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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

NATTO IYELA GBARABE,

Plaintiff,

v.

CHEVRON CORPORATION,

Defendant.

Case No. 14-cv-00173-SI

CHEVRON CORPORATION'S MEMORANDUM IN OPPOSITION TO MOTION FOR CLASS CERTIFICATION

Date: December 9, 2016
Time: 10:00 a.m.
Place: Courtroom 1
Judge: Hon. Susan Illston

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INTRODUCTION

Mass tort lawsuits are generally not suitable for class treatment. Determining the scope of injuries and damages caused by an alleged tort usually requires claimant-by-claimant proof, making those claims unsuitable for class treatment. That is true in this case, in which plaintiff asserts that individuals living along a 90-mile stretch of the Nigerian coastline (and several miles inland) sustained a broad array of injuries ranging from malaria to cracked buildings; from damaged fishing nets to ruined businesses; and from increased seaweed, prostitution and piracy to decreased turtles and fish. Each alleged injury raises a host of individual issues as to whether the claimants actually existed and where they lived at the time, what injuries if any they suffered, whether those injuries had anything to do with the incident, and what, if any, damages are recoverable. These idiosyncratic issues predominate over any common issues and, by themselves, defeat class certification.

But this case is even less suitable for class treatment than the typical mass tort case for multiple additional reasons.

First, it is doubtful that plaintiff or any purported class member was injured. The incident was at a natural gas well, not a crude oil well. It was six miles offshore. Plaintiff's experts admit that they have no basis to opine that the incident caused the alleged injuries. And—as a matter of undisputed science—the incident could not have caused the injuries plaintiff alleges.

Second, if anyone had a valid claim, a class action in San Francisco, over 8,000 miles from the incident, would not be a superior way to adjudicate it. Scores of lawsuits have been filed in Nigerian courts, including cases on behalf of the same communities. Plaintiff makes no showing that his country is not an adequate forum. Nigerian courts are geographically closer to the incident, have better access to most witnesses, are more familiar with the cultural and historical context of the claims, and are better equipped to evaluate them. At this distance, singling out anyone with a valid claim from those whom plaintiff's counsel refer to as their "bad apple" clients with falsified or inflated claims is impossible to do reliably, especially without documentary evidence, the ability to compel depositions, and the ability to travel freely to those communities. Claimants know that it is virtually impossible for anyone to investigate their

claims, especially from the United States. And, as Nigerian residents, they have little to fear from making false claims in the United States. Counsel's response that they are trying to identify and exclude the "bad apples" is little comfort and underscores the individualized and unmanageable nature of the undertaking.

Third, plaintiff does not meet Rule 23's adequacy requirements. His sworn testimony and verified discovery responses have been so evasive and contradictory that no one with a valid claim would want their case to turn on a jury's determination of his credibility. His story on key points—including where he lived, his medical condition, and why he stopped fishing—is incoherent and inconsistent. His regard for truth-telling is so low that, to avoid harmful admissions in a sworn affidavit, he testified that the affidavit was false and that he signed it only because his lawyer asked him to. He also swore that portions of another sworn declaration and verified interrogatory answers are false and "doctored." And he gave an irrevocable power of attorney for his fishing cooperative to another Nigerian lawyer, and lied about it at his deposition.[1] He is also not a typical claimant, because he alleges that he suffered only a handful of the myriad injuries that others are claiming and because he is subject to an individual standing defense due to the power of attorney he gave for his fishing cooperative.

These reasons, coupled with the individual trials needed to evaluate each individual's circumstances and alleged injuries, make this case unsuitable for class treatment.

Indeed, this case should never have been filed. Rather than growing out of any legitimate claim of harm, it reflects an all-too-common practice among some elements in the Niger Delta. When an accident or spill occurs, claims agents and "fixers" swarm into communities to sign up claimants.[2] Lawsuits are then filed in Nigeria with little or no investigation. And claimants

[1] For reasons previously chronicled, his counsel do not meet Rule 23's adequacy requirement either. *See* ECF 153; *infra*, pp. 32-34.

[2] *See* A. Morris Dep. 40:10-41:19, 43:4-20; N. Gbarabe Dep. (V2) 169:5-170:16, 342:1-343:12; Degbe Dep. 58:4-6; Ibobra Dep. 94:16-95:3, 95:25-96:3; Exs. 253, 254, 255, 356, 706 ¶¶ 14-15. Indeed, "when there is a spill here, claimants will fetch the crude there, go to a distant place and then even pour it there to extend the extent of damage." Abowei Dep. 68:14-69:3. All cited deposition testimony is contained in Exhibit 1 of the accompanying Mitchell Declaration. References to "Ex." are to the exhibits to the Mitchell Declaration.

submit their claim forms not expecting ever to be questioned about them or to face any sanction for false claims. *Infra*, pp. 11, 35-36. This case takes this improper practice to a new level—attempting to avoid individual scrutiny by filing a class action in the United States and anticipating that the desire to avoid adverse publicity will produce a quick and substantial settlement (s*ee* Exs. 4, 5 at 16)—all enabled by a third-party funder with no apparent ability for due diligence in the Niger Delta.

From day one, this case has been built on false allegations—from the allegation in the first three versions of the complaint that expert reports showed state-wide impact to the representation in the class certification motion that the 90-mile Bayelsa coastline is "a tightly defined geographic area within which contamination is shown to be present to a reasonable scientific certainty." ECF 123, at 18:4-5. As shown below (pp. 4-5), plaintiff's environmental experts agree that no such evidence exists.

BACKGROUND

A. Plaintiff's Claims of Injuries From the KSE Incident Are Invalid.

This case arises from a blowout in January 2012 of a natural gas well being drilled by the KS Endeavor rig almost six miles off the Nigerian coast.

1. The first three versions of the complaint defied common sense.

The original complaints filed by Gbarabe and five other plaintiffs alleged that they had "expert reports" showing that the incident caused injuries throughout all of Bayelsa State, Nigeria—approximately the size of New Jersey and stretching more than 75 miles inland. ECF 1, ¶¶ 24, 25 (p. 8), 20 (p. 13). Plaintiffs claimed to be suing for 65,000 residents, relying on a Schedule A that purported to list each claimant's economic damages. ECF 45.

When Chevron sought discovery of the basis for that improbable claim—a claim that plaintiff's litigation coordinator admitted defied "common sense" (ECF 78, ¶¶ 1-3; A. Morris Dep. 27:20-28:11)—plaintiffs acknowledged that most of the purported class and five of the six named plaintiffs did not have "articulable claims of damage." ECF 80, at 2:18-23, 5:13-18. It is now also agreed that the lost income figures on Schedule A were "doctored" to assert inflated and baseless claims. N. Gbarabe Dep. (V1) 112:12-113:16, 115:25-116:2; Ex. 2 at 22:10-16. Many

Schedule A claimants do not exist and, in some communities, "almost hundred percent of the list there was fake." A. Morris Dep. 78:24-79:8, 80:8-22; ECF 127-1, ¶ 1.

2. The claim of harm to coastal communities is not supported by any admissible expert analysis.

The fourth amended complaint drops the claim of statewide harm and all named plaintiffs other than Gbarabe. ECF 99. It alleges a class of residents of vaguely defined coastal areas in Bayelsa State who "sustained articulable damage" from the KSE incident. Plaintiff describes the class as consisting of 12,600 individuals. *Id*. ¶¶ 11, 12.

Plaintiff's allegation of harm to coastal areas is no more valid than the original statewide claim. If anything, plaintiff's expert reports show the ***absence*** of harm.[3] Plaintiff relies on three sets of purported experts. The first are U.K. scientists who mapped the seabed around the well site and collected and analyzed seabed sediment samples from that same area. They concluded that a crater exists in the seabed and that there may be fewer small organisms (known as benthic meiofauna and macrofauna) in the sediment in the immediate area around the well site than farther away. ECF 124-2.

Plaintiff's motion exaggerates this conclusion as a finding of "long-term, persistent impacts" on "marine habitats." ECF 123, at 24:2-4. But the experts admitted that their opinions are narrow—focused only on benthic fauna in the small area near the well site—and that they are not opining that any impact on fish or humans occurred. Trett Dep. 197:20-198:9 ("No, we can't make conjecture on that at all, no."). And they admitted that it is impossible to detect any impact on fish from any loss of fauna in that small area. As Dr. Trett put it:

> On fish communities, no, because you're so far up the food chain and they're so mobile, their dependency on that small area there would be negligible and you wouldn't be able to—wouldn't be able to—to detect the change in their flow of nutrients through the food chain. That's a fact.

Trett Dep. 198:17-199:1. These experts also admitted that they do not know whether the level of

[3] In violation of Local Rule 7-5(a), plaintiff's motion repeatedly makes factual assertions with no citation to any evidence. Indeed, the "Statement of Facts" section contains no citations to any evidence—only to unsown, non-compliant, inadmissible expert reports.

fauna they found was representative of general conditions in the Niger Delta as a whole or whether it was the result of proximity to the well site. Forster Dep. 48:8-50:4; Trett Dep. 50:2-51:20; *see* Calvo Dep. 10:13-19. They asserted that natural gas may still be seeping out of the sediment at the well site. ECF 124-8, pp. 7-8 of 17. But again, they offered no evidence or opinion that any seepage has affected fish or humans. Walshe Dep. 84:19-22. They did not test water or air quality, and they offer no opinion that the incident could have caused any of the other impacts plaintiff alleges, such as damaged property or personal injuries. Cleary Dep. 86:3-9; Trett Dep. 108:25-111:7; Calvo Dep. 9:14-21; Walshe Dep. 46:2-5; Wilson Dep. 6:14-22.

The second set of purported experts are from Nigeria. Onyoma Research submitted a report (ECF 125-1) that "seeks to establish" that Gbarabe's alleged damages are the same damages sustained by thousands of others in numerous coastal communities. *Id.* at 5, 26. But Gbarabe complains only that he ate a fish that smelled like kerosene, got diarrhea and a rash, and lost income from fishing because an invasion of seaweed damaged his nets. *See infra*, pp. 9-10, 22, 30. He does not complain of most of the numerous medical, physical, social and economic problems that Onyoma Research posits. And, as shown in the accompanying motion to exclude their testimony, the three authors' depositions confirmed that they have no expertise in any of the relevant sciences, including health, environment, physics, or engineering. They are simply historians and archaeologists who are channeling hearsay assertions from claimants and reporting the results of a biased, unscientific, inadmissible "survey" of 145 individuals. *See* Van Liere Decl., Ex. V-1.

The other purported expert from Nigeria is Jasper Abowei. He claims that a short-term study he says he conducted in 2012 of marine life in seven locations along the Bayelsa coast showed conditions suggestive of water pollution. ECF 125-3. But he did not actually sample any water. Abowei Dep. 91:1-12. And, contrary to the hyperbole in plaintiff's motion (ECF 123, at 26-27), he did not attribute his findings to the KSE incident—an issue he admitted he did not study. Abowei Dep. 353:13-354:21. As to whether the incident caused any contamination, the best he could say—having not studied it—was "maybe it did, maybe it didn't." *Id.* at 201:14-23. And his finding of possible pollution is itself groundless. As shown in the motion to exclude his

testimony, his studies not only failed to follow any reliable scientific methodology, but he falsified results in at least two of his studies by lifting key data from studies done before this incident at locations not involved in this case.[4]

Plaintiff also offers a damages accountant, Christopher Money. Ignoring alleged damages for purported personal injury or property injuries (Money Dep. 8:23-25, 61:15-25), his proposal is simply to add up the before-and-after income figures in the putative class members' claim forms, if and when someone corrects all the inaccuracies in those forms and verifies them. Money Dep. 44:14-24, 115:21-116:3, 118:16-119:7.

In short, contrary to his allegation, plaintiff has not submitted any expert evidence of harm to any class member, let alone common harm to "all areas" that could support a class action. And if he could show any harm, he has not offered any evidence that it was caused by the KSE incident. To head off a defense motion seeking disclosure of his causation evidence under *Lore v. Lone Pine Corporation*, 1986 WL 637507 (N.J. Sup. Ct. Law Div. Nov. 18, 1986), plaintiff represented that his "class certification papers will include causation evidence to the named Plaintiff." ECF 115, at 7:23-24; *see Avila v. Willits Envtl. Remediation Trust,* 633 F.3d 828, 833-34 (9th Cir. 2011) (affirming *Lone Pine* order). And in seeking Chevron's agreement for further time to serve their expert reports, plaintiff's counsel promised that they would "be providing relevant materials for the causation issues that lie at the heart of the class certification proceedings." Ex. 19 at 2. But plaintiff has done none of this.

This lack of scientific evidence is not the result of lack of effort or resources. Plaintiff's counsel received $1.7 million to use principally to retain experts for class certification. Exs. 12, 14. Instead, the lack of supporting scientific evidence reflects the nature of the incident itself

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[4] Plaintiff's counsel have asserted that they relied in filing the complaint on post-incident reports by a Bayelsa State ministry and by some local communities. Ex. 5, at 3; Ex. 2, at 19:2-9. None of those reports showed statewide damage, as plaintiff's counsel admitted internally. ECF 81, at Ex. F (p. 27). Reflecting as much, plaintiff does not offer up any of these reports in support of his class certification motion. His own expert concluded that those reports were "conflicting" and "further studies were necessary to determine whether there was or wasn't damage." Cleary Dep. 52:17-53:8; ECF 124-1, at 2 (plaintiff's expert stating that "further independent studies were warranted").

which, as explained by Chevron's experts, could not and did not cause the damages alleged.[5]

3. Natural gas well blowouts do not produce the wide-ranging environmental impacts plaintiff alleges.

As explained in the reports of Neal Adams and Thomas Deardorff, the well at issue was a natural gas well, not a crude oil well. In a shallow-water incident like the one here involving high-pressure flow, the gas is not broadly dispersed in the water but rises quickly in a column to the surface, where in this case it was consumed by fire.[6] Natural gas is a clean-burning fuel, releasing mostly carbon dioxide and water as it burns. *Id.* at ¶ 11. Once the flow from a gas well blowout is capped, the water and air return to background conditions. *Id.* at 12.

Consistent with the nature of a gas well incident, Chevron's experts show that plaintiff's fish depletion theory is unsupported and ignores other factors that long pre-date this incident, and that the invasion of seaweed that lies at the heart of Gbarabe's fishing claims are a regional phenomenon that started before the incident and has nothing to do with it. Deardorff Decl. ¶¶ 78-83. Those experts also agree with plaintiff's experts' admission that no credible scientific evidence suggests that the incident materially affected the fish population. *Id.* at ¶ 76. The defense experts also expose Jasper Abowei as a scientific fraud whose work is inherently unreliable because he plagiarizes extensively, lacks the requisite scientific expertise, and fails to collect, report, or analyze data critical to his stated objectives. *Id.* at ¶¶ 15-73.

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[5] Plaintiff submits other, non-expert evidence that, in addition to being irrelevant and insufficient, is inadmissible. Chevron objects on the grounds of hearsay, lack of authentication, and lack of personal knowledge to the class member declarations (ECF 126-2 to 126-10), particularly the portions offering scientific and medical opinions and referring to matters they did not personally observe, and to the Alagoa Morris Declaration and exhibits (ECF 127-1 to 127-5). *See, e.g.*, ECF 126-2, ¶¶ 7, 16, 22-33 (hearsay, no foundation, improper opinion); ECF 126, ¶¶ 13-24 (hearsay, no foundation, improper opinion); A. Morris Dep. 278:4-279:25, 280:18-281:19, 281:25-282:5; Ezekiel Dep. 231:7-233:1, 271:23-272:16; N. Gbarabe Dep. (V2) 289:23-291:3; 294:20-21, 295:10-21; Duoduo Dep. 284:22-285:22; 306:8-307:23; 310:4-12; 322:21-323:17; Christopher Dep. 274:7-275:19; 276:6-277:2; Agu Dep. 49:3-14; 102:13-103-21; 134:15-137:15. Chevron objects to the photographs in ECF 127-10 to 127-12 on the ground that they are unauthenticated, and to the article in ECF 127-13 on grounds of hearsay.

[6] Daily photographs show the fire size declining every day after the initial ignition on January 16, 2012, which is typical of similar blowouts. Adams Decl. ¶ 21.

Nor is there any scientific basis to conclude a natural gas fire could have caused the kinds of illnesses plaintiff alleges. Plaintiff offers no medical experts, and Chevron's experts show the incident could not have caused the array of injuries claimed. Dr. Marion Fedoruk, a medical doctor and expert in environmental toxicology, reviewed the medical claims and concluded that nothing connects them to the KSE incident. Fedoruk Decl., Ex. F-1 at 3-5, 34-35. Some of them, like malaria, are mosquito-borne or are otherwise entirely unrelated to anything that could be released in this type of incident. *Id.* at 32-33. Most claims are vague descriptions of common conditions, and plaintiff has made no effort to rule out their other causes or to tie them scientifically to the incident. *Id.* at 28-30, 32-34. As Dr. Stephen Abah attests based on his visit to the communities in 2012, many alleged conditions, such as respiratory issues, are long term and not attributed to the incident. Ex. 42, ¶ 9.

B. Individualized Claims of Purported Harm.

Lacking any supporting scientific evidence and faced with evidence that a natural gas well cannot cause the injuries he alleges, plaintiff is left to rely on his own testimony and that of other individuals to attempt to prove that the incident injured them. But their anecdotal testimony only confirms the incurably individualized nature of the claims, as well as the fraud that continues to pervade this case and demonstrates its unmanageability as a class action.

The threshold issue for Gbarabe and all potential claimants is where they lived at the time of the incident. Individual cross-examination is key given the absence of records or other methods to ascertain residency. *See* Francis Dep. 126:12-24 (plaintiff's Nigerian lawyer admitting he "can't think of any method on how to investigate" whether someone was in Koluama on date of incident). While Gbarabe was primed to testify he lived in the coastal Koluama, he tripped over where his family was living and when he left to move inland to Yenagoa, where he now lives. He swore in his interrogatory answers that he suffered such serious skin irritation that he had to move "to Yenagoa with my family" and that he suffered shock and distress "for myself and my family and alarm at the ailments that affected us all." Ex. 18, at 5:13-16. But he admitted at deposition that neither his wife nor only son was living in Koluama at the time of the incident. N. Gbarabe Dep. (V1) 160:2-161:25. As for himself, he

initially swore he was living in Koluama from 2000 until the time of the deposition in 2015, only later to say that he had moved to Yenagoa three months after the incident, in April-May 2012. *Id.* at 37:18-38:8. He first said he moved so he could communicate better with his lawyers. But that explanation was inconsistent with his testimony that he was not in touch with lawyers until the end of 2012, so he changed his testimony and claimed he moved to Yenagoa because his "livelihood is destroyed." *Id*. at 38:9-12.

Gbarabe's testimony about his supposed injuries was even more contradictory. With his advance approval, the operative complaint alleged that he suffered diarrhea and vomiting from "polluted air and water" and that others suffered the same health issues "as well as skin rashes and boils." ECF 45. But later he apparently realized it made no sense to say that polluted air caused diarrhea or that the offshore gas well incident polluted drinking water onshore. So he switched to say that his "serious gastro-enteritis" problems were caused by "eating contaminated fish that had been affected by chemicals" or, as he put it at his deposition, a fish that "smell[ed] like kerosene." Ex. 18, at 5:12-13; N. Gbarabe Dep. (V1) 232:2-7. If that is true, it has nothing to do with this natural gas well, as Chevron's experts explain. Adams Decl. ¶¶ 15, 17, 20; Fedoruk Decl., Ex. F-1 at 35-38.

At deposition, Gbarabe also adopted as his own the skin rashes and boils that he previously attributed only to others. *Compare* ECF 99, ¶ 10, *with* N. Gbarabe Dep. (V1) 238:10-15, 287:7-11. And he admitted that, contrary to his complaint, he did not suffer any vomiting. N. Gbarabe Dep. (V1) 294:11-16. So he went from alleging diarrhea and vomiting from air and water pollution, to claiming diarrhea from eating a kerosene-soaked fish and rashes from something. He embellished at his deposition, claiming that eating the fish also caused dizziness, shiver, and fever. *Id*. at 236:3-13. And he was unable to tell a consistent story on how long the rashes lasted—"some 3 months" in verified interrogatory answers, to two to three weeks at his deposition. *Compare* Ex. 18, at 5:25-26, *with* N. Gbarabe Dep. (V1) 245:2-5.[7]

[7] Other claimants' depositions reinforce the need for individual cross-examination. George Ibobra, for example, initially claimed he was only a fisher who had always lived in Koluama and now had no source of income to fuel his boat. Ibobra Dep. 9:1-15:1, 29:22-31:1, 33:13-19. (continued)

The individualized nature of the claims asserted here, and the importance of individual cross-examination, are further illustrated by the claim forms (entitled "Loss/Damage Questionnaires") recently collected as part of counsel's "re-signup" process to replace the "doctored" Schedule A. The claim forms ask claimants to state their alleged losses, including lost income, property damage, and "health problems." *See* Ex. 263. Plaintiff has to date delivered 5,630 claim forms to Chevron, and Chevron has deposed 36 putative class members.

The claim forms and depositions make clear that the fraud that infected the earlier complaints remains endemic. Claim forms were submitted on behalf of individuals without their knowledge or consent using inaccurate information and forged signatures or fraudulent thumbprints;[8] claim forms were submitted in the names of deceased persons, purporting to bear their signatures or thumbprints;[9] and plaintiff produced multiple inconsistent forms with matching names but different income figures and signatures.[10] By our count, plaintiff produced multiple, inconsistent claim forms for over 100 individuals. Mitchell Decl. ¶ 33.

Claim forms contain admittedly false information. *See* Ziprebo Dep. 119:10-22; 120:7-24 (admitting he wrote false damages figures because he "never thought about someone coming to scrutinize what I've written"); Igoli Dep. 58:18-59:4 (admitting her claim form contains damages

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Eventually he admitted that he and his wife owned a store in Yenagoa (the inland capital of Bayelsa with a 2006 population of 266,000), he had lived there most of the time since at least 2012, and he was paid under the amnesty program for ex-militants since 2011. *Id.* at 34:5-10, 36:6-37:24, 37:25-40:1, 48:8-49:20, 101:5-103:22. He clung to his story that he was in Koluama at the time of the incident but claimed that the incident had not happened before he left at 8 or 9 a.m. that morning, even though the fire in fact started earlier. *Id.* at 145:10-146:13, 147:7-20. His testimony on numerous other points further undermine his credibility. *See, e.g., id.* at 15:14-16:19, 104:7-105:15, 152:13-153:12, 155:17-156:6, 158:3-160:5, 160:6-161:23, 162:1-164:1. Indeed, he could not help from laughing while telling his story, recognizing that the questioner had to take his word for whatever he was saying. *Id.* at 41:16-43:19, 53:5-25, 59:8-61:3, 102:15-103:22.

[8] Erefawei Dep. 18:22-19:15, 52:15-22, 77:20-81:2; Princewill Dep. 43:21-25; Saigha Dep. 19:20-20:25, 22:20-23:13; B. Morris Dep. 97:14-100:15, 108:5-21; Tukuru Dep. 158:9-163:6; Ibobra Dep. 108:5-109:25 (told brother to fill out form without giving him information).

[9] Ex. 22, at 1; Ex. 25, at 2; *compare* Ex. 30 (damage questionnaire of Susu Freeman from 2016), *with* Freeman Dep. 80:19-81:1 (stating that Susu Freeman died in 2015).

[10] Exs. 420, 421; Clinton Dep. 150:8-15.

figures that are too high). Indeed, the witness who coordinated the "re-sign up" in one community instructed respondents to copy their information from Schedule A—the list that Gbarabe admitted had been "doctored" to inflate the claims. Sampson Dep. 182:25-185:8. At least 52 claim forms from one community contain the identical or closely similar statement that "people are dying untimely due to the explosion" (Ex. 31), which was untrue. Baghebo Dep. 269:8-272:1.[11] Witnesses testified to income loss and other damages that contradict their claim forms, which they tried to pass off as "mistakes."[12] Others disclaimed as "mistakes" facially inconsistent or improbable damages claims.[13]

Exaggerated and manufactured claims that defy the laws of medicine and physics extend beyond the claim forms—from a deponent claiming malaria from "[o]ver thinking" and breathing the "odor of the gas" (Gabriel Dep. 105:10-21) even though malaria is caused by mosquito-borne parasites and natural gas flowing directly from the well head is odorless (Fedoruk Decl., Ex. F-1 at 9; Adams Decl. ¶ 17), to others disavowing any pre-incident sickness, even common ailments like diarrhea.[14] Others claimed that their houses shook for hours or a day (Dio Dep. 14:4-25, Ekubo Dep. 81:10-82:11), the heat from the fire was felt five miles away (Clinton Dep. 70:5-19),

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[11] For other examples of identical or closely similar responses, *see* Exs. 32, 33.

[12] Ipale Dep. 285:17-287:1 (asserting health claims on his form were a "mistake"); Degbe Dep. 190:11-191:1, 197:23-203:6 (agreeing that his form contained information inconsistent with his testimony; he didn't expect anyone would ask him questions about his form); Ogoniba Dep. 115:9-119:1, 208:12-210:11 (testifying that some of his responses were not true and that he made a "mistake" in reporting his pre-incident income); Christopher Dep. 217:15-219:15 (admitting that his reported pre-incident income "was actually a mistake").

[13] Clinton Dep. 124:20-126:3 (stating that monthly loss figure of ₦400,000, which was two times his stated pre-incident income, was a "mistake" that he noticed but didn't want to correct at the time his form was completed); Gbarabe Dep. (V2) 253:8-255:25 (stating one claimant's reported pre-incident monthly income of ₦2.5 million was a "mistake" because it contained an extra digit, that many others made a similar "mistake," and that a lost property damages claim of ₦2.6 million is "too high").

[14] Ezekiel Dep. 165:9-12 ("In my life I've never suffered diarrhea before."); Gabriel Dep. 260:1-261:18 (claiming he never got sick in his entire adult life before the incident); Degbe Dep. 208:22-209:12 (claiming "all my life, no sickness" before January 2012 despite teaching children—who are sometimes sick—nine months of the year for 16 years); Toruyai Dep. (V2) 36:2-8, 38:12-14 (stating "[a]fter this incident occurred … we all smelled the air, perceived it, literally everybody had malaria," including himself, and that he never had malaria before).

the fire lit up the entire sky for 46 days and could be seen 28 miles away (Baghebo Dep. 250:19-251:14, 255:8-21),[15] and noise from the fire could be heard onshore for three months (Ibobra Dep. 160:6-161:5). Plaintiff offers no scientific evidence to support these outlandish claims. The only credible evidence is that the incident did not involve any explosion, shock waves, loud noise or earth vibration; did not emit heat that could be felt onshore; and after the initial few days of the incident was only barely visible to residents of the closest coastal communities. Adams Decl. ¶¶ 18, 19, and 21; Duakpenmi Decl. ¶¶ 3, 4.

Witnesses' alleged observations about the day of the blowout varied widely and were often contradicted not only by science, but by other witnesses who live in the same community or other communities closer to the well site.[16]

Similar irregularities pervade a purported survey of putative class members by Onyoma Research. Chevron deposed 13 purported survey respondents, and at least seven of those deponents whose names were on surveys denied ever completing a survey or being interviewed for the survey.[17] As a result, the surveys completed in their names contained false information.[18] Even survey respondents who testified to having completed a survey admitted that information

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[15] All references to distances of communities to the KSE site are based on the map contained in Ex. 3.

[16] One resident of Ikebiri swore he heard a loud "boom" sound that caused the earth to vibrate. Kojo Dep. 49:5-52:8. But another resident of the same community acknowledged that the earth didn't vibrate and he didn't hear any loud noise. Baghebo Dep. 248:17- 249:1. Another Ikebiri resident admitted that he heard no noise or felt any earth vibration even though he was staying at a fishing camp located "very close to the sea." J. Bruce Dep. 134:2-19, 272:19-25, 277:15-278:20. *Compare also* Agu Dep. 108:16-109:10 (resident of Amatu, over 43 miles away, claiming that the fire "cover[ed] the whole atmosphere"), *with* Erefawei Dep. 73:3-5 (resident of same community admitting she never saw the rig fire); *compare* Ipale Dep. 110:25-111:19, 236:18-25 (resident of Ezetu claiming vibrations like an earthquake caused part of his house to collapse), *with* Degbe Dep. 217:21-218:6 (resident of nearby community admitting no earth vibration).

[17] Igoli Dep. 60:10-61:2; Ipale Dep. 181:8-182:12; Kojo Dep. 86:6-87:9; B. Morris Dep. 157:14-159:1; Ododo Dep. 25:20-26:1, 94:24-95:13; Stanley Dep. 59:6-19, 66:7-25; Toruyai Dep. (V2) 45:10-46:13.

[18] Igoli Dep. 61:22-67:5; Ipale Dep. 261:20-282:7; B. Morris Dep. 159:2-167:20, 181:17-184:12.

contained in their surveys was false or a "mistake."[19]

The ongoing deception and irregularities—and need for individualized inquiries—are also reflected in the declarations filed with the class certification motion. ECF 126-2 to 126-10. When deposed, many declarants acknowledged that their declarations were inaccurate or that they did not understand words put into their mouths—and many contradicted statements in their declarations on key issues like their income and the injuries they are claiming.[20]

All of this comes from examining the claim forms and declarations of just the 36 putative class members deposed to date—a small sliver of the alleged 5,630 who re-signed up. No basis exists for thinking that the false claims and credibility problems are limited to the claimants whom plaintiff voluntarily brought to depositions.[21]

C. Plaintiff's Effort to Find "Genuine" Claimants.

Referring to the false claims revealed by the recent depositions, plaintiff's counsel have acknowledged (with considerable understatement) that "some re-signups may lack . . . honesty and/or diligence." ECF 162, at 8:25-9:1. They describe these clients as "bad apples" and attribute their presence in the case to Nigeria being an "African nation with well-documented problems of corruption from the government down in which individuals and corporations have

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[19] M. Ileberi Dep. 136:19-137:16 (admitting his pre-2012 income figure on the survey was a mistake); Baghebo Dep. 283:8-286:17; 288:11-289:21 (admitting he mistakenly filled his name on two forms); Tukuru Dep. 191:24-197:16, 204:22-205:16 (admitting many of his answers were untrue); J. Bruce Dep. 199:18-200:16 (testifying that he gave a lower post-2012 income figure on his survey "out of annoyance").

[20] Duoduo Dep. 306:2-307:23 (admitting he did not know if other communities suffered the same damage, despite saying so in his declaration); Ezekiel Dep. 233:16-236:9 (admitting she has fishing income even though her declaration states she had none since 2012); *compare* ECF 126-7 ¶ 17 (Baghebo swearing that he experienced skin infections immediately following the incident), *with* Baghebo Dep. 259:22-24 (testifying he had no skin problems); Agu Dep. 131:17-137:9 (admitting he did not use town criers for the re-signup process, as stated in his declaration); Ezekiel Dep. 270:3-8, 272:9-273:7 (conceding that she does not know the meaning of the phrases "drilling mud" or "depleted yield," used in her declaration).

[21] Of the 55 claimants whom Chevron sought to depose in Nigeria, plaintiff produced 36 of them. Even though the no-shows had submitted claim forms, and counsel had confirmed their availability only a week before the depositions, they reportedly became unavailable because they "migrated," were too old, or couldn't be located. Exs. 23, 24.

both, at times, been implicated." *Id.* at 9:5-8. That is hardly an endorsement of this purported class action. Counsel pledged that the claims would be "fully investigated" and that "any claim found to be false will be excised." *Id.* at 8:26-9:2. They say they hope to "hone down the client list" to include only those who are verified to have a "genuine claim; making sure that these people exist, and they live in the community where these lists say they live, and that they have [a] credible claim[] of damage." Ex. 2 at 23:4-18.

Counsel has refused on privilege grounds to explain who would be doing this investigation or how they would determine which of their clients is "credible" and "genuine," and which is a "bad apple." Ex. 16. The expert evidence reviewed above shows that no basis exists for ***anyone*** to make a claim. But if plaintiff's allegations were true, sorting the "bad apples" from any good ones could only be done by the same individualized process that has uncovered the fraud already revealed.

Reflecting the inherently individualized and unmanageable nature of his claim, plaintiff now wants to amend his proposed class definition. He first suggested he would exclude Odioma, because its residents claim damage from the Shell Bonga Oil field spill less than a month before the KSE incident, and Bilibiri, because no one there signed up as a claimant. ECF 163, at 10:19-26. But, apparently realizing that he and many other class members also claimed damage from the Bonga spill[22] (or perhaps because his funding agreement appears to bar counsel from dropping claimants (Ex. 13, § 8.7.3)), he is now proposing instead to expand the class to include non-residents who used any waterway and land in three coastal local government areas to fish or farm and who sustained "articulable damage." Ex. 17. Despite repeated inquiries, plaintiff has refused to state whether, as he has implied, his proposed class will consist solely of those people who have completed a Loss/Damage Questionnaire. Regardless, as shown below, class certification is improper.

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[22] N. Gbarabe Dep. (V2) 170:17-22, 185:17-23; Ibobra Dep. 69:15-17; Awe Dep. 291:6-17; Clinton Dep. 93:20-94:3; F. Ileberi Dep. 97:21-99:5,100:10-23; Degbe Dep. 226:8-13; Tukuru Dep. 32:25-33:2.

ARGUMENT

I. 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 v. Dukes*, 564 U.S. 338, 348 (2011) (internal quotation marks omitted). "The plaintiff must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23, including (if applicable) the predominance requirement of Rule 23(b)(3)." *Rahman v. Mott's LLP*, No. 13-CV-03482-SI, 2014 WL 6815779, at *2 (N.D. Cal. Dec. 3, 2014) (internal quotation marks omitted).

Plaintiff seeks certification under Rule 23(b)(3), which requires that he prove, in addition to each Rule 23(a) requirement, that questions "common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

II. INDIVIDUALIZED QUESTIONS OF INJURY, CAUSATION, AND DAMAGES PREDOMINATE.

Courts have long recognized that mass tort cases alleging personal, property, and business injuries usually do not meet Rule 23 requirements. As the Advisory Committee observed, a "'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability would be present." Fed. R. Civ. P. 23, advisory committee's note to 1966 amendment; *see Nola v. Exxon Mobil Corp.,* No. CIV.A. 13-439-JJB, 2015 WL 2338336, at *6 (M.D. La. May 13, 2015) ("[g]enerally, class actions in mass tort cases are not favored").[23]

The individual issues that courts most prominently cite as precluding class treatment are fact of injury, causation, and damages. "Mass tort cases, especially those of a national or multistate character, often present highly individualized issues with regard to causation and

[23] Plaintiff incorrectly asserts (ECF 123, at 3, 6, 15, 29) that Chevron is not contesting liability for purposes of class certification. Chevron agreed only that it does not "dispute that there are questions of law and fact common to the proposed class, to wit the allegations concerning Defendant's role in the events leading up to the Incident and Chevron Corporation's relationship with CNL and other entities as set forth in the second amended complaint." ECF 63, at 7:12-16.

damages." 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, 15 *Federal Practice and Procedure* § 3868 (2009); *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591. 625 (1997) (decertifying settlement class of asbestos victims because individualized causation and damages issues predominated). Even in "single incident" cases, courts have repeatedly denied class certification where proving injury, causation, and damages require individual proof. *In re MTBE Prods. Litig.*, 209 F.R.D. 323, 347-48 (S.D.N.Y. 2002) ("[T]he overwhelming majority of state and federal courts have denied certification of environmental mass tort classes, even in single-source cases."); *Puerto Rico v. M/V Emily S*, 158 F.R.D. 9, 13 (D.P.R. 1994) (denying class certification of personal injury claims arising from an oil spill because the "fact of each class member's personal injury and the causal link between that individual's injury and the spill" were questions that "could not be answered meaningfully on a class-wide basis").[24]

Here, the record establishes that these critical issues cannot be shown by common evidence, but require precisely the kind of individual-by-individual proof that defeats predominance and precludes class certification. Indeed, this is demonstrated by counsel's self-proclaimed individual-by-individual vetting to weed out their "bad apple" clients.

A. The Personal Injury Claims Require Individual-by-Individual Proof.

Courts almost universally recognize that personal injury claims are particularly ill-suited for class treatment. *See, e.g.*, *Zinser v. Accufix Research Inst., Inc.,* 253 F.3d 1180, 1192 (9th Cir. 2001). Here, plaintiff and the 5,630 individuals he seeks to represent assert a litany of widely varying ailments. Gbarabe alleges that he suffered "health issues" from "polluted air and water,"

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[24] *See also Mays v. Tennessee Valley Auth.*, 274 F.R.D. 614 (E.D. Tenn. 2011) (denying class certification of claim for diminution in property value allegedly caused by dike failure and resulting coal ash spill); *Ancar v. Murphy Oil, U.S.A., Inc.*, Civ. A. No. 06–3246, 2008 WL 2951794, at *1 (E.D. La. July 25, 2008) (denying class certification of property, business, and personal injury claims arising from refinery explosion); *Bradford v. Union Pac. R.R. Co.*, No. 05-4075, 2007 WL 2893650 (W.D. Ark. Sept. 28, 2007) (denying class certification of claim for property damage resulting from explosion caused by train collision); *Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598 (5th Cir. 2006) (affirming denial of class claims of personal injury, property damage, and business losses arising from a chemical plant fire); *Snow v. Atofina Chems., Inc.*, No. 01-72648, 2006 WL 1008002 (E.D. Mich. Mar. 31, 2006) (denying class certification of claim for diminution in property values resulting from large chemical fire).

including "diarrhea and vomiting." ECF 99, ¶ 10. And he alleges that putative class members suffered "similar health issues . . . including "diarrhea, vomiting, skin rashes and boils." *Id.*

Even if Gbarabe's and the proposed class members' personal injury claims were limited to what the complaint alleges, they would still be highly individualized. Unless this case is ended for lack of any evidence of causation, whether individuals have a valid claim can only be determined by examining each of their personal circumstances. Are they alive and did they actually fill out the claim form? Do they admit to falsifying their claim? Were they actually living or fishing in the communities at the time? Did they actually suffer any illness? What was the nature of the illness and what caused it? What are their damages? To prove entitlement to an award of damages, each individual must answer each question and many more with admissible, convincing evidence.

As shown by the inability of Gbarabe and other deponents to tell a consistent, coherent story, an individual's declaration or claim form cannot be simply accepted as true. Rather, Chevron is entitled to show by individual cross-examination that the person is not credible, did not suffer the injuries claimed, or that any injury was not caused by the KSE incident. And this would be true even if each person were asserting only the same or similar skin rashes and intestinal ailments as Gbarabe.

The individualized nature of the personal injury claims is even more pronounced than the complaint suggests. As reflected in claim forms and depositions, some denied any personal injury[25] while others went far beyond the complaint and—no matter how unbelievably—asserted anemia, arthritis, "breathing problems," brain damage, body pain, cancer, chest pain, cholera, constant headaches, cough, depression, diabetes, dizziness, eye pain, heart attack, heart pain, high blood pressure, influenza, itchy eyes, loss of appetite, malaria, measles, minor leg swelling, nerve pain, pneumonia, rheumatic fever, runny nose, "runny stomach," small pox, throat pain, typhoid fever, upper respiratory tract infection, weight loss and yellow fever.[26] And the variation is not

[25] *See, e.g.,* Ogoniba Dep. 246:25-247:10; Obedege Dep. 102:25-103:15, 116:5-11; R. Gbarabe Dep. 209:21-210:12; Ex. 35.

[26] Christopher Dep. 253:9-254:23; Toruyai Dep. (V2) 31:24-32:10, 36:2-8; Ipale Dep. 150:20- (continued)

just as to the type of illness, but also the onset (ranging from immediate to days, weeks or even months later) and duration (ranging from days, weeks, months, years and up to present).[27]

No common method exists for Gbarabe or anyone else to prove these claims. He and each of the 5,630 proposed claimants must identify what illness or illnesses he or she contracted, when it occurred, the symptoms and effects, and that the incident caused it. Given the variety of asserted illnesses, the numerous potential causes, and the individual health histories and living conditions, this cannot be done on any class-wide basis.

Several factors peculiar to this case compound the individualized nature of these claims:

First, as plaintiff's counsel have recognized, causation issues "lie at the heart" of their motion. Ex. 19 at 2. Unlike a case alleging injuries from a train wreck or a building collapse in which causation is typically undisputed, causation here is hotly disputed and individualized. Most or all of the asserted injuries are common ailments in the Niger Delta, wholly apart from any offshore natural gas fire. Ailments like gastrointestinal problems commonly occur because of the lack of basic sanitation, including raw sewage flowing into waterways used for drinking, cooking and bathing. Ex. 42, ¶ 11; *see* Fedoruk Decl., Ex. F-1 at 32-33; Gbarabe Dep. (V1) 188:17-190:6.[28] Illnesses such as malaria and typhoid are also prevalent in the Niger Delta. Fedoruk Decl., Ex. F-1 at 32-34; Ex. 42, ¶ 9; *see* N. Gbarabe Dep. (V1) 180:5-182:2 (admitting

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151:1, 211:11-19, 213:20-214:17; Duoduo Dep. 207:23-208:7; B. Morris Dep. 117:20-23; Igoli Dep. 73:23-75:1, 76:6-9; Baghebo Dep. 257:21-259:12; Kojo Dep. 24:14-25:5; Ex. 34.

[27] Ipale Dep. 214:18-215:15, 217:4-5 (skin rash appeared one month after incident and lasted three weeks); J. Bruce Dep. 43:1-45:14 (developed rashes one week after incident that lasted six to seven months); Freeman Dep. 151:22-152:10 (chest pain started immediately after the incident and lasted for a period of over three months); Christopher Dep. 253:25-254:11, 255:12-18 (experienced chest pain from February 2012 to present day); Clinton Dep. 54:15-24 (cough started two days after incident and lasted a week); Ekubo Dep. 92:14-94:14, 100:22-101:6 (cough started the day of the incident and lasted two months); Degbe Dep. 205:6-206:1 (cough started on February 15, 2012 and lasted three weeks); Ibobra Dep. 152:13-153:12 (everyone cried for two months), 158:3-160:5 (stopped breathing 10 times for 10 seconds), 155:17-156:6 (people coughing and covering noses with hankies, despite photos and videos showing no such thing (*see* Exs. 28, 37)), 161:6-23 (couldn't go in the water for four months because it was black), 162:1-164:1 (body itched for weeks when he bathed with well water).

[28] *See also* Gabriel Dep. 63:13-64:16, 67:11-69:11; Ipale Dep. 187:17-188:3, 189:16-24, 190:8-10; Ododo Dep. 74:19-76:9; Ogoniba Dep. 236:12-22; B. Morris Dep. 128:21-23.

he contracted malaria and typhoid fever long before this incident). No one can recover for any of these injuries without proving that it was due to the KSE incident, as opposed to any of the illness's real causes. And determining that question will require examination of each proposed claimant's personal circumstances, including place of residence, living conditions, and medical history. *See In re Am. Commer. Lines, LLC*, 2002 U.S. Dist. LEXIS 10116, at *44-45 (E.D. La. May 28, 2002) (finding lack of predominance in oil spill case in part because "the predominant ailments (i.e., headaches, nausea, dizziness, and sore throat) are quite common maladies which may be caused by any number of factors").

Second, causation is also complicated by the numerous other sources of pollutants in the Niger Delta. Crude oil operations by other companies are extensive in the area, including in the vicinity of the coastal communities at issue. Just one month before the blowout, a crude oil spill known as the "Bonga" spill occurred from a Shell offshore oil well. According to plaintiff's "case coordinator," the Bonga spill spread from coastal communities Odioma to Amatu—the same stretch of coastline at issue here. *See* Exs. 208, 277, 278; A. Morris Dep. 245:1-9. Gbarabe described the Bonga spill as "a massive spill" that caused crude oil to wash up "[e]verywhere on the coastline"—including the Koluama beaches, river, and estuary—and "affect[ed] everybody on the coast." N. Gbarabe Dep. (V2) 173:4-24, 174:19-176:6.[29] It was, according to one deponent, the worst oil spill in Koluama's history. Ibobra Dep. 136:16-22.

In the aftermath of the Bonga spill, Gbarabe and other claimants in this case submitted claims against Shell. *Supra*, p. 14, n.22. One deponent submitted over 4,000 compensation claims for fishermen from Koluama 2 (a community he estimated had a population of only 3,000 to 4,000, but he wasn't worried about fake claims (Ibobra Dep. 125:15-127:12)), and other coastal communities made similar claims. *Id*. at 74:11-75:2, 92:5-93:23. Ibobra charged N1,000 per

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[29] Ibobra Dep. 61:4-66:2, 72:6-10, 87:1-8, 111:2-118:16, 120:5-124:2, 139:18-142:3, 111:2-118:16, 120:5-124:2, 139:18-142:3 (testifying that the spill affected six local government areas in Bayelsa and Delta states and that he saw oil on beaches and rivers in or near Koluama 2); Awe Dep. 289:16-290:21 (claiming Bonga spill caused pollution in or near Ekeni); Ogoniba Dep. 268:14-270:18 (stating that an oil spill from a Shell facility caused pollution in Odioma that killed fish, trees, oysters, and periwinkles).

Bonga claim form (Ibobra Dep. 95:17-96:3), a practice in the Nigerian press referred to as selling claim forms. *See* Ex. 254. People all along the coast from Rivers State to Delta State, which includes the Bayelsa coast, "are laying claim to damages suffered" from the Bonga spill. A. Morris Dep. 226:9-228:7.

The area is also well known for illegal oil bunkering and refining operations, in which residents tap into pipelines, steal the crude oil, and boil it in large metal drums to extract gasoline and other petroleum products. These activities are "spread all over the Niger Delta." Ex. 458, at 2.[30] The widespread fouling of waterways and soil from these illegal operations, and from military operations to destroy the facilities, is well-documented: "There are no doubts about the huge environmental impacts occasioned by the activities of bush refinery operators . . . . The air and river/creeks around where these operations are taking place are really saturated with fumes, smell and slick of crude oil." *See* Ex. 458, at 5.[31] Thus, if someone got sick from eating a fish that smelled of oil, he cannot assume that the KSE incident is to blame; he needs to prove it.

Third, few, if any, individuals have medical records to document their alleged injuries and their causes—and plaintiff has not proffered any expert medical or scientific evidence that the claimed injuries were incurred or, if so, were caused by the KSE incident. This lack of any objective, scientific support heightens the need to test each individual claim by cross-examination and rebuttal evidence, which is impossible in a class action for thousands of individuals.

Fourth, the broad geographical dispersion of the alleged class means that—if there were

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[30] *See also id.* (stating that the Southern Ijaw local government area of Bayelsa State is "one of the major axis of the operation"); Okorobia Dep. 136:1-137:4 (agreeing that illegal bunkering and bush refineries are in Southern Ijaw and Brass LGAs); Alagoa Dep. 157:22-158:14 (bunkering happens along the rivers that drain through the communities and into the ocean); A. Morris Dep. 288:16-25, 311:21-312:5 (agreeing bush refineries existed in 2012, including several illegal oil refineries like the one depicted in pictures contained in Ex. 10).

[31] *See also* Abowei Dep. 40:9-42:4 (agreeing that illegal bunkering and refining causes huge waste oil dumping and pollution in the creeks and rivers leading to Koluama and other places in the Niger Delta); Okorobia Dep. 136:23-137:4, 137:13-16 (agreeing it is "common knowledge" that illegal bunkering and refineries cause pollution in the creeks and rivers throughout Bayelsa state and beyond and pollute drinking wells in the Niger Delta); Alagoa Dep. 157:2-21 (stating that spilled crude during bunkering hurts the environment "[v]ery badly," and refining crude in the bush near rivers is a "disaster" because it "destroys the environment").

any basis for anyone to claim impact—claimants would be differently situated as to the likelihood, if any, that they suffered any harm. Even excluding the inland areas of Bayelsa State, the class definition encompasses a 90-mile swath of the Nigerian coastline (roughly the distance between San Francisco and Bodega Bay) with proposed class members living between 7 and 45 miles from the well site. They fished, bathed in, and drew their water from a multitude of different waterways and areas of the coastline. Not only has plaintiff been unable to offer any proof that the gas blowout impacted any human or aquatic life, he has not even attempted to show that any imaginable impact was evenly distributed across this entire area. Thus, each claimant must establish individually that his or her water supply, sources of food, and air was polluted by the incident and caused that individual's asserted illness. And a jury would be entitled to take into account a proposed class member's distance from the well site in evaluating his or her credibility.

As noted, questions about the credibility of deponents to date underscore the impossibility of deciding thousands of claims with common evidence. Deponents repeatedly misstated or exaggerated the effects of the incident and lacked any factual basis for their claims of harm. Some admitted to intentionally falsifying their claim. Others tried to pass off their misstatements as a "mistake." Whether the claimants were intentionally lying or simply mistaken, individual proof is required and Chevron is entitled to individual cross-examination. And if a jury finds that an individual claimant lied on one material fact, it would be entitled to reject the entirety of that individual's claim. *See* 9th Cir. Model Civ. Jury Instr. 1.11 (2007).

B. The Property Damage Claims Require Individual-by-Individual Proof.

In their claim forms and at deposition, witnesses assert a variety of alleged property damage, all of it individual. Gbarabe says he lost "three or four bundles" of nets when they became caught in sargassum weeds in the river in which he was fishing. N. Gbarabe Dep. (V1) 262:15-263:18. He said that he had never seen the weeds before the fire and he "presumed" they were caused by the incident. *Id.* at 258:2-259:14.

Some witnesses asserted that their fishing nets were damaged, while others claim loss of

fishing boats, hooks or other fishing equipment. Their explanations for how the damage occurred vary widely, ranging from sargassum weeds, "pressure from the water" (Ipale Dep. at 151:13-152:21), a "foamy," " brownish chemical" (F. Ileberi Dep. 241:22-243:5), to the ocean current pulling nets towards the fire so the fisher was scared to retrieve them. Ziprebo Dep. 103:1-23.

Some claimed that their homes were damaged. One house 29 miles from the site supposedly cracked the day of the blowout and collapsed the next day. Ipale Dep. 111:18-112:10, 234:9-237:5. Another house, 28 miles from the site and 21 miles inland, supposedly cracked from crashing waves rotting the wood planks. B. Morris Dep. 145:24-147:16. Zinc roofs in the same inland community supposedly quickly rusted and tore "like clothes." Ex. 317; Baghebo Dep. 255:25-257:13. And raining "dirt" allegedly destroyed a farm and fish ponds in the same community. Igoli Dep. 26:24-27:5, 71:3-10, 72:9-73:22. Another witness claimed it cost her ₦200 million—at least $1 million[32]—to replace her boat engine. Omiebi Dep. at 50:5-51:19.

Like the personal injury claims, even if plaintiff could show that a gas well blowout was capable of causing improbable damage like this, these claims cannot be resolved without individual proof. Each individual who asserts property damage claims must individually attest to that damage and prove its cause. And, like the personal injury claims, the individuality of these claims is heightened because (1) the alleged damage, to the extent it occurred, could be due to numerous factors; (2) proof of the damage and its connection to the fire will depend on each claimant's own testimony, given the lack of any documentary proof or any scientific evidence showing that the fire could have affected fishing equipment or caused damage to homes or other structures onshore; (3) credibility will be a key issue in assessing the validity of each claim; and (4) the claimants' geographic dispersion means that the plausibility of their claims must be tested against the varying distances of their homes, farms, and fishing grounds from the rig site.

Gbarabe's claim illustrates the point. His testimony, even if the jury credits it, that his fishing nets were damaged by sargassum weeds will not prove that anyone else's nets were

[32] Until recently, ₦200 equaled about $1. Following a recent devaluation, the rate is now approximately ₦300 for $1. This brief uses the earlier rate to be consistent with deposition testimony and discovery given before the devaluation.

damaged, much less those who claim their nets were damaged by something other than sargassum weeds. Nor would his testimony about his fishing nets prove the claims of those who say their fishing boats were damaged, their homes cracked, their roofs corroded, their farm crops lost, or their fish ponds ruined. And Gbarabe's refusal at deposition to state the number of nets he supposedly lost (for fear that he would contradict his interrogatory answer that he could not remember)—along with the other inconsistencies in his story (*supra*, pp. 8-10, *infra*, pp. 29-32)—would entitle a jury to discredit his entire claim. N. Gbarabe Dep. (V2) 245:23-246:25.

As to each claim, the person making it will need to come forward with his or her own evidence and be subject to cross-examination. The need for this individual proof defeats predominance and precludes class certification. *See Benefield v. Int'l Paper Co*., 270 F.R.D. 640, 651 (M.D. Ala. 2010) (denying class certification of property damage claims because plaintiff failed to show "that ***all*** residential property owners in the class area suffered injury to property").

C. The Alleged Economic Injuries Require Individual Proof.

Individual issues also pervade plaintiff's claim that 5,630 individuals lost fishing income. Plaintiff has not offered any expert evidence that the incident had any effect on fish catch, let alone that it caused the kind of massive destruction of fisheries across a 90-mile swath of coastline that could support a class-wide claim of lost fishing income. To the contrary, as discussed above (pp. 4-6), his experts disclaimed any such opinion and considered it unlikely that the incident had that effect.

As with plaintiff's other theories of harm, he and the proposed class are thus left to try to establish this claim on a one-by-one basis, through testimony by individuals attesting to their reduced fish catches and their basis for attributing the reduction to the incident. And, as with plaintiff's other claims, because they are differently situated, one person's testimony as to his circumstances will not establish this claim for anyone else, let alone for 5,630 others.

Some individuals only fished in the sea (Tukuru Dep. 134:7-135:1), some fished in both the sea and the rivers (B. Morris Dep. 58:3-7), and some fished only in the rivers (Igoli Dep. 38:22-39:1, 39:8-10; R. Gbarabe Dep. 124:13-125:2). Some fished "very close" to the KSE rig (Tukuru Dep. 136:17-137:10), while others fished in waters 45 miles away (A. Peter Dep. 57:22-

59:13). Some fished in water allegedly fouled with crude oil from the Shell Bonga crude oil spill. Awe Dep. 291:6-8; 294:14-295:5 ("Q. Did the Bonga oil spill hurt your fishing? A. Yes."); Degbe Dep. 224:19-21 (Q. So the Bonga spill caused you to catch less fish? A. Yes."); Ogoniba Dep. 269:7-270:18. Others fished in waters not claimed to have been affected by the Bonga spill. Duoduo Dep. 153:4-11. Some, like Gbarabe, claim that their ability to fish was impaired by the growth of sargassum weeds. Baghebo Dep. 201:13-203:15, 204:2-5. Others testified that seaweed had no impact on their fishing. Princewill Dep. 39:22-40:8.

Individuals fished for different kinds of fish and used different types of fishing equipment. Ipale Dep. 89:6-90:10.[33] Even for those using the same equipment, the amount of their catch depended on their skill and "luck." N. Gbarabe Dep. (V1) 195:15-196:11. "[E]ach and every one of us [fisherman] is not doing the same fishing business. And even if we fish the same business, we cannot catch the same . . . ." Christopher Dep. 102:8-103:1. At least one deponent started to experience decreased catch years ***before*** the incident. Saigha Dep. 42:17-43:4 (testifying that she noticed reduced catch beginning in 2008). Another said the catch was worse in 2011 than 2010. Ekubo Dep. 75:2-7.

No scientific evidence shows that the incident affected any species of fish in any of the widely dispersed waterways at issue here, or excludes all other possible causes. *Supra,* pp. 4-8. Thus, these individual circumstances must be evaluated to determine the validity of any proposed class member's claim.

Plaintiff's main evidence of lost fishing income is the pre- and post-fire income listed on claim forms. But these figures are riddled with inconsistencies and outlandish claims that are obviously false, including a claim of lost income more than double the claimant's total pre-incident income. *Supra,* p. 11, n.13, 14. Faced with obviously false claims, witnesses could do no better than assert "sometimes the figure in your head is not the same as the figure you probably write out" (Ziprebo Dep. 116:20-117:3) or that the claim form was filled in by someone

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[33] *See, e.g.*, Baghebo Dep. 176:17-177:1 (fishes for catfish and grouper); H. Peter Dep. 35:5-15 (fishes for a variety of fish such as Doroh, Nda, Akpakoro, Sika, Una); Ekubo Dep. 32:25-33:6 (fishes only for periwinkle).

else who just "guessed it" and did not "know anything about it." Freeman Dep. 129:7-11. Another told the person who was filling out her form that she made ₦15,000 per month before the incident, but he wrote ₦2.5 million instead. Ekubo Dep. 131:6-132:8 ("It's not possible for me to make that much money in a month."). Others said in deposition that they could not estimate their income—even though they had submitted claim forms purporting to do so. A. Peter Dep. 41:4-16; Freeman Dep. 129:7-130:4; Toruyai Dep. (V1) 58:4-9. Some were unable to explain how they reached their purported income figures. Toruyai Dep. (V1) 57:7-58:3 (stating he has never counted his income, has no receipts, and can't explain how he determined he made ₦70,000 per day pre-incident). One witness testified at first that she did not know what she made before 2012, only to later say she earned ₦70,000 to ₦100,000 per ***month*** even though her claim form said she made ₦73,000 per ***day***, which is ₦1.898 million a month. Stanley Dep. 63:15-64:21. And one witness wrote his pre-incident monthly income was the sum total of what he made during an average month in the rainy season and in the dry season (*i.e.*, he added the two averages together without dividing by two). F. Ileberi Dep. 172:12-174:5, 261:1-19.

Faced with these false and conflicting answers, a trier of fact would be entitled to reject a claimant's testimony in its entirety and conclude not only that the income figures are untrustworthy but that the witness' claim of fishing impairment was unfounded. The same is true of testimony on all the other relevant issues, including where the claimant lived at the time, whether he was injured at all, if so, what caused it, and how much he was damaged.[34]

D. Plaintiff Has Not Identified Any Feasible, Efficient Method To Calculate Damages.

Plaintiff does not dispute that determining an individual's damages will require highly individualized proof. An individual's recoverable damages, if any, will vary according to his or

[34] Plaintiff's proposed class definition also refers to residents who used land for "farming." ECF 99, at 4. Plaintiff does not claim that he personally suffered any farming losses; he did not submit any expert report on farming; and his damages expert's model is limited to fishing losses. Money Dep. 183:18-184:3. But even if farming losses were part of this case, that would only raise further individualized issues regarding the location of the farm, how it was supposedly affected, and whether the effect was caused by the KSE incident.

her own circumstances, including the type and severity of any physical ailments, the real or personal property that was damaged and the extent of that damage, and the amount of his or her before-and-after fishing income.

The need for individual-by-individual proof of damages is further reason why individual issues overwhelm any common issues. As this Court has recognized, plaintiff must show that "damages [can] feasibly and efficiently be calculated once the common liability questions are adjudicated." *Rahman v. Mott's LLP*, No. 13-CV-03482-SI, 2014 WL 6815779, at *8 (N.D. Cal. Dec. 3, 2014) (internal quotation marks omitted).

Plaintiff asserts that he has a "framework for a damage[s] model herein capable of common proof." ECF 123, at 37:25-38:1 (referring to report by accountant Money). But the "model" ignores the claims for personal injury and property loss; it is limited to economic damages. Money Dep. 8:23-25, 61:15-25. Even as to that, he proposes simply to add up the before-and-after fishing income from "answers to questionnaires and interviews"—the very claim forms that, as shown above, are riddled with false information and unbelievable, exaggerated claims. *See* ECF 126-1, at 3-4 of 10.[35] When confronted with evidence that the claim forms were unreliable, Money said he would not rely on them unless someone else verifies them. Money Dep. 109:19-110:4. If he obtains verified data in the future, he proposes that damages be calculated individually and then averaged within to-be-determined categories (*e.g.*, individual communities). *Id.* at 67:18-68:8, 73:11-74:22. In effect, plaintiff's model proposes nothing more than individualized mini-trials about the validity of each and every lost income damage claim. *Id.* And plaintiff does not propose any model for other types of damages. This is the opposite of a feasible and efficient method for calculating damages on a class-wide basis.

Leyva v. Medline Indus., Inc., 716 F.3d 510 (9th Cir. 2009), cited by plaintiff, proves the point. The Ninth Circuit observed there that the defendant maintained computerized payroll and

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[35] Money did not know what he meant by "interviews" and could not recall writing it. Money Dep. 132:10-133:20. He admitted that he did not have other data necessary for his model—*i.e.,* data on cost of purchasing fish to replace fish for personal consumption. *Id.* at 57:8-21, 69:21-70:18, 118:20-122:6, 126:6-127:3.

time-keeping records that "would enable the court to accurately calculate damages and related penalties for each claim." *Leyva*, 716 F.3d at 514. In other words, damages could be calculated on an objective basis using the defendant's own data. No such data exist here.

III. GBARABE IS NEITHER TYPICAL NOR AN ADEQUATE REPRESENTATIVE.

In most class actions, little question exists over whether the named plaintiff is typical or adequate. This case is different. Plaintiff is not claiming he suffered the same injuries as the putative class members. And his false claims and inability to give consistent, coherent accounts on key issues disqualify him as an adequate representative.

A. Gbarabe Is Not A Typical Plaintiff.

A class representative must "possess the same interest and suffer the same injury as the class members." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (internal citation and quotation omitted). Gbarabe does not meet this standard, for at least two reasons.

First, the only personal injuries he claims are diarrhea and skin rashes. He does not claim any of the vast array of ailments that others say they contracted. The only property damage he claims was loss of his fishing nets. He does not claim that his home or other structures were damaged or that he has fish ponds or farmland that were destroyed. Second, at the time of the incident, he claims he was living in Koluama 1, one of the coastal communities closest to the well site. Yet he seeks to represent residents in communities spread along the entire Bayelsa state coastline, some of whom live 45 miles from the well site.

While the named plaintiff's claims need not be identical to those of proposed class members, he must have suffered the "same or similar injury." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). This requirement ensures that "the named plaintiffs' interests are sufficiently aligned with those of class members to assure that they not only can but will press each such claim to a full and equal extent." *Labou v. Cellco P'ship*, No. 2:13-CV-00844-MCE, 2014 WL 824225, at *3 (E.D. Cal. Mar. 3, 2014) (internal quotation marks omitted). But Gbarabe has no personal interest in trying to prove that the incident caused malaria, cholera or other illnesses he didn't have, caused buildings to crack or collapse, ruined inland fish ponds or farms, or impacted communities beyond Koluama.

Indeed, his lack of aligned interest is confirmed by his failure to offer any expert evidence to prove causation for the broad reach of alleged personal injuries or property damage. Tellingly, his damages model is limited to lost fishing income, which encompasses his principal claim of harm but ignores the kind of other injuries that proposed class members allegedly had.

Gbarabe is also atypical because he needs to overcome a threshold standing issue. In 2012, he granted an irrevocable power of attorney to another Nigerian (Chief Hudson Ebiowei) to take legal action for any claims of his fishing cooperative arising from this incident. Ex. 339. Chief Ebiowei submitted a claim on behalf of Gbarabe's co-op. Ex. 714. According to the co-op's by-laws, the members agreed to "Co-operative Fishing and marketing" with the goal of having the co-op market fish for its members. Ex. 36. By pursuing a claim for his co-op, Gbarabe arguably evinced an understanding that his co-op had the right to any claim for lost fishing income. This raises a separate issue not applicable to anyone other than members of his co-op, or co-ops with similar by-laws.

B. Gbarabe Is Not An Adequate Representative.

"[T]he Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members." *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812 (1985). "The named plaintiff's and class counsel's ability to fairly and adequately represent unnamed [class members are] critical requirements in federal class actions under Rules 23(a)(4) and (g)." *Baumann v. Chase Inv. Servs. Corp.,* 747 F.3d 1117, 1122 (9th Cir. 2014). Reflecting the issue's central importance, "the Court has a duty throughout the litigation to stringently examine the adequacy of class representatives." *Lopez v. San Francisco Unified Sch. Dist.*, No. C 99-3260 SI, 2003 WL 26114018, at *2 (N.D. Cal. Sept. 8, 2003).

Gbarabe does not satisfy this fundamental requirement for the same reasons he is not typical. *See Labou v. Cellco P'ship,* No. 2:13-cv-00844-MCE-EFB, 2014 U.S. Dist. LEXIS 26974, at *18 (E.D. Cal. Feb. 28, 2014) ("[B]ecause Plaintiff neither possesses the same interest nor suffers the same injury as the majority of the proposed class, the Court finds that Plaintiff has not met her burden of satisfying the adequacy requirement under Rule 23(a)(4)."); *W. States Wholesale v. Synthetic Indus.*, 206 F.R.D. 271, 277 (C.D. Cal. 2002) ("A class representative is

not an adequate representative when the class representative abandons particular remedies to the detriment of the class.").

He also has shown no ability to discharge his "[p]rimary" duty "to select class counsel and monitor the conduct of class counsel throughout the litigation." *Armour v. Network Associates, Inc.*, 171 F. Supp. 2d 1044, 1048 (N.D. Cal. 2001). He did not even speak with counsel of record or read the complaint until after the complaint was filed, and did not meet with counsel for the first time until just before his deposition in December 2015. N. Gbarabe Dep. (V1) 63:17-64:5, 77:7-12, 79:7-82:11, 83:1-7. And the false claims that continue to permeate this case belie any assertion that he can effectively supervise his lawyers or the conduct of this case.

Indeed, plaintiff himself lacks honesty and credibility, which confirms his inadequacy. "[H]onesty and credibility . . . is a relevant consideration . . . because an untrustworthy plaintiff could reduce the likelihood of prevailing on the class claims." *Jordan v. Paul Fin., LLC*, 285 F.R.D. 435, 462 (N.D. Cal. 2012) (internal quotation marks omitted). Credibility problems can easily "become the focus of cross examination at trial, impeding [a plaintiff's] ability to effectively represent the class." *Friedman-Katz v. Lindt & Sprungli (USA), Inc.*, 270 F.R.D. 150, 160 (S.D.N.Y. 2010). So when a plaintiff's false testimony "subjects [his] credibility to serious question," he may be deemed to be an inadequate representative, even if it "was the product of an innocent mistake." *Kline v. Wolf*, 702 F.2d 400, 403 (2d Cir. 1983).

Gbarabe has repeatedly shown himself to be neither honest nor credible. As shown above (pp. 8-9), he gave contradictory testimony on the fundamental issues of where he lived and what symptoms he supposedly had. When confronted with his sworn inconsistencies, he favors the excuse that someone "doctored" the earlier version. According to him, the allegations about his health effects in the second amended complaint were "doctored." Asked to confirm that the allegation that polluted air and water caused him to vomit was false, Gbarabe testified: "That is exactly what I'm saying. They just doctored – I was not even – I have not even seen this." N. Gbarabe Dep. (V1) 294:11-16. He testified that when he first saw the second amended complaint in 2015, he informed his lawyers of his symptoms: "I didn't tell them I had vomiting, only diarrhea and the rashes." *Id.* at 295:1-3. As to where his lawyers got the information in the

second amended complaint, "Obviously, all the plaintiffs, they are just imagining things. They didn't ask me any questions. I am not even aware of this until I read them, until I come into notice of this." *Id.* at 295:12-17. But those allegations were repeated verbatim in the third and fourth amended complaints that he approved in advance. *Id.* at 296:19-298:1, 306:19-307:12.

Gbarabe also dissembled on the facts relevant to whether he has standing. Twice, he admitted that he is a member and chair of the Iyela-Ogbo Deep Sea Fishing Cooperative. *See* Ex. 706, ¶ 6; Ex. 282, at 19:22-23. Twice, he denied fishing as part of a group or belonging to a fishing cooperative. N. Gbarabe Dep. (V1) 118:25-119:7; Ex. 725, No. 19. He began the second deposition the same way, denying having been a member of a fishing cooperative. N. Gbarabe Dep. (V2) 34:21-23. But when asked whether he was the chair (indicating the questioner was aware of the facts), he initially admitted having a fishing cooperative since 2006. *Id.* at 34:24-37:3, 365:23-25. Gbarabe also tried to evade the documentary evidence that he authorized Chief Ebiowei to sue for his cooperative.[36]

Gbarabe's testimony about the power of attorney he gave, or didn't give, the Nigerian attorney Egbegi that led to the filing of this case is even more damning. The 2012 power of attorney from the six original plaintiffs to Egbegi—which was the basis for authorizing counsel of record to represent them (ECF 1, ¶ 9)—bears only two signatures, apparently those of Ogola and Fresh Talent, two of the original named plaintiffs. Ex. 918. So in 2014, Gbarabe and the other plaintiffs executed affidavits in which they swore that they had agreed in Egbegi's office that Ogola and Fresh Talent would sign on behalf of the six. Ex. 706, ¶ 17; Ex. 6, ¶ 18; Ex. 7, ¶ 21; Ex. 8, ¶ 11; Ex. 9 ¶ 10. At Gbarabe's first deposition, he confirmed his sworn account (Dep. (V1) 81:6-8, 87:2-25), presumably because without a valid power of attorney, he was concerned about his counsel's authority to sue. By the time of his second deposition, however, he and others had completed the "re-signup" process in which 5,630 individuals purportedly signed letters of

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[36] When asked whether he had heard of Chief Ebiowei, Gbarabe responded: "Where did you learn of him?... [H]eard names like that so many places." N. Gbarabe Dep. (V2) 45:13-24. Then he evaded on what he asked Chief Ebiowei to do, eventually admitting he authorized Ebiowei to make a claim for the fishing cooperative by use of the power of attorney. *Id.* at 68:25-69:7.

authority to sue on their behalf and to supersede any previous authority provided to any person. With no need to keep Egbegi in the picture and indeed with an incentive to drop him, Gbarabe testified at his second deposition that, contrary to his affidavit, he was not present at the meeting with Egbegi where he supposedly authorized Ogola and Fresh Talent to sign the power of attorney for him. N. Gbarabe Dep. (V2) 159:12-15. He said he signed the false affidavit because he trusted his lawyer who told him to sign. *Id.* at 150:13-151:17, 202:4-5.

Gbarabe has attempted to disown other material parts of his 2014 affidavit, including statements about injuries allegedly caused by the KSE incident: "Q. You knew parts of this were untrue, but you signed it anyway; correct? A. Correct." *Id.* at 151:25-152:15. For other parts of the affidavit, he admitted he had no basis for his assertions but signed it because the lawyers told him to. For example, the affidavit says that "most persons in the communities . . . have suffered diarrhea, cholera, etc. from drinking the polluted waters." Ex. 706, ¶ 9. At deposition, he admitted that he did not know what caused those illnesses. N. Gbarabe Dep. (V2) 156:10-21; *see also id.* at 157:2-158:9 (signed part about others suffering skin rashes that blossomed into boils and experiencing breathing problems after inhaling fumes, because Egbegi wrote it).

Gbarabe also testified to physically impossible observations, like smelling tear gas from the well and hearing a boom from the blowout. N. Gbarabe Dep. (V1) 217:17-218:18; *see* Adams Decl. ¶¶ 17, 18 (natural gas is odorless and does not smell like tear gas when burned; unlikely the blowout could be heard six miles away).

Gbarabe has also been inconsistent on his pre-incident fishing income. Schedule A lists him twice, once as Iyela Gbarabe with monthly income of $5,208 and once as Natto Gbarabe with income of $2,604. ECF No. 45-1, at 1276, 1316. Although he claimed Schedule A was "doctored," he swore to the higher amount ($5,208 per month) in his April 2015 interrogatory response. Ex. 11, at 2:18-19. He then dropped the amount to the equivalent of $625 per month for the rainy season and $1625 for the dry season, for an average of $1041 per month. Ex. 18, at 7:22-25. He then increased it to the equivalent of $1,400 per month. Ex. 725, No. 7. Finally, at his July 2016 deposition, he said he made the equivalent of $500 per month in the seven-month rainy season and $1000 per month in the five-month dry season, which averages at $700

(although he mistakenly added the averages for the two periods and forgot to divide by 12, and arrived at a purported year round average of $1000 to $1500 per month). N. Gbarabe Dep. (V2) 241:19-242:25. With all these conflicting figures, a jury could readily reject his testimony. All in all, he has proven to be an unfit witness and thus an inadequate class representative.

C. Proposed Class Counsel Are Inadequate, And Their Funding Uncertain.

"Anything 'pertinent to counsel's ability to fairly and adequately represent the interests of the class' bears on the class certification decision," and that includes "an attorney's misconduct or ethical breach." *Reliable Money Order, Inc. v. McKnight Sales Co.*, 704 F.3d 489, 498 (7th Cir. 2013) (quoting Fed. R. Civ. P. 23(g)(1)(B)). "When class counsel have demonstrated a lack of integrity, a court can have no confidence that they will act as conscientious fiduciaries of the class." *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 918 (7th Cir. 2011). Counsel has an obligation to ensure that false evidence is not submitted to the court.[37] In addition, Rule 23(g)(1)(A)(iv) requires the Court to consider "the resources that counsel will commit to representing the class."

The relevant available facts were summarized in Chevron's discovery motions relating to funding and adequacy. ECF 139, 153. We add only that, while plaintiff concedes that he depends on third-party funding, he has not established what portion, if any, of the $1.7 million remains or whether it will be sufficient to take this case to trial. Although the generous six-fold "success fee" (which reflects the riskiness of the investment) provides some incentive to increase the amount, the countervailing incentive is not to throw good money after bad. The funder, Therium, has the right not only to decline to provide additional funding but also to terminate the agreement and obtain reimbursement if counsel failed to disclose all information relevant to Therium's funding, the disclosures were not "accurate, complete and true in all material respects," or counsel fails to promptly inform the funder of any "significant developments . . .

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[37] *See, e.g., Nix v. Whiteside,* 475 U.S. 157, 168-69 (1986) ("the legal profession has accepted that an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct; it specifically ensures that the client may not use false evidence").

which may be material . . . to the prospects of success of the Claim." Ex. 13, §§ 8.2, 15.3, 10.2.3(d)-(e).

From discovery to date, it appears that plaintiff's only substantive disclosure was a 53-page submission, apparently prepared in the first half of June 2015. Ex. 12.[38] That submission provides ample ground for the funder to terminate. After correctly noting that certifying a class action "requires some exacting burdens that must be surmounted by the plaintiffs," counsel falsely stated that "in this case, it has been ***agreed*** that we are only required" to show that lead plaintiffs are "fit and proper to represent" the identified communities, sustained "typical damage and loss" and the "extent of the damage claimed." *Id*. at 37-38 (emphasis added). No such agreement exists to that effect. *Supra* p. 15, n.23.

Counsel further misled Therium by representing that the "assigned judge, by his rulings, would appear to favor this method of adjudication," referring to class actions. That is not a fair characterization of Judge Conti's dismissal of the original complaint on the ground that plaintiffs had no standing to represent 65,000 individuals because they were not joined and the case was not pled as a class action. ECF No. 30, at 11-12.

Implying that payday is close at hand, counsel coupled these misleading statements about class actions with the false statement that "it has been inferred by the defendant that, if class status is conferred, Chevron may seek settlement talks." Ex. 12 at 40; *see also id.* at 6 ('It is the strong belief of counsel that, should this case be granted class action status, Chevron may well come to the table to negotiate a settlement . . .").

In addition to these false and misleading statements, there is no indication that counsel disclosed that Schedule A, cited in the operative complaint, was "doctored;" that many of the putative claims turned out not to exist; that Gbarabe's affidavit was knowingly false; that the re-signup process has been rife with fraud; or any of the other irregularities outlined above. To the

[38] Plaintiff's e-mail log for funding documents refers to summaries of his deposition and Verde "findings." Ex. 15. But counsel advised that the "summaries" are only two paragraphs and do not disclose the substance of the deposition (including the testimony that undermines his credibility) or the Verde findings (including Verde's admission that no basis exists for finding impact to fish or humans (*see supra*, p. 4-5)). Ex. 29 at 1.

contrary, counsel represented to the funder that the "realigned cases consist[s], we are confident, of only claims capable of proof." Ex. 12 at 25. Counsel further represented that "findings of Verde, our environmental experts are crucial" for class certification and they were "testing to establish a 'zone of impact' to a reasonable scientific certainty." *Id.* at 38. There is no indication that plaintiff advised the funder that Verde's testing accomplished no such thing, as discussed above (pp. 4-5). All of this raises a serious question as to whether Therium will terminate funding.

Counsel's reliance on outside funding may also interfere with their duties to act solely for the benefit of the class. *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013) ("Class counsel are duty bound to represent the best interests of class members."). The funding came with strings attached that cede to the funder control over important aspects of the case. The funding agreement requires the lawyers to follow an agreed "Project Plan" that can be varied only with the funder's consent. Ex. 13, § 7.2. Counsel can make only specific enumerated changes to the litigation (like adding a party) without prior notice to or consent from Therium. *Compare id.* § 7.1, *with* §§ 3.1.5(a)-(c), 10.4). The lawyers are barred from changing the contingency fee agreement (*id.* § 3.1.5(e)), even when it may be in the class's interest to do so. Except for ethical reasons, the lawyers can neither terminate the contingency fee agreement nor seek an order adverse to Therium's interests. *Id.* § 3.1.5(f), (k)). The lawyers are barred from securing funding from other sources absent Therium's consent. *Id*. §3.1.5(a).

IV. A CLASS ACTION IN CALIFORNIA IS NOT THE SUPERIOR METHOD FOR RESOLVING CLAIMS OF HARM IN NIGERIA.

Rule 23 requires that the proposed class action be "superior to other available methods for fairly and efficiently adjudicating the controversy." Relevant factors are "the extent and nature of any litigation concerning the controversy already begun by or against class members," "the desirability or undesirability of concentrating the litigation of the claims in the particular forum," and "the likely difficulties in managing a class action." Each factor weighs decisively against class certification.

A. The claims here—by Nigerian residents for alleged harm in Nigeria, based almost

entirely on events and evidence in Nigeria—are ill-suited to be resolved 8,000 miles away. In plaintiff's counsel's words, "Nigeria can be a difficult place from which to extract information and in particular the Delta area. Comprehensive investigations take time anyway—in Nigeria, the inherent logistical and geographic difficulties multiply general difficulties many times over." Ex. 21 at 10; Francis Dep. 121:18-122:14, 126:12-24 (plaintiff's Nigerian lawyer admitting difficulty to "investigate or verify" claims in these remote communities). These "inherent" difficulties extend to presenting the evidence to U.S. triers of fact unfamiliar with the language, customs and local conditions in Nigeria. Because Chevron lacks power to subpoena witnesses from Nigeria, the only class member testimony at trial will be from witnesses plaintiff declined or was unable to produce one-third of the claimants whose depositions Chevron sought in the first round. *Supra*, p. 13, n.21.[39]

Trying these claims in United States court would facilitate precisely the kind of fraud that has permeated this case. The difficulty of gathering evidence in the Niger Delta combined with U.S. jurors' unfamiliarity with conditions there creates fertile ground for proposed class members to falsify or exaggerate their claims The proposed class members almost certainly realize that they are unlikely to ever face questioning about their claims and, if they did, the lack of records and the "inherent logistical and geographic difficulties" make it more difficult to disprove their claims even if they are false. As one witness put it, he wrote false damages figures because he "never thought about someone coming to scrutinize what I've written." Ziprebo Dep. at 119:10-22; 120:7-24.[40] And they know they face almost no risk of sanction by way of contempt or otherwise for submitting false claims or signing false declarations.

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[39] *See Causey v. PAN AM*, 66 F.R.D. 392 (E.D. Va. 1975) (finding lack of superiority in part because "none of the potential class members has any apparent connection with the Commonwealth of Virginia" and "it does not appear that any witnesses, evidence or documentation is located within this District"); *Baricuatro v. Indus. Pers. & Mgmt. Servs., Inc.*, No. CIV.A. 11-2777, 2013 WL 6072702, at *11 (E.D. La. Nov. 18, 2013) ("Compounding these manageability problems is the fact that a majority of putative class members reside in the Philippines . . . .").

[40] *See also* Christopher Dep. 105:11-106:18 ("not possible" to verify whether information contained on claim forms is accurate; fisherman "don't actually keep record[s]" or receipts); Ogoniba Dep. 178:8-10 ("Q. Is there any way that I can verify that numbers you are telling me (continued)

These same circumstances would make it impossible for the Court to effectively supervise the claims process and ensure the intended distribution of funds. Plaintiff acknowledges as much in proposing that any proceeds should go into a "trust" for community benefit because "[i]t has been shown in the past that simply handing over vast amount of monies to one or more individuals would be a very ill thought out idea indeed." Ex. 706, ¶ 21. The remoteness of the area and the challenges of communication further complicate any effort to ensure constitutionally adequate notice to class alleged—an essential requirement on which plaintiff defaults.

B. If anyone had a legitimate claim, the superior method would be litigation in Nigeria. Over 70 lawsuits have been filed in Nigeria seeking compensation for this incident including many suits for communities, fishing cooperatives, and other large groups. Ex. 38; Mitchell Decl. ¶ 41. At least one was filed on behalf of all allegedly affected residents in Bayelsa State, encompassing the class members proposed here, and more. *Id.*

Trying to carry his burden to show that Nigerian courts are inadequate, plaintiff submits the declaration of a Nigerian lawyer. ECF 127-7. But he is the lawyer who serves as plaintiff's lawyer for this case (replacing Egbegi). Francis Dep. 48:1-51:3, 52:5-55:10, 56:8-58:12, 62:13-65:16; N. Gbarabe Dep. (V1) 305:13-306:13, 307:23-308:2. Because he is on a contingency fee (*Id.* at 70:20-77:21, 83:12-24, 86:6-87:9), he is disqualified as a witness. *See* Cal. Rules of Prof. Conduct, Rule 5-310(b) (lawyer may not pay witness "contingent upon . . . the outcome of the case"). His opinion is without adequate basis anyway. He has not studied Nigerian courts and is not an expert on that topic; he offers only a personal opinion, purportedly based mostly on handling inapposite community disputes over land title and chiefs. Francis Dep. 97:7-20, 106:23-107:7, 107:18-108:1, 116:3-117:4, 133:21-134:1. He says only that his "firm belief" is that Nigerian courts are "wholly inadequate" because litigation is "expensive" and the "remoteness of the communities and the lack of reliable communications makes acquisition of information difficult." ECF 127-7, ¶¶ 1, 6. But at deposition he acknowledged that he and other Nigerian lawyers handle cases on contingency fee so claimants pay nothing unless they prevail. Francis

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are true? A. No record."); Ibobra Dep. 60:2-61:3 ("You know, it's hard for me to find out exactly what you do; because I can only ask you, right? A. Okay.").

Dep. 29:13-30:20, 31:3-11. And exporting litigation to the United States would only compound the difficulties of obtaining information in these remote communities. He acknowledges that Nigerian law provides for compensation to individuals and communities damaged by oil and gas spills but does not explain his claim that Nigerian law limits what "type of damage is compensable" or say how it would apply here. *Id.* at 154:11-14; ECF 127-7, ¶ 2. Finally, he asserts that Nigerian courts are biased and Nigerian regulatory agencies have been ineffective in enforcing oil and gas regulations. *Id.* ¶¶ 1, 4. He offers no facts to support either assertion and no explanation why the second is relevant. In short, plaintiff offers no basis to conclude that litigation in the United States is superior to adjudicating his claims in his own country, where the claims arose and he and every proposed class member resides.

C. This action is inferior to the pending Nigerian cases for another key reason. To satisfy the superiority prong, a plaintiff seeking to represent a foreign class must show that a class action judgment likely would be *res judicata* where the class resides.[41] The declaration of Oba Nsugbe submitted by plaintiff does not carry this burden. Nsugbe opines only that "a mechanism exists" by which a Nigerian court may enforce a foreign judgment. ECF 127-6, ¶ 3. He does not opine, nor cite any Nigerian case holding, that a U.S. class action judgment would be enforced in Nigeria in any circumstances, let alone if a class member disputes receiving notice, claims not to have comprehended its meaning, or challenges the adequacy of the named plaintiff's representation. In short, Nsugbe does not establish that Nigerian courts likely would bar Nigerians from pursuing their cases in Nigeria simply because they are absent class members in a case that one Nigerian chose to bring in the U.S. as a class action, and lost. As in *In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76, 103-05 (S.D.N.Y. 2007), an expert opinion that establishes only that "one cannot rule out a U.S. class action settlement or judgment . . . will be recognized or enforced" in a foreign country "is insufficient on its face."

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[41] *In re Alstom SA Sec. Litig.*, 253 F.R.D. 266, 282 (S.D.N.Y. 2008) ("[I]f Plaintiffs are 'unable to show that foreign court recognition is more likely than not, this factor weighs against a finding of superiority and, taken in consideration with other factors, may lead to the exclusion of foreign claimants from the class'").

V. PLAINTIFF'S PROPOSED CLASS DEFINITION IS INVALID.

Class certification must also be denied because plaintiff's proposed class definition is impermissible. "[T]o maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable." *Rahman v. Mott's LLP*, No. 13-CV-03482-SI, 2014 WL 6815779, at *3 (N.D. Cal. Dec. 3, 2014) (internal quotation marks omitted). A class must be "defined with 'objective criteria'" and it must be "'administratively feasible to determine whether a particular individual is a member of the class.'" *Id.* at *4. The class cannot be defined in a "fail-safe" manner that requires "a determination of the merits of the individual claims to determine whether a person is a member of the class." *Daniel F. v. Blue Shield of California,* 305 F.R.D. 115, 122 (N.D. Cal. 2014). And "a class that includes those who have not been harmed is both imprecise and overbroad." *In re AutoZone, Inc., Wage & Hour Employment Practices Litig.*, 289 F.R.D. 526, 545 (N.D. Cal. 2012). Plaintiff fails on all counts, because of the inherently individualized nature of the claims he is asserting.

First, far from "a tightly defined geographic area within which contamination is shown to be present to a reasonable scientific certainty" (ECF 123, at 18:4-5), the class definition encompasses all residents along the coastline of Bayelsa State, as well as unspecified "adjacent" "rivers and creek-situated areas." Plaintiff has offered no scientific evidence—let alone to a reasonable certainty—that this geographic area corresponds to any area of actual harm. His environmental experts disclaimed any opinion on the geographic scope of any harm, and counsel admitted that its U.K. experts had nothing to do with it. Ex. 20 at 2.[42]

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[42] *See Duffin v. Exelon Corp.*, No. CIV A 06 C 1382, 2007 WL 845336, at *4 (N.D. Ill. Mar. 19, 2007) (finding class definition improper where "[t]here is simply no correlation between plaintiffs' evidence concerning the location of contaminated air and groundwater, and the 'arbitrarily drawn lines on a map' constituting plaintiffs' proposed class"); *Kemblesville HHMO Ctr., LLC v. Landhope Realty Co.*, No. CIV.A. 08-2405, 2011 WL 3240779, at *6 (E.D. Pa. July 28, 2011) (denying class certification where definition was "arbitrary and not reasonably related to evidence of record" concerning the extent of the contamination at issue); *Brockman v. Barton Brands, Ltd.*, No. 3:06CV-332-H, 2007 WL 4162920, at *4 (W.D. Ky. Nov. 21, 2007) (plaintiffs "offer no evidence whatsoever that the airborne contaminants spread in a uniform fashion in all directions . . . for a distance of up to two miles, or that the contaminants complained of by proposed class members bear a relationship to Defendant").

Second, even if there were any scientific basis for plaintiff's line-drawing, the class would be impermissibly fail-safe. Defining the class as individuals who fished or farmed along the 90-mile coastline and sustained "articulable damage and/or diminution to said activities" as a result of the gas rig incident (ECF 123, at 4:16-23) would require resolving the merits of putative class members' claims—*i.e.*, whether they were injured as a result of the incident. As the Ninth Circuit has recognized, "[w]hen the class is so defined, once it is determined that a person, who is a possible class member, cannot prevail against the defendant, that member drops out of the class. That is palpably unfair to the defendant, and is also unmanageable—for example, to whom should the class notice be sent?" *Kamar v. RadioShack Corp.*, 375 F. App'x 734, 736 (9th Cir. 2010).[43] Defining a class this way also would mean that, absent evidence of anyone being harmed, plaintiff cannot meet the numerosity requirement. Rule 23(a)(1).

Third, the class definition is impermissibly imprecise. The geographic area is defined, without explanation, as "coastal, estuarine and adjacent river or creek-situated areas." But no objective, verifiable mechanism exists for knowing, for example, what rivers and creeks are "adjacent," how far inland such waterways extend, or how much further beyond that the "area" extends. Nor does plaintiff define "articulable damage" or "diminution" of fishing or farming activities, and those terms raise additional and difficult individualized issues.[44]

Mullins v. Direct Digital, LLC, 795 F.3d 654 (7th Cir. 2015), does not aid plaintiff. The Seventh Circuit held only that Rule 23 does not impose a "heightened ascertainability" standard. It endorsed the more general ascertainability requirement (followed by this Court and others) that classes must be "defined clearly and based on objective criteria," and must not be "defined in terms of success on the merits—so-called 'fail-safe classes.'" *Id.* at 660. Plaintiff's class

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[43] *Luppe v. Cheswick Generating Station*, 2015 US Dist LEXIS 9791, at *10-11 (W.D. Pa. Jan. 28 2015) (rejecting as fail-safe a class defined to include "residents or homeowners who live or own real estate within one (1) mile of the Cheswick Facility who have suffered similar damages to their property"); *Burkhead v. Louisville Gas & Elec. Co.*, 250 F.R.D. 287, 293-94 (W.D. Ky. 2008) (rejecting class definition limited to those "whose property was damaged").

[44] *See Benefield v. Int'l Paper Co.*, 270 F.R.D. 640, 645 (M.D. Ala. 2010) (class not ascertainable where class was defined to include requirement that property was "contaminated" and that persons suffered "diminution in value of more than $100").

definition is invalid because it fails these settled requirements.

Defining a class as persons who submitted claim forms would be an improper opt-in class. The 1966 amendments to Rule 23 expressly eliminated that type of class action because it "failed to fulfill one of the principal reasons for the existence of class suits—to improve judicial efficiency by reducing the number of suits that might arise from a single wrong by many individuals." *Green v. Wolf Corp*., 406 F.2d 291, 297-98 (2d Cir. 1968).[45]

VI. A LIABILITY-ONLY CLASS UNDER RULE 23(C)(4) IS NOT APPROPRIATE.

Plaintiff's failure to establish predominance cannot be cured, as he suggests, by bifurcating the case under Rule 23(c)(4) to litigate "liability … first as a class action and … then determine whether or not damages can also be addressed in a class setting, or, at that point, reconsidering the issue of predominance." ECF 123, at 31:22-32:2.

First, certifying a Rule 23(c)(4) class is improper because this case fails to satisfy the typicality, adequacy of representation, and ascertainability prerequisites of Rule 23(a). Those prerequisites apply equally to certification under Rule 23(c)(4), and limiting the class to certain issues would not remedy any of the defects discussed above.

Second, a liability-issue class would not be appropriate because it would not materially advance disposition of the litigation as a whole. In *Rahman*, this Court found that "a district court is not bound to certify a liability class merely because it is permissible to do so." *Rahman v. Mott's LLP*, No. 13-CV-03482-SI, 2014 WL 6815779, at *9 (N.D. Cal. Dec. 3, 2014). Rather, certification of particular issues should be granted only "when appropriate," meaning "where resolution of the particular common issues would materially advance the disposition of the litigation as a whole." *Id.* (quotation marks and citations omitted). Thus, in *Rahman*, this Court declined to certify a liability class when it would later need to certify a damages class or allow

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[45] *Accord Kern v. Siemens Corp*., 393 F.3d 120, 126 (2d Cir. 2004) ("we find scant [authority] that a court could *ever* certify a class with an 'opt-in' provision"); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) ("Rule 23(b)(3) 'opt-out' class actions superseded the former 'spurious' class action, so characterized because it generally functioned as a permissive joinder ('opt-in') device"); Rubenstein, Newberg on Class Actions §9:48 (5th ed. 2013) ("[N]o court has ever certified an opt-in class under 23(b)(3)).")

class members to individually pursue damages. *Id.* As the Court explained, certifying a second damages class "would in essence amount to prosecuting two trials when one would have done just as well," whereas "allowing myriad individual damages claims to go forward hardly seems like a reasonable or efficient alternative." *Id.*[46]

As in *Rahman*, certification of a liability-issue class would not materially advance this case's resolution or achieve economies of time and expense because a subsequent proceeding would be overwhelmingly complex. Even if, as plaintiff contends (ECF 123, at 35:14-25), a liability-issue class could adjudicate the identity of the party or parties responsible for the tort, the standard of care owed to members of the class, and the legal liability of the parties responsible for the damages, the Court would still need to conduct thousands of individualized mini-trials on injury (*i.e.*, whether each class member actually suffered an injury), causation (*i.e.*, whether the injury is attributable to the incident), and damages (*i.e.*, the extent of harm suffered).

These issues are particularly thorny in the context of an alleged mass exposure over a large geographic area and will require in-depth inquiry into each individual plaintiff's nature and degree of exposure, the geographic-specific impact of harm (if any), and historical and hypothetical fish catches. In short, certification of a liability-issue class will not begin to resolve the myriad issues that typically doom mass tort class actions.

CONCLUSION

Plaintiff's motion should be denied.

Dated: September 16, 2016

JONES DAY

By: /S/ Robert A. Mittelstaedt
Robert A. Mittelstaedt

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[46] *See also McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008) (declining to certify issue of scheme to defraud "because it would not dispose of larger issues such as reliance, injury, and damages," and thus "would not materially advance the litigation"); *Saavedra v. Eli Lilly & Co.*, No. 2:12-CV-9366-SVW, 2014 WL 7338930, at *10 (C.D. Cal. Dec. 18, 2014) (declining to certify issue class that "would not advance the resolution of this litigation").