#300/390/412

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 15-4113 PSG (JEMx)	Date	February 9, 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 IN PART and DENYING IN PART Plaintiffs' renewed motion for class certification and DENYING IN PART and finding RENDERED MOOT IN PART Defendants' motion to strike**

Before the Court is a renewed motion for class certification 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. # 300 ("*Mot.*"). Defendants Plains All American Pipeline, L.P. and Plains Pipeline, L.P. ("Defendants") oppose the motion, *see* Dkt. # 389 ("*Opp.*"), and Plaintiffs replied, *see* Dkt. # 396 ("*Reply*"). Defendants also filed a motion to strike the declarations of Randall Bell, Igor Mezić, and Peter Rupert. *See* Dkt. # 379 ("*MTS*"). Plaintiffs oppose this motion to strike, *see* Dkt. # 402 ("*MTS Opp.*"), and Defendants replied, *see* Dkt. # 408 ("*MTS Reply*"). A hearing in these matters was held on February 5, 2018. Having considered the moving papers and oral arguments, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiffs' renewed motion for class certification and **DENIES IN PART** and finds **RENDERED MOOT IN PART** 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.

Defendants operated Lines 901 and 903 (together, "the Pipeline"), which transported crude oil extracted from seven off-shore platforms and processed at three on-shore facilities along the Santa Barbara coast. *Mot.* 2:9–11; *Declaration of Robert J. Nelson*, Dkt. # 300-2 ("*Nelson Decl.*"), Ex. 1 at 3 (U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration ("PHMSA") Failure Investigation Report) ("*PHMSA Report*"). Line 901 transported oil from ExxonMobil's ("Exxon") on-shore facility at Las Flores, which received its oil from Exxon's three off-shore platforms, called Heritage, Harmony and Hondo, as well as oil transported from Venoco's off-shore platform, Holly. *Mot.* 2:18–21; *PHMSA Report* at 3. Line 903 carried Line 901's oil in addition to oil from Freeport-McMoRan Inc.'s ("Freeport") three oil platforms at Point Arguello, called Hidalgo, Harvest, and Hermosa. *Mot.* 2:22–25; *Nelson Decl.*, Ex. 2. These operations created an oil industry in Santa Barbara that, in Plaintiffs' words, "was stable and provided solid income for hardworking families." *Mot.* 3:15–16. It became an "important source of high wage jobs," resulting in an average industry salary of roughly $177,200 in 2013. *Id.* 3:23–26; *see also Declaration of Peter Rupert*, Dkt. # 351-1 ("*Rupert Decl.*"), ¶ 21.

On May 19, 2015, the Pipeline ruptured, resulting in a release of crude oil that reached to the Pacific Ocean. *Mot.* 4:5–6. Plaintiffs allege that "heavy crude oil filled with toxic additives traveled from the on-shore Pipeline to the shore of a protected state beach, where the toxic oil mixture flowed unimpeded into the ocean." *Mot.* 5:10–13; *see also Second Amended Complaint*, Dkt. # 88 ("*SAC*"), ¶¶ 37, 49. Ocean currents deposited the oil plume along the coast, including area beaches and oceanfront properties. *Mot.* 5:14–18; *see also Declaration of Igor Mezić*, Dkt. # 300-4 ("*Mezić Decl.*"), ¶ 43; *Declaration of Randall Bell*, Dkt. # 300-3 ("*Bell Decl.*"), ¶ 16. Plaintiffs argue that "[a]s a result of the oil spill, residents within a half mile of the soiled beaches lost their use and enjoyment of the beach amenity, for which they paid a premium." *Mot.* 5:25–27 (citing *Bell Decl.* ¶ 57).

Although the Santa Barbara oil industry produced approximately 1.4 million barrels of oil in 2014, by 2016, after the spill, the number of barrels produced off-shore plunged to zero. *Mot.* 3:20–23; *Rupert Decl.* ¶ 21. As a result of the spill, the Pipeline shut down and remains dormant today. *Mot.* 4:9–16; *Nelson Decl.*, Ex. 3 at 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, *Andrews et al. v. Plains All American Pipeline, L.P. et al.*, 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*.

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On August 22, 2016, Plaintiffs moved to certify four subclasses: (1) the fisher and fish industry subclass, which included 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 included 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 included oil workers and oil supply businesses dependent on the Pipeline for their commercial livelihood; and (4) the business tourism subclass, which included businesses that lost revenue because of reduced tourism caused by the oil spill. *See* Dkt. # 122, at 2:11–20.

The Court ultimately granted in part and denied in part Plaintiffs' motion for class certification. *See* Dkt. # 257 ("*Class Cert. Order*"). Although it certified the fisher and fish industry 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.

Plaintiffs now move the Court to certify two subclasses under Rule 23(b)(3):

> Oil Industry Subclass: This subclass includes "[i]ndividuals and entities who were employed, or contracted, to work on or to provide supplies, personnel, or services for the operations of the off-shore oil drilling platforms, Hidalgo, Harvest, Hermosa, Heritage, Harmony, Hondo, and/or Holly, off the Santa Barbara County coast, or the on-shore processing facilities at Las Flores/POPCO, Gaviota, and/or Venoco/Ellwood, as of May 19, 2015." *Mot.* 6:10–15.
>
> Real Property Subclass: This subclass includes "(1) residential beachfront properties on a beach, (2) residential properties with a private easement to a beach, and (3) residential properties that are within one-half (½) mile of a beach (collectively 'Included Properties') where oil from the Line 901 spill washed up, and where the oiling was categorized as Heavy, Moderate or Light." *Id.* 6:16–20.

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) (quoting *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 Prods. 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 Randall Bell, Igor Mezić, and Peter Rupert. *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, 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 experts' testimonies meet these admissibility requirements. *See Lust By & Through Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996).

i. Randall Bell and Igor Mezić

Ultimately, the presence or absence of these experts' declarations does not alter the outcome of the motion to certify the Real Property Subclass, which, as discussed in Part III.B.ii below, fails even if they are considered. Because this evidence is not dispositive of any issue, the Court finds Defendants' motion to strike the declarations of Randall Bell and Igor Mezić **RENDERED MOOT**.[1]

ii. Peter Rupert

Plaintiffs offer the expert testimony of Dr. Peter Rupert, who is a professor of economics at the University of California, Santa Barbara ("UCSB"), former chair of UCSB's economics department, and Executive Director of the UCSB Economic Forecast Project. *See MTS Opp.* 23:12–15; *Rupert Decl.* ¶ 1. Rupert's evidence purports to demonstrate the impact of the oil spill and Pipeline shutdown on an Oil Industry Subclass-wide basis. *See MTS Opp.* 23:15–20.

To begin, as Plaintiffs note, Defendants focus their opposition on what they characterize as Rupert's effort "to develop a classwide method of proving which members of the Oil Industry

[1] Plaintiffs also filed an ex parte application for leave to file a surreply to Defendants' reply regarding the motion to strike. *See* Dkt. # 412. Because the subject of the surreply is not dispositive of any issue on this motion, and the Court need not consider its arguments, Plaintiffs' ex parte application is **DENIED**.

[S]ubclass were injured by the shutdown." *MTS* 24:12–14. However, this was *not* Rupert's assignment; instead, he sought "to analyze the economic impact of the Plains All American Pipeline rupture and shutdown, to consider whether such an analysis can be accomplished on a classwide basis, and whether the proposed class definition captures those most likely to be impacted by the rupture and shutdown." *Rupert Decl.* ¶ 3. In other words, "Rupert's regression analysis is [] targeted on classwide proof and class certification, not the eventual allocation of damages among class members." *MTS Opp.* 24:27–25:1. As discussed at length in Part III.B.i below, the Court does not require individualized damage assessments at the class certification stage.

The Court is satisfied that Rupert's methodology satisfies Rule 702. At this stage, the Court is only concerned that the evidence is sufficiently reliable and can be used to demonstrate classwide damages. Plaintiffs have met this burden, and whatever faults that may exist in Rupert's data and calculations do not foreclose the use of his testimony, since Rupert will likely do additional work as the litigation proceeds. *See Rupert Decl.* ¶ 47. This is acceptable. *See Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 843 (9th Cir. 2001) (determining that a district court's exclusion of an ongoing, unfinished study was "an abuse of discretion" and "clear error"); *see also 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).

Furthermore, although Rupert's model cannot assess damages for each *individual* member of the proposed Oil Industry Subclass, this is a matter that the Court raises in its *predominance* analysis below, not in a *Daubert* challenge, where the Court merely assesses whether the expert is credible and the methodology reliable. Moreover, to the extent that Defendants challenge the "probativeness" or accuracy of Rupert's calculations, such arguments go to the weight of the evidence, not its admissibility. *See Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1189 (9th Cir. 2002).

Accordingly, the Court **DENIES** Defendants' motion to strike the declaration of Peter Rupert.

B. Plaintiffs' Renewed Motion for Class Certification

Plaintiffs move to certify the two proposed subclasses under Rule 23(b)(3). *See Mot.* 6:7–9. 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 class 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 consider each subclass in turn to determine whether Rule 23's factors are satisfied.

i. Oil Industry Subclass

a. Rule 23(a) Factors

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

1. 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).

Here, Plaintiffs estimate that "several hundreds of jobs were lost and scores of oil businesses were affected," *Mot.* 7:17–19, and Defendants estimate that the contractors alone could "number well into the hundreds, if not thousands." *Opp.* 18:11. The Court therefore finds that the numerosity requirement is easily satisfied.

2. 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).

As Plaintiffs note, "The key common liability questions for [this Subclass] are the same as those raised by the Fisher Subclass: whether [Defendants] acted negligently, recklessly, and/or maliciously with regard to the design, inspection, repair, and/or maintenance of the Pipeline. As with the Fisher Subclass, the litigation will result 'in at least one common answer' to these questions, yes or no." *Mot.* 8:7–13 (citations omitted). The Court agrees with the comparison to the Fisher Subclass and reasserts its conclusion that class litigation will produce at least one common answer. The commonality requirement is therefore satisfied.

3. 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). This requirement is meant to guard against the danger that "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*.

Here, Plaintiffs note that "[e]ach of the Oil Industry Subclass representatives have lost work or business as a result of the oil spill and subsequent closure of the Pipeline." *Mot.* 8:23–25. Plaintiffs Robert Boydston, Zachary Frazier, Richard Lilygren, and Stephen Wilson are all oil platform workers who were laid off as a result of the oil spill and subsequent Pipeline shutdown, while Plaintiff Jim Guelker was laid off from his job as chief engineer on a vessel that supplied the affected facilities. *See MSJ Order* at 3–4. Plaintiff TracTide Marine Corp. ("TracTide") "provides marine fuels to oil drilling platform supply and crew vessels in the Port of Hueneme" and "did not have a contract with Exxon or Freeport, but instead contracted with vendors like General Petroleum, which would in turn contract with the oil producers." *Id.* at 4. Plaintiffs allege that "the shutdown of Lines 901 and 903 caused Exxon and Freeport to decrease their fuel orders to the vendors, which caused economic losses for TracTide." *Id*. The Court agrees that these injuries are typical of the other entities—workers, contractors, and subcontractors—that worked on and supplied the oil platforms and processing facilities, and lost work and business following the Pipeline shutdown. The typicality requirement is therefore satisfied.

4. 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 each of the proposed Subclass representatives "volunteered to represent the Subclass because of his or her commitment to pursuing this litigation." *Mot.* 10:8–10. The Court cannot see, and Defendants do not suggest, that there are any conflicts among them, or between them and unnamed members. The Court also has no reason to question the vigor of Plaintiffs' counsel. Adequacy is thus satisfied.

5. Summation

The Court concludes that the proposed Oil Industry Subclass satisfies the four requirements of Rule 23(a).

b. Predominance

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 as to the Oil Industry Subclass because the same factual and legal issues "will drive resolution of the [Subclass] members' claims." *Mot.* 12:17–18. To begin, the Court does not dispute that the *factual* underpinnings of the members' claims would be similar; as Plaintiffs characterize the situation, the "factual questions regarding the spill and its impact are central to each Subclass member's claims," *id.* 12:5–6, and courts have regularly found factual predominance in similar environmental disasters cases. *See, e.g.*, *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mex., on Apr. 20, 2010*, 910 F. Supp. 2d 891, 922 (E.D. La. 2012) ("This case arises from the blowout of one well, on one date, and the discharge of oil from one location. It is therefore clear that the vast majority of the contested factual questions are common to all class members and that the case includes a number of issues whose resolution will resolve an issue that is central to the validity of each one of the class member's claims in one stroke.") (internal quotation marks omitted); *Fox v. Cheminova, Inc.*, 213 F.R.D. 113, 129 (E.D.N.Y. 2003) (agreeing that the "predominance requirement is satisfied given that the cause of action generally arises from one set of operative facts"). However, the predominance of *legal* issues is a more complicated proposition.

In its previous class certification order, the Court determined that the proposed oil industry subclass was overly broad because it included entities whose relations to the oil platforms were overly attenuated. *See Class Cert. Order* at 20. Now, Plaintiffs propose what they characterize as a "far more narrowly focused" subclass, *Reply* 1:23, and so argue that

> [w]ith respect to Plaintiffs' negligence claim, the predominant common issue is whether [Defendants] owe[] a duty of care to those workers and businesses that support the Platforms and Facilities that suffered economic loss as a result of the Pipeline rupture and closure. Simply put: either [Defendants owe] a duty of care to this Subclass, or [they] do not.

Mot. 12:18–26 (citation omitted). The Court agrees with Plaintiffs that this more narrowly defined subclass addresses its prior concerns and presents common legal questions with manageable inquiries.

Defendants argue that this "new proposed class definition does not adequately narrow the class" and that it is still "overbroad and extremely varied." *Opp.* 17:15, 17:22. Defendants point out that

> [t]he class definition includes all employees who worked on the offshore platforms or onshore facilities, regardless of whether those individuals lost their job[s]. It also includes all companies who contracted with Exxon, Freeport or Venoco to provide goods, services, and personnel, regardless of whether they lost their contract or otherwise suffered an economic loss following the spill. Such contracting companies are not limited to those who work solely in the oil industry, but also include[] companies that contract to provide telecommunications, waste management, security, landscaping, pest control, postal courier services, copy machine repair, HVAC services, and many others. Based on the records obtained from Exxon, Freeport, and Venoco, such contracting companies number well into the hundreds, if not thousands.

Id. 18:1–11 (citation omitted); *see also Declaration of Avram S. Tucker*, Dkt. # 389-4 ("*Tucker Decl.*"), ¶¶ 29, 31–32. When taking into account the presence of subcontractors like Plaintiff TracTide that provided goods, services, and personnel to Pipeline-related facilities, Defendants estimate that the total number of Subclass members might be "exponentially higher than the number of contractors." *Opp.* 18:22–23; *see also Tucker Decl.* ¶ 57.

The size and variation of the proposed Subclass complicates two vital issues: whether a special relationship between Plaintiffs and Defendants exists, and whether individualized questions predominate as to injury and causation.

1. Special Relationship

Despite the size and variation of the proposed Subclass, the Court nonetheless agrees with Plaintiffs' contention that "either [Defendants owe] a duty of care to this Subclass, or [they] do not." *Mot.* 12:25–26. As discussed at length in the Court's most recent summary judgment order in this case, *see* Dkt. # 350 ("*MSJ Order*"), to prevail on their negligence claims, which are the only remaining causes of action for oil industry Plaintiffs, Subclass members would need to demonstrate the existence of a special relationship between themselves and Defendants in order to overcome the economic loss rule. *See id.* at 12–13, 27. Factors to be considered in such an inquiry include the foreseeability of harm to the plaintiff, the certainty of injury, and the closeness of the connection between the defendant's conduct and the injury. *See J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 804 (1979). Although Defendants suggest that "whether the [] special relationship factors are met requires an individualized inquiry, most notably with respect to the foreseeability, certainty of injury and closeness of connection factors," *Opp.* 19:27–20:2, the Court concludes that the size and scope of the proposed Subclass do *not* preclude a common inquiry as to these factors.

For example, as Defendants characterize the foreseeability issue, "A trier of fact would need to conduct a separate, individualized inquiry to determine if it was foreseeable that non-operation of the pipeline might cause harm to a maritime fuel supply company like [TracTide], an employee of a pest removal company, or a national internet service provider." *Opp.* 20:5–9. The Court disagrees, for one very important reason: the proposed Subclass is limited *only* to "[i]ndividuals and entities who were *employed*, or *contracted*, to work" on the oil drilling platforms or on-shore processing facilities. *Mot.* 6:10–15 (emphases added). Accordingly, each Subclass member would have a contractual relationship tying them to the oil industry and, hence, Defendants' allegedly negligent conduct. Foreseeability is therefore a one-size-fits-all proposition for this proposed Subclass: either the existence of a contract to provide services to the oil facilities made the entities' injuries foreseeable, or it did not. That the proposed Subclass would include a diverse collection of parties potentially scattered across the globe does not change the fact that a single theory of foreseeability can be advanced based on the existence of contracts.

Similarly, the proposed Subclass's contract requirement addresses Defendants' concerns regarding another *J'Aire* factor, the closeness of the connection between their conduct and the Subclass members' injuries. In the summary judgment order, the Court's decision on the issue was motivated in large part by the fact that the named Plaintiffs' "injuries were not nearly as geographically and temporally removed from [] Defendants' conduct" as was the case in *Benefiel v. Exxon Corp.*, 959 F.2d 805 (9th Cir. 1992). Defendants argue that the proposed Subclass would preclude a common inquiry because it "includes companies and individuals whose alleged injury will be significantly more attenuated than the named Oil Industry Plaintiffs, including individuals and entities that suffered no injury, or individuals or companies that suffered economic loss after the spill but for unrelated reasons." *Opp.* 21:4–8; *see also Tucker Decl.* ¶¶ 18–19, 35–38, 41–42. However, because the proposed Subclass only includes individuals and entities with contractual relationships to the oil industry, the degree of attenuation is restricted to a manageable degree. In *Benefiel*, consumers sued the defendant after their gas prices rose in the wake of the 1989 *Exxon Valdez* oil spill. *See Benefiel*, 959 F.2d at 806. The causal chain at issue in that case—where a "series of intervening events" disrupted the connection between the defendant and consumers, *id.* at 807—is readily distinguishable from the situation here, where the shutdown of the Pipeline and related facilities directly impacted the proposed Subclass members' contracts. The contract requirement therefore ensures that only those individuals and entities with a clear and definite connection to the oil facilities would be included in the Subclass. Accordingly, demonstrating a consistent causal nexus between Defendants' conduct and the array of actors that would be included in the proposed Subclass is manageable and subject to a common legal theory.

Finally, Defendants suggest that the certainty of injury is also hampered by individualized issues: "Plaintiffs' proposed subclass includes individuals who did not lose their job following the spill, individuals who worked on the rig and were transferred to a different job, and companies that may not have lost their contract following the spill or may have fully mitigated that loss." *Opp.* 20:14–17; *see also Tucker Decl.* ¶¶ 18–19, 35–38, 47. However, although certainty of *injury* for each potential Subclass member is required pursuant to *J'Aire*, certainty of *damages* is not a prerequisite for certification, as discussed below. Whether or not any individual worker actually suffered damages could be addressed, if necessary, at a later date. The requirement that each Subclass member have a contractual relationship with Defendants or the oil platforms would likely satisfy the certainty of injury requirement.

In short, the Court concludes that, despite the size, scope, and variation of the proposed Oil Industry Subclass, common questions predominate with respect to the *J'Aire* factors needed to establish the existence of a special relationship. The Court agrees with Plaintiffs that "[t]he duty inquiry . . . is easily managed with questions common to the entire Subclass or sizeable subgroups" and that "the *J'Aire* special relationship factors are common to the entire Subclass." *Reply* 2:5–10.

2. Injury and Causation

Defendants further argue that the size and variation of the proposed Oil Industry Subclass prevent common questions as to injury and causation.

With regards to employees of the oil industry in Santa Barbara, although Rupert's regression analysis controls for variables other than the Pipeline shutdown, Defendants contend that the evidence "does not identify *which* class members lost their jobs due to the release." *Opp.* 21:26–27. Defendants suggest that "this testimony would leave the Court with a class that includes many people who did not lose their jobs (or did not lose their jobs because of the shutdown), some who did, and no means to determine who falls into which category, short of individualized evidence." *Id.* 21:28–22:4. The regression analysis demonstrates that employment in the local oil and gas industry was 34 percent lower than it would have been but for the shutdown. *See Rupert Decl.* ¶ 39. Defendants conclude that this evidence would therefore suggest, given that the proposed Subclass includes *all* employees and not merely those who lost their jobs, that a significant number of potential class members suffered no injury. *See LeMoine Decl.*, Ex. 3 at 168:7–22. However, as Plaintiffs note, the need for some individualized inquires need not defeat class certification. *See Reply* 3:7–17; *see also Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1155 (9th Cir. 2016) (citing *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016)) ("The [Supreme] Court held that class certification was appropriate even though class members might have to prove liability *and damages*

individually.") (emphasis in original). In *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161 (9th Cir. 2014), the Ninth Circuit held that "[s]o 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." *Id.* at 1168. Here, although at least some class members were not injured as a result of the Pipeline shutdown, all employees were at the very least *exposed* to the shutdown, which distinguishes the proposed Subclass from classes that include members who never experienced the alleged misconduct. *See Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1136 (9th Cir. 2016) (distinguishing between "the possibility that an injurious course of conduct may sometimes fail to cause injury to certain class members" and "a flaw that may defeat predominance, such as the existence of large numbers of class members who were never *exposed* to the challenged conduct to begin with") (emphasis in original).

Defendants further argue that the problems of causation and injury are magnified for the Subclass's business members, noting that "[t]he class definition includes all contractors and subcontractors, regardless of whether they suffered injury, and regardless of whether any injury they suffered was due to the release." *Opp.* 23:8–11; *see also Tucker Decl.* ¶¶ 35–45. Furthermore, although Rupert controlled for other variables that might have impacted employment in the Santa Barbara oil industry, Defendants suggest that there is no indication of how Plaintiffs would address the variables that would impact worldwide businesses—for example, whether "they can control for factors such as quality of service, reputation, advertising, and longevity of the business." *Class Cert. Order* at 21. Of the myriad businesses included within the proposed Subclass—which includes, by Defendants' uncontested estimation, "diverse lines of business: firms that provide internet, janitorial, pest removal, waste management, and HVAC services, among many others," *Opp.* 23:17–19—some continued to provide services following the shutdown and some were subject to varying factors other than the oil spill that might affect their success and profitability. *See Tucker Decl.* ¶¶ 35–38, 43–47. Again, however, that a class might include members who were not injured does not preclude certification as long as the members were at least *exposed* to the alleged misconduct. Here, each contractor and subcontractor in the Subclass had a contract to work at or on the oil facilities that were shuttered as a result of the Pipeline shutdown. Therefore, the question of causation is common because each Subclass member had a contract that was impacted in one way or another by Defendants' alleged negligence. As for injuries, Plaintiffs are not required to have a definitive method of calculating damages at class certification, and again, "[s]o 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." *Jimenez*, 765 F.3d at 1168; *see also In re Deepwater Horizon*, 910 F. Supp. 2d at 907 (noting that "the extent to which the [alleged misconduct] versus other factors caused a decline in the income of an individual or business" is a "limited individualized issue[]" that does not "defeat predominance in light of the core common issues that are appropriate for classwide treatment").

Relatedly, Defendants suggest that Plaintiffs' methodology of calculating damages is a "fluid recovery," a method prohibited by law. *See Opp.* 25:9–23. However, Plaintiffs note that common damage analysis is but one part of its proposed two-tiered trial management approach, and that they will "utilize both common and individualized damage analysis." *Reply* 4:5–21. Therefore, the Court does not agree that Plaintiffs are relying solely on an illicit theory of fluid recovery.

3. Summation

In previously denying class certification of an oil industry subclass, the Court explained that "[g]iven the potential scope of the subclass, the Court cannot conclude that it is sufficiently cohesive or that common questions would predominate over uncommon ones." *Class Cert. Order* at 20. Plaintiffs' revised Subclass addresses these concerns. Because each qualifying individual or entity had a contract to work on the oil platforms or processing facilities that were shut down as a result of Defendants' alleged misconduct, common questions of duty, causation, and injury predominate. Therefore, Rule 23(b)(3)'s predominance requirement is satisfied.

c. 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.

1. 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." *Class Cert. Order* at 23. This same consideration motivates the Court here. As Plaintiffs note, the Oil Industry 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.* 19:16–18. This reality, in addition to the docket-clogging effect of individualized litigation, favors certifying a class action. *See In re Deepwater Horizon*, 910 F. Supp. 2d at 929 ("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].").

2. 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 those [] lawsuits includes members of the putative class." *Mot.* 20:6–7. This factor thus weights in favor of class certification.

3. 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).

Defendants renew their argument from the previous class certification motion that other claims processes might be superior remedial procedures in this case. *See Opp.* 2 n. 1; *see also Class Cert. Order* at 23–24. The Court readopts the conclusion it reached in that prior order: "In discrediting the alternative methods [put] forward, Plaintiffs have shown the propriety of proceeding with this litigation in this particular forum." *Class Cert. Order* at 24.

4. 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 1192.

In the predominance inquiry above, the Court already concluded that common legal issues abound as to members of the proposed Oil Industry Subclass. Although the assessment of economic damages may deserve a separate phase of trial or other claims procedures, courts in the Ninth Circuit have recognized that the calculation of damages alone is not enough to defeat class certification. *See Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 513 (9th Cir. 2013) ("In this circuit . . . damage calculations alone cannot defeat certification."). Therefore, this fourth factor also favors certification.

5. Summation

Based on the disposition of the relevant factors, the Court concludes that the proposed Oil Industry Subclass satisfies Rule 23(b)(3)'s superiority requirement.

Because the Subclass also meets the predominance requirement of Rule 23(b)(3) and the four requirements of Rule 23(a), the Court **GRANTS** Plaintiffs' motion to certify the Oil Industry Subclass.

ii. Real Property Subclass

The Court will begin by analyzing the Rule 23(b)(3) predominance requirement because it is dispositive of whether the Real Property Subclass should be certified.

a. Predominance

In rejecting a property subclass on Plaintiffs' first class certification motion, the Court determined that the proposed subclass was "too broadly defined for the Court to conclude that common questions predominate over uncommon questions." *Class Cert. Order* at 17. That subclass was "expansive: it include[d] government and private-owned property, unoccupied and occupied homes, owners and tenants, undeveloped and developed land, and land where no oil spilled and land where it did." *Id*. Now, Plaintiffs propose a more tightly defined subclass, focusing only on residential properties on or within one-half mile of the beach. Despite this narrower definition, Defendants point out that the new Subclass would contain a *higher* number of potential class members: "[t]he new subclass spans 165.3 miles of coastline and includes over 55,000 parcels," as opposed to the original "130-mile, 30,000 parcel subclass" that was previously rejected. *Opp.* 3:12–14.

As with the proposed Oil Industry Subclass, the Court does not dispute Plaintiffs' contention that the factual underpinnings of the Real Property Subclass's claims predominate; "[t]he central issues of the corroded Pipeline, why the rupture occurred, the scope of the oil spill

itself, and [Defendants'] liability for it, are common to every class member of the Real Property Subclass." *Mot.* 15:19–21. This is a common theme in similar environmental disasters cases, where "[c]ommon issues of liability, causation, and remedies not only predominate but overwhelm individualized issues." *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 67 (S.D. Ohio 1991); *see also Stanley v. U.S. Steel Co.*, No. 04-74654, 2006 WL 724569, at *7 (E.D. Mich. Mar. 17, 2006) ("Common issues predominate in air pollution cases when the paramount issue concerns whether a plant's emissions are substantially interfering with the local residents' use and enjoyment of their real and personal property."); *Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597, 606 (E.D. La. 2006) ("[T]he central factual basis for all of Plaintiffs' claims is the leak itself—how it occurred, and where the oil went.").

Nevertheless, Defendants vigorously contest the predominance requirement with respect to the proposed Real Property Subclass. Ultimately, the Court agrees that, as defined, the current iteration of the Subclass presents individualized issues that preclude predominance.

1. Liability Questions

"To determine whether the requirement of predominance is satisfied, a district court must first identify the parties' claims and defenses and their elements." *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1234 (11th Cir. 2016). Defendants argue that, "[b]ecause Plaintiffs propose to group proximate and beachfront properties in the same class," individualized issues prevent the establishment of liability for all proposed class members. *Opp.* 6:16–18. However, the Court need not consider each of Plaintiffs' causes of actions, as Defendants do, *see id.* 6:23–10:14, because as Plaintiffs correctly note, this exercise actually demonstrates why class treatment is *appropriate* as to liability.

All members of Plaintiffs' class either possess beachfront property or property within one-half mile of the beach, and

> Plaintiffs' expert Igor Mezić's model demonstrates where the oil went, and to what degree, beach by beach along the California coastline. . . . Because this Subclass is limited to those proximate to beaches that Mezić has determined were soiled based on the [available] data, there are no individualized issues regarding injury; such soiling either caused the loss of use and enjoyment of the beach amenity or it did not.

Mot. 16:12–26. Liability as to each cause of action is therefore a Subclass-wide and not an individualized issue, or at least is ascertainable as to large subsets of the Subclass. What Defendants are engaged with is essentially a merits-based assessment, and "'[w]hether class

members could actually prevail on the merits of their claims' is not a proper inquiry in determining the preliminary question 'whether common questions exist.'" *Stockwell v. City & Cty. of S.F.*, 749 F.3d 1107, 1112 (9th Cir. 2014) (quoting *Ellis*, 657 F.3d at 983 n. 8).

Defendants further argue that the alleged injury, which Plaintiffs "characterize as the temporary loss of the premium class members paid to live near the beach," is "not a legally cognizable injury." *Opp.* 10:16–12:24. Again, that is a merits question, and although "a district court must consider the merits if they overlap with the Rule 23(a) requirements," *Ellis*, 657 F.3d at 981, there is no such overlap here; the Subclass members will rise and fall together (or, at the very least, will rise and fall as two groups, beachfront property owners and proximate property owners), and so the merits of Plaintiffs' claims as to liability do not impact the class certification analysis.

2. Individual Issues

However, despite the predominance of liability questions, the presence of individualized questions as to the extent of injuries and the resulting damages preclude certification of the Real Property Subclass.

In addition to concerns over "differences in the level of soiling," the Court previously noted that Plaintiffs' "methodology does not purport to account for different types of damage to the property, including . . . the length of time the properties were affected by the spill." *Class Cert. Order* at 17. The revised Subclass definition still does not adequately address these and other differences between properties. Plaintiffs assume that the "beach amenity" is affected in the same way for each property in the class. *See Mot.* 15:21–23 ("[C]ommon questions plainly predominate, as does the degree to which the oil spill affected the use and enjoyment of beach areas."). However, despite this assertion of common damage, Defendants note that the "properties, spanning 165 miles of coastline, vary substantially with respect to location, proximity to water, accessibility of nearby beaches, construction quality, and other characteristics." *Opp.* 14:10–12; *see also Dent Decl.* ¶ 29; *Declaration of Hal Sider*, Dkt. # 376 ("*Sider Decl.*"), ¶ 81. Plaintiffs claim that their "updated expert analysis" addresses the Court's previously articulated concerns, *Mot.* 17:16–19, and while *some* issues have been addressed, not all have been. For example, the Court previously noted that developed and undeveloped plots were treated identically in the former subclass definition; now, vacant lots are differentiated, but only in so far as the beachfront premium afforded to them is based on lot size rather than square footage of the structure. *See Dent Decl.* ¶ 30; *LeMoine Decl.*, Ex. 1 at 261:6–262:25. In the Court's view, this does not sufficiently distinguish between what might be vastly different properties, which would require individualized causation and injury assessments based on use and other factors.

The problem of common evidence is even more pronounced with regards to properties within one-half mile of the beach. Plaintiffs chose this one-half mile figure based on Bell's survey, in which he asked the beachgoers how far they were willing to walk to get to a beach. *Bell Decl.* ¶¶ 54–56. However, Bell defined the class of properties within one-half mile of the beach based on the centers of the properties to the nearest shoreline. *LeMoine Decl.*, Ex. 1 at 98:6–14. This does *not* necessarily correspond to whether these properties are within one-half mile's walk to the beach, and hence the "beach amenity." *See Dent Decl.* ¶¶ 15–20. A property might be one-half mile from the beach as the crow flies but have no clear access to the shore. Or, as Defendants note, "the closest accessible beach may be unoiled." *Opp.* 14:23–25. By including all properties based on this arbitrary metric in the Subclass, Plaintiffs have lumped together properties with injuries that might be vastly different, based on characteristics that their experts have not addressed. Defendants describe some of the other variations that might exist in the Subclass:

> The premium paid to live on or near the beach, moreover, may vary depending on these various attributes. A house on a bluff may not be readily accessible to the beach, but may command a premium because of a magnificent view. A house on a narrow, rocky beach may not enjoy access to a walkable beach, but may command a premium because of the view, the sound of waves crashing, and the ocean breeze and smell. Bell's methodology ignores all of these varying characteristics that contribute to a property's value, simply assuming that all class members entirely lost the beach amenity whenever they (allegedly) could not walk on the beach. It also ignores that different types of owners experience loss of use differently, and that individualized inquiry would be required to determine whether it was the owner or the lessee who suffered harm due to a restriction on the use of a property.

Opp. 15:4–15. The Court agrees that these variations present uncommon questions, and further agrees that "[b]ecause properties enjoy different types of water amenities, with different values, that were affected differently, including not at all, by the [Pipeline] release, and there is no way to measure whether and to what extent those amenities were impacted by the release, individual issues predominate." *Id.* 15:15–18.

3. Summation

In their motion, Plaintiffs suggest that the new, more narrowly defined Real Property Subclass "is substantially similar to the certified real property class in the *Deepwater Horizon* case." *Mot.* 18:1–2. Although some of the issues previously raised by the Court have been addressed, it concludes that the Subclass still falls short of that case's example. There, the

property class was divided into *three* subclasses based on common attributes. *See In re Deepwater Horizon*, 910 F. Supp. 2d at 907. Had Plaintiffs attempted to certify *only* properties along the beach or with beach easements, then common issues might have been sufficiently predominant. As is, however, the Subclass is too broadly defined to merit certification. *See Amchem*, 521 U.S. at 611, 624 (refusing to certify a settlement class of plaintiffs with advanced asbestos-related disease and plaintiffs that had not manifested disease at all); *Parko*, 739 F.3d at 1086 (refusing to certify a class where each plaintiff had a different diminution in the value of their home); *see also Mays v. Tennessee Valley Auth.*, 274 F.R.D. 614, 626–27 (E.D. Tenn. 2011) ("[I]ndividualized inquiries, such as whether coal ash is or was present on specific property . . . how each plaintiff's property interest and use and enjoyment of property has been impacted by the coal ash, and the extent of each plaintiff's damages, will predominate.").

In short, although the Real Property Subclass is more narrowly defined than Plaintiffs' previous iteration, and despite the fact that common issues of liability predominate, the Subclass would present a number of individualized issues as to injuries and damages that trump whatever common questions exist. Therefore, the predominance requirement is not satisfied.

At oral argument, Plaintiff's counsel observed that, absent a subclass, real property owners impacted by the oil spill would have little success prosecuting their claims individually, given the expense and expertise required to demonstrate the extent of oiling along the coastline. Therefore, because the Court believes that a viable real property subclass offers the best chance of remedy for impacted property owners, it will again offer guidance in the event that Plaintiffs move for class certification for a third time.

To begin, the 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. For example, if oil invaded these properties and easements, then subclass members would have viable trespass and Lempert-Keene-Seastrand Oil Spill Prevention and Response Act claims. 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.

The Court again draws Plaintiffs' attentions to the *Deepwater Horizon* litigation, where three real property subclasses were certified, each of which was limited to properties that were

actually oiled or were along the coastline or in impacted wetlands. *See In re Deepwater Horizon*, 910 F. Supp. 2d at 907. If analogous limitations were applied to this real property subclass, common issues would similarly predominate.

The proposed Real Property Subclass fails the predominance requirement primarily because it includes inland properties within one-half mile of the beach. Absent physical invasion of oil, and considering the vast disparities in terms of the beach amenity that each inland parcel would have, common questions of injury and liability would not predominate. The Court is not necessarily foreclosing the possibility that a viable real property subclass could include inland properties that lack an easement. However, such properties could only be included if some limiting factors, such as actual walking distance to the beach, view of the beach, or some other means of establishing a common beach amenity, were applied.

b. Superiority and Rule 23(a)

Because the predominance requirement of Rule 23(b)(3) is not satisfied here, the Court need not consider Rule 23(b)(3)'s superiority requirement or the Rule 23(a) factors.

Accordingly, the Court **DENIES** Plaintiffs' motion to certify the Real Property Subclass.

IV. Conclusion

The Court concludes that the proposed Oil Industry Subclass satisfies the requirements of Rule 23(a) and Rule 23(b)(3), and so **GRANTS** Plaintiffs' renewed motion to certify that subclass. It hereby **CERTIFIES** the Oil Industry Subclass under Rule 23(b)(3) and, for the reasons discussed in the previous class certification order, *see Class Cert. Order* at 28, **APPOINTS**, under Rule 23(g), counsel at Lieff, Cabraser, Heimann & Bernstein, LLP; Keller Rohrback L.L.P.; Cappello & Noël LLP; and Audet & Partners, LLP as lead counsel for the Oil Industry Subclass. It also **APPOINTS** the moving Plaintiffs as Subclass representatives.

Because the Court concludes that individual issues predominate over common questions as to the proposed Real Property Subclass, and thus certification under Rule 23(b)(3) is precluded, the Court **DENIES** Plaintiffs' renewed motion to certify that subclass.

The Court also **DENIES** Defendants' motion to strike the declaration of Peter Rupert and finds Defendants' motion to strike the declarations of Randall Bell and Igor Mezić **RENDERED MOOT**.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 15-4113 PSG (JEMx)	Date	February 9, 2018
Title	Keith Andrews et al. v. Plains All American Pipeline, L.P. et al.		