespass. *See Opp.* 12:22–13:8. Regardless of the validity of this proposition, this is the sort of common legal question that applies to a substantial portion of the Subclass, and so would not defeat predominance.

> to location, proximity to the water, accessibility of nearby beaches, construction quality, and other characteristics not captured in [Plaintiffs'] data. . . .
>
> [B]each amenities may have many components, including not only the ability to walk on the beach, but also to see it and the ocean, to smell the ocean, to hear its sounds, and to feel the ocean breeze. The premium paid to live on or near the beach . . . may vary depending on these various attributes.

Opp. 20:5–20 (citations omitted). However, the Ninth Circuit has repeatedly held that variability in injury and damages of the sort implicated by these dissimilarities *need not* preclude class certification. *See, e.g.*, *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1136 (9th Cir. 2016) ("[E]ven a well-defined class may inevitably contain some individuals who have suffered no harm as a result of a defendant's unlawful conduct."); *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1155 (9th Cir. 2016) (citing *Tyson Foods*, 136 S. Ct. at 1046) ("The [Supreme] Court held that class certification was appropriate even though class members might have to prove liability *and damages* individually.") (emphasis in original); *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1168 (9th Cir. 2014) ("So long as the plaintiffs were harmed by the same conduct, disparities in how or by how much they were harmed [do] not defeat class certification.").

Indeed, other courts have regularly utilized an individual damages phase for similar property classes where, as here, common liability questions predominate. *See, e.g.*, *Olden v. LaFarge Corp.*, 383 F.3d 495, 496, 508 (6th Cir. 2004) (affirming certification of a class of 3,600 owners of polluted properties, because although "individual *damage* determinations might be necessary, [] the plaintiffs [] raised common allegations which would likely allow the court to determine liability (including causation) for the class as a whole") (emphasis in original); *Bell v. DuPont Dow Elastomers, LLC*, 640 F. Supp. 2d 890, 895 (W.D. Ky. 2009) (finding predominance where "some class members disagree about the significance of the discharges each has experienced" because "[t]he environmental impact from the odors, particulate and air contamination affected Plaintiffs and their properties in similar ways under the law"); *Collins v. Olin Corp.*, 248 F.R.D. 95, 105 (D. Conn. 2008) ("[C]ourts have repeatedly stated that differences in the amount and recoverability of damages do not defeat predominance."). As Plaintiffs note, the fact that there is diversity of property types in the Subclass "is true of most every property class certified," and "relevant variations within the Subclass are easily handled through ordinary trial procedures." *Reply* 9:14–15, 9:26–10:6.

In summation, variations in the injuries and damages experienced by Subclass members need not defeat predominance and preclude certification. The Court concludes that common

questions of law and fact predominate as to the Real Property Subclass despite these individualized disparities. The first requirement of Rule 23(b)(3) is therefore satisfied.

iii. Superiority

The "superiority" requirement is the second requirement for certification under Rule 23(b)(3). To demonstrate superiority, Plaintiffs must show that a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." *Briseno*, 844 F.3d at 1127. The superiority analysis "specifically mandates that courts consider the likely difficulties in managing a class action." *Id.* (internal quotation marks omitted). It requires the Court to consider four non-exhaustive factors.

a. Individual Control

The first factor is the interest of each member in "individually controlling the prosecution or defense of separate actions." Fed. R. Civ. P. 23(b)(3)(A). Where damages suffered by each putative class member are not large, this factor weighs in favor of certifying a class action. *See Zinser v. Accuflix Research Inst., Inc.*, 253 F.3d 1180, 1190–91 (9th Cir. 2001).

Previously, in certifying the Fisher Subclass, the Court noted that "the cost of pursuing the claims on an individual basis and the limited benefit, for at least the fisheries subclass, counsels in favor of proceeding as a group." *First Class Order* at 23; *see also Second Class Order* at 15–16. This same consideration motivates the Court here. As Plaintiffs note, the Real Property Subclass members "would have to incur enormous expense to litigate their individual claims in this complex disaster action . . . including hiring liability and damages experts." *Mot.* 7:27–8:1. This reality, in addition to the docket-clogging effect of individualized litigation, favors certifying a class action. *See In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mex., on Apr. 20, 2010*, 910 F. Supp. 2d 891, 929 (E.D. La. 2012) ("Litigation of this type is extraordinarily complex and expensive, and the class action device was designed to allow individuals with comparatively modest claims to band together to bring such claims."); *Wehner v. Syntex Corp.*, 117 F.R.D. 641, 645 (N.D. Cal. 1987) ("Significant judicial economies are served by trying the common issues [of contamination].").

b. Extent of Pending Litigation

The second factor is "the extent and nature of any litigation concerning the controversy already begun by or against class members." Fed. R. Civ. P. 23(b)(3)(B). If the Court finds that several other actions are already pending and there is a risk of inconsistent adjudications, "a

class action may not be appropriate [] unless the other suits can be enjoined." *See Zinser*, 253 F.3d at 1191.

Although the Court is currently presiding over several other lawsuits related to the Santa Barbara oil spill, Plaintiffs note, and Defendants do not dispute, that "[n]one of the other pending Oil Spill lawsuits in federal court includes members of the Real Property Subclass." *Mot.* 8:12–14.[4] This factor thus weights in favor of class certification.

c. Desirability of Concentration

The third factor is "the desirability or undesirability of concentrating the litigation of the claims in the particular forum." Fed. R. Civ. P. 23(b)(3)(C).

As in its prior oppositions to class certification, Defendants assert that other claims processes might offer superior remedial procedures in this case. *See Opp.* 2 n. 1; *First Class Order* at 23–24; *Second Class Order* at 16. The Court readopts the conclusion it reached in its previous certification orders: "In discrediting the alternative methods [put] forward, Plaintiffs have shown the propriety of proceeding with this litigation in this particular forum." *First Class Order* at 24; *Second Class Order* at 16.

d. Difficulties of Managing a Class Action

The fourth factor is "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(D). "[W]hen the complexities of class action treatment outweigh the benefits of considering common issues in one trial, class action treatment is not the 'superior' method of adjudication." *Zinser*, 253 F.3d at 1193.

As the Court concluded above, common legal questions as to liability predominate among members of the Real Property Subclass. Although the determination of damages may require a separate phase of trial or other claims procedure, the Ninth Circuit has recognized, as stated, that the individualized calculation of damages alone is not enough to defeat class certification. *See Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 513–14 (9th Cir. 2013) ("In this circuit . . . damage calculations alone cannot defeat certification."). Therefore, this fourth factor also favors certification, and the superiority requirement of Rule 23(b)(3) is thus satisfied.

[4] Plaintiffs note the potential exception of *Grey Fox, LLC v. Plains All American Pipeline, L.P.*, CV 16-3157 PSG (JEMx) (C.D. Cal.), "whose class members are owners of the properties through which the Pipeline runs, who allege claims related to easement contracts that the proposed Subclass do not have." *Mot.* 8:14–17. Although the Court acknowledges some potential overlap, this fact does not change its conclusion as to this factor.

IV. Conclusion

Because the Court concludes that the Real Property Subclass satisfies the requirements of Rule 23(a) and the predominance and superiority requirements of Rule 23(b)(3), the Court **GRANTS** Plaintiffs' renewed motion for class certification of the Real Property Subclass. The Court also **DENIES** Defendants' motion to strike the declarations of Igor Mezić and Randall Bell.

The Court **CERTIFIES** the following Real Property Subclass pursuant to Rule 23(b)(3):

> Residential beachfront properties on a beach and residential properties with a private easement to a beach (collectively "Included Properties") where oil from the 2015 Santa Barbara oil spill washed up, and where the oiling was categorized as Heavy, Moderate or Light, as identified in Exhibit A to Plaintiffs' renewed motion.

Excluded from the proposed Subclass are: (1) Defendants, any entity or division in which Defendants have a controlling interest, and their legal representatives, officers, directors, employees, assigns and successors; and (2) the judge to whom this case is assigned, the judge's staff, and any member of the judge's immediate family.

Plaintiffs Baciu Family LLC, Alexandra Geremia, Jacques Habra, and Mark and Mary Kirkhart are **APPOINTED** to serve as Subclass Representatives. Lieff Cabraser Heimann & Bernstein, LLP, Keller Rohrback L.L.P., Cappello & Noël, and Audet & Partners are **APPOINTED** to serve as Class Counsel.[5]

Within thirty days of entry of this order, Class Counsel shall submit a Notice Plan and proposed form of notice to be disseminated to class members in accordance with Rule 23(c)(2)(B) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

[5] Under Rule 23(g) of the Federal Rules of Civil Procedure, a district court must appoint class counsel at the time the class is certified, unless otherwise provided by statute. *See* Fed. R. Civ. P. 23(g)(1). The class counsel must fairly and adequately represent the interests of the class, and the court must review the counsel's work in investigating claims, experience in handling class action litigation, and the resources counsel will commit to representing the class. *See id.* The Court previously determined that Class Counsel in this case satisfies Rule 23(g)'s requirements, *see First Class Order* at 28, and readopts that position here.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 15-4113 PSG (JEMx)	Date	April 17, 2018
Title	Keith Andrews et al. v. Plains All American Pipeline, L.P. et al.		