No. 15-1735

In the United States Court of Appeals for the Eighth Circuit

KARL EBERT, CAROL KRAUZE, AND JACKIE MILBRANDT,
individually and on behalf of others similarly situated,
Plaintiffs-Appellees,

vs.

GENERAL MILLS, INC.,
Defendant-Petitioner.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA,
THE HONORABLE DONOVAN W. FRANK, DISTRICT JUDGE

PLAINTIFFS-APPELLEES' BRIEF

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

General Mills contaminated hundreds of homes in the heart of a residential neighborhood in Minneapolis, Minnesota, by dumping thousands of gallons of toxic solvents, including carcinogenic trichloroethylene ("TCE"), into the ground. TCE contaminated the shallow groundwater located below the ground surface, migrated beneath hundreds of adjacent residential properties, and is now off-gassing and rising upward in vapor form into the soils beneath the sub-slabs of homes and invading, or threatening to invade, the interiors of the homes themselves. General Mills has repeatedly admitted that it caused this contamination, and even defined the geographic boundaries of the residential area it contaminated. In fact, General Mills' experts could not identify any other polluter who bore primary or sole responsibility for this contamination.

Based on these admissions and expert testimony, the district court granted class certification to the home owners, finding that General Mills' liability, and the requests for classwide injunctive relief, could be determined by common proof in an initial classwide trial, and that damages would be determined on an individualized basis in a subsequent phase of proceedings. In adopting this bifurcated approach, the district court joined the majority of other federal courts to utilize this case management structure in environmental cases. The district court's certification decision should be affirmed. Plaintiffs request 20 minutes for argument.

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STATEMENT OF JURISDICTION

The district court has subject matter jurisdiction over this case under 28 U.S.C. § 1331, because Plaintiffs assert claims under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607 *et seq.* ("CERCLA"), and the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B) ("RCRA"). The district court has supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367.

The district court granted Plaintiffs' motion for class certification in a memorandum opinion and order entered on February 27, 2015. Add15-35. This Court granted General Mills' petition for permission to appeal the certification ruling under Federal Rule of Civil Procedure 23(f), on April 10, 2015, and thus has appellate jurisdiction to review the certification decision under Rule 23(f) and 28 U.S.C. § 1292(e).

This Court does not have jurisdiction to review other decisions of the district court, however. Rule 23(f)'s limited appellate jurisdiction renders improper General Mills' request to review the district court's denial of General Mills' motion to dismiss the Second Amended Complaint. In addition, the district court's denial of General Mills' *Daubert* motions was not specified for review in General Mills' Rule 23(f) petition. Accordingly, this Court does not have jurisdiction to review the motion to dismiss or *Daubert* rulings at this time.

STATEMENT OF THE ISSUES

I. The District Court's Factual Finding of Common Injury and Common Proof. Did the district court abuse its discretion in granting class certification where the evidentiary record established that General Mills has caused environmental injury to every Class Area property, and thus all Class Members have suffered an injury caused by General Mills' conduct?

Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910 (7th Cir. 2003)

Stoll v. Kraft Foods Global, Inc., No. 09-0364, 2010 WL 3613828 (S.D. Ind. Sept. 6, 2010)

McHugh v. Madison-Kipp. Corp., No. 11-724, Order (W.D. Wis. April 16, 2012) (PA.558-574).

II. The District Court's Determination That These Common Issues Predominated. Did the district court abuse its discretion in rejecting General Mills' arguments that common issues predominated over individual issues of injury and causation?

In re Zurn Pex Plumbing Prods. Liab. Litig., 644 F. 3d. 604 (8th Cir. 2011)

Ludwig v. Pilkington North America, Inc., No. 03-1086, 2003 WL 22478842 (N.D. Ill. Nov. 4, 2003)

Fed. R. Civ. P. 23(b)(3)

III. The District Court's Certification Under Rule 23(b)(2) and 23(b)(3). Did the district court abuse its discretion when it concluded that claims for injunctive relief may be certified under Rule 23(b)(2), where claims for damages were separately

certified under Rule 23(b)(3), and in employing the bifurcated approach, adopted by the majority of federal courts in environmental cases of this type, whereby liability and injunctive relief issues are determined on a classwide basis, followed by individual damages proceedings?

Olden v. LaFarge Corp., 383 F.3d 495 (6th Cir. 2004)

Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910, 911 (7th Cir. 2003)

O'Dell v. Hercules Inc., 904 F.2d 1194, 1201-02 (8th Cir. 1990)

Fed. R. Civ. P. 23(b)(2), 23(b)(3).

IV. General Mills' Waiver of Reconsideration of the *Daubert* Rulings. Has General Mills waived its request for the Court to review the district court's *Daubert* rulings?

International Bhd. of Elec. Workers v. Hope Elec. Corp., 380 F.3d 1084 (8th Cir. 2004)

In re Blood Reagents Antitrust Litig., 783 F.3d 183 (3d Cir. 2015)

In re Zurn Pex Plumbing Prods. Liab. Litig., 644 F. 3d. 604 (8th Cir. 2011)

STATEMENT OF THE CASE

For over fifteen years, General Mills dumped thousands of gallons of TCE and other toxic chemicals at its research and development facility located on East Hennepin Avenue, in the Southeast Como neighborhood of Minneapolis, Minnesota. The carcinogenic and highly volatile TCE contaminated the groundwater, and migrated beneath homes located immediately south of General Mills' facility.

In late 2013, General Mills and the Minnesota Pollution Control Agency ("MPCA") informed area residents that the TCE in the groundwater was off-gassing and rising upward, in vapor form, into the soils beneath the sub-slabs of their homes and, potentially, into the interiors of the homes themselves. PA.665-93. General Mills admitted that its dumping practices had caused this problem, and as an interim remedy began installing "vapor mitigation systems" ("VMS") throughout the area. PA.668-69.[1] To date, General Mills has installed and paid for over 150 VMS. *See* MPCA, Vapor Intrusion, SE Minneapolis, http://www.pca.state.mn.us/index.php/about-mpca/mpca-news/featured-stories/draft-se-como-vapor-intrusion.html (last visited July 1, 2015); *see also* PA.695.

General Mills does not dispute that a nearly 3,000 foot-long, 1,000 foot-wide plume of TCE-contaminated shallow groundwater underlies the 400 homes in the

[1] All references beginning "PA" refer to Plaintiffs-Appellees' Separate Appendix. References to "Br." mean Defendant-Appellant's Opening Brief. Unless otherwise indicated, all references to "Doc." refer to the district court docket below.

Class Area. General Mills likewise does not dispute that this plume is off-gassing TCE vapor, which rises up from the shallow plume, through the soil, and toward the Class Area homes immediately above it, invading, and threatening to invade, the air the residents breathe. The company's own consultant, Barr Engineering ("Barr"), has referred to this as a TCE "vapor cloud," present throughout the Class Area. PA.307-308. General Mills' own testing within this "vapor cloud" revealed the presence of TCE vapors immediately underneath the basements of the great majority of Class Area homes tested, and in soils throughout the Class Area at concentrations up to "1,000 times what would be safe in air inside a residential structure," according to the same consultant. PA.307-308.

As General Mills admits, "TCE is prevalent" throughout the Class Area. Br. at 6. But where did it come from? Over the past 31 years, General Mills has offered two distinctly different explanations for the source of this "prevalent" TCE contamination.

The first explanation, recounted below, was the one repeatedly recited by General Mills for the 30 years between 1984 and early 2014—and embraced to this day by Minnesota's environmental and health agencies. In that explanation, General Mills admitted that the TCE contamination in the Class Area is the result of the company's dumping of 15,000 gallons of toxic chemicals almost directly into the groundwater underlying Class Area homes.

General Mills' second explanation, discussed thereafter, is the one General Mills has offered only since this litigation started. In this alternative universe, General Mills ignores its 30 years of admissions, claims General Mills has played no or only a minor role in the contamination, and speculates that "other" sources may have played some role in creating the massive underground TCE plume and resulting TCE vapors.

I. Since 1984, General Mills Has Repeatedly Admitted Its Former Facility Is The Source Of TCE Contamination In The Class Area

Beginning in 1984, and even as recently as May 2014, General Mills has admitted—to government regulators, its own executives, its liability insurer, the public, and at least two courts, including the trial court in this case—that its 15-year dumping of some 15,000 gallons of highly toxic industrial solvents, including TCE, directly into the shallow groundwater that flows throughout the now-certified Class Area, has caused substantially all of that neighborhood's TCE contamination.

In 1984, General Mills' environmental consultant, Barr, collected test data from 58 Class Area groundwater wells, and then drew for regulators the geographic boundaries of the contamination—called a "plume"—emanating from the General Mills "former disposal site," which extends more than 3,000 feet off the General Mills site to the southwest. This is the plume that Barr drew:

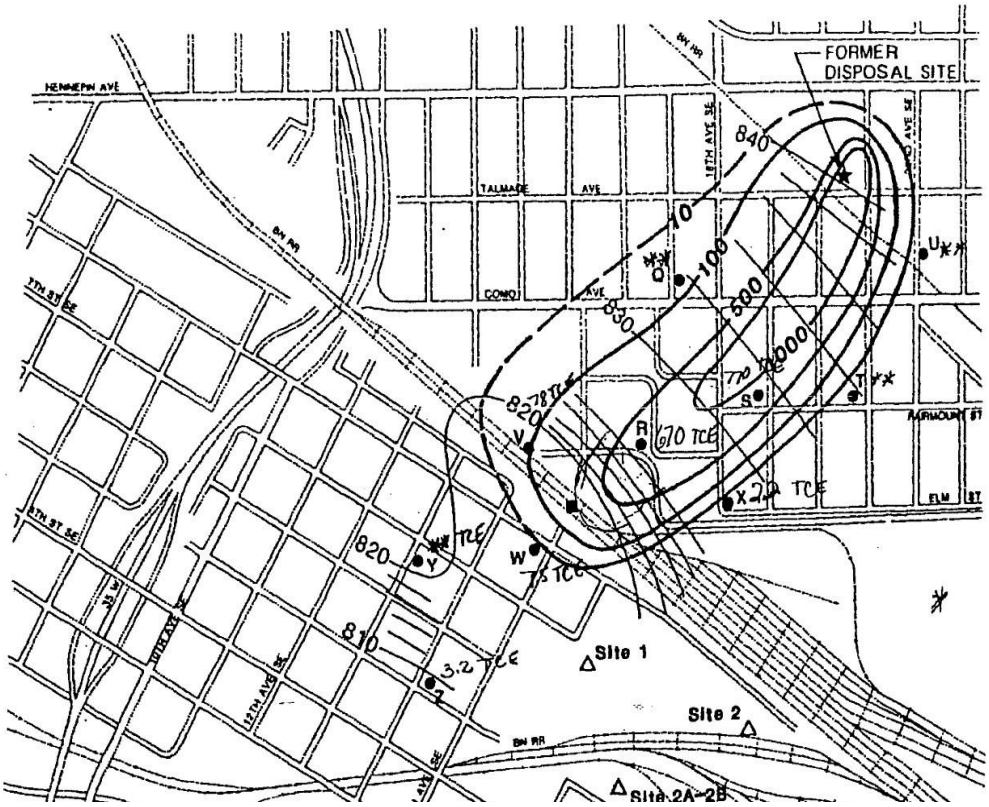

Figure 1, PA.334. Barr's 1984 plume is virtually identical to the Class Area proposed by Plaintiffs, and certified by the trial court. A20.

In October 1984, General Mills executed a Consent Order with MPCA, reciting the 15,000 gallon disposal of "certain laboratory solvents" by General Mills between 1947 and 1962. A25. The Consent Order includes a General Mills-agreed Remedial Action Plan ("RAP") intended for "minimizing the further migration of volatile organic hydrocarbons and **in particular trichloroethylene (TCE)** detected near the General Mills absorption pit in the groundwater[.]" PA.590, 611 (emphasis added).

Soon after General Mills and MPCA entered into the Consent Order, in May 1985, General Mills executive Donald Thimsen, in "intra-Company Correspondence," advised General Mills executive Dennis Olean that "solvents discharged at the 2010 Hennepin Avenue Site have reached the shallow groundwater table which is about 20 feet below the surface of the ground and **have spread in a plume of shallow groundwater contamination generally to the southwest of the site for a distance of about 2,500 feet and a width of about 1,000 feet**. This plume of shallow groundwater contamination is in mainly a residential and some commercial area almost entirely southwest of the solvent disposal site." PA.640 (emphasis added). The "mainly" residential area that Thimsen is describing is the now-certified Class Area.

More than a decade later, General Mills filed a complaint in New Jersey state court against its insurers, seeking millions of dollars to address the General Mills dumping and contamination at the former Facility (the "coverage litigation"). In June 1997, General Mills moved for summary judgment in the coverage litigation, asserting in its memorandum that General Mills' investigation into contamination on its property "established that **the groundwater under and adjacent to the East Hennepin site was contaminated with VOCs, primarily TCE, and that the area at the former soil absorption pit was the source of the contamination."** PA.654 (emphasis added).

Barr's senior scientist, Allan Gebhard, provided the following sworn testimony concerning the "source of the contamination":

- "[T]he soil and groundwater contamination at the [General Mills Site] was caused by the reported disposal to an on-site soil absorption pit of waste solvents during the period 1947-1962. **No other source of this contamination has been identified. The contamination consists primarily of trichloroethylene ("TCE")..."**

- Sampling in 1982-1984 "established the existence of a plume of contaminated groundwater, and that **the downgradient edge of the plume had migrated off-site**. The sampling also demonstrated that **the soil absorption pit area was the source of the groundwater contamination**."

- "Barr determined that the plume of contamination in the glacial drift unit [*i.e.*, the shallow groundwater] **had migrated laterally downgradient approximately 3,000 feet**. The levels of contamination and the extent of the migration of the plume are consistent with the estimate of former GMI employees that on the order of 15,000 gallons of waste solvents were disposed of over the 15-year period that the pit was in use."

PA.644-646, at ¶¶ 5, 10-12, 19, 21 (emphasis added).

Immediately after concern over possible TCE vapor intrusion into area homes was made public in November 2013, General Mills handed out a "Fact Sheet" to area residents, indicating, *inter alia*, that "**TCE is the primary chemical of concern associated with [General Mills'] historic disposal.**" PA.656 (emphasis added). In early December, 2014, GMI issued a press release stating that the "cost of offered vapor ventilation systems would be fully paid for by General Mills" and that "[w]e want to make this right for any impacted homeowner." PA.661.

In March 2014, General Mills agreed to modify the 1984 Consent Order's RAP, and promised to address the threat of TCE vapor contamination in the Class Area. PA.701-08. In the process, General Mills committed to spend additional monies to investigate and attempt to remedy the TCE vapor contamination throughout the Class Area. PA.705-06. In Barr's February 2014 "Final Sub-slab Sampling and Building Mitigation Work Plan," which was approved by the MPCA, Barr explained the need for this work as follows: "General Mills is in the process of conducting a vapor intrusion investigation associated with historic disposal practices at the [General Mills Site]...**Historic disposal practices at the Site from the late 1940's to the 1960's impacted shallow groundwater in the mainly residential neighborhood south of the Site with [VOC's], primarily trichloroethylene (TCE)**." PA.664, at Section 1.1(emphasis added). The "mainly residential neighborhood south of the Site" is the now-certified Class Area.

II. Minnesota's Environmental And Health Agencies Have Concluded General Mills Is The Source Of TCE Contamination In The Class Area

MPCA and the Minnesota Department of Health ("MDH") have likewise concluded that General Mills' 15-year dumping of chemicals caused the TCE contamination in the Class Area. After MPCA required General Mills to execute the 1984 Consent Order, MPCA never required another entity to address TCE contamination in the Class Area, nor has it publicly identified any other entity as a

source of TCE contamination in the Class Area. Similarly, in November 2013, MPCA and MDH stated to area residents, without objection from General Mills, that:

- "[General Mills] Workers dumped volatile organic compound (VOC) solvents, **primarily TCE**, in a soil absorption pit each year from 1947 until 1962." PA.666 (emphasis added)

- "The source of the potential vapor intrusion [in the Class Area]... is **related to historic waste disposal activities** at [the General Mills site]." PA.671 (emphasis added)

- "What we know: **Main contaminant of concern: trichloroethylene (TCE) from on-site [General Mills] disposal (1947-1962)**...The major VOC of concern at the General Mills site is trichloroethylene (TCE)." PA.679 (emphasis added)

In March 2014, MPCA and MDH publicly issued a "General Mills Soil Vapor Study Update," which stated: "TCE disposal at the [General Mills] site, from 1947 to 1962, created an area of groundwater contamination (known as a 'plume') that extends about one-half mile southwest." PA.695. The "area of groundwater contamination...that extends about one-half mile southwest" is the now-certified Class Area.

From 2013 until the present day, MPCA has regularly published on its website the "Approximate TCE Groundwater Plume" caused by General Mills' dumping of chemicals on its property. That MPCA-drawn plume is nearly identical to the 1984 Barr-drawn plume, with the Barr-drawn plume overlaying the MPCA-published plume:

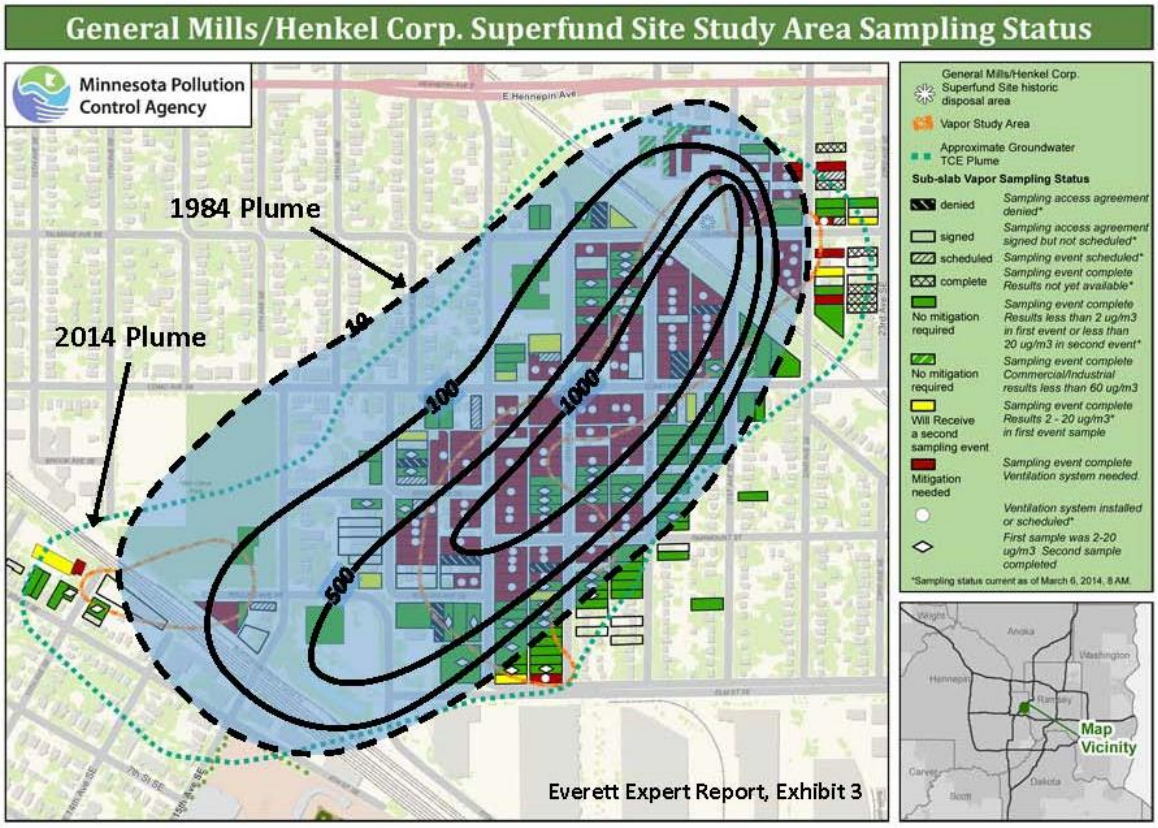

Figure 2, PA.700. The 2014 MPCA-drawn plume depicted above is identical to the Class Area certified by the district court.

III. Plaintiffs' Expert Has Opined That General Mills Caused Groundwater And Vapor Contamination Throughout The Entire Class Area.

Plaintiffs' expert, Dr. Lorne Everett, submitted an expert report in which he opines that the Class Area vapor intrusion and risk therefrom is due to off-gassing of TCE and other chemicals from the contaminated groundwater. PA.301. He has concluded that "substantially all of this groundwater contamination originated from the General Mills Facility." *Id.* Dr. Everett's conclusion was based upon his review of the scientific data that demonstrated that the site released chemicals into the

environment; the releases reached the underlying groundwater; the concentrations of on-site impacts were equal to or greater than downgradient impacts; and that the chemical signatures on-site and in downgradient wells are consistent. PA.301-306. He also concluded that the soil vapor measurements throughout the Class Area over the plume demonstrated the relationship between the plume and the vapors above it. PA.305-306.

Further, Dr. Everett opined, consistent with MPCA and MDH:

- "General Mills' disposal of large quantities of toxic chemicals, including TCE, at the Facility has resulted in widespread soil vapor contamination at the General Mills Facility and throughout the entirety of the residential area immediately adjacent to the General Mills Facility and identified as the proposed Class Area on Exhibit 1." PA.298

- "General Mills has acknowledged that between at least 1947 and 1962 it discharged to the ground at the Facility some 15,000 gallons of toxic chemicals, including TCE. This material was discharged into a makeshift dry well apparently consisting of three steel drums stacked end to end, extending 10 to 12 feet into the ground. Wastes were poured into the drums and were allowed to permeate into the ground. The chemicals were intentionally allowed to migrate into the subsurface, within a few feet of the shallow groundwater aquifer. . ." PA.296

- "General Mills' disposal pit can be thought of as very efficient means of rapidly polluting the groundwater." PA.301

- "Because this contamination was not adequately cleaned up, the contamination persists throughout the entirety of the proposed Class Area. Groundwater contamination has been documented by General Mills throughout the area since at least 1983 and the groundwater remains contaminated to this day. Toxic gas has

infiltrated the soil on the properties in the area, is beneath the homes and other structures on those properties causing, and threatening to cause, contamination of indoor air through the process of vapor intrusion." PA297

- "The vapor contamination in the proposed Class Area is sufficiently widespread and present in such high concentrations that interim action is required on all properties to prevent and mitigate infiltration of the toxic vapors into the residential structures in the proposed Class Area." PA.298

- "To accomplish a long term, permanent remedy of the vapor contamination, the contamination buried by General Mills must be located and removed. The contaminated groundwater which is carrying the chemicals and releasing the vapors must be removed or treated." PA.299

Dr. Everett considered the possibility that other sources were contributing to the plume and found no significant contributors to the Class Area TCE plume other than the General Mills Facility. PA.309-312.

IV. None Of General Mills' Experts Rebuts Plaintiffs' Evidence That General Mills Has Contaminated The Entirety Of The Class Area.

Nowhere does General Mills refute Plaintiffs' (and their expert's) central contention that the company's historical dumping of toxic chemicals has caused TCE contamination **"throughout the entirety of"** the Class Area. PA.301. Dr. Everett has concluded that TCE is present in subslab vapor under homes throughout the entire Class Area. PA.309, 316-318. He also has opined that because of the temporal and spatial variability in vapor intrusion, isolated non-detects or low measurements do not represent the full range of TCE that impacts and threatens these homes, especially in

different seasons, periods of different atmospheric pressure, and different soil moisture conditions. PA.313-316.

Rather than offer evidence, General Mills argues that the TCE contamination is not a classwide problem, citing supposedly "multiple" locations where testing of groundwater and the air underneath Class Area homes has revealed no, or low concentrations of, TCE. Br. at 14, 16. But no scientifically sound principle supports the merits argument that isolated non-detect or low TCE vapor measurements prove that homes sitting on top of the contaminated plume are not impacted or threatened by the TCE released into the environment by General Mills. PA.485, at ¶ 24.

The intrusion and threat of TCE vapors invading Class Area homes arises from the presence of the shallow groundwater plume of TCE contamination that indisputably underlies each Class Area home. TCE vapor migrates; its concentrations change over time, distance, and geologic conditions. *Id.* Dr. Everett noted that the TCE vapors resulting from General Mills' dumping practices infiltrated the Class Area likely beginning some 50 years, or more, ago. PA.301. He then opined that General Mills' testing of a Class Area home for TCE vapors on a single day (or even two days) of the likely more than 15,000 days that the vapors have already been present cannot adequately characterize the past or future threat to the home's residents from the vapors:

- "I have been studying vapor intrusion and soil vapor mitigation for nearly 40 years. In my experience, sparse sampling and

reliance on modeling underestimate the true risk of exposure." PA.316.

- "[O]ne or two sampling events at a home cannot capture the full temporal and spatial variability of soil vapor migration and vapor intrusion dynamics, thus decisions about whether or not to install mitigation systems are arbitrary, and are based on incomplete characterization of risk. The decision is being based on a concentration that happened to be measured on a certain day, **even though the next day**, **the concentration at the very same location could be 10 or even 100 times higher**." PA.321 (emphasis added).

- Demonstrating the variability of TCE vapor detections, measurements at a single Class Area home **on the same day** varied from 1,160 to 99 ug/m3; at another home from 6,740 to 1,400 ug/m3; and at a third home from 33 to 0 ug/m3. PA.314.

Moreover, even General Mills recognizes that because TCE vapor migrates, and its concentrations change, a home where no, or low, TCE vapor was detected still requires protection against the subsequent intrusion of that vapor. For example, General Mills has installed VMS in multiple Class Area homes with no detection of TCE vapors, because those homes were "adjacent" to homes where the one-day testing did find TCE. Br. at 17-18.[2] General Mills thereby acknowledges that the TCE vapors can and do migrate.

[2] General Mills also submitted expert testimony of Richard J. Rago, A511-523, who contended that the VMS that General Mills has installed in some, but not all, Class Area homes, are appropriate methods of mitigating subsurface soil vapor. The effectiveness of the VMS was not a certification issue, but rather goes to the merits of Plaintiffs' claims for injunctive relief.

V. General Mills Offers Only Speculation, Not Evidence, That "Other Sources" Might Have Contributed To The Contamination.

General Mills argues extensively that sources "other" than General Mills may have contributed to the Class Area's "prevalent" TCE contamination—even though each of Defendant's experts failed to opine that General Mills is **not** the source of the TCE plume in the Class Area. Br. at 5-11. Indeed, although Dr. Thomas McHugh and Dr. James W. Mercer pointed to several sources they believe may be contributing to the groundwater contamination in the Como neighborhood, they failed to identify any portion of the Class Area that General Mills did not contaminate. Dr. Everett reviewed these expert's reports and the data they rely upon, and concluded that none of these potential sources is substantially contributing to the Class Area plume. PA.474-485, at ¶¶ 1-23.

General Mills retreats from its 30 years of admissions that the exclusive source is General Mills itself—including testimony under oath that "[n]o other source of this contamination has been identified," PA.644, at ¶ 5, and Barr's 2014 report to MPCA that "historic disposal practices at the [General Mills] Site from the late 1940's to the 1960's impacted shallow groundwater in the mainly residential neighborhood south of the Site with…primarily [TCE]." PA.664, at Section 1.1. And nowhere did General Mills try to reconcile these admissions with its new litigation claim that "there might be other sources."

Beyond disclaiming its own admissions, General Mills now suggests that household products, the smokestack of a local medical device manufacturer, and "[o]ther industrial and commercial facilities in and around Como" may have contributed to the contamination. Br. at 7. Consideration of the "other" potential sources reveals the lack of evidentiary support for the claim:

"**Household products**": General Mills asserts that "household products containing TCE are common," and that "examples appeared within several properties within the Class Area." Br. at 6-7. However, examination of the "evidence" reveals that only two (2)—of some 400—Class Area structures were found to have containers that General Mills even considers suspect, and further that General Mills is not even sure that these containers have any TCE in them at all, but rather only that they "contain or potentially contain" TCE. A329-330. None of General Mills' experts explained how whatever is in any of these containers had anything whatsoever to do with: the Class-wide TCE contamination in the shallow groundwater underneath all 400 homes; the TCE "vapor cloud" permeating the entirety of the Class Area; or even the TCE found in the breathing space of those two structures in which the suspect containers were found.

"Local Medical Device Manufacturer"*:* General Mills argues that TCE emissions from this company are "often" blown by prevailing winds into the Class Area. Br. at 7. General Mills fails to explain how TCE blowing out of a smokestack

could migrate to groundwater 10-12 feet or more below the ground surface, or in vapor form underneath a home's basement. Moreover, while one General Mills' expert (McHugh) speculated that TCE from the stack "could" wind up in a Class Area home's breathing space, the expert does not say that, in fact, it did. A330. Nor is his speculation supported by anything other than the expert's observation that the wind sometimes blows in the Class Area's direction. A330.

"Other industrial and commercial facilities": General Mills claims other businesses have released TCE into the groundwater beneath the Class Area, and further claims that even MPCA has "acknowledged the contribution of other sources of TCE." Br. at 7-8. But MPCA said no such thing. As the email excerpted in General Mills' brief explicitly states, MPCA noted only that there "**may be**" other industrial sources of TCE. The agency specifically identifies no such source, and has never named another responsible party. Br. at 8. Further, General Mills' expert's conclusion that TCE from non-General Mills sources "extends downgradient into" the Class Area appears in his report as a statement without any citation whatsoever to any study or analysis that might justify such a conclusion. A323.

These "other" sources are red herrings, whose status as such is confirmed by the company's own response to the contamination it caused. General Mills has not sued any of these alleged "other sources," seeking either financial contribution to cleanup costs or responsible party designation for the contamination. General Mills is

the only polluter paying to address TCE contamination in the Class Area, including, as General Mills admits, 25 years of groundwater remediation. Br. at 13.

Relatedly, General Mills implies that perhaps someone else's TCE is contaminating the groundwater, because of what General Mills calls the "apparent paradox" of TCE being only a supposedly modest percentage of the soil contamination at its former facility, and yet a "significant" percentage of the contamination in the area's groundwater. Br. at 12. However, as demonstrated, General Mills and Barr—which took and interpreted thousands of environmental tests in and around the General Mills' site—regularly acknowledged that the TCE dumped by General Mills caused the TCE groundwater contamination.

None of the scientific detail that would accompany a credible "other source" allegation exists here. General Mills needs to prove, but offers no evidence as to: 1) how much TCE the "source" dumped (or where, or when, or how, or how deep); 2) how much of the Class Area's TCE supposedly originates from that "source"; and 3) the geographic reach of that "source's" contamination into the half-mile long, 1,000 foot-wide Class Area. While the latter is customarily depicted by the drawing of a "plume" of contamination—such as the one both Barr and MPCA have drawn to represent the extent of the General Mills-sourced contamination—neither General Mills nor any of its many litigation experts drew one depicting alleged "other source" contamination.

VI. Plaintiffs Brought This Suit To Require General Mills To Clean Up Its Contamination.

Plaintiffs Karl Ebert, Carol Krauze and Jackie Milbrandt own homes in the Como neighborhood within the zone of TCE contamination caused by General Mills. In their Second Amended Complaint, Plaintiffs asserted a cost recovery claim under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), a citizen's suit claim under RCRA, 42 U.S.C. § 6972(a)(1)(B), and common law negligence, private nuisance, and willful and wanton misconduct claims.

Plaintiffs allege that General Mills has failed to adequately investigate or remediate the contamination it has caused, and under their common law claims seek injunctive relief to compel General Mills to comprehensively remediate the vapor contamination it has caused. Plaintiffs' RCRA claim seeks the same injunctive relief concerning the vapor contamination, and also seeks to compel General Mills to comprehensively remediate all impacted groundwater aquifers. Under the common law claims, Plaintiffs seek monetary damages for diminished property values, loss of reasonable use and enjoyment of their properties, and aggravation and annoyance. Under their CERCLA claim, Plaintiffs seek recovery of the costs they have incurred to protect themselves and their families against the TCE contamination caused by General Mills.

General Mills moved to dismiss each claim in the Second Amended Complaint. In a Memorandum Opinion and Order dated September 4, 2014, the district court denied the motion to dismiss in its entirety. Add40-57.

Following an initial phase of fact and expert discovery, Plaintiffs' amended motion for class certification, Doc. 93, was comprehensively briefed, and the district court conducted a multi-hour hearing on Plaintiffs' certification motion and Defendant's *Daubert* motions. The district court granted the amended motion for class certification on February 27, 2015.

SUMMARY OF ARGUMENT

As the district court correctly found in its carefully considered, thirty-five page class certification ruling (the "Certification Order"), the record presents a textbook case for class certification. Determinations as to General Mills' liability, and the injunctive relief that is necessary to comprehensively remediate General Mills' contamination, can readily be made on a classwide basis. The evidence that General Mills dumped chemicals into the ground and failed to take appropriate action after it did so is the same for every Class member. The evidence that General Mills has caused environmental injury to all Class Area properties is also the same for every Class member, much of it consisting of General Mills' repeated admissions that it (and no one else) caused the Class Area contamination. The evidence establishing what

needs to be done to remediate the Class Area – the classwide injunctive relief Plaintiffs seek under federal and state law – is common proof from experts.

Until this litigation, General Mills had for decades assumed exclusive responsibility for causing *all* of the Class Area contamination, never once seeking to involve or implicate any other alleged polluter. Only in this litigation has General Mills suggested it is not the source of the Class Area contamination. But this case is not an environmental "whodunit," where multiple "other sources" lurking on the edges of this residential community "may have" caused the contamination at issue, thus necessitating a house-by-house inquiry to finger the appropriate polluter-culprit.

Indeed, the Class Area certified by the district court is identical to the "plume" map General Mills' own consultants drew to depict *the area that General Mills contaminated*, a map the Minnesota Pollution Control Agency ("MPCA") to this day uses to delineate the area of contamination caused by General Mills. To obtain insurance money for the very same contamination at issue here, General Mills represented to a different court that **its** dumping caused the plume/Class Area contamination, and even represented to that court that **"[n]o other source of this contamination has been identified**." Further, despite the opportunity to join these phantom "other polluters" as parties, General Mills failed to do so. General Mills has publically apologized for causing vapor contamination, and it and it alone has installed interim vapor mitigation systems in a large number of Class Area properties. And,

most significantly, General Mills and its numerous class certification experts did not deny the central proposition advanced by Plaintiffs and their expert – that General Mills has caused contamination throughout the entirety of the Class Area – or identify even one square inch of the Class Area that wasn't contaminated by General Mills.

General Mills' failure to provide the district court with these basic scientific facts to support its "other sources" defense starkly contrasts with those facts known and admitted, as shown by the following:

	"Other Sources" Alleged by General Mills	**General Mills' East Hennepin Ave. Facility**
What quantity of chemicals was released to groundwater?	Not identified by General Mills	Approximately 15,000 gallons (admitted by General Mills)
Where did the releases to groundwater occur?	Not identified by General Mills	Into General Mills' on-site pit, directly into the shallow groundwater
When did the releases to groundwater occur?	Not identified by General Mills	1947-1962 (admitted by General Mills)
Has a "plume" been drawn to show the geographic extent of the contamination?	No	Yes (by General Mills' environmental consultant and MPCA)
Has this entity acknowledged causing contamination in the Class Area?	No	Yes (admitted by General Mills', repeatedly, between 1984-2014)

	"Other Sources" Alleged by General Mills	**General Mills' East Hennepin Ave. Facility**
Did MPCA identify this entity as causing contamination in the Class Area?	No	Yes (repeatedly, beginning in 1984)
Did this entity agree to a Remedial Action Plan with MPCA?	No	Yes (twice – in both 1984 and 2014)
Has this entity spent its money to address contamination in the Class Area?	No	Yes (since 1984)
Has this entity been sued by anyone for having caused contamination in the Class Area?	No	Yes (by Plaintiffs)

The Certification Order was not manifestly erroneous or otherwise an abuse of the district court's broad discretion under Rule 23. During the class certification proceedings, Plaintiffs submitted extensive evidence. In its Certification Order, the district court repeatedly referred to this evidence as it made findings on each Rule 23 requirement. The district court's ultimate conclusion – that all liability and injunctive issues can be resolved on a classwide basis with such common evidence–is directly in line with the certification rulings of the majority of district courts and courts of appeals in similar environmental cases from across the country. Each of these cases

bifurcated liability, injunctive relief, and damages determinations as the district court did here.

While General Mills now attacks the district court's commonality finding, General Mills did not even contest the commonality requirement in the certification proceedings below. Nonetheless, Plaintiffs in fact have extensive common evidence that will lead to common liability and injunctive relief answers for the Class. General Mills' standing, Seventh Amendment, and claim-splitting assertions are similarly meritless, and the district court's rejection of them was not an abuse of discretion. Moreover, General Mills cannot seek review of the district court's motion to dismiss ruling concerning CERCRLA § 113, nor the rulings rejecting General Mills' *Daubert* motions, as these rulings are beyond the scope of Rule 23(f) and interlocutory review of them were neither sought nor permitted under 28 U.S.C. § 1292(b).

The district court's rejection of General Mills' challenges to certification was correct and well within its discretion. The Certification Order should be affirmed.

STANDARD OF REVIEW

This Court reviews a district court's order certifying a class for abuse of discretion. *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F. 3d. 604, 616 (8th Cir. 2011)(stating the district court has "'broad discretion in determining whether to certify a class,' recognizing 'the essentially factual basis of the certification inquiry and . . . the district court's inherent power to manage and control pending litigation.'")

(internal citation omitted)). While issues of law are reviewed *de novo,* the district court abuses its discretion only if it commits an error of law. *Blades v. Monsanto Co.,* 400 F. 3d. 562, 566 (8th Cir. 2005).

The manner in which the district court applies the law to the facts and circumstances of the case is reviewed on an abuse of discretion basis. *Zurn,* 644 F. 3d at 618. Further, the district court's factual findings underlying the certification ruling are reviewed under the "clearly erroneous" standard. *Blades,* 400 F. 3d. at 566; *see also Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.,* 546 F. 3d 196, 201 (2nd Cir. 2008).

ARGUMENT

I. The District Court Correctly Found Plaintiffs' Claims Can Be Resolved With Common Proof, On A Classwide Basis.

The primary issues General Mills raises on appeal – lack of standing for "uninjured" class members and the supposed absence of "common questions and common answers" on injury and causation–fall away where, as here, the defendant engaged in standardized conduct that has adversely impacted every Class Area property. The majority of federal district and appellate courts to address certification in nearly identical environmental contamination cases have endorsed class certification. *See Mejdrech v. Met-Coil Sys. Corp.,* 319 F.3d 910, 911 (7th Cir. 2003), *affirming Mejdreck v. Lockformer Corp.*, No. 01-6107, 2002 WL 1838141 (N.D. Ill. Aug. 12, 2002); *McHugh v. Madison-Kipp Corp.*, No. 11-724, Order (W.D. Wis. April 16,

2012) (Doc. 136-2); *Stoll v. Kraft Foods Global, Inc.*, No. 09-0364, 2010 WL 3613828 (S.D. Ind. Sept. 6, 2010); *see also Olden v. LaFarge Corp.*, 383 F.3d 495 (6th Cir. 2004); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988); *Bentley v. Honeywell Int'l, Inc.*, 223 F.R.D. 471 (S.D. Ohio 2004); *Cook v. Rockwell Int'l Corp.*, 181 F.R.D. 473 (D. Colo. 1998); *Yslava v. Hughes Aircraft Co.*, 845 F.Supp. 705 (D. Ariz. 1993); *Boggs v. Divested Atomic Corp.,* 141 F.R.D 58 (S.D. Ohio 1991); *Greene v. Will*, No. 09-510, Order (N.D. Ind. Jan. 29, 2013) (PA.545); *Muniz v. Rexnord Corp.*, No. 04-2405, 2005 WL 1243428 (N.D. Ill. Feb. 10, 2005); *Ludwig v. Pilkington N. Am., Inc.*, No. 03-1086, 2003 WL 22478842 (N.D. Ill. Nov. 4, 2003); *LeClercq v. Lockformer Corp.*, No. 00-7164, 2001 WL 199840 (N.D. Ill. Feb. 28, 2001); *Cannata v. Forest Preserve Dist. of DuPage Cty.*, Case No. 06-2196, Order (N.D. Ill. Oct. 11, 2006) (PA.576). Two of these cases—*McHugh* and *Stoll*— involved vapor contamination, the exact type of contamination at issue here. All of these cases held that the defendant-polluter's liability to the class can be established in a single proceeding which determines the areal extent of contamination unlawfully caused by the defendant.

These courts, just as the district court did here, granted certification to determine all liability and injunctive relief issues on a classwide basis, reserving individual damages determinations to a subsequent phase of the case. As the Seventh Circuit explained in *Mejdrech*, the defendant's liability is determined by resolving two common questions: 1) whether the defendant unlawfully disposed of chemicals, and

2) what the geographical boundaries are of the contamination the defendant unlawfully caused. 319 F.3d at 911-912. Damages are not determined in the classwide trial, but rather in "individual follow-on proceedings." *Id.* In light of this substantial authority, the district court's Certification Order was not an abuse of discretion.

A. All Class Members have standing to seek redress from General Mills.

Although they were not required to do so, Plaintiffs provided evidence that every Class Member has been injured by General Mills' contamination and thus has standing to bring claims under statutory and common law. The district court therefore did not abuse its discretion in finding that Plaintiffs and all members of the class have justiciable claims.

As a general matter, Article III's requirements are easily met in environmental contamination cases like this one. *See Maine People's Alliance and Natural Res. Def. Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 283 (1st Cir. 2006) (stating "probabilistic harms are legally cognizable"); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263–64 (2d Cir. 2006) ("[E]xposure to toxic or harmful substances has been held sufficient even without physical symptoms of injury caused by the exposure, and even though the exposure alone may not provide sufficient grounds for a claim under state tort law…aesthetic, emotional or psychological harms also suffice for standing purposes"). Although a district court may not define a class to include members who "would not have standing," federal courts "do not require that each member of a class submit evidence

of personal standing." *Zurn,* 644 F.3d at 616. As this Court has noted, "[i]n most cases the question whether [a plaintiff] has a cognizable injury sufficient to confer standing is closely bound up with the question of whether and how the law will grant him relief." *Id.* (internal citation and quotation omitted). Nonetheless, "[i]t is crucial, … not to conflate Article III's requirement of injury in fact with a plaintiff's potential causes of action, for the concepts are not coextensive." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 591-93 (8th Cir. 2009).

Unlike all of the cases General Mills relies upon, here Plaintiffs and all Class Members not only allege that General Mills has contaminated the entire Class Area, and that this contamination has "substantially diminished" the property values for each and every property located in the Class Area—they have submitted the proof of this common injury. A2 Am. Compl. ¶ 3, A5 ¶ 15-16; PA.485 at ¶ 24; PA.309, 316-318; PA.313-316.[3] Every class member is therefore alleged to have suffered property damage, and loss of enjoyment of their property, as a result of General Mills' historic dumping. A2 Am. Compl. ¶ 3, A5 ¶ 15-16. Accordingly, all absent class members would have the right to seek, through RCRA, comprehensive remediation of the source contamination caused by General Mills' dumping, and all absent class members

[3] *See also* Add52 (holding that allegation of property value diminishment "due to vapor intrusion contamination" sufficiently stated a claim for negligence, and noting that under Minnesota law, "anything which is injurious to health, or indecent or offensive to the sense, or an obstruction of the free use of property, so as to interfere with the comfortable enjoyment of life or property" states a claim for nuisance).

would have the right to seek, through CERCLA and their common law claims, compensation for response costs and for any monetary damages incurred as a result of property diminution.[4] Plaintiffs have therefore made the requisite showing, fully supported by their expert's submissions. PA.485, at ¶ 24; PA.309, 316-318; PA.313-316.

The district court also correctly rejected General Mills' argument that certification is improper because other polluters may have caused the class members' injuries. As Plaintiffs demonstrate, General Mills' 30-year history of admissions makes this assertion untenable. Statement of the Case ("SOC"), at pp. 8-10, *supra*. Further, none of General Mills' experts concluded that General Mills was ***not*** the primary source of contamination. SOC, at 14-20, *supra*.

Finally, the district court correctly found that the Class Area was properly defined by the geographic boundaries depicted in Figure 2, PA.700; Add25 ("[A] geographical boundary-delineated class does in fact allow the Court to identify the members of the putative class"). At summary judgment or trial, General Mills is entitled to provide evidence that it contaminated part or none of the defined Class

[4] *See generally Dealers Mfg., Co. v. Cnty. of Anoka*, 615 N.W.2d 76, 79 (Minn. 2000) (noting that under Minnesota law, "a stigma factor can attach to property whether contaminants are present, are threatened, or are totally absent" because "stigma may nonetheless be present as a heavy burden on the value of the property due to the perception of risk of liability, or government imposed restrictions on the use or transferability of the property, among other concerns").

Area. If the jury finds General Mills contaminated none of the Class Area, no class member will recover. If it contaminated only part of the Class Area, only some class members would recover. Despite General Mills' contention, these are solely merits issues, not an instance of a district court "refusing to entertain arguments against [plaintiffs'] damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432-33 (2013) (partially cited by Br. at 31).

B. The district court did not abuse its discretion by finding that environmental injury and causation can be determined on a classwide basis.

The district court also did not abuse its discretion in finding that Rule 23(a)'s commonality element was met.

The environmental "injury" and "causation" elements of Plaintiffs' claims do not require individual proof. The proof demonstrating General Mills' unlawful dumping in this residential area, and its failure to clean up this contamination, is the same for each and every class member. So too is the evidence concerning the areal extent and geographical boundaries of the contamination General Mills has caused, which includes General Mills' repeated admissions that it has contaminated, and thus has injured, the entire Class Area, General Mills' assumption of responsibility for vapor contamination throughout the Class Area, and Plaintiffs' expert testimony that

every Class Area property has been impacted by General Mills' contamination and requires remedial measures.

The record on which certification was granted contains unrefuted classwide proof on the liability elements of Plaintiffs' claims. Certification was proper on this evidentiary record.

C. No house-by-house inquiry is needed.

Determining the areal extent of the contamination caused by General Mills is not an individualized "house by house" exercise, as General Mills falsely claims, but rather a single determination, based on all available sampling data and other relevant information, to specify the geographic boundaries of the area contaminated by General Mills.

In the "block by block" excerpt from the class certification hearing transcript that General Mills repeatedly cherry-picks, Plaintiffs' counsel was simply stating the obvious: At trial General Mills would have the opportunity to challenge Plaintiffs' evidence on the geographical boundaries of the contamination it had caused, if General Mills could produce evidence that there is some portion of the Class Area that General Mills did not contaminate. General Mills did not offer this proof at the class certification stage, however, and Plaintiffs came forward with substantial, admissible evidence that General Mills is liable to the entire Class – satisfying all standing, causation and injury requirements applicable to class members.

Contrary to General Mills' incorrect argument that class treatment is improper because many properties have no TCE contamination at all, General Mills many years of admissions and Dr. Everett's expert opinions, discussed extensively above, prove compellingly that the TCE plume has invaded every Class Area property, and the resulting TCE vapors are immediately beneath and threaten to invade every Class Area home

D. A single instance of injurious conduct is enough to support a commonality finding.

Relying on *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) and *Luiken v. Domino's Pizza, LLC*, 705 F.3d 370 (8th Cir. 2013), General Mills asserts that a classwide proceeding supposedly cannot provide "common answers" to the liability elements of class members' claims. This argument should be rejected, for both procedural and substantive reasons.

Procedurally, General Mills conceded the Rule 23(a)(2) commonality element in the district court.[5] Indeed, the only two requirements of Rule 23(a) that General Mills did challenge were typicality (Rule 23(a)(3)) and adequacy (Rule 23(a)(4)). A215-219. In the Certification Order, the district court expressly (and correctly) found that General Mills was not disputing commonality. Add17. General Mills has thus waived the commonality issue as a basis for reversal or remand of the Certification Order. *See,*

[5] In its brief to the district court, General Mills did not even cite *Luiken*, and only cited to the *Dukes* case, in a footnote, for a different point. *See* A215-21, A226, n. 13.

e.g., International Bhd. of Elec. Workers v. Hope Elec. Corp., 380 F.3d 1084, 1096 (8th Cir. 2004)(finding waiver and declining to "address issues that a party raises for the first time on appeal and failed to raise in the district court."); *Local 2, Int'l Bhd. of Elec. Workers v. Anderson Underground Construction, Inc.*, 907 F. 2d 74, 76 (8th Cir. 1990)(same holding and result).

General Mills' waiver of the commonality issue aside, its substantive attacks are otherwise meritless. None of the problems identified in *Dukes* or *Luiken* exist in this case. The jury's finding in the classwide trial concerning the geographical scope of contamination caused by General Mills will resolve all liability issues for Plaintiffs and the entire class. This geographical scope of contamination determination will thus, as required by *Dukes*, be a "common answer" that will "resolve an issue that is central to the validity of each one of the claims in one stroke." 131 S. Ct. at 2551; *see also In re Deepwater Horizon*, 739 F.3d 790, 810-11 (5th Cir.) *cert. denied sub nom. BP Exploration & Prod. Inc. v. Lake Eugenie Land & Dev., Inc.*, 135 S. Ct. 754 (2014) (analyzing *Dukes* and stating "the legal requirement that class members have all 'suffered the same injury' can be satisfied by an instance of the defendant's injurious conduct, even when the resulting injurious effects—the damages—are diverse"). General Mills will be liable to those class members who own property within the area of contamination adjudicated in the classwide trial to have been caused by General Mills, and those class members will move on to the next stage of the case to seek to recover monetary damages.

Conversely, if any class member owns property outside the area of contamination adjudicated in the classwide trial to have been caused by General Mills, the case ends as to that class member and General Mills will receive a preclusive judgment as to that member. *See Mejdrech*, 319 F.3d at 911, 912 ("the next question is the particular harm suffered by particular class members whose homes are in the area of contamination").

As many courts have held in similar cases, this bifurcated case management approach is both fair and efficient. It is fair to the class because it allows members to prove common propositions once, leveraging the significant cost of experts in this type of case, rather than in economically infeasible individual cases. *See*, *e.g.*, *Bentley*, 223 F.R.D. at 488; *Greene,* No. 09-510, PA.551.

This bifurcated approach is also fair to General Mills, which would have a full opportunity to defend its conduct, attempt to prove that there are portions of the Class Area it did not contaminate (although it made no such attempt to do so during the class certification proceedings), and, if found liable, to attempt to prove in the second phase of the case that individual class members have not been damaged. Finally, this bifurcated approach is patently the most efficient approach from the standpoint of the court system, as the certification granted here would prevent courts and juries in potentially hundreds of individual cases from considering identical evidence and legal claims. The district court in *Stoll*, a similar vapor intrusion case, found:

> [A] class action is the best vehicle for adjudicating this matter in a fair and efficient fashion. There are over 100 households in the proposed Class, meaning that without a class action, over 100 very similar lawsuits could be brought. Each lawsuit would cover the same legal terrain with virtually identical evidence. Obviously, a class action would eliminate considerable replication, thus resolving the matter more efficiently and expeditiously.

2010 WL 3613828 at *8; *see e.g., Mejdrech*, 2002 WL 1838141 at *7 (stating "it would be wholly inefficient to try thousands of separate cases that would allege the same misconduct and provide the same proof of such … [C]lass certification is the most efficient and manageable way to proceed in an action against Defendants for injunctive relief and determining liability.")

General Mills suggests that a class can never be certified unless it is certain in advance that all class members will uniformly prevail, or lose, on the merits. But that is wrong, as decades of environmental contamination class actions prove. Rather, numerous courts have authorized classwide determinations of the geographical scope of contamination caused by a polluter-defendant, which leave open the possibility that liability will be established for some class members, but not for others, based on the fact-finder's "common answer" on the geographical scope of contamination issue during the classwide liability proceeding. No court has held that certification is dependent on an "all or nothing" result for the Class as a whole.[6]

[6] For example, the common use of sub-classes, where some members of a larger class may recover while others may not, demonstrates the clear error of General Mills'

E. Plaintiffs' claims are typical.

Likewise, General Mills' claim that Rule 23(a)'s typicality requirement is not satisfied falls well short of the mark. Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class," meaning that "the claims or defenses of the representative parties and members of the class stem from a single event or are based on the same legal or remedial theory." *Paxton v. Union National Bank*, 668 F.2d 552, 561-62 (8th Cir. 1982). "Factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory." *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996).

The district court correctly found that the typicality element was satisfied because Plaintiffs' claims, as well as those of all Class Members, arise out of General Mills' common course of conduct in discharging chemicals into the Como neighborhood, and Plaintiffs advance the same legal claims for the Class as they do individually, and seek relief for all on the same legal theories. Add18-20.

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assertion. *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995) (approving use of subclasses and stating that "[t]he fact that individuals with different mortgage forms will have RESPA or contract claims of differing strengths does not impact on the commonality of the class as structured").

The district court also correctly rejected General Mills' typicality arguments concerning "differing levels of contamination and different use and treatment of each property" Add20. As the district court's typicality finding was in accord with the typicality determinations in nearly identical cases, the typicality ruling was not an abuse of discretion and should be affirmed. *See Mejdrech,* 2002 WL 1838141 at *3-4 (differing levels of contamination and property features not relevant to typicality issues); *Muniz,* 2005 WL 1243428 at *3 (rejecting defendant's typicality argument based on differing property locations and hydraulic conditions); *Ludwig,* 2003 WL 22478842 at *2 (differing levels and sources of arsenic contamination not a legitimate typicality factor); *Cannata,* No. 06-2196, Order, PA.582-84 (class certified despite "differing levels of contamination and chemicals in the proposed class area").

F. Plaintiffs are adequate representatives.

Invoking the rule against claim-splitting, General Mills argues the district court abused its discretion in finding Plaintiffs to be adequate representatives, because they do not assert (non-existent) personal injury claims resulting from exposure to Defendant's contamination. If accepted, General Mills' position would mean that no environmental contamination case of any kind could ever be certified for class treatment, as all such cases involve the potential that chemical exposures might result in sickness or disease. While the procedural rules and common law res judicata principles require individuals, suing only on their own behalf, to join all possible

claims, Rule 23 allows a court to try some common claims with common proof without prejudicing the ability of absent class members to pursue additional relief based on individual theories of recovery. The large number of similar cases where courts have certified environmental property damage claims demonstrates that this is the case.

In *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 880 (1984), the Supreme Court held that former class members are not precluded from asserting subsequent individual suits with claims that were not litigated in prior class proceedings. The Court held that the general rule invoking *res judicata* had no application to former class plaintiffs because the alternate theories of relief required different elements of proof. *Id.* at 878-80. *Res judicata*, therefore, did not bar the plaintiffs from bringing their individual claims against the employer in separate actions. *Id.* In so holding, the Supreme Court determined that a court's choice to use the class device in order to address common questions under Rule 23 supercedes other procedural requirements of individual actions. *Id.* at 880. Thus, the preclusive effects of a class judgment are narrowly limited to the legal issues raised in the class proceeding.

Similarly, in *Bentley*, a directly on point environmental case, the court rejected the exact argument made here, holding:

> Plaintiff's claims on behalf of the class are for injunctive relief and property damages. Based upon the record before the Court,

> there would seem to be no reason to inquire into any bodily injuries allegedly suffered by individual class members. Hence, *res judicata* would not apply to bar and/or prejudice any personal injury claims that the class members may have.

223 F.R.D. at 483. Numerous other courts have found that individual claims, not actually litigated in prior class proceedings, would not be barred by the class case.[7]

In contrast to this authority, General Mills' primary case, *Brown-Wilbert, Inc. v. Copeland Buhl & Co.,* 732 N.W.2d 209 (Minn. 2007), neither addresses claim splitting nor res judicata in the class action context, and actually undercuts General Mills' argument concerning the scope of res judicata. *Brown-Wilbert* holds that res judicata does not preclude claims in a subsequent suit unless "the estopped party had a full and fair opportunity to litigate" the subject matter of the subsequently filed claims, *and* those claims actually were or "could have been litigated in the earlier action." *Id.* at 220. Here, neither requirement is present. Plaintiffs do not assert bodily injury or medical monitoring claims; hence Class Members would not have any opportunity to litigate them in this case, nor could bodily injury claims that have not accrued even be brought at this time.

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[7] *See Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 432 (4th Cir. 2003); *Cameron v. Tomes*, 990 F.2d 14, 17-18 (1st Cir. 1993); *Rodriguez v. Taco Bell Corp.*, 2013 WL 5877788 at **3-4 (E.D. Cal. Oct. 30, 2013) (stating "the rule against claim splitting does not apply when a member of a class subsequently seeks to pursue a claim that was not litigated in the class action"); *see also*, *In re Light Cigarettes Marketing Sales Practices Litig.*, 271 F.R.D. 402, 415 (D. Me. 2010); *Gasperoni v. Metabolife, Int'l, Inc.*, 2000 WL 33365948 at *4 (E.D. Mich. Sept. 27, 2000).

Defendant nonetheless argues that a personal-injury claim arising out of General Mills' conduct would have accrued when Plaintiffs' claims for negligence, nuisance, and willful and wanton conduct accrued, which is "the moment they incurred any 'compensable damage,' regardless of the specific relief they seek in this case." Br. at 40. General Mills is mistaken. Under CERCLA, a personal-injury claim does not accrue until "the plaintiff knew (or reasonably should have known) that the personal injury . . . [was] caused or contributed to by the hazardous substance or pollutant or contaminant concerned." 42 U.S.C. § 9658(b)(4)(A). And CERCLA further provides that if state law establishes an accrual date for claims of personal injury based on exposure to hazardous substances released into the environment that is earlier than the accrual date under CERCLA, state law is pre-empted. *See* 42 U.S.C. § 9658(a)(1); *see also N. Pac. Ctr., Inc. v. BNSF Ry. Co.*, 723 F. Supp.2d 1123, 1128 (D. Minn. 2010) ("[CERCLA] expressly preempts state accrual rules in environmental cases, even in the absence of a CERCLA claim."); *Soo Line R. Co. v. B.J. Carney & Co.*, 797 F. Supp. 1472, 1487 (D. Minn. 1992) (concluding that CERCLA's "federally mandated discovery rule" applies to common law personal injury claims caused or contributed by hazardous substances); *Tower Asphalt, Inc. v. Determan Welding & Tank Serv., Inc.*, 530 N.W.2d 872, 875 (Minn. Ct. App. 1995). Therefore, since Minnesota's "any damage" rule produces an earlier accrual date than CERCLA's discovery rule,

the Minnesota rule is preempted, and any potential future personal-injury claim by a class member would not accrue until the date of discovery of the injury.

Thompson v. American Tobacco Co., Inc., 189 F.R.D. 544 (D. Minn. 1999), is also not on point. That case dealt with potential *res judicata* effects of a certified medical monitoring claim, on non-class certified personal injury claims. The plaintiffs in *Thompson* proposed that class members with accrued personal injury claims be included in the medical monitoring class, and also be allowed to litigate their accrued personal injury claims in separate lawsuits. The court denied certification of a proposed medical monitoring class of smokers, which "include[d] current smokers who suffer from smoking-related illnesses" and "former smokers who suffer from smoking-related illnesses," *id.* at 548, finding that it would be improper to split off those accrued personal injury claims from the medical monitoring claims proposed for class treatment. In sharp contrast, here Plaintiffs do not know of any Class Member who has been diagnosed with a personal injury attributed to TCE exposure, and it is undisputed that no personal injury lawsuit has been filed by any class member against General Mills.

Moreover, here the district court excluded persons—not claims—from the class, ensuring that persons with accrued personal injury claims will not split their claims. In its Certification Order, the district court defined the class to include only those individuals without present, known physical injuries, and noted that several

other protective measures can and might in the future be taken to avoid claim-splitting issues. Add24, at n.6.

None of the named Plaintiffs have been diagnosed with any disease or illness attributed to TCE exposure. It is thus disingenuous for General Mills to assert that Plaintiffs have "split-off their personal injury claims," where no such claims presently exist, and hopefully they never will. Accordingly, the named Plaintiffs are adequate representatives under Rule 23(a)(4). There is absolutely no reason, therefore, to reverse the district court.

II. The District Court Correctly Found Common Issues Predominate.

The district court did not abuse its discretion finding common issues predominate. Fed. R. Civ. P. 23(b)(3). General Mills claims that the district court did not examine General Mills' defenses and improperly carved out liability issues for determination after the initial classwide proceeding. Both of these criticisms are incorrect.

The district court in fact did consider the defense arguments that General Mills raised, Add30, but found that the central common issue in the case concerning General Mills' liability, which could be established "through common proof," predominated. The court stated:

> Defendant's liability here is based on its actions relating to its release of certain chemicals at a single source, into a geographically limited area, in the Como neighborhood in Minneapolis, and in the form of a single plume. The GMI site is

> alleged to be at least the substantially dominant source of contamination in the area. The questions to be certified focus on whether Defendant caused contamination of the area surrounding a single dump site, whether its actions violated the law, and thus whether defendant is liable for contamination.

Add30-31 (citations omitted). In reaching this conclusion, the district court referenced and relied upon the common evidence of General Mills' liability proffered by Plaintiffs. Add3, 4, 19, 25, 31, 33. These factual findings are entitled to significant deference on appeal, and the district court's conclusion that predominance is met accords with numerous other courts, which have granted certification in environmental cases to determine liability on a classwide basis.

General Mills argues that the district court failed to analyze the claims in the case "as a whole," seizing out of context on the district court's language in the Certification Order concerning "those questions for which certification is sought" and "the narrow issues certified." Br. at 32. But the district court made abundantly clear that "all issues of liability would be addressed in the primary trial, and only potentially individualized damages issues would be determined in the second phase of the case." Add33; *see also id.* at Add33 ("[T]he existence of certain individualized issues, particularly with respect to damages, does not necessarily preclude certification."). The Certification Order is clear that damages are the only case issue to be addressed after the classwide trial on liability and injunctive relief issues.

General Mills also claims that the district court's predominance finding was error, in view of its "other sources" defense. However, as noted, General Mills has admitted that it has contaminated the entire Class Area, does not offer any expert testimony to rebut Plaintiffs' expert concerning General Mills' contamination being present throughout the Class Area, and has not sued any "other source" polluters. General Mills also ignores applicable case law and legal principles which justified the district court's rejection of its contrived "other sources" defense to class certification.

General Mills argues that only "single source" contamination cases are appropriate for class treatment. A cursory review of the applicable cases disproves this assertion. Class certification has in fact been granted in numerous environmental cases where the defendant, like General Mills here, has attempted to assert that other or multiple sources of contamination existed.

To begin with, *Mejdrech* was not a "single source" case, as General Mills incorrectly claims. In *Mejdrech*, the defendants, just like General Mills has here, attempted to finger other entities as causing contamination in the Class Area, and even filed third-party claims against such alleged "other sources." *See* Doc. 136-19 (Third-Party Complaint). The defendants in *LeClercq* case made this same argument. *See Ludwig*, 2003 WL 22478842, at *5 (rejecting defendants' other sources certification argument, finding that the defendants in *LeClercq* and *Mejdrech* filed multiple third

party complaints against other companies). And in *Bentley*, the court squarely rejected the same multiple source argument General Mills makes here:

> Defendants further argue that to the extent there is TCE and/or PCE in Urbana's soil and groundwater, it came from multiple sources, although they concede that they are two of those sources. Honeywell avers, for example, that it released primarily PCE. Its expert concluded that the Bowshiers' property, in contrast, is contaminated primarily with chemicals other than PCE. Honeywell argues, therefore, that it cannot be liable for the Bowshiers' property contamination. Likewise, Siemens claims that the 'area of contamination' illustrated by Plaintiffs' map is exaggerated in scope and extent and fails to account for other sources of contamination. *** Those arguments go to the merits of Plaintiffs' claims and may be presented in a motion to dismiss or on a motion for summary judgment, but not in a motion for class certification.

223 F.R.D. at 479; *see e.g., Olden*, 383 F.3d at 508. *Leib*, 2008 WL 5377792 at *8; *Muniz*, 2005 WL 1243428 at *2 (certifying class where contamination resulted from multiple operations by several companies within an industrial park). *Greene*, No. 09-0510, Order at PA.552.

In light of this authority, where numerous courts have expressly held the presence of possible other or even actual existing multiple sources does not preclude certification, General Mills' reliance on *Parko v. Shell Oil Co.* is misplaced. 739 F.3d 1083 (7th Cir. 2014). *Parko* does not limit *Mejdrech*, as General Mills incorrectly asserts. Indeed, the Seventh Circuit actually reaffirmed that *Mejdrech* was properly decided and remains good law. *Id.* at 1087 ("[I]n so ruling we unsay nothing that we said in *Mejdrech*"). In *Parko*, the contamination was confined to a groundwater zone beneath

the proposed class area, and the plaintiffs presented no evidence that the homeowners in the area were exposed in any way to this groundwater, whether by drinking it, breathing it or otherwise. Class certification was reversed because the district court had failed to conduct a rigorous analysis concerning classwide exposure and damages. *Id.* at 1087. *Parko* thus did not hold only "single source" environmental cases can be certified. To the contrary, *Parko* was remanded for further class certification proceedings, even though there were multiple defendants and assertions that other sources had also contributed to the subject groundwater contamination. *Id.* (ordering remand "with directions that the judge revisit the issue of certification").

Unlike *Parko*, where there was no proof any class member had been or could be exposed to or threatened in any way by contamination, Plaintiffs and the Class here all are directly exposed to or threatened by vapor contamination, which has necessitated the installation of mitigation systems throughout the Class Area as an interim remedy until the vapor contamination is remediated. Additionally, the *Parko* trial court's certification included damages issues, and was reversed because the trial court "should have investigated the realism of Plaintiffs' injury and damages model." 739 F.3d at 1086. Here, Plaintiffs did not seek or obtain certification on damages issues, but rather sought and obtained certification solely on the liability issues endorsed for class treatment in *Mejdrech* and the majority of other cases in this area.

For certification purposes, General Mills' "other sources" defense is irrelevant because General Mills is subject to joint-and-several liability to the Class as a whole, irrespective of whether other parties may have also contributed to the environmental contamination in the Class Area. General Mills concedes this, admitting that under "CERCLA's joint and several liability regime" it is "liable for cleanup regardless of the existence of other sources." Br. at 13. The same is true with respect to Plaintiffs' common law claims. Minnesota common law has long held that "tortfeasors whose concurrent negligence produces a single, indivisible injury are jointly and severally liable to the person harmed." *Staab v. Diocese of St. Cloud*, 813 N.W.2d 68, 74 (Minn. 2012) (citing *Flaherty v. N. Pac. Ry. Co.*, 40 N.W. 160, 160-61 (Minn. 1888)). Concurrent negligence occurs when "the acts or omissions of two or more persons combine to bring about a harmful result," *State v. Hofer*, 614 N.W.2d 734, 737 (Minn. App. 2000), but joint-and-several liability applies whether the tortfeasors act separately or in conjunction. *See Gronquist v. Olson*, 64 N.W.2d 159, 165 (Minn. 1954).

III. Rule 23(b)(2) Certification Was Proper.

A. The Court does not have jurisdiction to review the district court's decision that CERCLA § 113 does not bar injunctive relief claims.

General Mills contends that Rule 23(b)(2) certification was improper because CERCLA § 113(h) divested the district court of jurisdiction to issue injunctive relief. General Mills is wrong.

As an initial matter, this issue is not properly before this Court. The district rejected General Mills' CERCLA § 113(h) argument in the order, issued 6 months before its certification decision, denying General Mills' motion to dismiss. Add36, September 4, 2014. The only avenue for interlocutory review of this motion to dismiss ruling was under 28 U.S.C. § 1292(b), providing permissive review, which General Mills never sought nor obtained. This Court therefore lacks jurisdiction to review General Mills' CERCLA § 113(h) argument. *See, e.g. Johnson v. West Publishing Corp.,* 504 Fed. App'x. 531, 535 (8th Cir. 2013)(permitting interlocutory review of Rule 23 class certification ruling and Rule 12 ruling at same time where petitions under both Rule 23(f) and 28 U.S.C. § 1292(b) were brought and granted); *see generally Mims v. Stewart Title Guar. Co.,* 590 F.3d 298, 306 (5th Cir. 2009) (stating "[g]iven our limited jurisdiction in this Rule 23(f) appeal, we have no authority to review the district court's conclusion [in its motion to dismiss order] that the plaintiffs have stated a claim for these alleged overcharges").

In addition, General Mills waived CERCLA § 113(h) as a class certification issue by not raising it in any way during the certification proceedings below. General Mills did not cite to or present any argument about CERCLA § 113(h) in its certification response brief. A187.

Finally, the statute conclusively refutes General Mills' criticism of the district court's ruling. CERCLA § 113(h) provides as follows:

(h)Timing of review

> No Federal Court shall have jurisdiction under Federal law…to review any challenges to **removal or remedial action selected under Section 9604 of this title***;* or to review any **order issued under Section 9606(a) of this title**…

42 U.S.C. § 9613(h) (emphasis added). Thus, only those remedial determinations specifically made under CERCLA § 9604 or § 9606 are exempted from federal court review.

Adhering to this language, the district court correctly found that CERCLA § 113(h) does not apply here. The key document the district court focused on in its motion to dismiss order – the 1995 "Enforcement Deferral Pilot Project" agreement ("Deferral Project"), A141-145 –confirmed that MPCA's involvement at the General Mills site is exclusively under state law, not CERCLA. This means that with regard to the General Mills' site, USEPA has not acted and is not acting under either CERCLA §§ 9604 or 9606. MPCA's involvement with that site is exclusively under state law. And, as the district court correctly noted, the 1984 Consent Order and the 2014 modification were not issued under the authority of CERCLA § 9604 or § 9606. Add47-50. To the contrary, these directives were issued by MPCA exclusively and expressly under the state MERLA statute. Neither the 1984 Consent Order nor the 2014 modification even mention the federal CERCLA statute, let alone § 9604 or § 9606.

The 1994 Superfund Memorandum of Agreement ("SMOA") also fails to support General Mills' claim that MCPA's oversight of the General Mills' site became subject to the federal CERCLA statute, and hence within the scope of CERCLA § 113(h). As the district court correctly found, in the subsequent 1995 Deferral Project, USEPA and MCPA agreed that the General Mills site would be one of a small number of Minnesota sites handled outside the federal CERCLA process, with MCPA acting as the lead agency utilizing its oversight and enforcement powers exclusively under Minnesota state law. Add38, 46-50. The district court also correctly noted that Deferral Project remains in place today, and hence, as the Deferral Project agreement states, the General Mills site is not subject to CERCLA authorities. Add49.

Moreover, General Mills' brief fails to address the Deferral Project and its express language that the MPCA is not acting under CERCLA with respect to the General Mills site. It also fails to confront the fact that the 1995 Deferral Project post-dates the 1994 SMOA it relies upon, and clearly withdraws any CERCLA authority over this site that MPCA might have obtained via the SMOA. And General Mills offers no explanation for the USEPA statements the district court noted and relied upon, including that presently contained on USEPA's website, that MPCA's actions are exclusively under state law, not CERCLA, and that USEPA "was not involved with the selection of the remedy at this state-enforcement-lead site." Add48. As the district court properly found, CERCLA § 113(h) does not bar Plaintiffs'

injunctive relief claims, nor does it create a basis for reversal of the Rule 23(b)(2) certification granted in this action.

B. Hybrid certification was proper.

The prohibition against Rule 23(b)(2) certification on damages issues does not apply in cases where "hybrid" certification is granted under both Rule 23(b)(2) and (b)(3), so long as damages are addressed under Rule 23(b)(3). General Mills' reliance on *Dukes* on this point is misplaced, as certification in that case was granted exclusively under Rule 23(b)(2).

The district court's Certification Order is in line with the rulings of numerous other courts in similar environmental cases which granted certification under both Rule 23(b)(2) and (b)(3). *See, e.g., Mejdrech,* 319 F.3d at 911, *affirming Mejdreck*, 2002 WL 1838141, at *6-7; *see also Olden*, 383 F.3d at 510-12; *Bentley*, 223 F.R.D. at 485-87; *Cannata*, No. 06-2196, Order, at PA.584. The Sixth Circuit in *Olden*, rejecting the defendant's argument that Rule 23(b)(2) certification was improper because damages were also sought in that case, held that "we do not believe that the defendant's argument makes much sense, given that the district court has granted certification under both 23(b)(2) and 23(b)(3)." 383 F.3d at 510. The same is true here.

In addition, General Mills criticizes the district court's hybrid certification for denying class members their "due process right to opt out." Br. at 52. This appeal was taken before the district court had an opportunity to approve a class notice and

determine whether to allow class members to opt out. Because certification was granted under both Rules 23(b)(2) and (3), and because notice and the right to opt out are required under Rule 23(b)(3), Plaintiffs proposed a notice which provided an opt-out right to all members of the class. Docs. 174, 176. Before the district court, General Mills' opposed the approval of a class notice which provided any opt out right. Doc. 175. As the class notice and opt out issue have not yet been resolved by the district court, reversal is plainly unwarranted.

C. Bifurcation of liability and damages does not violate the Seventh Amendment.

The district court's decision to bifurcate liability and damages issues does not violate the Seventh Amendment. *Olden*, 383 F.3d 495, 509, n.6 (6th Cir. 2004) (stating "bifurcation will not raise any constitutional issues"). The hybrid certification does not run afoul of the Seventh Amendment requirement that when legal claims and equitable claims are tried together, the jury should issue its findings before the court issues any injunctive relief. Here, in the classwide liability and injunctive relief proceeding, the jury will issue its factual findings before the district court issues any classwide injunctive relief. In the subsequent damages proceedings, the same will be true: the jury will issue its damages findings before the court issues any class member specific injunctive relief, such as installation of a mitigation system. This bifurcated procedure, adopted by many other courts, does not violate the Seventh Amendment

and the district court's decision to utilize it here is well within its broad discretion under Rule 23 and in managing its cases.

The district court's decision accords with the many environmental class certification decisions that have similarly bifurcated. It also harmonizes with Eighth Circuit precedent. In *O'Dell v. Hercules Incorporated*, 904 F.2d 1194, 1201-02 (8th Cir. 1990), this Court affirmed the district court's bifurcation of an environmental case into separate liability and damages phases. In *Taylor v. Raggo, Inc.*, 680 F.2d 1223 (8th Cir. 1982), this Court affirmed a judgment in a wrongful death act case which was bifurcated and tried to two different juries, the first on the liability issue and the second on damages. As all liability issues will here be resolved in the classwide trial, the district court correctly found that "there would be no violation of Seventh Amendment principles with the current bifurcated structure." Add33.

General Mills premises its Seventh Amendment argument on *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995), where bifurcation of various sub-issues—not merely liability and damages, as was the case here—was held improper. *Rhone Poulenc* was authored by Judge Posner, eight years before he authored *Mejdrech*, which approved of bifurcated liability and damages proceedings in environmental class action cases. The Seventh Circuit was obviously well aware of *Rhone-Poulenc's* meaning, scope and application when it affirmed certification in *Mejdrech*, and did not perceive any Seventh Amendment concerns.

As the district court held, the certified classwide proceeding will resolve all liability issues, and leave only damages issues to be subsequently determined in a subsequent phase of the case. The jury or juries in these damages proceedings would not re-examine any jury findings from the classwide proceeding, but rather would be instructed that General Mills has been found liable for contaminating specified properties, and that the questions of whether the class members who own those properties have been damaged, and in what amount, are the only ones that remain to be determined. There is no Seventh Amendment violation here, any more than there is in any case where liability and damages issues are bifurcated.

IV. General Mills Has Waived Any Challenge to the District Court's *Daubert* Analysis.

Belatedly, General Mills challenges the district court's denial of Defendant's *Daubert* motions, not because the district court committed legal error by failing to follow this Court's precedent, but because this Court purportedly wrongly decided *Zurn*. Br. at 53. General Mills waived this argument because it failed to raise the issue in its Petition for Review under Rule 23(f), and did not subsequently submit a revised statement of issues. Apr. 10, 2015 Appeal Briefing Schedule Order (requiring Statement of Issues to be submitted by Apr. 26, 2015); *see International Bhd. of Elec. Workers,* 380 F.3d at 1096.

Despite General Mills' contention, the district court in fact conducted a full *Daubert* analysis, in complete conformity with this Court's precedents. Add5-15. The

court fully considered each of Plaintiffs' expert's qualifications, examined their methodologies, and determined that Defendant's challenge simply went to the credibility, not reliability or admissibility, of their testimony. Add11, Add14. This was not an abuse of discretion.

Further, General Mills is wrong to claim that *Zurn* (or the district court) allowed a more relaxed approach to the admissibility of expert testimony at class certification. In the very decision that General Mills cites for the proposition that other courts do not follow this Court's approach, Br. at 54, the Third Circuit noted with approval that at the certification stage, this Court in fact requires "a focused *Daubert* analysis" that "scrutinizes the reliability of expert testimony in light of the criteria for class certification and the current state of the evidence." *In re Blood Reagents Antitrust Litig.,* 783 F.3d 183, 187-88 (3d Cir. 2015) (citing *Zurn*, 644 F.3d at 614) (internal quotations omitted)). And, unlike the district courts in *Messner v. Northshore Univ. HealthSystem,* 669 F.3d 802, 812 (7th Cir.2012) and *Sher v. Raytheon Co.*, 419 F. App'x 887, 890-91 (11th Cir. 2011), the district court did not decline to rule on General Mills' motion.

Zurn does not need to be reconsidered. The district court properly ruled that Dr. Everett's and Dr. Ozonoff's testimony (in large part) was admissible, and did not abuse its discretion in relying upon this testimony.

CONCLUSION

This Court employs an abuse of discretion standard in evaluating district court class certification decisions. This case provides a paradigm for affirmance under this standard. The district court fully considered the record on General Mills' defenses in this environmental contamination case, certifying a class located in a discrete, fully defined area of Minneapolis, Minnesota, using geographical boundaries that General Mills had itself used. The court fully considered common proof, including General Mills' 30-year history of admissions that it had contaminated this area. It also examined the parties' voluminous expert submissions, which demonstrated that common proof could establish General Mills' liability. The district court made all reasonable factual determinations and its decision should be affirmed.

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CERTIFICATE OF COMPLIANCE AND VIRUS SCANNING

I hereby certify that Plaintiffs-Appellees' Brief conforms to the requirements of Fed. R. App. P. 28(b) and 32(a). It contains 13,415 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief uses a proportional space, 14-point Garamond font and was prepared using Microsoft Word 2010.

Pursuant to Local Rule 28A(h)(2), I certify that the Brief has been scanned for viruses and is virus-free.

Respecfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2015, I electronically filed Plaintiffs-Appellees' Brief with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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