

Claim No: HQ13X02540/

HT-13-339

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

IN THE BOMU BONNY PIPELINE LITIGATION

BETWEEN

**CELINA NAADUEBA & OTHERS**

**Claimants**

**-and-**

**THE SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LIMITED**

**Defendant**

---

**AMENDED DEFENCE TO RE-RE-AMENDED PARTICULARS OF CLAIM**  
**PURSUANT TO THE ORDER DATED 25 JULY 2014 DATED 2 DECEMBER 2013**

---

## CONTENTS

CLAUSE	PAGE
PREAMBLE	4
I. SUMMARY OF CLAIM	1012
II. THE PARTIES	1015
<u>III. THE BACKGROUND AND FACTUAL CIRCUMSTANCES OF THE CLAIM</u>	<u>11</u>
<u>Location</u>	<u>11</u>
Oil operations in the Niger Delta	1415
SPDC's operations in the Niger Delta	1418
<i>The environment near Bodo prior to the 2008 Oil Spills</i>	1520
The surveys relied upon by the Claimants	1721
The First Oil Spill	1823
Statements by the Centre for Environment, Human Rights and Development	2226
The volume of oil released in the First Oil Spill	2327
Video evidence of the First Oil Spill	2530
The alleged impact of the First Oil Spill	2530
The Second Oil Spill	2731
General Nature of the Environmental Damage Caused	3035
Clean up and Remediation	3742
Clean up	3743
<i>Pre Clean Up Assessment in August 2009</i>	3944
Remediation	4146
<i>Response to the specific allegations in relation to clean up and remediation</i>	4450
V. LEGAL LIABILITY	4651
Applicable Law	4651
Basis of Liability of the Defendant in Nigerian Law	4652
<i>Environmental Guidelines and Standards for the Petroleum Industry (2002)</i>	4967
<i>Liability for damage caused by third parties</i>	6079

<b>VI. LOSS AND DAMAGE</b>	<u>6281</u>
<b>VII. REMEDIES SOUGHT</b>	<u>6382</u>
<b>General/basic damages</b>	<u>6382</u>
Aggravated and Exemplary Damages	33
<i>Exemplary Damages</i>	84
<i>Particulars relied upon in support of both aggravated and exemplary damages</i>	84

**PREAMBLE**

1. This Amended Defence responds to the Re-Re-Amended Particulars of Claim served and filed, or adopted, by the Claimants in claim HQ43X02640 amended as a consequence of the Court's judgment in the trial of the Preliminary Issues and in accordance with the Order dated 25 July 2014.
2. The Defendant (hereafter referred to as "**SPDC**"), adopts the abbreviations used by the Claimants in those Re-Re-Amended Particulars of Claim. References below are, except where otherwise indicated, references to paragraph numbers in those Re-Re-Amended Particulars of Claim.
3. This Amended Defence is served without prejudice to:
  - 3.1 Any relief to which SPDC is entitled by reason of the fact that as a matter of English law and/or as a matter of substantive Nigerian law, these claims constitute an abuse of process because the same relief is sought on behalf of the same Claimants (and/or members of the represented class) in actions that are currently proceeding in the Nigerian Courts in Suit No: FHC/PH/CS/644/2010 Chief Patrick Porobunu & Ors v. SPDC (the "Porobunu Action"), currently on appeal in the Nigerian Court of Appeal and/or Suit No. FHC/PH/CS/98/2011 Meneka John Boro Bula Nordum v. SPDC (the "Nordum Action"), currently in the Port Harcourt Division of the Federal High Court.
    - (a) ~~The same relief is sought on behalf of the same Claimants in actions that are currently proceeding in the Federal High Court of Nigeria in Port Harcourt Judicial Division in Suit No: FHC/PH/CS/644/2010 Chief Patrick Porobunu & Ors v. SPDC (the "Porobunu Action") and/or Suit No: FHC/PH/CS/98/2011 Meneka John Boro Bula Nordum v. SPDC (the "Nordum Action").~~
  - (b)3.2 The effect on these proceedings of:
    - (a) A further an action, whose plaintiffs include including some of the same Claimants bringing these claims, that is currently proceeding in the Federal High Court of Nigeria in Port Harcourt Judicial Division in Suit No: FHC/PH/CS/435/2012 Chief Patrick Porobunu & Ors v SPDC (the "Second Porobunu Action"). Judgment at first instance has been given in favour of the claimants in that action, which SPDC is appealing to the Nigerian Court of Appeal.

(b) a number of other claims pending in the Nigerian courts which relate to the 2008 Oil Spills and which claim compensation in relation to damage to land which is said in this claim to be Bodo community land. A map showing the areas that are the subject of claims currently proceeding in Nigeria is annexed at Appendix V.

**3.23.3** SPDC's contention that the Court lacks jurisdiction to try such causes of action as are relied on by these Claimants which are precluded by reason of s. 30 of the *Civil Judgments and Jurisdiction Act 1982*.

(a) It is averred that these proceedings are principally concerned with questions of title to, or the rights to, possession of property, for the purposes of section 30 of the *Civil Judgments and Jurisdiction Act 1982* (the "1982 Act"). Such issues are raised *inter alia* by the following paragraphs of the Re-Re-Amended Particulars of Claim

(i) Paragraph 154 which alleges that the Claimants "*used the creek in large part as an extension of their homes.*" Although not pleaded it is understood that it is thereby contended that the Claimants have the necessary proprietary interest in their homes to entitle them to damages for loss of amenity arising from damage to those properties, ~~whether under the 1990 Act and/or in public nuisance and/or in negligence, which is not admitted.~~

(ii) Paragraph 365 which pleads that SPDC is liable to the Claimants under s 11(5)(c) of the 1990 Act. Although liability has been admitted under s.11(5)(c), the extent of any statutory compensation will be determined by the nature and extent of the proprietary and other interests held by the Claimants in respect of their homes and/or other lands.

~~(iii) Paragraph 37 which pleads to section 11(5)(a) of the 1990 Act and requires the Claimants to prove that they have the necessary proprietary or other interest in order to claim for injurious affection thereto.~~

~~(iii) Paragraphs 50 to 53 which plead that SPDC is liable to the Claimants in public nuisance and/or negligence. Although not pleaded it is understood that it is thereby contended that the~~

~~Claimants have the necessary proprietary interests in their homes and/or other lands to be entitled to recover damages for loss of amenity in public nuisance and/or negligence, which is not admitted.~~

- (b) In light of the fact that issues of the ownership, or the right to possession, of immovable property require determination in these claims, and by virtue of section 30 of the 1982 Act aforesaid, SPDC will contend that the English Court does not have jurisdiction to determine these proceedings.
4. Further, these claims are the subject of a costs-budgeting regime. In the premises, insofar as SPDC's pleas herein require the Claimants to plead and/or prove any individual (as opposed to common) facts and matters, it is understood that no individual costs will be incurred in responding to this Amended Defence unless and until they have been agreed by the parties and/or directed or authorised by the Court.

#### **SUMMARY OF SPDC'S DEFENCE**

5. SPDC has long admitted its liability to pay compensation in accordance with the strict liability provisions of the Nigerian *Oil Pipelines Act 1990* (the "**1990 Act**") to those persons who have suffered recoverable damage as a consequence of the operational spill in October 2008 (the "**First Oil Spill**") and the operational spill in December 2008 (the "**Second Oil Spill**"), together, the "**2008 Oil Spills**".
- ~~6. In spite of this prompt admission of liability under the 1990 Act, the Claimants have chosen to plead a number of additional causes of action. As well as being unnecessary, each of these additional causes of action is misconceived and/or discloses no reasonable grounds for bringing that part of the claim. In summary:~~
- ~~6.1. The statutory remedy provided by the strict liability regime of the 1990 Act is the only remedy available under Nigerian law. By operation of section 32(1) of the *Interpretation Act*, the provisions of the 1990 Act disapply the common law of England in relation to claims arising from operational oil spills.~~
- ~~6.2. The claims in negligence will fail, not least because the Claimants do not have the necessary proprietary or other interest in the allegedly affected lands in order to found such claims.~~
- ~~6.3. The claims in public nuisance will fail, not least because the Claimants have not suffered special and particular damage.~~

- 6.4 ~~The claim for breach of statutory duty under the *Petroleum Drilling and Production Regulations 1969* (the "**1969 Regulations**") is misconceived, not least because the 1969 Regulations do not apply and, in any event, are not actionable at civil law by the Claimants~~
- 6.5 ~~The claim for breach of statutory duty under the *Mineral Oils (Safety) Regulations 1997* (the "**1997 Regulations**") is misconceived, not least because the 1997 Regulations do not apply, and, in any event, the *Oil Minerals (Safety) Regulations 1963* which it is assumed the Claimants seek to rely upon are not actionable at civil law by the Claimants.~~
- 6.6 ~~The claim for breach of the *Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (2002)* is misconceived, not least because these guidelines are not legislation and therefore do not impose any statutory duty.~~
- 7.6. Further, these claims are duplicative. The claims being brought, whether under the 1990 Act and/or in public nuisance and/or negligence are claims for individual financial losses and/or damage to land and/or property. As to the latter, ~~The~~ Claimants seek damages for loss of value and/or loss of amenity and/or injurious affection as a result of interference with their use and enjoyment of that property and/or of communal lands. Indeed, SPDC avers that this is the only basis on which the Claimants are entitled to such damages. Accordingly:
- 7.16.1 Insofar as the Claimants live in the same property as one of the Individual Claimants in claims HQ11X02791, HQ11X04516, HQ12X02373, HQ13X03161 and HQ13X02539 who is also seeking damages for loss of amenity in respect of that property, these claims are duplicative and any award of damages to these Claimants would represent double recovery which is precluded under Nigerian law;
- 7.26.2 Insofar as the Claimants are seeking damages in respect of interference with their communally held rights to use the communal lands (namely, the waterways, mangroves and swampland) these are being claimed in the New Bodo Community Claim. If it is being said that these Claimants have suffered interference above and beyond that claimed for in the New Bodo Community Claim, SPDC avers that any such interference is *de minimis* and will not sound in damages.
- 8.7. SPDC ~~nonetheless~~ accepts its obligation to pay just and reasonable compensation to any person entitled thereto in accordance with the 1990 Act. However:

8.17.1 SPDC denies that it should pay compensation for damage that has been caused by:

- (a) Oil from other sources, whether released from pipelines operated by others, or spilled as the result of the illegal tapping, sabotage, illegal refining or illegal transporting of oil that is prevalent in the Niger Delta. SPDC contends that, both before and after the 2008 Oil Spills, oil from such other sources adversely affected the area in and around Bodo. The Claimants must prove that any damage was caused by oil from the 2008 Oil Spills.
- (b) The malicious act of a third person in obstructing the efforts of SPDC, its servants or agents, to contain, repair, clean up or remediate the 2008 Oil Spills.
- (c) The negligence or default of the members of the Bodo Community or others.

8.27.2 SPDC denies that the total volume of oil lost as a result of the 2008 Oil Spills is at least 600,000 bbls. This figure derives from the Claimants' contention that at least 3,900 bbls of oil was spilt per day for at least 147 days. This is because:

- (a) SPDC denies that the First Oil Spill lasted the alleged 72 days or more; in fact, it lasted for about 33 days. There is no dispute that the period of the Second Oil Spill was 75 days. Therefore the 2008 Oil Spills lasted in total for about 108 days.
- (b) The Claimants' estimated daily volume is derived from an analysis of video footage taken of the First Oil Spill on 7 November 2008. SPDC doubts the reliability of that calculation. In any event, it denies that it is appropriate to use this estimate to calculate the volume of oil spilled on the other days of the 2008 Oil Spills, not least because:
  - (i) For 24 days of the First Oil Spill, and for 72 days of the Second Oil Spill, the relevant section of the pipeline had been closed (or "isolated"). This meant that no further oil would have passed into this section of the pipeline and the flow of oil from the leak was significantly reduced than as at 7 November.
  - (ii) For 24 days of the First Oil Spill there were other leaks on the 24" Pipeline. These leaks would have reduced the amount of oil in the Pipeline.

- (iii) The video footage taken on 7 November can have no relevance to the amount of oil released from a differently-sized hole at a different place during the Second Oil Spill.
- (c) Further, the contemporaneous observations of those who attended the sites soon afterwards, in particular the joint investigation teams that investigated and repaired both spills (comprising government officials, regulators, SPDC employees and members of the Bodo Community) concluded that a total of 4,144.03 bbls of oil were released from these two spills.

8.37.3 SPDC also denies that the area affected by the 2008 Oil Spills was as extensive as alleged by the Claimants, who contend that up to 9,320 hectares were impacted:

- (a) Again, SPDC relies upon the contemporaneous observations of the joint investigation teams referred to in paragraph 87.2(c) above.
- (b) SPDC also relies upon the observations recorded by members of a similarly constituted joint investigation team which visited the sites in August 2009 in order to assess the scope of the necessary clean up operations. They found that a total area of 36 hectares had been impacted since the 2008 Oil Spills.
- (c) Further, it is averred that the oil released as a result of the 2008 Oil Spills will have been subject to weathering processes and as a result up to 70% of the volume of oil released would have either evaporated in the weeks following the 2008 Oil Spills and/or have been removed from the environment by biodegradation or natural attenuation. SPDC will also aver that the operation of the tide in this estuarine environment would have resulted in the removal of significant quantities of the said oil.

8.47.4 However, SPDC avers that the total volume of oil released as a result of the 2008 Oil Spills and the area affected by the 2008 Oil Spills exceeded the contemporaneous estimates referred to above. The issues of volume and extent of impact will be the subject of expert evidence which will include hydrological data, satellite imagery and further data from samples taken from the relevant areas.

~~8.5~~ ~~SPDC denies that the Claimants or any of them are entitled to aggravated damages, or to exemplary damages. Such additional damages are irrecoverable.~~

as a matter of Nigerian Law, under the compensation scheme provided by the 1990 Act.

~~8.6~~ In any event, it is denied that SPDC's conduct or motives were such as to justify these remedies. In particular, SPDC denies that its conduct of the repair, clean up and remediation of these spills which should be judged in the context of the particular security and access challenges that resulted from the hostility of the local communities merits such awards.

~~8.77.5~~ In particular ~~as~~ to clean up and remediation, in 2009, SPDC carried out the "clean up" of, and has taken reasonable steps to carry out the "remediation" of, the area then identified as having been impacted by the 2008 Oil Spills. Further, SPDC is, and has since 2009 been, ready and willing to undertake further reasonable and necessary clean up and remediation of all areas concerned in this litigation that have been impacted as a result of oil spills from its pipelines, irrespective of the cause of the spills, namely whether operational or caused by illegal activities, in accordance with its own policy and /or its responsibility under EGASPIN and/or its other accepted obligations.

7.6 As to the Claimants' amendment to introduce s.11(5)(b) of the OPA:

(a) The Claimants' claim in this action is limited to claims for relief in respect of the damage alleged to have been caused by the 2008 Oil Spills, as is expressly stated in the Claim Form and the summary of the claim set out at paragraph 2 of the Re-Re-Amended Particulars of Claim.

(b) The Claimants must prove that the 2008 Oil Spills caused the damage alleged. To do so, the Claimants must prove:

(i) the status quo ante, namely the condition of the Bodo environment prior to the 2008 Oil Spills (referred to by the Claimants as 'baseline data' at paragraph 17 of the Re-Re-Amended Particulars of Claim); and

(ii) the damage caused to that environment by the 2008 Oil Spills.

(c) As to the status quo ante, the Claimants' case at paragraph 17 of their Re-Re-Amended Particulars of Claim is that the creeks were "environmentally sound". The Defendant's case is that the Bodo environment had suffered damage prior to the 2008 Oil Spills, including as a result of illegal bunkering (incidents of which are listed at Appendix II) and illegal refining and that this is relevant to the "baseline" condition of the environment and that this prior damage must be taken

into account when assessing what additional damage has been caused by the 2008 Oil Spills. Separately the Defendant contends that illegal bunkering and refining has continued since 2008 and has caused additional damage which, again, is not damage caused by the 2008 Oil Spills and needs to be distinguished from such damage.

- (d) The Claimants' have raised s.11(5)(b) of the OPA, claiming that the Defendant is responsible under s.11(5)(b) for illegal bunkering, but the Claimants have repeatedly confirmed that 11(5)(b) is purely responsive to the Defendant's position on illegal bunkering.
- (e) In circumstances in which this claim is limited to damages/compensation in respect of the 2008 Oil Spills and the Claimants have made clear that their reliance on s.11(5)(b) is purely responsive to the Defendant's pleas as to illegal bunkering, the Claimants' allegations in respect of s.11(5)(b) are necessarily limited to: (i) the proper assessment of the compensation payable by the Defendant in respect of the 2008 Oil Spills; and (ii) the claims of illegal bunkering made by the Defendant. The Claimants make no claim for compensation in respect of any damage which may have been caused by illegal bunkering, but not by the 2008 Oil Spills; any such claim would fall outside the scope of this action.
- (f) Insofar as it is intended to be alleged that the 2008 Oil Spills caused members of the Bodo Community to commit acts of illegal bunkering and that, therefore, the 2008 Oil Spills should be deemed to have caused the damage resulting from illegal acts of bunkering since 2008, the same is denied. Causation is denied, foreseeability is denied and, further, any such claim is unsustainable on grounds of public policy.
- (g) In summary: the Defendant's position is that the Claimants' reliance on s.11(5)(b) of the OPA is irrelevant to the proper assessment of the compensation payable by the Defendant in respect of the 2008 Oil Spills; any claims in respect of damage caused by any oil spills other than the 2008 Oil Spills falls outside the scope of this litigation. It is denied that the Defendant is liable to the Claimants pursuant to s.11(5)(b) in this action, whether as alleged or at all.
- 9.8. In conclusion, SPDC remains committed to paying just and reasonable compensation for the 2008 Oil Spills to those to whom it is due under the strict liability regime of s.11(5)(c) the 1990 Act. It denies, however, that it is liable to the Claimants under section 11(5)(b) of the 1990 Act as alleged or at all. The

~~Claimants' unnecessary reliance upon further common law causes of action is misconceived and/or inappropriate, disproportionate and unnecessary.~~

## I. SUMMARY OF CLAIM

9. Paragraph 1 of the Re-Re-Amended Particulars of Claim is noted.
10. Paragraph ~~2~~<sup>4</sup>, of the Re-Re-Amended Particulars of Claim provides a summary of the Claimants' case. As all of these facts and matters are addressed above or below SPDC does not plead separately thereto here. save to note that the Claimants' claim is limited (as it is in paragraph 2 of the Re-Re-Amended Particulars of Claim and by the Claim Form itself) to a claim for relief arising out of the two 2008 Oil Spills. For the avoidance of doubt, any application to amend the Claim Form, and these Particulars of Claim, to claim compensation or any relief in relation to any other oil spills, whether pursuant to section 11(5)(b) of the OPA or otherwise, will be opposed (whether or not such further claims were statute-barred as a matter of Nigerian Law).
11. Paragraphs ~~32~~<sup>3</sup>, ~~43~~<sup>4</sup> and ~~54~~<sup>5</sup> are noted. In respect of the last sentence of paragraph ~~54~~<sup>6</sup>, SPDC repeats paragraph ~~67~~<sup>7</sup> above.
12. As to paragraph ~~65~~<sup>8</sup>:
  - 12.1 SPDC admits and avers that in its letter of response dated 1 July 2011 SPDC stated that:

*"...as licensee for the oil pipeline license granted in relation to the 24" Trans Niger pipeline, [SPDC] accepts responsibility under the Oil Pipelines Act for the two oil spills [on 5 October 2008 and 7 December 2008 respectively], both of which were due to equipment failure.*

*SPDC acknowledges that it is liable to pay compensation in accordance with its obligations under the Oil Pipelines Act to those that are entitled to receive such compensation."* (p2)
  - 12.2 Insofar as it is alleged that SPDC has made an admission of liability which is wider in scope than that set out above, that allegation is denied.
  - 12.3 It is averred that these proceedings are principally concerned with questions of title to, or the rights to, possession of property, for the purposes of section 30 of the Civil Judgments and Jurisdiction Act 1982 (the "1982 Act"). Such issues are

raised *inter alia* by the following paragraphs of the Re-Re-Amended Particulars of Claim:

- (a) In paragraphs 2, 37 and 57 contend that the Claimants and each of them is entitled to compensation for loss of amenity arising from the 2008 Oil Spills insofar as any Claimant can provide sufficient right of occupation of to land and/or property. Paragraphs 10, 88 and 105 below respond thereto.
- (b) Paragraph 37 pleads that those Claimants who enjoy sufficient interest in the property and/or land which has been injuriously affected by the said 2008 Oil Spills will seek damages pursuant to section 11(5)(a) of the OPA. Those (as yet unidentified) Claimants must therefore establish the nature and extent of the (as yet unpleaded) proprietary interests enjoyed by them (or others with whom they say that they possess or occupy any relevant property) over the (as yet unidentified) land, and in particular:
- (i) whether the said property or land is or was at any material time urban or non-urban land within the meaning of the Nigerian Land Use Act 1978 (the "1978 Act");
  - (ii) whether the said property or land is or was at any material time developed land within the meaning of the 1978 Act;
  - (iii) whether the said property or land is or was at any material time unoccupied land within the meaning of the 1978 Act;
  - (iv) whether the Claimants and each of them is a party in possession of the said property or land;
  - (v) whether the Claimants have acquired the alleged or any customary rights over the alleged property or land or under the provisions of the 1978 Act;
  - (vi) whether someone else has a competing interest in the alleged or any such property or land;
  - (vii) whether the said property or land is already the subject of a claim by another claimant in one of the claims that comprises the Bomu-Bonny Oil Pipeline Litigation; and
  - (viii) whether the said property or land is already the subject of a claim (whether intimated or already proceeding in the courts of Nigeria

or elsewhere) by another person or persons for compensation or damages arising from the 2008 Oil Spills.

Further, the extent of any statutory compensation will be determined by the nature and extent of any proprietary and other interests in the communal lands held by the Claimants.

(c) Paragraph 43 pleads that the Defendant is liable for damage caused by criminal acts of third parties in illegally bunkering oil. If, which is denied, this claim is maintainable in this litigation (as to which paragraph 10 above is repeated) the Claimants will have to establish the nature and extent of their proprietary interests over any allegedly damaged land. The particulars pleaded in the preceding sub-paragraph are repeated.

(d) Paragraph 36 pleads that SPDC is liable to the Claimants under s 11(5)(c) of the OPA 1990. Although liability has been admitted under 11(5)(c), the extent of any statutory compensation will be determined by the nature and extent of the proprietary and other interests in the said property or land allegedly held by the Claimants or any of them. The Claimants must therefore establish the nature and extent of their proprietary interests over any damaged land. The particulars pleaded in sub-paragraph (b) above are repeated.

(e) Finally, there are a number of other claims pending in the Nigerian courts which relate to the 2008 Oil Spills and which claim compensation in relation to damage to land which is said in this claim to be Bodo community land. In a number of these claims other communities and/or factions (some within the Bodo community) assert ownership of and/or the right to possession of and/or other interests in some or all of the land which may be the subject of these claims, which necessarily means that questions of title or the right to possession will also arise if these claims are to be adjudicated and ruled on. A map showing the areas that are the subject of claims currently proceeding in Nigeria is annexed at Appendix V.

12.4 In light of the fact that issues of the ownership, or the right to possession, of immovable property require determination in these claims, and by virtue of section 30 of the 1982 Act aforesaid, SPDC will contend that the English Court does not have jurisdiction to determine these proceedings.

13. Paragraph 76 is noted.

## II. THE PARTIES

14. As to paragraph 87 the Claimants are required to prove that each of them live in one of the 20 villages which form part of the Bodo Community and which are most proximate to the Bodo Creek.
15. Paragraph 98 is admitted. It is averred that at all material times:
  - 15.1 SPDC operated oil and gas production in the Niger Delta on behalf of the partners of an unincorporated joint venture, the majority interest holder being the Nigerian state-owned company known as the Nigerian National Petroleum Corporation ("NNPC").
  - 15.2 SPDC was at all material times the operator of the Bomu-Bonny Trans Niger Pipeline (the "TNP") on behalf of the said unincorporated joint venture under a licence from the Nigerian Government, such licence being granted under the 1990 Act.

## III. THE BACKGROUND AND FACTUAL CIRCUMSTANCES OF THE CLAIM

### Location

16. As to paragraph 109:
  - 16.1 It is admitted that Bodo City and its component villages are located in the Gokana Local Government Area of Rivers State. ~~and in Bodo City is a part of Ogoniland.~~
  - 16.2 It is further admitted that Bodo City and its component villages are situated to the north and east of a series of creeks and mangrove swamps which are known as "the Bodo Creek". In the absence of any particulars thereof, SPDC is unable to admit or deny that the Bodo Creek comprises about 9,320 hectares of land, swampland and waterways.
  - 16.3 It is denied that the population of Bodo City and its surrounding villages, and (if it be so alleged) the Bodo Community, numbers 31,500 people.

### Oil operations in the Niger Delta

17. SPDC pleads as follows to paragraphs 110 and 121:
  - 17.1 The Niger Delta is an oil-rich region. In the last fifty years, nearly 1,500 oil wells have been drilled in 159 different oilfields across the Niger Delta by dozens of different oil companies.

- 17.2 In spite of the success of the oil and gas industries, many of the inhabitants of the Niger Delta continue to live in poverty. Local groups have campaigned for a greater share of the oil revenues taken by the government. This campaign has coincided with a rise in violence in the Niger Delta, including in Ogoniland, with increasing threats to those working for oil companies.
- 17.3 As a result of an escalation of this unrest, in 1993 SPDC was forced to stop the oil production from its wells in Ogoniland and withdraw its employees from the area.
- 17.4 The nature and extent of the violence in Ogoniland worsened from 2005 to 2008. Consequently, SPDC restricted the number of staff and contractors who were permitted to conduct operations in the field and increased the security required on site visits. These restrictions and directions applied in the Bodo area.
- 17.5 One of the features of this unrest has been the targeting of oil facilities and pipelines by saboteurs. Heavily armed and well-organised groups have attacked oil and gas facilities including pipelines in the Niger Delta, shut down operations and kidnapped staff. Such sabotage inevitably results in the release of crude oil into the environment.
- 17.6 The Niger Delta has also seen the development of significant criminal activity focused upon the theft of crude oil by criminal gangs. In particular, and at all material times:
- (a) Oil pipelines in rural areas have been tapped by these criminal gangs who siphon off oil (a practice colloquially known as "bunkering").
  - (b) Some of the stolen oil is illegally refined at make-shift refineries. The crude oil is heated in primitive stills – often metal pipes and drums welded together - over open fires fuelled by crude oil. The resultant fumes are condensed and the product is supplied to the domestic market or transported to tankers waiting offshore for export.
  - (c) Such illegal activities have usually been carried out on an *ad hoc* or artisanal basis. On occasion, they have been conducted on an extensive and semi-industrialised scale.
  - (d) These activities resulted in the release of crude oil, refined oil, and the by-products of such refining, into the environment.

17.7 Sabotage, illegal bunkering, illegal refining and the transport of stolen oil have caused, and continue to cause, significant environmental damage in the Niger Delta in general, and Ogoniland in particular:

- (a) The United Nations Development Programme Niger Delta Human Development Report 2006 (the "UNDP Report") recorded that the majority of oil spills which occurred in the region between 2000-2004, and thereafter, were caused by such illegal activities.
- (b) The frequency, scale and effect of such illegal activities increased in the years prior to the 2008 Oil Spills. According to the UNDP Report:

*"...the incidence of oil spills has increased considerably in the region. Spills occur accidentally and through the deliberate actions of the local people... Available records show that a total of 6,817 oil spills occurred [in the Niger Delta] between 1976 and 2001, with a loss of approximately three million barrels of oil." (p76)*
- (c) In June 2010 a media release issued by the United Nations Environment Programme ("UNEP") highlighted the extent of environmental damage from criminal activity targeting the oil industry, including illegal refineries in the Gokana Local Government Area.
- (d) The UNEP Environmental Assessment of Ogoniland, 2011 (the "UNEP Report"), recorded *inter alia* that:

*"While the footprint of individual artisanal refining operations is localized, the cumulative impact exerts a significant environmental stress on Ogoniland. The main problems are....spread of pollution beyond the refinery area...contamination of water in the creeks and coastal and mangrove vegetation, as well as soil exposed to layers of oil at low tide..." (p104)*
- (e) The UNEP Report noted the scale and impact of illegal refining of crude oil at Bodo West, an area close to the sites of the 2008 Oil Spills. It stated that:

*"The locations at which artisanal refining is – or has been – carried out present a picture of total environmental devastation. With fresh crude oil stored on land in sandy pits, hydrocarbon can migrate in all directions. Damage to the soil at the refinery site itself is but a small portion of the overall environmental footprint caused by the refinery. The oil which*

*escapes from the refining process...flows into open water. Given the Bodo West oilfield's position in a flat, tidally influenced area, spilled oil can spread across many square kilometres..." (p164)*

(f) SPDC's facilities in the Niger Delta have often been targeted by saboteurs. Indeed, the great majority of oil spills from SPDC's facilities are the result of sabotage or other illegal acts by third parties. ~~In particular:~~

~~(i) In the area generally, such illegal activity accounted for 74% of all oil spill incidents, and 73% of all oil volume spilled, from SPDC's facilities in the Niger Delta in the five-year period from 2007-2011.~~

~~(ii) Between 2000 and 2010, there were 63 leaks reported from the 24" Pipeline which forms part of the TNP. 51 of these leaks were caused by the illegal acts of third parties.~~

17.8 In addition to environmental problems arising from oil operations in the Niger Delta, the UNDP Report records that large scale industrial enterprises including breweries, paint factories, cement and asbestos factories in Rivers State also generate and discharge waste materials which detrimentally affect the environment.

#### **SPDC's operations in the Niger Delta**

18. SPDC has operated in the Niger Delta since 1958. Its current operations include a network of more than 71 producing oilfields, approximately 1,000 producing wells, 9,000 kilometres of flow lines and pipelines, 87 flow stations, nine gas plants and two major oil exporter terminals at Bonny Island and Forcados.

19. The crude oil produced by SPDC is transported from the production wells through pipelines (known as flow lines) to flow stations. The oil is transported from the flow stations through delivery lines to trunk lines, and from there the oil flows to the export terminals. Delivery lines and trunk lines are interconnected using manifolds.

19.1 At all material times since SPDC's withdrawal from Ogoniland in or about 1993, its only remaining operational infrastructure has been the TNP which runs through this area and which transports oil from SPDC's northern production wells to the Bonny terminal. As to this, it is admitted and averred that:

- 19.2 The total length of pipelines, flow lines and delivery lines that SPDC operates on shore in Nigeria. The TNP is over 6,000 kilometres long. The TNP is approximately 168 kilometres in length.
- 19.3 The final ~~429~~<sup>23</sup> kilometre section runs from the Bomu manifold (north of Bodo City) to the Bonny Terminal on the coast - passing through the Patrick Waterside manifold and the Bonny manifold.
- 19.4 There are in fact two trunk lines on the same right of way running in close parallel: the first is 24" in diameter (the "24" Pipeline"), the second 28" in diameter (the "28" Pipeline"). Sections of each are encased in concrete and each pipeline is buried approximately 1 to 1.5 metres below the ground. The routes of these two pipelines in and around Bodo are shown on the map at Appendix I.
- 19.5 The 24" Pipeline and the 28" Pipeline carry "Bonny light" crude (or unrefined) oil, being a mixture of oil and water, commonly known as "wet crude" oil.
- 19.6 A third pipeline, operated by the NNPC, runs parallel to these two SPDC pipelines. This NNPC pipeline carries a more concentrated crude oil that is commonly referred to as "dry crude" oil. Water and gas already having been removed from such dry crude oil, the product ~~does not require~~ less processing further distillation and is therefore a more attractive target for illegal bunkerers than SPDC's wet crude oil.
20. SPDC implemented various systems to protect its pipelines from these illegal activities, and to minimise the pollution that might result from them or any operational spills. It pleads below at paragraph 9697.4 to these specific systems and practices. However:
- 20.1 SPDC's ability to protect its Pipeline from such illegal activities, and to perform regular maintenance thereon, has been hampered by the threat to the security of its employees and contractors as a result of militancy and criminal activity and denial of access.
- 20.2 SPDC's ability to respond to spills has also been hampered by these security issues and difficulties in obtaining access to the spill sites. SPDC's personnel often have had to wait for the permission of the leaders of the local communities before they have been able to operate in the area. These security and community access issues have meant that SPDC has not always had ready access to spill sites and this has caused significant delays to investigations, containment, recovery and clean up of oil, and remediation after spills occur. In fact, access to

spill sites and SPDC facilities in Ogoniland is at the permission of the local communities.

21. Save as otherwise pleaded above, paragraphs 110 and 124 are admitted.

#### **Bodo Creek**

##### ***The environment around Bodo prior to the 2008 Oil Spills***

22. As to paragraph 132, in the absence of any particulars thereof, SPDC is unable to admit or deny that the Bodo Creek is an area of about 9,230 hectares of land, swampland and waterways.
23. SPDC is unable to admit or deny paragraphs 143, 154 and 165, save that it is admitted that at all material times:
- 23.1 Some of those living in and around Bodo engaged in fishing and farming; and
- 23.2 People fished and travelled through the Bodo Creek.
24. The Claimants are required to prove the uses which it is alleged they made of the creek.
25. As to paragraph 176, SPDC denies that, prior to the 2008 Oil Spills (whether the First Oil Spill occurred on or about 5 October 2008 or, which is denied, 28 August 2008), the series of creeks and waterways that made up the Bodo Creek was environmentally sound (which phrase is understood to mean that it was rich in fauna and essentially free of hydrocarbons) and that the nature and extent of previous oil pollution was not significant.
26. On the contrary, SPDC avers that by the time of the 2008 Oil Spills, the area around Bodo, including the Bodo Creek, had been detrimentally affected by the cumulative effect of oil released over many years from different sources, but predominantly as the result of illegal activities of the types pleaded above - namely sabotage, illegal bunkering, illegal refining and/or illegal transportation. In particular, SPDC avers that before the 2008 Oil Spills, at least twenty incidents of sabotage or illegal bunkering occurred in respect of its pipelines in the area of and surrounding Bodo with resultant leakage of oil into the environment. These incidents are listed in Appendix II hereto.
27. Further, the NNPC pipeline running through the region was, prior to 2008 (and remains to date) the source of spills, including those as a result of illegal activity.

The NNPC pipeline has been particularly targeted by illegal bunkerers as the dry crude it carries is easier to refine.

28. The detrimental effect of these various polluting events on the local environment was recorded by:

28.1 The video footage allegedly taken on or about 15 October 2008, that is relied upon in paragraph 226 of the ~~Master~~Re-Re-Amended Particulars of Claim, which recorded oiled, deteriorating and dead mangroves along the banks of the Bodo Creek and in the Bodo lagoon. Mangrove trees are not immediately killed by exposure to crude oil, but they deteriorate over time and may ultimately die. The presentation of the dead and deteriorating mangroves in this video indicates that:

- (a) The dead mangroves shown in the video could not have been, and were not, killed by oil released from the First Oil Spill (whether it occurred on 5 October 2008 or, which is denied, on ~~29~~28 August 2008); and
- (b) The deterioration in the condition of some of the other deteriorating mangroves shown in the video could not have been, and was not, caused by oil released from the First Oil Spill (whether it occurred on 5 October 2008 or, which is denied, on ~~29~~28 August 2008).

In the premises, the observations recorded on the said video are inconsistent with the Claimants' case that the Bodo Creek was environmentally sound prior to the 2008 Oil Spills.

28.2 In the same video allegedly taken on 15 October 2008, a person understood to be a member of the Bodo Community stated that:

*"there are eight points like this, from here down to Bonny, eight points like this. That is the cost of the whole pollution. The whole coastal area of Ogoni is polluted as a result of this. Eight points like this. If you come, I will take you to the eight points tomorrow, any time."*

28.3 Various surveys and reports at Appendices III and IV, many of which are relied upon by the Claimants, including the report and press release of the Centre for Environment, Human Rights and Development ("CEHRD") relied upon by the Claimants at paragraphs 198 and 2049. As to the surveys, see paragraph 29 below and Appendices III and IV hereto.

#### **The surveys relied upon by the Claimants**

29. The Claimants rely upon various surveys at paragraph 176. SPDC pleads as follows to the surveys:
- 29.1 SPDC denies that, when read in their proper context, the passages relied upon by the Claimants at paragraphs 176.1 – 176.5, or the surveys as a whole, support the Claimants' case as to the condition of the Bodo Creek before the 2008 Oil Spills and/or generally. In particular:
- (a) The surveys are not, nor do they purport to be, assessments of the environmental condition of the Bodo Creek as a whole and/or assessments of the source or cause of any pollution which was present.
  - (b) The scope of each of the surveys is limited, whether as to the geographical area surveyed, the objective of the survey or the subject matter being studied.
  - (c) The passages relied upon by the Claimants, which are said to be "findings" of the surveys, are not reasoned findings based upon evidence gathered by, or cited in, the surveys. The said passages amount to bare assertions, the provenance of which is unclear.
  - (d) On the contrary, the contents of the surveys in fact undermine the Claimants' case in that they evidence:
    - (i) The extent of oil pollution arising from spills in the Niger Delta before the 2008 Oil Spills and the resultant pollution of the land and waters therein.
    - (ii) The existence and extent of illegal activities, and their role as one of the main causes of such spills.
    - (iii) The detrimental effect on the environment of pollution from other sources, such as road-building projects and industrial activities.
    - (iv) The serious problem of overfishing in the Bodo Creek.
- 29.2 SPDC sets out its specific pleas in relation to these surveys in Appendix III hereto.
- 29.3 As to the facts and matters alleged in the sub-paragraphs of paragraph 176, SPDC admits that these findings were included in one or other of the said surveys, but (save in respect of paragraph 176.1 which is denied for the reasons pleaded above) requires the Claimants to prove the accuracy of those findings.

- 29.4 Accordingly, SPDC denies that the matters pleaded at paragraph 176 are proved by the various ecological surveys relied upon by the Claimants.

#### **The First Oil Spill**

30. SPDC pleads as follows to paragraph 187:
- 30.1 In August 2008 three sabotage oil spills were reported to SPDC in respect of a section of the 24" Pipeline to the north of Bodo City. The last of these spills, which was reported on 29 August 2008, occurred at a place called Kegbara-Dere ("K-Dere").
- 30.2 On 2 October 2008 a further spill from the 24" Pipeline was reported to the south of Bodo at a place called Sohbiekiri. This spill was also caused by sabotage.
- 30.3 In order to carry out repairs to the 24" Pipeline at K-Dere and Sohbiekiri, ~~on or~~ ~~about 3 October 2008~~ SPDC isolated the 24" Pipeline prior to 2 October 2008.
- 30.4 On 5 October 2008 SPDC was notified of the First Oil Spill from the 24" Pipeline at Sivilbilagbara (known also by some members of the Bodo Community as Patrick Waterside and/or Tekuru Island). The spill occurred on the isolated section of the 24" Pipeline into which no further oil had been able to pass since on or about 3 October 2008, significantly reducing the volume of oil that could escape from the 24" Pipeline.
- 30.5 On 6 October 2008 the existence of the First Oil Spill was confirmed by a local surveillance team. Two days later both the National Oil Spill Detection & Response Agency ("NOSDRA") and the Department of Petroleum Resources ("DPR") were formally notified of the spill.
- 30.6 Thereafter, SPDC sought to gain access to the site of the First Oil Spill in order to conduct repair and/or containment works but was prevented from doing so by the actions of members of the Bodo Community and/or their representatives and/or third parties; and/or by the actions of the members of the K-Dere Community and/or their representatives and/or third parties in refusing to allow SPDC, its servants or agents to carry out necessary repairs on the 24" pipeline in respect of a spill at K-Dere,
- 30.7 During this period, SPDC engaged local contractors from the Bodo Community to contain the spill and begin the task of cleaning up. In particular, on various dates in October and November 2008, those contractors took steps to:

- (a) Contain the spill including placing booms around the area of the spill, digging for trenches, and digging a dyke.
  - (b) Recover and remove oil from the spill site.
- 30.8 On 29 October 2008, ~~following the completion of the above containment and removal measures,~~ SPDC re-opened the 24" Pipeline, understanding that the First Oil Spill was from the 28" Pipeline, which was situated in close parallel to the 24" Pipeline. The denial of access, pleaded above at paragraph 0, largely contributed to SPDC's inability to confirm which of the Pipelines the spill originated from.
- 30.9 On 7 November 2008, SPDC's team of personnel was granted access to the site of the First Oil Spill. On this date, a joint investigation team, comprising SPDC's employees, representatives from the federal government's regulators and members of the Bodo Community, attended the spill site. Contrary to their expectations, the spill was found to be coming from the 24" Pipeline, rather than the 28" Pipeline. While preparatory excavation works were undertaken at the site, steps were taken to switch the flow of oil from the 24" to the 28" Pipeline. The 24" Pipeline having been isolated that evening, the leak in the 24" Pipeline was clamped the following day, 8 November 2008, to prevent any further oil from escaping.
- 30.10 During the following weeks, emergency containment and recovery work continued. On 16 December 2008 two local contractors, Alpha Drilling Services and Donoks Nig. Ltd, signed Project Execution Reports confirming their containment and recovery operations over the previous few weeks. The report included a declaration made and signed by a member of the Bodo Community, Chief M. B. Kottee, that the contractor had *"completed the containment and recovery of spilled oil in our community Tekuru Island Bodo City"*.
- 30.11 In the above premises:
- (a) SPDC admits that a leak developed in an underground section of the 24" Pipeline at Sivilbilagbara, 04 36 03.1 latitude and 07 15 30.7 longitude, caused by a weld defect in the pipeline. It is therefore admitted that it was an operational spill due to equipment failure.
  - (b) It is denied that:
    - (i) The leak occurred, and that oil began to leak from the pipeline, on or about 28 August 2008.

- (ii) SPDC, its servants or agents, were notified of the First Oil Spill, whether by local fishermen or by contractors or otherwise, during September 2008.
  - (c) SPDC is unable to admit or deny whether local fishermen had reported the First Oil Spill to the Council of Chiefs and Elders during September 2008.
- 30.12 Further, SPDC avers that the leak at Sivilbilagbara occurred on or about Sunday 5 October 2008. SPDC relies upon the following facts and matters in support of its case on the date of the First Oil Spill:
- (a) At all material times SPDC engaged members of the local communities as contractors to carry out daily inspections of the TNP in the Bodo area. One of the purposes of these inspections was to identify any leaks. The first report of the leak at Sivilbilagbara came from one of these contractors on 5 October 2008. None of the previous daily surveillance visits generated such a report.
  - (b) The video footage of the site of the First Oil Spill that is relied upon by the Claimants, and is said to have been filmed on 15 October 2008, recorded the contemporaneous commentator saying that the spill "*... has been on for the past two, three weeks now...*".
  - (c) Those engaged to investigate, contain and clean up the spill recorded the date of the commencement of the First Oil Spill as 5 October 2008. For example:
    - (i) The Form A Oil Spill/Leak Notification Report made by SPDC to NOSDRA recorded the date of the incident as "05/10/08". The same date was recorded on the Spillage/Leakage Report submitted to the DPR.
    - (ii) The report of the joint investigation team that visited the spill site on 7 and 8 November 2008 - which comprised the federal government's regulators, SPDC personnel and local members of the Bodo Community - recorded that the spill started on 5 October 2008. This report was approved and signed by members of the team.

- (iii) The Project Execution Reports of Alpha Drilling Services and Donoks Nig. Ltd, were signed on 16 December 2008, recording that the incident date was 5 October 2008.

30.13 Further, SPDC avers that:

- (a) Any damage to the communal lands as a result of the release of oil from the First Oil Spill on 6 October 2008 or thereafter was caused and/or contributed to by the refusal by the members of the Bodo and/or other local Communities and/or their representatives to grant SPDC access to its pipelines as set out at paragraph 30.6 above.
- (b) Accordingly, SPDC is not liable to the members of the Community: ~~whether under s 11(5)(c) of the 1990 Act and/or the other causes of action relied upon by the Claimants,~~ for any such damage to the communal lands because such damage was not caused by:
- (i) any breakage of or leakage from the pipeline or an ancillary installation (s 11(5)(c));
  - (ii) the alleged, or any, ~~negligence and/or~~ breach of duty of SPDC, its servants or agents;
  - (iii) the exercise of the rights conferred by SPDC's Oil Pipeline Licence (s.11(5)(a));
  - (iv) any neglect by SPDC or its agents, servants or workmen to protect, maintain or repair any work structure or thing executed under the licence (s.11(5)(b)).
- (c) Further, that for the purposes of s 11(5)(c) of the 1990 Act ~~and/or the other causes of action relied upon,~~ the conduct of the members of the Bodo and/or other local Communities and/or their representatives and/or unknown third parties in refusing SPDC access to its pipelines and therefore obstructing SPDC in its efforts to prevent the breakage or leakage from causing any damage to the communal lands constitutes a "default" on the part of the members of the Community and/or their representatives and/or a "malicious act of a third party" for which SPDC is not liable.

31. The last sentence of paragraph 187 is denied for the reasons pleaded above.

**Statements by the Centre for Environment, Human Rights and Development**

32. Paragraph 198, and the first two sentences of paragraph 2019, are denied, save that:
- 32.1 It is admitted that CEHRD published the said report and issued a press release as alleged and that these publications contained the extracts pleaded. SPDC is unable to admit or deny whether the press release was reported in the national media.
- 32.2 In any event, it is denied that either the report or press release related to the First Oil Spill. Both publications related to a spill which it is said occurred on or around 28 August 2008 on the 28" Pipeline.
- 32.3 If, contrary to the above, either the report or press release did relate to the First Oil Spill, then no admissions are made as to the accuracy of these extracts or any of their contents.
33. As to the final sentence of paragraph 2019:
- 33.1 It is admitted, as pleaded above, that SPDC did not visit the site of the First Oil Spill and clamp the pipeline before 7 November 2008.
- 33.2 It is denied that SPDC did not reduce the flow of oil until 7 November 2008. As pleaded above, the 24" Pipeline was isolated by SPDC ~~between~~ prior to 3 October and until 29 October 2008.
- 33.3 It is denied that SPDC did not contain the spread of oil until 7 November 2008. As pleaded above, containment and recovery were carried out in October and November 2008.

#### **The volume of oil released in the First Oil Spill**

34. As to paragraph 210 SPDC repeats paragraphs 30.13 above. Without prejudice to the foregoing:
- 34.1 It is denied that oil leaked from the site of the First Oil Spill from 28 August 2008 until its repair on 8 November 2008, a period of 75 days. It is averred that the spill in fact lasted for around 33 days from on or about 5 October 2008 until its repair.
- 34.2 SPDC denies that oil was leaking from the 24" Pipeline at a rate of 3,900 bbls per day on 7 November 2008, or on any other day in that period. In particular:

- (a) The Claimants have not pleaded the basis for this contention. It is understood from interlocutory witness evidence filed on their behalfs that their case in this regard is based upon an expert analysis of a few minutes of video footage of the pipeline taken that day. As to that analysis:
- (i) SPDC will plead fully to the accuracy of any such an assessment as and when its methodology is properly understood.
  - (ii) SPDC avers that any such calculation would depend upon a measurement of the velocity of the oil shown in the video. SPDC avers, however, that the frame rate of the footage is too slow to allow any marker to be tracked effectively between the frames, whether by Particle Image Velocimetry or similar method. It is therefore denied that such a method can be used reliably to measure the velocity of the oil from that footage.
- (b) Further and in any event, it is denied that it is appropriate to assume, as the Claimants have done, that oil would have been released at that same rate for the rest of the period of the First Oil Spill. In fact:
- (i) At the time that the video was taken, the 24" Pipeline had not been isolated or switched. As pleaded above, the pipeline had been isolated on or about 3 October until 29 October 2008, that is for 24 days of the 33 days of the First Oil Spill. When so isolated no further oil was able to pass into this section of the pipeline and the volume of oil that escaped from the leak was significantly reduced. This will be a matter for expert evidence and SPDC may will plead further on such issues on exchange of expert evidence.
  - (ii) At the time that the video was taken, the earth and concrete coating around the 24" Pipeline had been excavated. At all material times beforehand, however, sections of the pipeline had been encased in concrete and each pipeline buried 1 - 1.5 metres underground. It is averred that these factors reduced significantly the amount of oil that escaped from the weld defect. This will be a matter for expert evidence and SPDC may will plead further on such issues on exchange of expert evidence.
  - ~~(iii) It is averred that the holes in the weld would not always have been the same size as they were on 7 November 2008. In the nature of such a weld defect, the holes would have started as pinholes~~

~~which would have gradually increased in size as the weld was eroded by escaping oil. In the premises, the amount of oil released from the pipeline was significantly less in the early stages of the period. SPDC will plead further on such issues on exchange of expert evidence.~~

~~(iv)(iii)~~ It is further averred that if there was a leak from the 24" Pipeline at Sohbiekiri from 2 October – 10 October 2008, and another at K-Dere from 29 August until 29 October 2008, which would have reduced the oil in the pipeline at these times.

(c) Further, SPDC will contend that contemporaneous observations of the joint investigation team are inconsistent with the allegation that 3,900 bbls of oil were being released daily from the spill site for the entire period of the spill. Following their visits on 7 and 8 November 2008, they recorded that a total of 1,640.63 bbls had been released. This assessment was made on the basis of the Direct Assessment Method that had been approved by, *inter alia*, the relevant industry regulator.

34.3 SPDC admits that the spill site was in an area that was flooded by the incoming tide and that some crude oil from the First Oil Spill would have been carried to the surface of the Bodo Creek, but it denies for reasons pleaded above and further below the amount and the extent of the spread of oil from the First Oil Spill thereafter as pleaded by the Claimants. SPDC avers, however, that the net tidal flow is downstream. Further SPDC repeats paragraph 87.3(c) above as to the effect of weathering, ~~and biodegradation and natural attenuation~~ on the oil released.

34.4 However, SPDC avers that the total volume of oil released as a result of the First Oil Spill exceeded the contemporaneous estimates referred to above. The issues of the volume of oil released and the extent of impact as a result of the 2008 Oil Spills will be the subject of expert evidence which will include hydrological data, satellite imagery and further data from samples taken from the relevant areas.

### Video evidence of the First Oil Spill

35. Paragraph 22<sup>1</sup> is not admitted, save that:
  - 35.1 SPDC admits that the Claimants have provided video footage of the Bodo Creek that is said to have been taken on 15 October 2008.
  - 35.2 SPDC admits that the Claimants have provided it with video footage of the repair of the spill site which was taken on 7 November 2008.
  - 35.3 SPDC admits that a joint investigation team visited the spill site on 7 and 8 November 2008 as pleaded in paragraph 30.9 above.

### The alleged impact of the First Oil Spill

36. As to paragraph 22, SPDC repeats paragraph 30.13 above.
37. ~~As to paragraph 23, Without prejudice to the foregoing~~ SPDC admits and avers that the area surrounding the site of the First Oil Spill was affected by the oil released thereby. However:
  - 37.1 It is denied that all community land, forests, waterways and creeks were extensively impacted by the crude oil from the First Oil Spill; and it is denied that the vast majority of the Bodo Creek was materially impacted thereby. The issue of the nature and extent of the impact as a result of the 2008 Oil Spills will be a matter for expert evidence. At this stage SPDC relies in particular upon:
    - (a) The finding of SPDC's Geomatics Team that the area heavily impacted by the First Oil Spill was approximately 3.4 hectares. In the course of the joint investigation visit on 7 and 8 November 2008, a survey of the affected area was conducted by members of the joint investigation team, including representatives of the Bodo Community. They identified the extent of the heavily impacted area and took GPS coordinates around the boundary thereof. These coordinates were used by the Geomatics Team to produce a computer-generated assessment of the geographical extent of the spill and thereby to estimate the impacted hectareage.
    - (b) The findings of a Pre Clean Up Assessment carried out in 2009 (the "2009 PCA") that the area impacted by both of the 2008 Oil Spills was 36 hectares. This was a ground survey carried out in preparation for the planned phase of clean up of the area impacted by the 2008 Oil Spills. The findings reflect that, in the eight to ten months since both the 2008 Oil Spills occurred, the oil had travelled to a relatively limited area. While the

2009 PCA noted that other areas were affected by oil, the members of the team who performed this assessment (including the regulators and representatives of the Bodo Community themselves) recorded that this was due to oil spilled from other sources - and in particular was the result of illegal activities of third parties, as pleaded above.

- (c) Further, it is averred that the oil released as a result of the 2008 Oil Spills will have been subject to weathering processes and as a result up to 70% of the volume of oil released would have either evaporated in the weeks following the 2008 Oil Spills and/or have been removed from the environment by biodegradation or other forms of natural attenuation. SPDC will also aver that the operation of the tide in this estuarine environment would have resulted in the removal of significant quantities of the said oil.

37.2 However, SPDC avers that the extent of impact as a result of the First Oil Spill exceeded the contemporaneous estimates referred to above. The issues of the volume of oil released and the extent of impact as a result of the 2008 Oil Spills will be the subject of expert evidence which will include hydrological data, satellite imagery and further data from samples taken from the relevant areas.

37.3 As to the allegations in relation to creeks belonging to the neighbouring communities, these are irrelevant to these claims and no admissions are made as to the nature and extent of any impact on lands and waters which are not the subject matter of these claims.

37.4 Further, the Claimants are required to prove that any of the land allegedly impacted was affected by oil from the First Oil Spill rather than from any of the other sources including oil released into the environment as the result of:

- (a) Incidents involving other pipelines; and/or
- (b) Incidents of sabotage, illegal bunkering, illegal refining and illegal transportation as pleaded above.

### **The Second Oil Spill**

38. As to paragraph ~~243~~:

38.1 SPDC admits and avers that there was a further and separate leak from a different section of the 24" Pipeline on or about 7 December 2008. For the

avoidance of doubt, the map coordinates of the site of this Second Oil Spill are 04 33 33.9 latitude and 07 15 05.8 longitude.

- 38.2 This Second Oil Spill was reported to SPDC on 7 December 2008. A Form A Oil Spillage/Leakage Notification Report was sent to DPR and NOSDRA on 10 December 2008.
- 38.3 Upon its notification of the spill, SPDC took immediate action to reduce the flow of the oil and to contain the oil spill. In particular it is averred that:
- (a) On each of 8 and 9 December 2008 SPDC conducted an over-fly of the spill site. This confirmed that the leak was on the 24" Pipeline.
  - (b) The 24" Pipeline was isolated at the Bomu manifold (in the north) on 8 December 2008 and the Bonny Flow Station (in the south) was shut in on 9 December 2008. The shutdown of the pipeline at locations both north (Bomu) and south (Bonny) of the spill site meant that no further oil would have passed into this section and the flow of oil from the leak was significantly reduced.
- 38.4 However, ~~as was the case with the First Oil Spill,~~ the members of the Community and/or their representatives and/or third parties prevented SPDC, its servants or agents from accessing the site of the Second Oil Spill and/or obstructed the efforts of SPDC, its servants or agents in its efforts to prevent the Second Oil Spill from causing damage to the communal lands. In particular:
- (a) During the course of 9 and 10 December 2008 SPDC took steps to contain the spread of oil, including mobilising Clean Nigeria Associates and a local contractor to boom across the Andoni River to avoid further oil spread and gathering SPDC's Oil Spill Response Team at the Bonny Terminal in preparation for escort to the leak site. However, the Oil Spill Response Team could not attend without a security escort and the local contractor was later forced to leave the site due to threats from local youths ~~members of the Bode Community.~~
  - (b) On 17 December 2008 a further over-fly of the spill site was carried out by SPDC during which it was observed that the containment booms had been tampered with by a third party, rendering them ineffective. Those observing could not see oil being released into the environment, and this was considered to be due to the isolation and switching of the pipeline.

- (c) On 18 December 2008 employees of SPDC tried to visit the spill site. They were, however, unable to reach the spill site because their boats could not navigate in the shallow waters of mangrove creeklets. They were able to observe that approximately 30 metres of booms had been vandalised and that the tension member chain of the booms had been stolen. Further containment booms were deployed around the outlet creeks in order to prevent any further spread of oil.
- (d) In or around February 2009, SPDC received uncorroborated reports from the Community that oil was continuing to leak from the pipeline (which is not accepted). SPDC therefore attempted to take steps to conduct further isolation upstream of the site of the Second Oil Spill at Patrick Waterside and downstream at the Opobo Channel. However, in respect of the latter SPDC's isolation crew were chased away by unknown third parties whilst on route to carry out these works.

38.5 After negotiations between SPDC and members of the Bodo Community, culminating in a meetings on 11 and 13 February 2009, the Bodo Community finally granted SPDC access to the spill site in order to conduct further isolation and/or a joint investigation visit and to repair and clamp the 24" Pipeline.

39. As to paragraph 254:

39.1 As to the first sentence:

- (a) It is admitted that a joint investigation visit took place between 19 and 21 February 2009 and that the report of the joint investigation visit concluded that the spill was caused by equipment failure.
- (b) It is averred that the joint investigation team comprised of representatives from SPDC, NOSDRA, the DPR and the Bodo Community and that the report of the joint investigation visit was signed by the members of the joint investigation team.

39.2 As to the second sentence:

- (a) SPDC admits that oil spilled from the site from 9 December 2008 until the pipeline was clamped on 19 February 2009.
- (b) It is however averred that the section of the pipeline in which the leak occurred was isolated by 9 December 2008 and from that time no further

oil would have passed into this section and the flow of oil from the leak was significantly reduced.

- (c) Further and in any event, SPDC avers that any damage to the communal lands as a result of the release of oil from the Second Oil Spill from 9 December 2008 or thereafter was caused and/or contributed to by the refusal by the members of the Community and/or their representatives and/or unknown third parties to grant access to SPDC to the site of the Second Oil Spill for the purpose of clamping and/or repairing the pipeline and/or by the actions of the members of the Community and/or their representatives and/or unknown third parties in obstructing SPDC's efforts to contain the Second Oil Spill as set out at paragraph 38.4 above.

39.3 As to the third sentence:

- (a) SPDC admits that the report prepared by the joint investigation team concluded that the volume of oil spilled as a result of the Second Oil Spill was approximately 2,503 bbls.
- (b) However, SPDC avers that the total volume of oil released as a result of the Second Oil Spill exceeded the contemporaneous estimates referred to above. The issues of the volume of oil released and the extent of impact as a result of the 2008 Oil Spills will be the subject of expert evidence which will include hydrological data, satellite imagery and further data from samples taken from the relevant areas.
- (c) For the avoidance of any doubt, SPDC maintains its denial that at least 3,900 bbls was released per day and/or that 600,000 bbls were released in total as a result of the 2008 Oil Spills.

39.4 The fourth sentence of paragraph 254 is denied for the following reasons:

- (a) The volume of oil spilt was calculated using the Direct Assessment Method. This methodology gives the volume as being the area affected by the oil, multiplied by the depth of oil in the soil, multiplied by the effective porosity of the soil.
- (b) The Direct Assessment Method is approved by the Industry regulators and has subsequently been sanctioned by the *Oil Spill Recovery, Clean up, Remediation and Damage Assessment Regulations 2011*.

- 39.5 Save as expressly admitted or denied above, no further admissions are made to paragraph 254. SPDC may plead to the facts and matters therein alleged following the exchange of expert evidence.
40. Paragraph 265 is denied. In particular, and for the reasons pleaded above, it is denied that SPDC took no or no adequate steps to reduce the flow of oil and/or to clamp and contain the 2008 Oil Spills as alleged.

**General nature of the environmental damage caused**

41. As to paragraph 276:
- 41.1 SPDC admits that the environment near Bodo has been affected by the 2008 Oil Spills. SPDC repeats paragraphs 30.13 and 39.2 above.
- 41.2 Without prejudice to the foregoing, SPDC requires the Claimants to prove it is denied, for the reasons pleaded below, that marine life has been devastated within the 9,230 hectares of the Bodo Creek and that about 1,000 hectares of the mangroves have been largely destroyed as a result of the 2008 Oil Spills.
- 41.3 In particular, SPDC avers that the 2008 Oil Spills affected a smaller area than that alleged by the Claimants. As pleaded above, the issue of the nature and the extent of impact as a result of the 2008 Oil Spills will be the subject of expert evidence. At this stage, SPDC relies upon the following:
- (a) SPDC relies upon the contemporaneous documents which assessed the area that had been impacted by the 2008 Oil Spills, namely the reports of the joint investigation teams in respect of both of the 2008 Oil Spills and the 2009 PCA. These reports, which were prepared by teams that included representatives of SPDC, the relevant government regulator (NOSDRA) and of the local community, estimated the volume of oil spilled in accordance with the approved Direct Assessment Method described above.
  - (b) Further, as pleaded above, SPDC will rely upon expert analysis of satellite images of the Bodo area, both before and after the 2008 Spills, in support of its denial.
  - (c) SPDC repeats paragraphs 34 and 39.2 to 39.4 above as to the volume of oil spilled as a result of the 2008 Oil Spills and paragraph 37.1(c) as to the effects of weathering, and degradation and natural attenuation.

- 41.4 However, SPDC avers the area affected by the 2008 Oil Spills exceeded the contemporaneous estimates referred to above. The issues of the volume of oil released and the extent of impact as a result of the 2008 Oil Spills will be the subject of expert evidence which will include hydrological data, satellite imagery and further data from samples taken from the relevant areas.
- 41.5 If and insofar as the area was affected by oil in 2008 and thereafter, SPDC repeats its averment that the area in and around Bodo, including some or all of the Bodo Creek, has been detrimentally affected by oil from illegal activities, such as sabotage or illegal refining, and other sources. The Claimants are required to prove that any of the alleged environmental damage was caused by the 2008 Oil Spills and not by oil from other sources.
42. As to paragraph 27.6.1:
- 42.1. SPDC requires the Claimants to prove that the oil released by the 2008 Oil Spills ~~detrimentally affected~~ devastated marine life within the 9,320 hectares of-in the Bodo Creek. Paragraph 41 above is repeated.
- 42.2 SPDC does not admit that as a result of the 2008 Oil Spills, there has been a severe reduction in the abundance of marine life throughout the Bodo Creek; ~~and that shellfish are no longer present in the Bodo Creek; and that fish numbers have dramatically reduced~~ in the Bodo Creek. SPDC avers that the nature and extent of the damage caused as a result of the 2008 Oil Spills is a matter for expert evidence.
- 42.3 It is averred that any such damage to marine life as may be proved was caused or materially contributed to by:
- (a) Oil from other sources, particularly oil from illegal activities both before and after the 2008 Oil Spills. Paragraphs 25 to 28 above are repeated.
  - (b) Pollution of the Bodo Creek and surrounding waters from other sources including discharge of industrial waste and dredging activities.
  - (c) Overfishing of the Bodo Creek and surrounding waters. In support of this averment SPDC relies upon:
    - (i) The Resource Damage Assessment carried out by the Nigerian Federal Ministry of Environment in 2006, relied upon by the Claimants at paragraph 28.7.2, which recorded that "*Near-shore*

*illegal fishing by commercial trawlers*" (p4) was a main cause of reduction of fishing populations in the Niger Delta.

- (ii) The UNEP Report, relied upon by the Claimants at paragraph 287.3, which recorded that *"overfishing is a major problem affecting the fisheries in Ogoniland"*. (p178)
- (iii) The environmental study by Zabbey ('Community ecology of intertidal macrozoobenthos at Bodo Creek, Nigeria', May 2011), relied upon by the Claimants at paragraph 176, which recorded that *"it is safe to infer that the cockle is biologically and economically overfished in Bodo Creek."* (p141)

43. As to the facts and matters in paragraph 276.2:

43.1 SPDC admits that the oil released by the 2008 Oil Spills affected mangroves in the vicinity. Paragraph 41 above is repeated.

43.2 SPDC denies that as a result of the 2008 Oil Spills, there has been a dramatic reduction (insofar as that phrase is understood) in the mangrove population of the Bodo Creek. ~~In particular, SPDC is unable to admit or deny it is denied that 1,000,754 hectares of mangroves were heavily impacted and killed, and that 5,500,3,110 hectares of mangroves were moderately impacted (insofar as those terms are understood) by the 2008 Oil Spills. As pleaded above, the nature and extent of the damage caused as a result of the 2008 Oil Spills is a matter for expert evidence.~~

43.3 In particular, the Claimants are required to prove that any such damage to the mangrove population as may be proved was caused by the 2008 Oil Spills, and not by other factors. In particular, it is averred that, both before and after the 2008 Oil Spills, the mangrove population of the Bodo Creek was detrimentally affected as a result of oil spills caused by illegal activities. In support of this averment SPDC relies upon:

(a) A report produced by CEHRD in 2006 entitled 'Training of Rural Conservationists To Carry Out Re-Vegetation Of Mangrove Forest In A Crude Oil Polluted Swamp In Bara-Nwezor Village, Bodo City, Ogoni, Rivers State, Nigeria' which recorded that:

- (i) An oil spillage occurred in August 2003 at K-Dere and was *"carried by tide into Bodo Creek"* (p5); and

- (ii) This spill resulted in *"the death of endemic biota (flora and fauna alike). Consequently, about 120m long of mangrove fringing Bodo...died out."* (p5)
- (b) The CEHRD report dated October 2008, relied upon by the Claimants at paragraph 198, which recorded that, *"Tidal regimes have caused wide-spread distribution of oil scum to the length and breadth of Bodo Creek and the network of adjoining Creeks. ....Mangrove...dominate the creek floristic community. These are tainted and have started showing signs of death and defoliation; some mangrove stands are dead already."* (p4)
- (c) The presence of dead and deteriorating mangroves in the area in October 2008 (as recorded in the video referred to at paragraph 28.1 above, and the report of CEHRD referred to ~~in the paragraph above~~ at paragraph 38.3(b)). SPDC avers that the dead mangroves observable in the video were killed and the deterioration of some of the other deteriorating mangroves could not have been, and was not, caused by oil released from the 2008 Oil Spills.
- (d) The Pre Clean up Assessment Report produced by a joint investigation team including representatives of the regulators and the local communities dated September 2009 which recorded that, *"The presence of dead mangrove vegetation is clearly an indication of cumulative effect of oiling over extended period of time. The cumulative impact is from pre-2008 sabotage spill incidents from the upstream communities that have steadily impacted the network of creeks down stream from Kpoghor, through K-dere, B-dere, Kpor, Gio, Goi and to Bodo area."* (p4)
- (e) The UNEP Report, relied upon by the Claimants at paragraph 287 which recorded that:
- "The impact of oil on mangrove vegetation in Ogoniland has been disastrous, as was evident to the UNEP team during an early reconnaissance mission along the creeks. Impacts vary from extreme stress to total destruction....The pollution has accumulated over a very long period, perhaps over decades."* (p158)
- (f) Satellite images of Bodo before the 2008 spills that reveal the detrimental effect of oil on mangroves in the vicinity of Bodo, and in particular on the fringes of the Bodo lagoon and along the reaches of the Kpador Channel, by 2006.

- 43.4 Further, SPDC avers that the mangrove population of the Niger Delta was also detrimentally affected by other sources of pollution including seismic operations and the discharge of industrial waste.
44. As to the facts and matters in paragraph 276.3:
- 44.1 SPDC admits that the oil released by the 2008 Oil Spills impacted some land in the vicinity. Again, the nature and extent of the damage caused as a result of the 2008 Oil Spills is a matter for expert evidence. Paragraphs 30.13, 39.2(c) and 41 above are repeated.
- 44.2 SPDC requires the Claimants to prove:
- (a) The area or areas of farmland that are alleged to have been so contaminated by oil.
  - (b) That any proven oil contamination of any such farmland was caused by oil from the 2008 Oil Spills, and was not in fact caused by oil from other sources. Paragraph 26 above is repeated.
  - (c) That any such proven contamination by the 2008 Oil Spills caused the alleged or any reduction in farm production and yields.
45. As to the facts and matters in paragraph 276.4:
- 45.1 SPDC admits that oil from the 2008 Oil Spills released hydrocarbons into the water and sediment in the vicinity of the 2008 Oil Spills. Paragraphs 30.13, 39.2(c) and 41 and 42 above are repeated.
- 45.2 SPDC requires the Claimants to prove that as a consequence of the 2008 Oil Spills, there were at any material time levels of hydrocarbons in water, sediment and tissue samples that exceeded the standards pleaded in paragraph 287.3.1. SPDC pleads to these matters at paragraphs 48 and 49 below. SPDC repeats paragraph 37.1(c) above as to the effects of weathering, ~~and~~ degradation and natural attenuation on the oil released as a result of the Spills.
- 45.3 It is averred that any such levels of hydrocarbons as may be proved were caused, or contributed to, by other factors. In particular, SPDC repeats that, both before and after the 2008 Oil Spills, the Bodo Creek was detrimentally affected as a result of oil spills caused by illegal activities.
46. As to paragraph 287, it is averred that, with the exception of the Post-Impact Ecological Assessment study pleaded at paragraph 287.1, the materials relied

upon are not, nor do they purport to be, assessments of the damage caused as a result of the 2008 Oil Spills and do not attribute the environmental damage which they record to the 2008 Oil Spills. In particular:

- 46.1 As to the Post-Impact Ecological Assessment study relied upon at paragraph 287.1, no admissions are made as to the accuracy or veracity of the contents of the study and/or that any environmental damage identified in the study was caused by the 2008 Oil Spills. It is noted that the study appears to rely upon baseline data in the studies relied upon by the Claimants at paragraph 176. SPDC repeats paragraph 29 above.
- 46.2 As to the Niger Delta Natural Resource Damage Assessment and Restoration Project Report relied upon at paragraph 287.2, it is averred that the Report is founded upon the findings and observations of a scoping visit to the Niger Delta between 21 May and 29 May 2006. The visit and Report thus pre-dated the 2008 Oil Spills and therefore did not relate to the damage caused by the 2008 Oil Spills.
47. As to the UNEP Report relied upon at paragraph 287.3:
  - 47.1 The UNEP Report is not specific to SPDC operations and it does not attribute the environmental damage which it records to the 2008 Oil Spills. The UNEP Report states that it does not address "*legal questions which were beyond the terms of reference of the undertaking.*" (p6)
  - 47.2 The findings relied upon at paragraphs 287.3.1 to 287.3.5 do not attribute the levels of hydrocarbons recorded to the 2008 Oil Spills.
  - 47.3 The finding in the UNEP Report that bears the greatest relevance to the nature and cause of environmental damage in the Bodo area is that illegal activities, specifically artisanal refining at nearby Bodo West, have had a significant detrimental impact on the mangrove habitat. The UNEP Report concluded that such refineries were observed to cause "*total environmental devastation*" (p164) in the locality.
  - 47.4 The UNEP Report also recorded that, while the footprint of individual artisanal refining operations was localised, the cumulative impact exerted a significant environmental stress on the wider environment with the most significant risks being:
    - (a) Contamination of soil and groundwater in the immediate vicinity.

- (b) Damage to surrounding vegetation from smoke and fire.
  - (c) Spread of pollution beyond the refinery area.
  - (d) Contamination of water in the creeks and coastal and mangrove vegetation as well as soil exposed to layers of oil at low tide.
  - (e) Air pollution.
48. As to paragraph 287.3.1:
- 48.1 It is admitted that the UNEP Report recorded TPH concentrations in sediments taken at various sample sites that exceeded the intervention value of 5,000 mg/kg set by the *Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (2002)*.
- 48.2 It is further admitted that these sample sites included: Bodo West, Bodo and Sugi-Bodo. If it be so alleged, the Claimants are required to prove that these TPH concentrations were caused by the 2008 Oil Spills.
49. As to paragraph 287.3.2:
- 49.1 It is admitted that the UNEP Report recorded TPH concentrations in the surface water at a number of sample sites, four of which were said to have been taken from the environs of Bodo. Of these four samples:
- (a) Sample number 119-001 (Bodo) was low (11 CWG).
  - (b) Sample number 119-002 (Bodo) was low (13 CWG).
  - (c) Sample number 120-003 (Bodo) was low (15 CWG).
  - (d) Sample number 125-001 (Bodo) was high (2,030 CWG).
  - (e) Sample number 120-001 (Kapador-Bodo) was low (13 CWG).
- 49.2 In the premises, it is denied that the samples taken from Bodo were all particularly high and therefore support the contention that the incidents in 2008 were more severe than elsewhere.
- 49.3 It is further denied, if it be so alleged, that the alleged or any hydrocarbons found in the said samples of surface water in 2011 came from the 2008 Oil Spills. It is averred that the presence of such sheen was caused by other sources of oil.
50. As to paragraphs 287.3.3 to 287.3.5:

50.1 It is admitted that the UNEP Report records the alleged findings. The Claimants are required to prove, however, that any of the alleged findings relate to sites near the TNP near Bodo.

51. Save as is admitted above, no admissions are made as to the accuracy or veracity of the contents of the materials pleaded at paragraph 287 and/or that any environmental damage identified in the materials was caused by the 2008 Oil Spills.

#### **Clean up and remediation**

52. As to the two terms of art of "clean up" and "remediation":

52.1 The first stage of any environmental restoration is the initial "clean up", which entails two phases: the emergency phase in which free phase oil is contained and recovered; and the planned phase which entails further recovery of any recoverable oil, flushing of oil from the mangroves and the application of nutrient amendment. Impacted vegetation is also removed and disposed. This work is overseen by SPDC and the regulator and does not require a particularly skilled or expert labour force.

52.2 The second stage is "remediation". A variety of specialised and standardised techniques are employed, including the use of biological, chemical and physical methods as appropriate in order to hasten the restoration of the land to a condition in which it can be used as it was prior to the spill.

53. Paragraph 2928 is denied:

53.1 SPDC has carried out the "clean up" of, and has taken reasonable steps to carry out the "remediation" of, the area identified as having been impacted by the 2008 Oil Spills.

53.2 Further, or in the alternative, SPDC avers that both in the immediate aftermath of the 2008 Oil Spills and since to date, the members of the Bodo Community and/or their representatives and/or unknown third parties have:

- (a) Refused SPDC access to Bodo and the surrounding area for the purposes of clean up and/or remediation as set out further below; and/or
- (b) Obstructed SPDC in its efforts to commence and/or carry out clean up and/or remediation, including by causing further pollution of the Bodo environment as a result of illegal activities, as set out further below.

**Clean up**

54. Further as to paragraph ~~298~~, SPDC avers that:
- 54.1 It took immediate steps to seek to carry out the emergency phase of clean up, namely to contain and recover free phase oil in the aftermath of both of the 2008 Oil Spills.
- 54.2 However, the members of the Community and/or their representatives and/or unknown third parties prevented SPDC from gaining access ~~to the spill site of the First and/or Second Spills~~ and/or obstructed SPDC in its efforts to immediately implement the emergency phase of clean up at the First and/or Second Spills.
- 54.3 As to the First Oil Spill, SPDC repeats paragraph 30 above.
- 54.4 As to the Second Oil Spill, SPDC repeats paragraph 38.4 and 38.3 above.
55. Once the emergency phase of the clean up work had been carried out insofar as was possible given the above, SPDC sought to commence the planned phase of clean up in respect of both of the 2008 Oil Spills.
56. However, as in the emergency phase, the members of the Community and/or their representatives and/or unknown third parties prevented SPDC from gaining access ~~to the spill site of the First and/or Second Spills~~ and/or obstructed SPDC in its efforts to immediately implement the planned phase of clean up at the spill sites of the First and/or Second Spills:
- 56.1. From February to May 2009, SPDC sought to engage with the members of the Community to reach an agreement that would allow the clean up operation to resume. However, as in the emergency phase, the members of the Community and/or their representatives prevented SPDC from gaining access to the spill site of the First and/or Second Spills and/or obstructed SPDC in its efforts to implement the planned phase of clean up. ~~During March 2009 SPDC was prevented from making further progress with the planned phase of clean-up work due to demands from the members of the Bodo Community and/or their representatives for relief materials despite the provision of adequate relief materials as pleaded below at paragraph 84 and compensation.~~
- ~~56.2. Between February and May 2009, SPDC engaged with the members of the community to reach an agreement that would allow the clean up operation to resume.~~

~~56.356.2~~ In particular, ~~from February 2009~~, SPDC sought nominations from the Community of local contractors to carry out the clean up operations. However, intra community disputes meant that SPDC was provided with several iterations of the Community nominated list over the period between February and September 2009.

~~56.456.3~~ Notwithstanding the above, in May 2009 SPDC engaged local Community nominated contractors to carry out the planned phase of the clean up of the areas identified as having been affected by the 2008 Oil ~~s~~Spills, whose work was to include ~~including~~ further recovery of oil, flushing of the affected land and the disposal of impacted vegetation.

~~56.556.4~~ However, SPDC experienced various challenges with these contractors which caused further delay to the ~~completion of the planned phase of ongoing~~ clean up effort.

~~56.656.5~~ The recovery of free phase oil was eventually completed by July 2009.

#### ***Pre Clean Up Assessment in August 2009 (the 2009 PCA)***

57. In advance of the commencement of ~~Following the planned phase of clean-up~~ it was necessary for SPDC to conduct a ground survey in Bodo and the surrounding communities in order to assess the area affected by the 2008 Oil Spills. Again, the members of the Community and/or their representatives delayed SPDC in carrying out the survey:

57.1 In May 2009, SPDC planned to send a joint investigation team (comprised of representatives from SPDC, NOSDRA, the DPR and the Rivers State Ministry of Environment and representatives of each of the communities in the area) to review and assess the impacted areas where clean up and remediation were required.

57.2 Ahead of the planned visit on 15 May 2009, the various communities informed SPDC that they were not ready to receive the assessment team. SPDC understands that this was as a result of disagreement and disputes between some of the communities to be visited.

57.3 A further attempt to conduct the Pre Clean Up Assessment commenced in July 2009 but could not be concluded due, *inter alia*, to:

- (a) The failure of the members of the Community and/or their representatives to source the correct marine equipment, despite this having been agreed with SPDC;
- (b) The absence of adequate security provision being provided by the Joint Task Force (JTF) despite this having been requested by SPDC, such being necessary because of the security threats posed by the members of the Community and/or their representatives.

57.4 SPDC informed the Regulator, NOSDRA, of the difficulties it was experiencing in gaining access to Bodo and the surrounding communities by letter dated 6 July 2009.

57.5 A joint investigation team was subsequently allowed access to Bodo and its neighbouring communities to conduct the 2009 PCA between 25 and 29 August 2009.

58. In the course of the 2009 PCA:

58.1 The joint investigation team visited those communities which claimed to have been impacted by the 2008 Oil Spills. In addition to Bodo, these were Owokiri, Mogho, Kpor, K-Dere, B-Dere, Gbe, Bomu, Lewe, Kuri Boue, Gio and Kpoghor. With the exception of Owokiri these communities are all upstream from Bodo.

58.2 Physical inspections and observations of impacted soil, sediment, vegetation and water, mapping utilising GPS and soil sampling and analysis were undertaken.

58.3 Following the 2009 PCA, a report dated September 2009 was produced which recorded these findings and which was signed by members of the joint investigation team, including representatives of the relevant communities including the Bodo Community. That report recorded *inter alia* that the pre clean up area of impact of the 2008 Oil Spills was approximately 36 hectares comprising 32.4 hectares of impacted swamp and shoreline and 3.6 hectares of water. Paragraph 41.4 above is repeated.

~~58.4 In August 2009, in addition to those already engaged by SPDC, further contractors were engaged to continue the clean up work. Each of these contractors was selected from names nominated by the Bodo Community.~~

~~58.5~~58.4 These contractors From August 2009, the contractors previously engaged by SPDC carried out clean up activities in the areas identified by the joint investigation team during engaged in the 2009 PCA. This work included further

recovery of free phase oil, flushing of residual trapped oil from the mangroves, cutting of heavily impacted vegetation and the application of nutrient amendments.

~~58.6~~58.5 The clean up work was completed by December 2009 and the contractors submitted invoices accordingly. SPDC then raised Service Entry Sheets confirming that the work contracted for had been carried out and that the payment process could be initiated. The contractors have subsequently provided written confirmation to SPDC that they carried out the clean up work in the areas identified by the 2009 PCA and were paid for it.

~~58.7~~58.6 On 23 December 2009, a representative of the Bodo Community certified the project completion reports filed by the clean up contractors to confirm that the contractors had completed the clean up work to the satisfaction of the Bodo Community.

59. In the premises SPDC avers that:

59.1 It undertook a reasonable and/or adequate clean up of the area identified as having been affected by the First and Second 2008 Oil Spills.

59.2 Further or in the alternative it is averred that:

- (a) Any failure to undertake, and/or delay in carrying out, such clean up was caused by the members of the Community and/or their representatives in failing to grant access to SPDC and/or in obstructing SPDC's efforts to clean up as pleaded above.
- (b) The areas which were cleaned up in 2009 were subsequently affected by spills caused by illegal activities.
- (c) Such conduct as is pleaded as above at (a) and/or (b) constitutes a "default" on the part of the members of the Community and/or their representatives and/or a "malicious act of third parties" for the purposes of s 11(5)(c) of the 1990 Act ~~and/or nuisance~~.

59.3 Accordingly, it is denied that SPDC is liable in respect of any damage to the communal lands which the Claimants may establish has arisen as a result of any such failure to carry out adequate clean up and/or delay in carrying out such clean up, whether as a matter of causation and/or because SPDC is not liable for damage caused by the malicious acts of third parties.

### **Remediation**

60. After the completion of the clean up phase, in the ordinary course the next stage would be for remediation to be carried out in the impacted areas as required. The methodology used by SPDC in areas such as these is Remediation by Enhanced Natural Attenuation ("RENA").
61. In 2010 SPDC began to make the necessary arrangements for the remediation work to take place in Bodo. This process was once again delayed as a result of the demands of the Community and intra community disputes as to Community nominated contractors.
62. In June 2010, following an online bidding process, SPDC awarded six contracts for the provision of remediation services to community-nominated local contractors. Each contractor was assigned to remediate a site of approximately 8,000 square metres which it had been assessed had been impacted by the spills which occurred in August 2008, as pleaded at paragraphs 30.1 and 30.2 above, and the 2008 Oil Spills.
63. However, the scale of the illegal activities of third parties that caused non-operational spills in the area after the 2008 Oil Spills meant that the land and water cleaned up during 2009 was re-impacted and continued to be re-impacted and SPDC had to abandon efforts to undertake remediation.
64. SPDC repeats paragraph 59 above as to causation and/or its liability in respect of damage caused by such illegal activities.

***SPDC's efforts to resume clean up at Bodo***

65. Further to the clean up and remediation efforts in 2009 pleaded above, in mid-2011 SPDC embarked on another pre-clean up assessment exercise (the "2011 PCA") in Bodo and twelve of its neighbouring communities (namely Kpor, Goi, Mogho, Lewe, Bomu, Gbe, Nyonkwiri Boue, Kerekwiri Boue, Kpoghor, Gio, Owokiri and Asaramatoru).
66. The objective of this exercise was to determine the total area requiring clean up in the communities visited as a result of the impact of oil from three contributory sources:
  - 66.1 spills from SPDC pipelines and/or facilities during 2009 to 2011 caused by sabotage that were not cleaned up due to widespread insurgency and/or insecurity in the area and continuous re-impact from illegal activities;
  - 66.2 spills from NNPC pipelines; and

- 66.3 illegal bunkering and artisanal refineries.
67. The 2011 PCA assessed that the total area requiring clean up was 1736.5 hectares including 1256.64 hectares in Bodo. Following the 2011 PCA it was agreed by SPDC and the representatives of the Community that clean up would be progressed initially by way of a "pilot project" of clean up in a section of the total impacted area.
68. At around the same time as the 2011 PCA, in May 2011, Leigh Day & Co, sent a letter before claim on behalf of the members of the Community which, *inter alia*, requested that all further communications between SPDC and the Community be conducted via Leigh Day & Co.
69. SPDC's solicitors, Hogan Lovells, sought to agree with Leigh Day & Co that "*in the interests of time and practical efficiency, [SPDC] will clearly need to liaise directly with representatives of the Bodo Community so that [clean up] work can begin*" and "*the practical and technical considerations involved in clean up mean that it can only be progressed by the parties working together directly on the ground. It is not a process that can be adequately handled through the parties' respective legal advisers in London.*"
70. SPDC was keen to ensure that clean up was not delayed as a result of the commencement of these proceedings. However, the pilot clean up in Bodo could not proceed as planned due to Leigh Day's repeated demands for SPDC to stop all direct contact with the representatives of the Community on all matters including clean up and further as a result of continued refusal of access to the Bodo Creek.
71. Despite these obstacles, in late 2011 SPDC produced a Project Execution Plan (PEP) for the pilot project which set out the methodology and timetable for the programme of work. The PEP set out the seven different oil impacted areas that had been selected for clean up, including one area of approximately 20 hectares at Bodo Patrick Waterside.
72. According to the timetable set out in the PEP, the pre-start site assessment and community assessment in Bodo was due to begin in the third week of October 2011, with contractor mobilisation to site to begin clean-up activities occurring in mid-December and completion of the pilot by mid-February 2012, followed by remediation of the site.

73. However, SPDC has been stopped from commencing the pilot project in Bodo because *inter alia*:
- 73.1 Intra factional disputes within the Community relating to the location and size of the pilot areas as well as the number and identity of the local contractors engaged to clean up the pilot areas have hampered the commencement of the pilot project. Engagement between the parties' respective English solicitors has so far failed to resolve these issues, despite the efforts made by SPDC to accommodate the demands made by the Community through Leigh Day & Co.
- 73.2 SPDC has been repeatedly denied access to the Community or had access which had previously been granted by the Community revoked.
- 73.3 There has been a lack of direct communication between SPDC and the members of the Community, as stipulated by Leigh Day & Co.
74. Throughout this period of delays SPDC has repeatedly confirmed its commitment to carry out clean up of the Bodo environment in respect of oil spilt from its pipelines , irrespective of the cause of the spills, namely whether operational or caused by illegal activities, in accordance with its own policy and/or its responsibility under EGASPIN and/or its other accepted obligations;
75. Further, SPDC has gone to great lengths to modify the plans for the pilot clean up in order to accommodate the effects of intra-Community factional divisions, including:
- 75.1 Adding an additional pilot clean up area;
- 75.2 Increasing the size of that area and;
- 75.3 Increasing the number of Community contractors required for the pilot clean up.
76. After engagement between the parties' English solicitors over many months proved fruitless, SPDC has sought to open direct channels of communication with the Community. Most recently, on 7 February 2013, SPDC held a meeting with the Community, which was also attended by the relevant regulators, regarding contractor selection for the pilot clean up areas.
77. As a result of these discussions:
- 77.1 The Community agreed to grant FTO access to SPDC for clean up to commence;

- 77.2 The Community agreed to provide a final list of nominated contractors to go through SPDC's contractor selection process.
- 77.3 The continuing disagreements within the Community as to leadership and land ownership, and their effect on progressing clean up, were also acknowledged at the meeting.
78. Leigh Day has however since reiterated that SPDC should not deal directly with the Community despite such progress having been made.
79. Since 2011, SPDC's efforts to resume clean up and remediation operations in Bodo have therefore been obstructed by the members of the Community and/or their representatives.
80. However, SPDC remains committed to carry out reasonable and necessary clean up and remediation in Bodo and as at the time of the service of this Defence SPDC and the representatives of the Community, in addition to other relevant stakeholders, are engaging in an initiative of the former Dutch Ambassador to Nigeria to facilitate round table talks in order to reach a final agreement so that clean-up work can begin.

***Response to the specific allegations in relation to clean up and remediation***

81. As to paragraph 3029:
- 81.1 It is admitted that the Ministry of the Environment of Rivers State wrote to SPDC on 15 January 2009 and 11 February 2009 requesting a meeting between the Bodo Community leaders and SPDC.
- 81.2 It is denied that SPDC failed to respond to the said letters:
- (a) The Ministry of Environment's letter of 11 February 2009 itself refers to a letter from SPDC of 27 January 2009.
  - (b) A meeting was held between SPDC and NOSDRA on 23 April 2009.
  - (c) On 5 May 2009, SPDC wrote to NOSDRA in respect of clean up of the spills, provision of relief materials and negotiation of compensation.
  - (d) Further, as pleaded above, SPDC held meetings with the Bodo Community on 11 and 13 February 2009, and on 24 March 2009, which were attended by King Felix Berebon Berebon, members of the Council of Chiefs, Community leaders and members of the Community.

- (e) Two further meetings were arranged by SPDC but were cancelled by the Community.
82. Paragraph 310 is admitted, save that it is denied that SPDC failed to respond to the efforts of NOSDRA to ensure that a damage assessment was carried out expeditiously. Pre Clean Up Assessments were scheduled to take place in May and July 2009. The Pre Clean Up Assessment in May could not proceed and the Pre Clean Up Assessment in July could not be concluded for the reasons pleaded above at paragraph 57.3 above. The 2009 PCA was eventually conducted in August 2009 as pleaded above at paragraph 57.
83. Paragraph 321 is denied for the reasons pleaded at paragraphs 52 to 81 above.
84. Paragraph 332 is not admitted save that:
- 84.1 It is admitted that the said relief materials were provided by SPDC in May 2009 and that they were subsequently rejected by the Bodo Community.
- 84.2 It is averred that the issue of relief materials had previously been discussed at the meeting between SPDC and the Bodo Community on 24 March 2009 and that the Community had agreed that the proposed relief was adequate.
85. As to paragraph 343:
- 85.1 Paragraph 343.1 is admitted save that it is denied that either of the 2008 Oil Spills resulted from erosion.
- 85.2 Save that it is admitted that the Defendant was notified of the spills on 5 October 2008 and 7 December 2008 respectively, paragraph 333.2 is denied for the reasons pleaded above at paragraphs 30.6, 30.9 to 30.10, and 38.3 to 38.4.
- 85.3 Paragraph 343.3 is denied for the reasons pleaded above at paragraphs 34 and 39.
- 85.4 Paragraph 343.4 is denied for the reasons pleaded above at paragraphs 25 to 29, 36 and 41 to ~~38~~59.
- 85.5 Paragraph 343.5 is denied for the reasons pleaded above at paragraphs 52 to 60.

## V. LEGAL LIABILITY

### Applicable law

86. Paragraph 354 is admitted. In particular, SPDC admits that issues of substance are governed by the law of Nigeria, whereas matters of procedure are governed by the law of England and Wales.

**Basis of liability of the Defendant in Nigerian law**

**Liability for the 2008 Oil Spills**

**Section 11(5)(c) of the OPA**

87. The reference in paragraph 36 to the Claimants' "primary case" being premised upon the liability of the Defendant for the 2008 Oil Spills under the OPA is not understood. Following the Preliminary Issues Judgment, the Claimants have no claim other than in respect of the 2008 Oil Spills under the OPA. Further, no claim for compensation has been made (as is clear from the Claim Form and paragraph 2 of the Re-Re-Amended Particulars of Claim) in respect of any spills other than the said 2008 Oil Spills. Without prejudice to the foregoing, SPDC pleads as follows to paragraph 365:

- 87.1 SPDC admits that it was at all material times the relevant licence-holder.
- 87.2 It is admitted that SPDC is liable to pay compensation pursuant to section 11(5)(c) of the 1990 Act to any person suffering damage (other than on account of his own default or on account of the malicious act of a third person) as a consequence of the 2008 Oil Spills, for any such damage not otherwise made good.
- 87.3 For the avoidance of doubt, SPDC avers that it is not liable, as a matter of causation, to compensate a Claimant under s 11(5)(c) in respect of any damage that has been caused and/or contributed to by the conduct of the members of the Bodo and/or other local Communities and/or their representatives and/or unknown third parties.
- 87.4 In particular, it is denied that SPDC is liable to compensate a Claimant under s 11(5)(c) for any damage that has been suffered by reason of:
- (a) His or her own default; and/or
  - (b) The malicious act of a third person, including the obstruction of efforts by SPDC, its servants or agents to contain, repair, clean up or remediate the 2008 Oil Spills.

SPDC repeats paragraphs 30.13, 38.4 and 59.2 above.

87.5 Pursuant to section 20(4) of the 1990 Act, it is denied that SPDC is liable to pay any such compensation in relation to any unoccupied land within the meaning of the 1978 Act.

87.6 SPDC repeats, for the avoidance of doubt, that it requires each of the Claimants to prove that he or she has suffered recoverable damage as a consequence of the 2008 Oil Spills.

~~87.7 Further, it is averred that Part IV of the 1990 Act provides a comprehensive statutory basis for the assessment of such compensation. In the premises, SPDC will contend that:~~

~~(a) The statutory scheme provides a complete and exclusive code for such compensation which does not allow for separate awards of either aggravated or exemplary damages.~~

~~(b) The statutory remedy provided by this strict liability regime is the only remedy available under Nigerian law. This is because the 1990 Act, which was a Federal Law made under the exclusive competence of the National Assembly of Nigeria, provides an exclusive remedy for those suffering recoverable damage as a consequence of any breakage of or leakage from a relevant pipeline. By operation of section 32(1) of the Interpretation Act, the provisions of the 1990 Act disapply the common law in relation to such matters. In the premises, the Claimants are unable to rely upon any of the common law causes of action. Without prejudice to this contention, SPDC sets out below its defence to the various common law causes of action pleaded by the Claimants.~~

Section 11(5)(a) of the OPA

88. As to paragraph 37:

88.1 The Claimants are required to prove the nature and extent of their interest in the property and/or land that is alleged to have been injuriously affected by the 2008 Oil Spills, and in particular whether any such interest was and is sufficient to seek damages pursuant to section 11(5)(a) of the OPA. Paragraph 12.3(b) above is repeated.

88.2 Pursuant to section 20(4) of the 1990 Act, SPDC is not liable to pay any compensation in relation to any unoccupied land within the meaning of the 1978 Act. The Claimants are therefore required to prove that the alleged or any such property or land is or was at any material time not unoccupied property or land.

88.3 The Claimants are further required to prove that the alleged or any such property or land has been injuriously affected by oil from the 2008 Oil Spills rather than from any of the other sources. SPDC avers that it cannot be liable under section 11(5)(a) for any injurious affection caused by the acts of the Claimants themselves and/or by the members of the Bodo Community and/or by third parties because such acts were not licensed activities. In particular, SPDC is not liable for any oil released into the environment as the result of:

(a) Incidents involving other pipelines, and/or

(b) Incidents of sabotage, illegal bunkering, illegal refining and illegal transportation.

**Alleged liability for other spills caused by illegal bunkering under section 11(5)(b)**

89. As to paragraphs 40 to 44:

89.1 The Claimants' claim in this action is limited to claims for relief in respect of damage that has been caused by the two 2008 Oil Spills, as is expressly stated in the Claim Form and the summary of the claim set out at paragraph 2 of the Re-Re-Amended Particulars of Claim.

89.2. SPDC repeats that it has admitted liability in respect of those two 2008 Oil Spills and has submitted to this jurisdiction in respect of claims for compensation in respect of the two 2008 Oil Spills.

89.3 The Claimants must prove that the 2008 Oil Spills caused the damage which they allege.

To do so, the Claimants must prove:

(a) the *status quo ante*, namely the condition of the Bodo Creek (as defined in paragraph 10 of the Re-Re-Amended Particulars of Claim) prior to the 2008 Oil Spills; and

(b) the damage alleged to have been caused to the Bodo Creek as a result of the 2008 Oil Spills.

89.4 As to the *status quo ante*:

(a) the Claimants case is that the Bodo Creek was environmentally sound prior to the 2008 Oil Spills. The Claimants claim that whilst the creeks had suffered a small number of oil spills prior to 28 August 2008, any resulting pollution was not

significant (paragraph 17). The Claimants rely on baseline data from identified ecological survey at paragraph 17 of the Re-Re-Amended Particulars of Claim.

(b) The Defendant's position is that:

(i) The Bodo Creek had suffered damage prior to the 2008 Oil Spills, including as a result of illegal bunkering (incidents of which are listed in Appendix II to this Defence) and illegal refining activities; that this damage was relevant to the baseline condition of the environment; and that this prior damage must be taken into account when assessing what additional damage has been caused by the 2008 Oil Spills.

(ii) This litigation concerns claims for compensation arising out of the 2008 Oil Spills and no others. Further, any claims in relation to any other oil spills are likely to be time-barred and/or to have been the subject of other proceedings in Nigeria.

89.5 As to the damage alleged to have been caused to the Bodo Creek as a result of the 2008 Oil Spills, SPDC contends that illegal bunkering and refining has continued since 2008 and has caused additional damage which, again, is not damage caused by the 2008 Oil Spills and needs to be distinguished from such damage. The Claimants' accept the fact of such activities at paragraph 42.

89.6 In circumstances in which this claim is limited to relief in respect of the 2008 Oil Spills, and the Claimants' have made clear that their reliance on s.11(5)(b) is purely responsive to the Defendant's pleas as to illegal bunkering, the Claimants' allegations in respect of s.11(5)(b) are necessarily limited to:

(a) the proper assessment of the compensation payable by the Defendant in respect of the 2008 Oil Spills; and

(b) those specific incidents of illegal bunkering on which the Defendant relies, namely those pre-spill incidents listed in Appendix II.

89.7 Insofar as it is intended to be alleged that the 2008 Oil Spills caused members of the Bodo Community to commit acts of illegal bunkering and that, therefore, the 2008 Oil Spills should be deemed to have caused the damage resulting from illegal acts of bunkering since 2008, the same is denied. Causation is denied, foreseeability is denied and, further, any such claims are unsustainable on grounds of public policy.

89.8 The Defendant's position is that the Claimants' reliance on s.11(5)(b) of the OPA is irrelevant to the proper assessment of the compensation payable by the Defendant in

respect of the Oil Spills; any claims in respect of damage caused by any oil spills other than the 2008 Oil Spills falls outside the scope of this litigation.

90. In all the circumstances, it is denied that the Defendant is liable to the Claimants pursuant to s.11(5)(b) in this action, whether as alleged or at all.

91. SPDC maintains its pleas at the paragraphs listed at paragraph 38.

92. Paragraph 39 is noted. Further, the Claimants reference to paragraphs 24-25, 37 and 100-101 of the Re-Amended Reply to the Individual Claimants are irrelevant because they do not plead to the spills set out in Appendix II.

93. Paragraphs 40-41 are denied:

93.1 Paragraph 89 above is repeated.

93.2 The Claimants contend, inter alia, that (i) the burden is on the Defendant to establish that any spills proved were caused by criminal acts of third parties, rather than the condition of the pipelines (ii) where the Defendant fails to prove that a given spill is caused by the criminal act of a third party then the Defendant is liable to the Claimants for such spills pursuant to s.11(5)(c) of the OPA and (iii) insofar as any spill is demonstrated to have been caused by criminal acts of third parties, the Defendant is liable for the consequences under s.11(5)(b) of the OPA. In summary, the Defendant's position is that:

(a) Each of those contentions is misconceived in law and is denied;

(b) The burden rests with the Claimants to demonstrate the damage caused by the 2008 Oil Spills and the losses resulting from such damage;

(c) As set out in paragraph 2 of the Re-Re-Amended Particulars of Claim and the claim form, this claim is only concerned with the loss and damage caused by the 2008 Oil Spills. Any other damage resulting from any other cause falls outside its scope. Moreover, other alleged spills which the Claimants might hereafter seek permission to particularise are likely to be time barred and/or to have been the subject of other proceedings in Nigeria; and

(d) The issue of other damage (whether by other oil spills, illegal refining or otherwise) is relevant to the present proceedings only for the purpose of establishing the state of the relevant environment prior to the 2008 Oil Spills and the true nature and extent of the damage caused by the 2008 Oil Spills.

- 93.3 It is denied that the criminal standard of proof applies as alleged at paragraph 41. The Defendant is obliged to prove any of its averments in accordance with the usual civil standard of proof.
- 93.4 Further, it is denied that the alleged presumption of fact, rebuttable only on highly cogent evidence, has arisen as alleged or at all. The Claimants bear the legal and evidential burden of proving their case.
- 93.5 The Defendant is unable to plead to the unparticularised allegations made relating to the state of the pipeline, which the Claimants are required to prove.
- 93.6 Without prejudice to the foregoing, even if this litigation were concerned with a claim for relief in respect of any spills other than the 2008 Oil Spills, which is denied, it would be for the Claimants to prove that SPDC is strictly liable under section 11(5)(c) in respect of any such spill. They would have to establish that the alleged loss or damage was caused by a breakage of, or leakage from, the said pipeline which arose other than on account of their own default or on account of the malicious act of a third person.
94. As to paragraph 42:
- 94.1 Paragraph 89 above is repeated.
- 94.2 SPDC avers that persons (whether the Claimants themselves or members of the Bodo Community or third parties) have been illegally bunkering and/or refining oil in the Bodo Creek since before the 2008 Oil Spills. Paragraph 26 above is repeated.
- 94.3 SPDC admits and avers that the Bodo Creek has been affected by oil from other sources in the period since the 2008 oil spills, including by oil released as the result of illegal bunkering or illegal refining in or near the Bodo Creek, whether from the Defendant's pipelines or from the NNPC pipeline. Paragraph 41.5 above is repeated. The Defendant has not pleaded any specific incidents of illegal bunkering in the period since the 2008 Oil Spills. It is, in any event, for the Claimants to prove that the alleged loss and damage was caused by oil from the 2008 Oil Spills – which are the subject of this claim – rather than oil from these other sources.
- 94.4 Further, the Claimants have repeatedly confirmed that their pleas on section 11(5)(b) are purely responsive to the Defendant's position on illegal bunkering. In circumstances in which this claim is limited to damages/compensation in respect of the 2008 Oil Spills, and the Claimants have made it clear that their reliance on s.11(5)(b) is purely responsive to the Defendant's pleas as to illegal bunkering, the Claimants' allegations in respect of s.11(5)(b) are necessarily limited to:

(a) the proper assessment of the compensation payable by the Defendant in respect of the 2008 Oil Spills; and

(b) those specific incidents of illegal bunkering on which the Defendant relies, namely those pre-spill incidents listed in Appendix II.

94.5 The Claimants make no claim for compensation or other relief in respect of any damage which may have been caused by illegal bunkering, but not by the 2008 Oil Spills; any such claim would fall outside the scope of this action.

94.6 In the premises, the Claimants' reliance on s.11(5)(b) of the OPA is irrelevant to the proper assessment of the compensation payable by the Defendant in respect of the Oil Spills; any claims in respect of damage caused by any oil spills other than the 2008 Oil Spills falls outside the scope of this litigation. It is denied that the Defendant is liable to Claimants pursuant to s11(5)(b) in this action, whether as alleged or at all.

94.7 Without prejudice to the generality of the foregoing, insofar as the Claimants intend to allege at paragraph 42 that illegal bunkering since the 2008 Oil Spills has itself been caused by the 2008 Oil Spills, the same is denied. Causation is denied. Foreseeability is denied. It is denied that any illegal acts after the 2008 Oil Spills, whether bunkering or refining, that may be proved by the Claimants were the foreseeable consequence of the economic and social damage caused by the 2008 Oil Spills and/or were caused by those spills. Further, insofar as the same is intended to be alleged, it would be contrary to public policy for the Claimants to be able to recover damages or compensation on the basis that the 2008 Oil Spills caused any member or members of the Bodo Community to engage in such criminal/illegal activities. The Defendant is unable to admit or deny at present whether the damage caused by oil released by such illegal post-spills bunkering and/or refining was "minimal" (insofar as such term is understood, which it is not).

95. Paragraph 43 is denied. Paragraph 89 above is repeated; the current litigation is not concerned with compensation for any spills other than the two 2008 Oil Spills, in respect of which liability has been admitted. The relevance of any other spills is limited to the assessment of the damage caused by the two 2008 Oil Spills. Without prejudice to the foregoing:

95.1 SPDC denies that it is liable under section 11(5)(b) for any damage caused by oil released as the result of the incidents of illegal bunkering in Appendix II hereto, or for any other incidents of illegal bunkering as may be established.

95.2 SPDC denies that s 11(5)(b) of the 1990 Act imposes a duty on a licence holder to protect a pipeline against the illegal activities of third parties and accordingly it is denied

that SPDC can be liable to the Claimants to pay just compensation in respect of damage caused as a result of such activities, as alleged or at all, save insofar as permitted by the judgment of the Court dated 20 June 2014.

95.3 Pursuant to section 20(4) of the 1990 Act, SPDC is not liable to pay any compensation in relation to any unoccupied land within the meaning of the 1978 Act. The Claimants are therefore required to prove that the alleged or any damaged property or land is or was at any material time not unoccupied property or land.

95.4 Without prejudice to the above, SPDC denies that it failed to protect, maintain and repair the pipeline in accordance with its duty under s.11(5)(b) or at all. Paragraph 96 below is repeated.

96. Paragraph 44 is denied. Paragraph 89 above is repeated. Without prejudice to the generality of the foregoing, if, which is denied, the Claimants are hereafter permitted to amend the Claim Form or otherwise establish that they are entitled to claim damages/compensation in respect of any spill other than the two 2008 Oil Spills, then SPDC pleads as follows to the Particulars of Neglect under paragraph 44:

Reinforced Concrete

96.1 As to sub-paragraph (a):

(a) It is denied that, as a matter of construction, the alleged or any failure of design or construction could amount to neglect to protect the pipeline within the meaning of section 11(5)(b). The Defendant will rely upon the Court's finding of law at paragraph 92(e) of its judgment dated 20 June 2014. This allegation of neglect therefore fails *in limine*.

(b) Without prejudice to the generality of the foregoing, it is in any event averred that relevant section of the pipelines of the TNP were made from lengths of concrete sheathed pipeline. The said sheathing was made from reinforced concrete; and, when constructed, the joints between the lengths of concrete sheathed linepipe were sealed with bitumen concrete. In the premises, it is denied that the Defendant failed to provide a reinforced concrete fill over the relevant sections of the said TNP.

(c) The intended purpose of the concrete sheath was to provide extra weight, and therefore stability, to the pipeline (which was particularly important if the pipeline was located in swamps or mangrove forests or waterways). It was not intended to, nor did it in fact provide, any or any material protection against the illegal

activities of third parties (and in particular the theft of oil by determined gangs of criminals).

(d) Further, it is denied (if it be so alleged) that the Defendant's failure retrospectively to encase any other parts of the pipeline in additional reinforced concrete once SPDC became aware of the threat of such illegal activities (whether in 2010, as alleged by the Claimants, or at any other time beforehand) was unreasonable, not least in the light of the limited level of protection that such concrete casing would offer against determined criminals, the significant scale of such an operation, and the security challenges faced by SPDC in those areas in which the illegal activities were most prevalent as set out in paragraphs 17 and 26 above.

(e) In any event, the Claimants are required to prove, in relation to each and every incident of illegal bunkering in relation to which this allegation is made that:

(i) the relevant section of the pipeline was not sheathed in concrete at the site of any relevant illegal bunkering;

(ii) the absence of such a concrete sheath from the pipeline at that site amounted to a neglect to protect, maintain or repair the pipeline in that location; and

(iii) any proven absence of reinforced concrete sheath was the effective and /or enabling cause of the alleged or any preventable damage by people illegally engaged in bunkering on that occasion.

(f) It is denied that the pipeline was in a poor state as alleged (namely that the concrete sheathing was absent and that the absence thereof rendered the pipeline vulnerable to activities of criminals) and/or that the Defendant was aware thereof. The contents of the email dated 5 November 2008 do not support the Claimants' contention. SPDC will rely upon the full text of the email for its full meaning and effect.

(g) For these reasons, SPDC denies that it failed to protect, maintain or repair the pipeline in breach of section 11(5)(b) as alleged.

Leak detection system

96.2 As to sub-paragraph (b):

(a) It is denied that SPDC failed to have in place any, or any adequate, leak detection systems. SPDC had and implemented systems to detect possible spills when they occurred. In particular:

- (i) The Defendant hired surveillance contractors to carry out regular inspection of its manifolds and pipelines. The contracts with these contractors stipulated that each kilometre of pipeline under surveillance should be monitored by a minimum of three persons at any time on a 24 hour, seven days a week, basis. SPDC employed inspectors to conduct site visits every 7 to 14 days in order to confirm that the contractors were performing their contractual obligations. SPDC instructed its surveillance contractors to report promptly any leaks that were identified in the course of their surveillance.
- (ii) SPDC arranged overflights of the pipeline in order to identify leaks at an early stage.
- (b) At all material times, however, SPDC has been unable to use its other usual leak detection systems (including flow monitoring equipment or acoustic pressure monitoring systems) on the 24 or 28 inch pipelines in or around Bodo. This was, and is, because all and any such leak detection equipment that has been fitted to the exterior of the pipeline has been sabotaged or stolen and it was not reasonable to keep replacing such equipment. Moreover, the places from which such equipment had been stolen were often used as bunkering points.
- (c) In these premises, it is denied that the Defendant failed to take reasonable steps to ensure that reasonably practicable systems were in place to detect leaks from the said pipelines.
- (d) In any event, the Claimants are required to prove, in relation to each and every incident of illegal bunkering relied upon, that the absence of the alleged leak detection systems from the pipeline near or at the said bunkering site:
- (i) amounted to a neglect to protect the pipeline in that location; and
- (ii) was the effective and/or enabling cause of the alleged or any preventable damage by people illegally engaged in bunkering on that occasion.
- (e) In all the circumstances, SPDC denies that it failed to protect, maintain or repair the pipeline in breach of section 11(5)(b) as alleged.

Well-heads

96.3 As to sub-paragraph (c):

- (a) In the absence of any proper particulars as to the location of the well-heads that are referred to therein, or the period for which they are alleged to have been

unprotected, or what is meant by the word "unprotected", or the incidents of illegal bunkering that are alleged to have occurred from the well-heads, the Defendant is unable to plead to this allegation which is embarrassing for want of particularity.

(b) Without prejudice to the foregoing, it is averred that SPDC's ability to maintain its Pipeline and other assets, including the well-heads at Bodo West (which were the only well-heads in the Bodo Creek), has been hampered by the threat to the security of its employees and contractors as a result of militancy and criminal activity and denial of access. Paragraph 17 above is repeated.

(c) In 1993, SPDC was abruptly prevented from continuing operations in Ogoniland (where Bodo is located). As a result, the well-heads in the area (including those near Bodo West) were unmanned. Some became targets of sabotage and it is admitted that some became unsecured in the period thereafter. It was not until 2010 that SPDC was permitted by the members of the Bodo Community to have access to the area in order to block the wells underground.

(d) It is admitted and averred that illegal refining has been observed in the area around Bodo West before 2010, and paragraph 17.7(e) above is repeated. The Claimants are required to prove, however, that the alleged or any illegal bunkering activities were concentrated in this area until late 2010 or at all.

(e) In any event, the Claimants are required to prove, in relation to each and every proven incident of illegal bunkering from the said well-heads in the period up to late 2010, that:

(i) the well-head was unprotected;

(ii) that the absence of such well-head protection amounted to a neglect to protect, maintain or repair the pipeline in that location; and

(iii) the absence of the well-head protection was the enabling cause of the alleged or any preventable damage by people illegally engaged in bunkering on that occasion.

(f) In all the circumstances, SPDC denies that it failed to protect, maintain or repair the pipeline in breach of section 11(5)(b) as alleged.

Bunkering detection systems

96.4 As to sub-paragraph (d):

- (a) It is denied that SPDC failed to have in place any, or any adequate, surveillance system for the detection of unlawful bunkering. In particular:
- (i) The Defendant hired surveillance contractors to carry out regular inspection of its manifolds and pipelines. Paragraph 96.2(a)(i) above is repeated.
- (ii) SPDC arranged overflights of the pipeline in order to identify leaks at an early stage. Paragraph 96.2(a)(ii) above is repeated.
- (b) In these premises, it is denied that the Defendant failed to take reasonable steps to ensure that reasonably practicable surveillance systems were in place to detect bunkering from the said pipelines.
- (c) In any event, the Claimants are required to prove, in relation to each and every incident of illegal bunkering relied upon, that the lack of any adequate surveillance system in the area of the bunkering:
- (i) amounted to neglect to protect the pipeline in that location; and
- (ii) was the effective and/or enabling cause of the alleged or any preventable damage by people illegally engaged in bunkering on that occasion.
- (d) For these reasons, SPDC denies that it failed to protect, maintain or repair the pipeline in breach of section 11(5)(b) as alleged.

Shut down

96.5 As to sub-paragraph (e):

- (a) In the absence of any particulars of the occasions on which SPDC is said to have failed to ensure that the pipeline was shutdown, the Defendant is unable to plead to this allegation which is embarrassing for want of particularity. The Claimants are therefore put to strict proof as to the incidents of illegal bunkering that are alleged not to have been detected and/or which did not lead to an immediate shutdown of the pipeline. In relation to each such incident, the Claimants are required to prove that the alleged or any failure:
- (i) amounted to neglect to protect the pipeline in that location; and
- (ii) was the effective and/or enabling cause of the alleged or any preventable damage by people illegally engaged in bunkering on that occasion.

(b) Further, in the absence of any particulars of the occasions on which it is said that SPDC's equipment failed to operate to isolate a spill caused by illegal bunkering, the Defendant is unable to plead to this allegation which is embarrassing for want of particularity. The Claimants are therefore put to strict proof as to the incidents of illegal bunkering following which SPDC's equipment failed to operate, properly or at all, to isolate the pipeline. In relation to each such incident, the Claimants are required to prove that the alleged or any failure of the equipment to operate:

(i) amounted to a neglect to protect, maintain or repair the pipeline in that location; and

(ii) was the effective and/or enabling cause of the alleged or any preventable damage by people illegally engaged in bunkering on that occasion.

(c) Unless and until the Claimants have properly particularised these allegations, the Defendant is unable to plead to the allegation that it knew beforehand that relevant equipment (namely equipment that had failed as alleged) had been incapable of isolating the pipeline at the material time.

(d) Furthermore, unless and until the Claimants have identified the equipment that is alleged to have failed, it cannot plead to the relevance of the two documents pleaded (namely document 1577 and 3487) to the specific claims advanced. In particular:

(i) Document 1577 records the author's understanding in August 2009 that certain equipment (pipeline receivers) at a certain location (the TNP at the Opobo Channell) had been found to be leaking in 2005; that steps had been taken to repair the equipment; and that some of those repairs had not been completed. In the absence of any allegation that this equipment failed to operate to isolate a relevant leak, the alleged knowledge is not relevant.

(ii). Document 3847 records the authors understanding that there had been cases of improper or ineffective isolation during emergency response. Again, in the absence of any allegation that this equipment failed to operate to isolate a relevant leak, the alleged knowledge is not relevant.

The said documents do not support the allegation that the Defendant was aware that all of its isolation equipment wheresoever located was incapable of operation.

(e) SPDC may plead further upon receipt of proper particulars. In the premises, it denies that it failed to protect, maintain or repair the pipeline in breach of section 11(5)(b) as alleged.

Timeous repair

96.6 As to sub-paragraph (f), and in the absence of any particulars of the occasions on which SPDC is alleged to have failed timeously to repair a leak caused by bunkering, this plea is embarrassing for want of particularity and the Defendant is unable to plead thereto. The Claimants are put to strict proof as to the incidents of illegal bunkering that are alleged not to have been repaired timeously, and to each of the alleged periods of delay. In relation to each such incident, the Claimants are required to prove that the alleged failure and/or delay:

(a) amounted to neglect to protect, maintain or repair the pipeline in that location within the meaning of section 11(5)(b); and

(b) was the effective and/or enabling cause of the alleged or any preventable damage by people illegally engaged in bunkering on that occasion.

96.7 SPDC may plead further upon receipt of proper particulars. In the premises, it denies that it failed to protect, maintain or repair the pipeline in breach of section 11(5)(b) as alleged.

97. As to paragraph 45, paragraph 89 above is repeated. Without prejudice to the foregoing, the first sentence is noted. As to the second sentence, SPDC is unable to respond to the unparticularised allegations made relating to the inadequacy of the JTF in providing security and its complicity in illegal bunkering, as well as SPDC's alleged knowledge of the same, are denied.

Limitation Defences

98. Further, SPDC has a limitation defence to any claim under section 11(5)(b) of the OPA arising from any incidents of illegal bunkering that occurred five years before the commencement of this claim (namely 29 April 2013). In the premises, any purported claim by the Claimants in relation to the first 15 of the incidents in Appendix II are now statute-barred by reason of section 16 of the Rivers State Limitation Law Cap 80.

~~88. As to paragraphs 36 and 37:~~

~~88.1 SPDC denies that s 11(5)(b) of the 1990 Act imposes a duty on a licence holder to protect a pipeline against the illegal activities of third parties and accordingly it~~

~~is denied that SPDC can be liable to the Claimants to pay just compensation in respect of damage caused as a result of such activities, as alleged or at all;~~

~~88.2 SPDC denies that it owes the Claimants a duty of care at common law in respect of damage caused by the illegal activities of third parties as alleged or at all and accordingly it is denied that SPDC can be liable to the Claimants for such damage as alleged or at all.~~

~~89. As to paragraph 38, without prejudice to the above, SPDC denies that it failed to protect, maintain and repair the pipeline in accordance with its duty under s 11(5)(b). Paragraph 97 below is repeated.~~

~~90 As to paragraph 39, SPDC repeats paragraph 0 above as to the scope of its liability to the Claimants under s 11(5)(c) of the 1990 Act.~~

99. As to paragraph 46, paragraph 89 is repeated. Without prejudice to the foregoing, SPDC denies that section 11(5)(b) should be construed having regard to the regulatory provisions and other materials pleaded in paragraphs 47 to 54.

#### **Other relevant Nigerian Statutory Provisions**

##### ***Petroleum and Drilling and Production Regulations 1969 ("the 1969 Regulations")***

91.100. As to paragraphs 470 and 481, SPDC denies that the requirements of regulations 25 and/or 37 of the 1969 Regulations applied at any material time to SPDC as an operator of the TNP:

91.1100.1 The 1969 Regulations were made under section 9 of the *Petroleum Act 1969* (the "1969 Act") which provided for the exploration of petroleum from the territorial waters and continental shelf of Nigeria.

91.2100.2 By virtue of regulation 63(2) of the 1969 Regulations, the licensee referred to in regulation 25 and/or 37 is the holder of an oil prospecting licence granted under the 1969 Act. It is denied that it is a reference to an operator of oil pipelines licensed under the provisions of the 1990 Act.

91.3100.3 Further in respect of Regulation 37, and for the same reason, it is denied that the TNP fell within the definition of "*apparatus or appliances in use in his operations*".

91.4100.4 In the premises, regulation 25 and/or 37 does not impose the alleged or any such a duty on a licensed operator of an oil pipeline such as SPDC.

~~91.5 If, contrary to the above, regulation 25 and/or 37 did apply to the operation of the TNP at the material time, then SPDC further denies that a breach thereof gives rise to civil liability in favour of the Claimants. The Claimants are therefore required to prove that any breach gives rise to a private law cause of action for damages for pecuniary or other losses by the Claimants.~~

***Minerals Oils (Safety) Regulations 1997 ('the 1997 Regulations')***

~~92.101. As to paragraph 492:~~

~~92.1101.1 The Claimants rely upon Regulation 6 of the 1997 Regulations. Regulation 6 addresses the duties of managers to appoint in writing competent persons to supervise all drilling, production, loading and transmission operations. Its relevance to these claims is not understood. It is denied that those Regulations applied at any material time to SPDC as an operator of the TNP. The licensee referred to is a licensee under the repealed Mineral Oils Act.~~

~~92.2 It is assumed that the Claimants seek to rely upon regulation 7 of the *Mineral Oils (Safety) Regulations 1963* (the "1963 Regulations").~~

~~92.3 Regulation 7 of the 1963 Regulations was revoked by regulation 76 of the 1997 Regulations. The 1997 Regulations did not re-enact regulation 7 of the 1963 Regulations.~~

~~92.4 In these premises, SPDC denies that it was at any material time required to comply with regulation 7.~~

~~92.5 If, contrary to the above, the 1963 Regulations did apply to the operation of the TNP at the material time, then SPDC further denies that a breach of these regulations gives rise to a private law cause of action for damages for pecuniary or other losses in favour of the Claimants.~~

***Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (2002)***

~~93.102. As to paragraphs 5043 to 5447:~~

~~102.1 SPDC denies that the pleaded sections of the Guidelines, all of which require a licensee to take various steps to clean-up spills, are relevant to the allegations that the Defendant had neglected to protect, maintain or repair the said pipelines.~~

~~102.2 Without prejudice to the foregoing, it is denied that the sections of the Environment Guidelines and Standards for the Petroleum Industry in Nigeria~~

(2002) ("The Guidelines") relied upon applied to SPDC's operation of the 24" Pipeline at any material time.

102.3 In any event, the Claimants are required to prove the facts and matters therein and their relevance to the claim under section 11(5)(b) of the OPA.

~~93.1 SPDC denies that it was under any statutory duty to comply with the alleged or any Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (2002).~~

~~93.2 In particular as to paragraphs 5245, 5346 and 5447, it is denied that the Sections of the Guidelines relied upon applied to SPDC's operation of the 24" Pipeline at any material time.~~

~~93.3 If, contrary to the above, the said guidelines did raise a statutory duty, then SPDC further denies that a breach of these Guidelines gives rise to civil liability. The Claimants are therefore required to prove that any breach gives rise to a private law cause of action for pecuniary or other losses.~~

~~93.4 Further and in particular as to paragraph 5144:~~

~~(a) This Guideline addresses the clean up of spills in already impacted environments. It could only be relevant if, contrary to the Claimants' case, the local environment had already been contaminated with oil.~~

~~(b) This Guideline contains no requirement to submit an oil spill notification report to the director of the DPR.~~

#### **Breaches of Nigerian Statutory Law**

~~94. As to paragraph 48, SPDC repeats its admission at paragraph 12 above.~~

~~95. As to paragraph 49:~~

~~95.1 Paragraph 49.1 is denied:~~

~~(a) It is denied that SPDC owed the Claimants, or any of them, the alleged statutory duty for the reasons at paragraph 0 above.~~

~~(b) In any event, it is denied that SPDC failed to take any, or any adequate, precautions to prevent pollution from the 24" Pipeline at any material time. SPDC avers that:~~

~~(i) In order to prevent pollution from illegal activities such as sabotage and illegal bunkering, SPDC:~~

- ~~(1) —~~ Hired surveillance contractors to carry out regular inspection of its manifolds and pipelines. The contracts with these contractors stipulated that each kilometre of pipeline under surveillance should be monitored by a minimum of three persons at any time on a 24 hour, seven days a week, basis. Further, SPDC employed inspectors to conduct site visits every 7 to 14 days in order to confirm that the contractors were performing their contractual obligations.
  - ~~(2) —~~ Worked with the Nigerian Government to provide security for its facilities in the Niger Delta. Two groups primarily provided this security to the extent practicable: the Supernumerary Police (who were seconded by the Nigeria Police Force and protected SPDC facilities) and the Joint Task Force ("JTF") (which guarded SPDC facilities which were designated as national strategic assets).
- ~~(ii) —~~ In order to prevent pollution from operational spills, whether as the result of pipeline corrosion or equipment failure, SPDC implemented systems to maintain its pipelines. Whereas in other parts of the country SPDC was able to access its facilities, the unrest in Ogoniland (and in particular the security and access issues that have arisen as a result thereof), at all material times prevented SPDC from implementing all of the systems used elsewhere. Further, difficulties of access near Bodo meant that SPDC relied upon indirect integrity assurance processes. In particular, with respect to the section of the 24" Pipeline on which the 2008 Oil Spills occurred:
- ~~(1) —~~ SPDC sought to prevent corrosion, or deterioration in its condition, by applying the industry standard cathodic protection system and by operating the 24" Pipeline at good flow rates with average flow velocity range of within the design range of >1m/s.
  - ~~(2) —~~ SPDC carried out both preventative and reactive maintenance on the 24" Pipeline as and when it was granted access thereto by the local communities. In

~~particular, on such occasions, SPDC required those attending:~~

- ~~i. To carry out detailed inspections and assessments.~~
  - ~~ii. To check the condition of the 24" Pipeline to ensure that the polyethelene coating remained intact and that there was no evidence of rust and/or corrosion defects or loss in wall thickness (which was determined by taking ultrasonic readings). There was little evidence of corrosion or loss of wall thickness.~~
  - ~~iii. To perform any necessary maintenance and repairs.~~
- ~~(iii) In order to minimise pollution, SPDC implemented systems to detect possible spills as quickly as possible when they occurred. In particular:~~
- ~~(1) SPDC instructed its surveillance contractors to report promptly any leaks that were identified in the course of their surveillance.~~
  - ~~(2) SPDC arranged overflights of the pipeline in order to identify leaks at an early stage.~~

- (c) ~~Further, it is denied that SPDC failed to take prompt steps to control the pollution from the 2008 Oil Spills. Paragraphs 0, 0 to 0, 0, 0 to 0, 0 and 0 above.~~
- (d) ~~If it be so alleged, then it is denied that, having regard to the prevailing operating conditions in Ogoniland, and in particular the security threats and access challenges pleaded above, SPDC failed to take reasonable steps to prevent and control the alleged or any pollution from the 2008 Oil Spills.~~
- (e) ~~If, contrary to the above, SPDC did fail as alleged, then the Claimants are nonetheless required to prove that such failures caused the 2008 Oil Spills and/or the alleged or any damage.~~

95.2 ~~Paragraph 49.2 is denied.~~

- (a) ~~It is denied that SPDC owed the Claimants or any of them the alleged statutory duties for the reasons at paragraphs 0 and 0 above.~~
- (b) ~~It is denied that it was a relevant installation within the meaning of regulation 37 of the 1969 Regulations.~~
- (c) ~~Further, SPDC denies that, by reason of the prevailing operating conditions in Ogoniland, and in particular by reason of the security threats and access challenges pleaded above, it failed to take reasonable steps to maintain the relevant installations in good repair. Paragraph 0 above is repeated, and it is further averred that neither of the operational failures which led to the 2008 Oil Spills resulted from a failure to maintain the TNP.~~
- (d) ~~If, contrary to the above, SPDC did fail as alleged, then the Claimants are nonetheless required to prove that such failures caused the 2008 Oil Spills and/or the alleged or any damage.~~

95.3 ~~Paragraph 49.3 is denied.~~

- (a) ~~It is denied that SPDC owed the Claimants or any of them the alleged statutory duties for the reasons at paragraphs 0 and 0 above.~~
- (b) ~~In any event, it is denied that SPDC's pipeline integrity management and leak detection systems failed to conform with good oilfield practice whether as alleged or at all. In particular, at all material times SPDC'S Pipeline Integrity Management System ("PIMS") complied with the American Society of Mechanical Engineers ("ASME") B31.s Code of Practice and the American Petroleum Institute ("API") 1106 Code of Practice.~~
- (c) ~~Further, SPDC avers that it implemented its PIMS reasonably given the background against which it operated in Ogoniland. If and insofar as its implementation of its systems fell below the practice set out in the said codes, then it is nonetheless averred that SPDC complied with good oilfield practice in the context of the particular security and access challenges posed by its operations in Ogoniland.~~
- (d) ~~If, contrary to the above, SPDC did fail as alleged, then the Claimants are nonetheless required to prove that such failures caused the 2008 Oil Spills and/or the alleged or any damage. SPDC repeats paragraphs 0 0, 0, (c) and 0 above.~~

95.4 ~~Paragraph 49.4 is denied:~~

- (a) ~~Paragraph 93 above is repeated.~~
- (b) ~~Further, SPDC denies that, by reason of the prevailing operating conditions in Ogoniland, and in particular by reason of the security threats and access challenges pleaded above, it failed to take prompt and adequate steps to contain, remove and dispose of the 2008 Oil Spills. Paragraphs 0, 0 to 0, 0, 0 to 0, 0 and 0 above are repeated.~~
- (c) ~~If, contrary to the above, SPDC did fail as alleged, then the Claimants are nonetheless required to prove that such failures caused the alleged or any damage. SPDC repeats paragraphs 0 0, 0, (c) and 0 above.~~

95.5 ~~Paragraph 49.5 is denied:~~

- (a) ~~Paragraph 0 above is repeated.~~
- (b) ~~SPDC admits that it did not take any steps to clean up the 2008 Oil Spills within 24 hours of their occurrence. It is denied, however, that this amounted to an inadequate response to the 2008 Oil Spills in view of:~~

- ~~(i) The containment operations that were being planned and/or implemented at that time are pleaded at paragraphs 30 and 0 above are repeated.~~
  - ~~(ii) The particular security and access challenges posed by its operations in the area. Paragraphs 17 and 20 above are repeated.~~
  - ~~(iii) It is admitted that SPDC submitted a Form A Oil Spill Notification Report to the Director of the DPR in relation to the First Oil Spill on or around 8 October 2008; and another Form A in relation to the Second Oil Spill on 10 December 2008.~~
- ~~(e) If, contrary to the above, SPDC did fail as alleged, then the Claimants are nonetheless required to prove that such failures caused the 2008 Oil Spills and/or the alleged or any damage.~~

~~95.6 Paragraph 49.6 is denied:~~

- ~~(a) Paragraph 0 above is repeated.~~
- ~~(b) Further, it is denied that Part VIII B 2.11 of the Guidelines applied to SPDC's operation of the TNP at any material time.~~
- ~~(c) If, contrary to the above, SPDC did fail as alleged, then the Claimants are nonetheless required to prove that such failures caused the 2008 Oil Spills and/or the alleged or any damage.~~

~~95.7 Paragraph 49.7 is denied:~~

- ~~(a) Paragraph 0 above is repeated.~~
- ~~(b) Further, it is denied that Section VIII B.7.1 of the Guidelines applied to SPDC's operation of the 24" Pipeline at any material time.~~
- ~~(c) In any event, it is admitted that SPDC has not yet conducted an environmental evaluation (post impact) study of the adverse leak impacted environment because it has not yet been able to remediate the impacted environment for the reasons pleaded at paragraphs 0 to 0 above, which are hereby repeated.~~
- ~~(d) If, contrary to the above, SPDC did fail as alleged, then the Claimants are nonetheless required to prove that such failures caused the 2008 Oil Spills and/or the alleged or any damage.~~

**Public Nuisance and negligence**

96. As to the allegations of negligence in paragraphs 51 and 52:

(a) It is admitted that SPDC owed the Claimants a duty to take reasonable care to avoid acts or omissions which might foreseeably cause damage to property or injury to person as a result of the negligent act.

(b) It is denied that SPDC owed the Claimants the alleged or any duty of care to take reasonable care to avoid acts or omissions which might foreseeably damage property owned by third parties. It is averred that as a matter of both substantive English and Nigerian law, no duty is owed by a defendant, who negligently damages property belonging to a third party, to a claimant who suffers loss because of dependence upon that property.

(c) In these premises, SPDC denies that it owed the Claimants or any of them the duty of care therein alleged:

(i) The Claimants have failed to plead any or any sufficient particularise sufficiently their alleged proprietary interest in, or right to use, the lands alleged to have been affected by the alleged negligence so as to give rise to a duty of care.

(d) In any event, SPDC denies that each or any of the Claimants were at any material time the legal owner and/or in exclusive possession of the land allegedly damaged by the escape. SPDC avers that:

(i) By virtue of section 1 of the *Land Use Act 1978* (the "**1978 Act**"), ownership of all land comprised in the territory of each State in the Federation of Nigeria, including lands described as "*communal land*", was vested in the Governor of the State, while a right of occupancy could be granted (or deemed to be granted) in relation to such lands by the Governor or, as the case may be, by the local government.

(ii) By virtue of section 1 of the *Minerals and Mining Act 2004* (the "**2004 Act**") the entire property in, and control of, "*all rivers, stream and water courses throughout Nigeria*" is vested in the Government of the Federation "for and on behalf of the people of Nigeria".

~~(e) The Claimants have averred in their Responses to SPDC's Requests for Further Information of the Particulars of Claim that individual members of the community and/or families within the community have customary rights to use and occupy the lands alleged to have been affected by the 2008 Oil Spills by virtue of sections 34 and 36 of the 1978 Act. The Claimants are required to prove that there has been an express or deemed grant of such rights of occupancy to any, or all, of them pursuant to the provisions of the 1978 Act. In the absence of such a grant SPDC avers that the Bodo creek, or other such land as it is alleged was damaged by the escape, were at all material times vested in either the Governor of Rivers State or the Government of the Federation of Nigeria respectively.~~

~~(f) Further, and in any event, it is denied that such customary rights entitle the Claimants, or any of them, to maintain a claim in negligence for the reasons pleaded above.~~

~~(g) Further, SPDC repeats paragraph 0 above.~~

~~97. Without prejudice to the above, it is denied that SPDC failed to discharge the alleged or any legal duties so as to render it liable in negligence and/or public nuisance:~~

~~97.1 It is denied that SPDC failed to ensure the pipeline was maintained in good condition and/or that it failed to take reasonable steps to avoid foreseeable damage to surrounding lands and waterways and/or that it failed to take adequate steps to prevent, contain and clean up any oil spills from the pipeline. Paragraphs 0, 0 to 0, 0, 0 to 0, 0, 0 and 0 above are repeated.~~

~~97.2 It is denied that SPDC failed to clean up and remediate any contaminated lands and waterways. Paragraphs 0 to 0 above are repeated.~~

~~98. If, contrary to the above, SPDC did fail to discharge some or all of its duties as alleged, then the Claimants are nonetheless required to prove that such failures caused the 2008 Oil Spills and/or the alleged or any damage and/or interference with the Claimants' use of the creek and/or their comfort and amenity. SPDC repeats paragraphs 0, 0, 35.3(c) and 0 above.~~

Particulars of Knowledge

~~99. As to paragraph 52, SPDC repeats its denial of the alleged duty of care to the Claimants or to any of them. Without prejudice to the generality of the foregoing, SPDC pleads as follows to the various particulars therein:~~

~~99.1 It is admitted that SPDC has, and had at the material time, knowledge as to the risk and effect of oil spills in the Niger Delta region.~~

~~99.2 As to paragraph 52.1:~~

~~(a) It is admitted that the materials relied upon recorded the alleged statistics as to the scale and prevalence of oil spills in the Niger Delta. SPDC is unable to admit or deny the accuracy thereof.~~

~~(b) SPDC avers that such statistics must be viewed in context, in particular:~~

~~(i) The scale of oil production in the Niger Delta over the last fifty years or so. Paragraph 17.1 above is repeated.~~

~~(ii) The security situation which prevailed, and continues to prevail, in the Niger Delta, in particular since 1993. Paragraph 17 above is repeated.~~

~~(iii) The scale and prevalence of illegal activities in the Niger Delta, specifically sabotage and illegal bunkering of crude oil from pipelines. Paragraphs 17.5 to 17.7 and 26 above are repeated.~~

~~(iv) The fact that as a result of the security situation in Ogoniland, in particular, SPDC has been restricted in its ability to protect its pipelines from such illegal activities, to perform regular maintenance thereon and to respond to and clean up oil spills. Paragraphs 17 and 20 above are repeated.~~

~~99.3 As to paragraph 52.2:~~

~~(a) In the absence of any proper particulars thereof, SPDC is unable to admit or deny that unidentified reports from unnamed local and international organisations and experts have raised the alleged or any concerns. SPDC reserves the right to plead further in the event that the Claimants particularise those reports relied upon and/or upon receipt of expert evidence.~~

~~(b) SPDC is unable to plead to the content of the 1994 Etiebet Report because it does not have a copy. It will plead further following disclosure and/or exchange of expert evidence.~~

~~99.4 Paragraph 52.3 is admitted. It is averred, however, that:~~

~~(a) In 1995 SPDC began a programme of upgrading its oil pipelines and infrastructure in response to such concerns.~~

~~(b) SPDC relies upon the fact that a relatively small number of oil spills resulted from corrosion and/or equipment failure. Between 2000 and 2010, 63 leaks were reported from the 24" Pipeline. Of these, 51 were caused by the illegal activities of third parties.~~

~~99.5 As to paragraph 52.4:~~

~~(a) The objective of the Conflict Expert Group ("CEG"), which was established by Shell Companies in Nigeria ("SCIN"), was to provide an analysis of, and to advise on the implementation of, the Peace and Security Strategy ("PaSS"). PaSS is a SCIN initiative the objective of which was to set out how SCIN can contribute to conflict resolution and sustainable peace in the Niger Delta.~~

~~(b) It is admitted that the CEG's Report contains the quote relied upon. It is averred that the quote must be viewed in the context of the report as a whole, which is over 90 pages long and which assesses the current challenges in the Niger Delta, including the practices around the determination of the cause of oil spills and compensation. The quote relied upon appears in a section of the report which sets out a number of claims and allegations which communities make in respect of premature determination of the causes of spills, responses to oil spills and corruption. The report recognises that "Whether these allegations are true or not is no longer relevant from a conflict perspective. They become a reality that influences the behaviour of communities and as such, are factors the company has to deal with." (p17).~~

~~(c) The report also acknowledges that "It remains a fact that the current level of violence in the Niger Delta severely reduces both SCIN's ability to operate in the region and the impact of its social investment programmes. Pervasive agitation and crime, coupled with poor law enforcement undermine SCIN's ability to operate efficiently in the region." (p8).~~

99.6 As to paragraph 52.5:

- (a) ~~It is admitted that the report contained the alleged conclusion and recommendation as to operations in the Niger Delta.~~
- (b) ~~It is denied that such a "double standard" existed. At all material times, the same Shell standards were applied worldwide and all of SPDC's assets in Nigeria were certified to ISO 14001 standard by external assessors.~~
- (c) ~~The report recognised that there are "many sources of environmental damage in the Delta" (p5), that "Many of these spills are now being caused by the many disenfranchised residents" (p5) and that "A way has to be found to stop communities from looking at oil spills as a commercial asset and make them realize that the spills they create are causing long term damage to their future..." (p6).~~
- (d) ~~The report also recognised that there are a number of agencies who bore responsibility in respect of oil spill prevention and response and the report recommends the "need for more effective support from the government to the communities" (p7) and that "Government must enhance its oversight and management of the oil industry." (p8).~~

99.7 As to paragraph 52.6:

- (a) ~~It is admitted that the Shell Sustainability Report, 2006 contains the passage relied upon.~~
- (b) ~~It is averred that the statement must be viewed in its proper context, namely in response to a question as to whether Shell accepted the accusation that it applies lower standards in Nigeria than to its operations elsewhere. As pleaded above, such an allegation is denied and, as set out in the report, SPDC avers that the same standards are applied worldwide. However, as acknowledged in the passage cited, SPDC is often limited in its ability to implement its policies and standards as to maintenance, for the most part due to lack of safe access to its facilities. In particular, the report highlighted the alarming escalation of violence in the Niger Delta in 2006. It stated that "Militants have sabotaged flow stations and pipelines and made it impossible for [SPDC] to get to many of these facilities to repair the damage or do normal maintenance. Fifty-~~

~~four of our staff and contractors were kidnapped last year. Nine were killed in assaults or kidnappings." (p32).~~

Particulars of Fault

~~100. As to paragraph 53:~~

~~100.1 Insofar as it is alleged that SPDC is liable to the Claimants or any of them for damage caused to the Claimants' property, the Claimants are required to plead and prove their interest in such property. Paragraph 96 above is repeated.~~

~~100.2 Paragraphs 53.1 and 53.2 are denied for the reasons pleaded above, in particular at paragraphs 97 and 98.~~

~~100.3 Paragraphs 53.3, 53.4 and 53.5 are denied for the reasons pleaded above in particular at paragraphs 0 to 0.~~

~~100.4 Paragraph 53.6 is denied for the reasons pleaded above in particular at paragraphs 0 to 0.~~

~~100.5 Paragraph 53.7 is embarrassing for want of particularity, and SPDC is therefore unable to plead thereto.~~

***Liability for damage caused by third parties***

~~101. As to paragraph 54:~~

~~101.1 Insofar as paragraph 54 refers to the Claimants' property and rights, SPDC repeats paragraph 96 above.~~

~~101.2 Paragraphs 54.1 and 54.3 are denied. Paragraphs 17.5 to 17.7 and 25 to 28 above are repeated.~~

~~101.3 As to paragraph 54.2:~~

~~(a) SPDC denies that s 11(5)(b) of the 1990 Act imposes a duty on a licence holder to protect a pipeline against the illegal activities of third parties and accordingly it is denied that SPDC can be liable to the Claimants for damage caused as a result of such activities, as alleged or at all;~~

~~(b) In any event, it is denied that SPDC failed to take any or any adequate steps to prevent and/or reduce the incidence of bunkering and/or other illegal activities. Paragraphs 97 and 98 above are repeated.~~

~~101.4 As to paragraph 41.4:~~

~~(a) In the absence of any proper particulars thereof, SPDC is unable to admit or deny the cause of action that is relied upon. In the premises, SPDC requires the Claimants to prove the nature and scope of the alleged or any such duty.~~

~~(b) In any event, for the reasons pleaded above and below, paragraph 41.4 is denied. Paragraphs 0 to 0 above are repeated.~~

## VI. LOSS AND DAMAGE

~~402.103.~~ As to paragraph 55:

~~402.103.1~~ SPDC requires the Claimants to prove that the alleged loss and damage was caused by the alleged breaches of statutory ~~and/or breaches of common law duties, and the amount thereof.~~ In particular, SPDC denies that it is liable for:

- (a) Any loss and damage caused by oil that was not released in the course of the 2008 Oil Spills, and
- (b) Any loss and damage that was suffered as a consequence of any individual Claimant's own default, and/or by reason of any individual Claimant's contributory negligence; and
- (c) Any loss and damage that was suffered on account of the malicious act of a third person.

SPDC avers that the exclusions at (b) and (c) above includes any loss and damage that was caused by the members of the Community and/or their representatives and/or unknown third parties preventing SPDC, its servants or agents from accessing the spill points for the purposes of assessing and responding to the spills and/or obstructing SPDC in clean up and remediating the spills. SPDC repeats paragraphs 30.6, 30.13, 38.4, 39.2(c) and 59.2 above.

~~402.1~~ ~~Further, SPDC requires the Claimants to prove that they have suffered direct and substantial loss and damage over and above that suffered by the public generally.~~

~~403.104.~~ As to paragraph 56:

~~403.104.1~~ SPDC requires the Claimants to prove that they experienced, and continue to experience, the matters pleaded at paragraph 56.2.:

- ~~(a)~~ ~~They each lived in one of the 20 villages in the Bodo Community most proximate to the creek before and after the 2008 Oil Spills;~~
- ~~(b)~~ ~~They experienced, and continue to experience, the matters pleaded at paragraphs 56.1 to 56.8; and~~
- ~~(c)~~ ~~They experienced, and continue to experience, the matters pleaded at paragraphs 56.1 to 56.8 more severely and frequently than the wider~~

~~Gekana community (which is understood to mean the 17 communities in the Gokana Local Government Area as pleaded in the Claimants' Responses to SPDC's Requests for Further Information of the Particulars of Claim). As pleaded above, SPDC avers that for the purposes of public nuisance, the Claimants must prove that they suffered direct and substantial loss over and above that suffered by the public generally.~~

~~103.2 Without prejudice to the above, SPDC denies that the suffering of general inconvenience by the Claimants, such as that pleaded in paragraphs 56.1 to 56.8, is sufficient to satisfy the requirement of special and particular damage so as to entitle the Claimants to damages in public nuisance as a matter of both Nigerian and English substantive law.~~

~~103.3~~104.2 Further, as to paragraph 56.9, SPDC requires those Claimants who are claiming damages for loss of earnings to prove, in addition to those matters pleaded above, that:

- (a) Their primary source of income as they grow up would have been and/or will be derived from fishing related activity;
- (b) The amount of income which it is averred that they would have generated from such fishing related activity;
- (c) That they are not, and will not, be able to generate such income as a result of damage caused by oil released from the 2008 Oil Spills for which SPDC is liable. Paragraphs ~~87.1~~ above are repeated;
- (d) That they have taken all reasonable steps to mitigate any losses which they prove they have suffered and/or will suffer as a result of the 2008 Oil Spills.

## VII. REMEDIES SOUGHT

### General/basic damages

~~104.105.~~ As to paragraph 57, the Claimants have filed and served Schedules of Loss and the Defendant has filed and served a Counter Schedule which responds thereto. for the purposes of case management, rather than for the purpose of quantifying their claims, the Claimants have served an Amended Master Schedule of Loss: Heads of Loss dated 8 November 2013 that identifies simply the heads of alleged loss.

~~105. SPDC serves herewith a preliminary counter-schedule.~~

106. For the avoidance of doubt, SPDC denies that the Claimants are entitled to seek general damages for losses which are being recovered by the Bodo Individual Claimants and/or in the New Bodo Community Claim as the same would amount to double recovery which is prohibited as a matter of Nigerian law.

**~~Aggravated and exemplary damages~~**

~~107. As to paragraph 58 of the Master Particulars of Claim:~~

~~107.1 SPDC avers that the availability of aggravated and/or exemplary damages is a matter of substantive law and is therefore an issue that will be governed by the law of Nigeria.~~

~~107.2 SPDC denies that the Claimants, or any of them, are entitled to aggravated or exemplary damages as alleged or at all for the reasons set out below.~~

**~~Aggravated damages~~**

~~108. As to the claim for aggravated damages:~~

~~108.1 In the premises, and as a matter of principle, under both the law of Nigeria and England, SPDC admits and avers that such aggravated damages are only recoverable as damages for the tort of nuisance. For the avoidance of doubt, it is denied that aggravated damages are recoverable under the 1990 Act and/or in negligence.~~

~~108.2 If, contrary to its denial in paragraphs 97 to 0 above, SPDC is liable to the Claimants or any of them in public nuisance as alleged, then it avers that, such damages are only recoverable if the Claimants and each of them, establish that SPDC's motives, conduct or manner of inflicting the injury were exceptional or contumelious and aggravated the damage suffered by each member by injuring his or her proper feelings of dignity and pride.~~

~~108.3 In the premises:~~

~~(a) SPDC pleads below to the specific allegations contained in the sub-paragraphs of paragraphs 59 and 60, but denies that the facts and matters pleaded therein, even if proved, amount to the type of exceptional or contumelious motives, conduct or manner of inflicting injury that justifies such aggravated damages.~~

- (b) ~~Even if the alleged facts and matters were found to have been exceptional and contumelious, SPDC requires each Claimant to prove he or she was aware of the alleged conduct and that the alleged conduct caused injury to his or her proper feelings of dignity and pride.~~

***Exemplary damages***

~~100. As to the claim for exemplary damages:~~

~~100.1 In the premises, and as a matter of principle:~~

- (a) ~~SPDC denies that exemplary damages are recoverable under the 1990 Act because the scheme of compensation prescribed by the 1990 Act does not allow for such a punitive remedy.~~
- (b) ~~SPDC admits that exemplary damages are recoverable, in principle, in cases of breach of statutory duty and/or public nuisance and/or negligence.~~

~~100.2 In any event, it is denied that such exemplary damages are recoverable by the Claimants, or any of them, in these cases for the reasons set out below:~~

- (a) ~~SPDC denies that the alleged or any relevant conduct was calculated to make such a profit. It pleads below to the specific allegations contained in the sub-paragraphs of paragraphs 59 and 60.~~
- (b) ~~If, contrary to the above, SPDC's conduct is found to have been calculated to make such a profit, then it is nonetheless denied that any compensatory award made by the Court would be inadequate to punish SPDC for the alleged or any conduct and/or would be inadequate to mark the Court's disapproval of such conduct and/or to deter SPDC from repeating it.~~

***Particulars relied upon in support of both aggravated and exemplary damages***

~~110. Without prejudice to its above denials, in particular at paragraphs 0 to 95 above, SPDC pleads below to the specific allegations in paragraph 59:~~

***Matters pleaded at paragraphs 59.1-59.4***

~~110.1 As to paragraph 59.1:~~

- (a) ~~SPDC has pleaded to these events above, in particular at paragraphs 30 and 0 to 0.~~

~~(b) — It is denied that its response to the 2008 Oil Spills was conduct motivated by, or calculated to make, a profit.~~

~~110.2 — As to paragraph 59.2, SPDC repeats its denials in paragraphs 0 and 97 above.~~

~~110.3 — As to paragraph 59.3, SPDC repeats its denials in paragraphs 0 to 0 above.~~

~~110.4 — As to paragraph 59.4, it is denied that SPDC had a history of disregard for the safety and rights of the inhabitants of the Niger Delta. As to the matters pleaded at paragraphs 59.4.1–59.4.5:~~

~~(a) — As to paragraph 59.4.1, it is admitted that the UNDP Report reported that more than 6,800 oil spills were recorded in the Niger Delta between 1976 and 2001, with a loss of approximately 3 million bbls of oil. It is averred that the report does not attribute these spills to SPDC's facilities, nor to any disregard for safety on SPDC's part. The report records that 13 oil companies operate in the Niger Delta and that "Spills occur accidentally and through the deliberate actions of the local people...In recent times, oil spills appear to be caused more by wilful damage to facilities than by accidents" (p76).~~

~~(b) — As to paragraph 59.4.2, it is admitted that NOSDRA reported that there were at least 2,000 sites in the Niger Delta that required remediation because of oil related pollution. It is denied, if it be so alleged, that NOSDRA provided any information as to the size or location of these sites; or as to the level or source of the pollution; or that it concluded that the majority of these locations were SPDC's sites.~~

~~(c) — Paragraphs 59.4.3 and 59.4.4 are admitted. It is averred that, in response to these problems, in 1995 SPDC began a programme of upgrading its oil pipelines and infrastructure. It is averred that the relatively small number of oil spills which have arisen as a result of corrosion and/or equipment failure evidences the effectiveness of the steps taken by SPDC in this respect. Between 2000 and 2010, 63 leaks were reported from the 24" Pipeline. Of these, 51 were caused by the illegal activities of third parties.~~

~~(d) — As to paragraph 59.4.5, it is admitted that UNEP recommended that "SPDC procedures for oil spill clean-up and remediation need to be fully reviewed and overhauled so as to achieve the desired level of environmental restoration." (p16) — SPDC supports these recommendations and has taken the following steps to implement them:~~

- ~~(i) SPDC has carried out a preliminary review of its procedures. RENA remains a proven and internationally recognised method to remediate spill sites which is widely used in many countries. The report noted that in a few specific cases in Ogoniland, SPDC did not go deep enough in its pre clean-up assessments and this may have impacted the overall effectiveness of remediation in these areas. A review by SPDC has confirmed this finding in relation to a few specific sites. Based on this finding, SPDC will revisit the sites in Ogoniland investigated by UNEP to determine whether clean-up and remediation have been adequate, and take action as required. SPDC will also review a sample of other remediated sites more widely across the Niger Delta to check that adequate remediation has indeed been carried out.~~
- ~~(ii) SPDC will continue its ongoing efforts to ensure effective supervision of contractors and their full compliance with regulatory and contractual requirements.~~
- ~~(iii) SPDC has been in negotiations with a reputable international organisation for some time, to launch a joint project to review and if necessary, further improve SPDC's remediation techniques in the Niger Delta, drawing upon independent expert scientific knowledge. SPDC has also appointed Bureau Veritas to provide independent review and assurance of SPDC's oil spill response and management practices.~~

~~110.5 In these premises, it is denied that all or any of the facts and matters pleaded in the sub-paragraphs under paragraph 59 amounted to exceptional or contumelious conduct and/or conduct intended to make a profit in excess of the compensation payable to the Claimants, or any of them. In these premises, it is denied that the Claimants, or any of them, are entitled to recover exemplary damages as alleged or at all.~~

~~111. As to paragraph 60:~~

~~111.1 Paragraph 60 contains various facts and matters that are pleaded in support of the Claimants' claim for aggravated and/or exemplary damages. It contains serious and wide-ranging allegations in relation to SPDC's conduct, including allegations of deliberate misconduct and/or recklessness. These allegations are~~

said to be supported by a number of pleaded documents which were provided by SPDC as part of a limited voluntary disclosure exercise.

~~111.2 The question of whether SPDC can be liable herein to the Claimants for aggravated and/or exemplary damages is to be determined at the trial of preliminary issues that is listed in April/May 2014. Accordingly, it is yet to be determined whether the claim for aggravated and/or exemplary damages will be in issue in the litigation.~~

~~111.3 The Parties have therefore agreed, and the Court has ordered, that at this stage the Parties shall give disclosure of documents limited to the issues in the Claimants' case under section 11(5)(c) of the 1990 Act and not including, for the avoidance of doubt, the issues as to whether the Claimants are entitled to aggravated or exemplary damages.~~

~~111.4 Further, the Court is yet to make directions as to the service of factual witness statements and/or of expert evidence.~~

~~111.5 At this stage in the litigation, prior to disclosure and/or the exchange of lay and expert evidence, SPDC is unable to plead fully to the facts and matters alleged and/or to the documents relied upon in paragraph 60. Further, in the light of the case management directions, it is not proportionate for SPDC to have to plead fully to such matters at this stage.~~

~~112. In these premises, SPDC is unable to admit or deny, and requires the Claimants to prove, the facts and matters alleged in paragraph 60, save in relation to the discrete facts and matters admitted or denied below:~~

~~112.1 It is admitted that the documents pleaded in paragraph 60 have been disclosed by SPDC and that they contain the extracts cited:~~

~~112.2 As to paragraph 60.1:~~

~~(a) It is admitted and averred that the design life for the TNP is 30 years, this is, however, extendable depending on passing a fitness for service assessment and/or necessary and remedial action.~~

~~(b) As to the systems which SPDC implemented to protect its pipelines and/or to minimise pollution in the event of a spill and/or as to the difficulties it faced due to the security situation in the Niger Delta, SPDC repeats paragraph 0 and 97 above and responses 6, 7, 8 and 9 of its Responses~~

~~to the Claimants' Requests for Further Information of the Defence in the Bodo Individual Claims dated 13 March 2013.~~

~~(e) As to the allegation in respect of operating the Pipeline without a Leak Detection System, SPDC repeats response 9.1 of its Responses to the Claimants' Requests for Further Information of the Defence in the Bodo Individual Claims dated 13 March 2013~~

~~112.3 As to paragraph 60.2, SPDC repeats its averments above at paragraphs 34.2(b)(i) and 38.3(b) as to the isolation of the 24" Pipeline following the First and Second Oil Spills.~~

~~112.4 As to paragraph 60.3:~~

~~(a) As to the allegation in respect of operating the Pipeline without a Leak Detection System, SPDC repeats response 9.1 of its Responses to the Claimants' Requests for Further Information of the Defence in the Bodo Individual Claims dated 13 March 2013.~~

~~(b) As to the allegations in respect of SPDC's efforts to physically verify the location of spills from its pipelines, SPDC repeats paragraphs 0 above and responses 5.1, 5.2, 9.3 and 9.5 of SPDC's Responses to the Claimants' Requests for Further Information of the Defence in the Bodo Individual Claims dated 13 March 2013 are repeated.~~

~~112.5 As to paragraph 60.4:~~

~~(a) As to the allegation that SPDC failed to adequately reduce the flow of oil, shut down or expeditiously cap and contain the 2008 Oil Spills, SPDC repeats its denials above, in particular paragraphs 30 and 0 to 0.~~

~~(b) It is admitted that it is SPDC's policy to shut down the relevant flow station and/or to isolate the relevant section of a pipeline as soon as reasonably possible on the detection or the reporting of a leak.~~

### **Reservation**

~~113.107. Paragraph 61 is noted.~~

~~114.108. As to paragraph 62, the claim to interest is noted.:~~

~~114.1 SPDC avers that the right to claim interest on tortious damages is a substantive issue to be determined by Nigerian law.~~

~~114.2 SPDC avers that as a matter of Nigerian law interest is not recoverable on just compensation and/or damages at common law for past losses.~~

**CHARLES GIBSON Q.C.**

**GERAINT WEBB Q.C.**

**ADRIAN BRIGGS**

**TOBY RILEY-SMITH**

**ADAM HEPPINSTALL**

**OGNJEN MILETIC ABIGAIL COHEN**

I believe that the facts stated in this Defence are true.



Julius Ejikonye

Managing Counsel, Global Litigation – Sub-Sahara Africa, The Shell Petroleum Development Company of Nigeria Limited

Dated: 29 August 2014 ~~10 December 2013~~