IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

KARL EBERT and CAROL KRAUZE,
Individually and on behalf of
all persons similarly situated,

Plaintiffs,

-v-

Case No. 13-cv-3341 DFW/JJK

GENERAL MILLS, INC.,

Defendant.

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I. INTRODUCTION

Plaintiffs, Karl Ebert and Carol Krauze, own and live with their young children in a home in the Como neighborhood of Minneapolis, Minnesota located near a facility (the "Facility") that was formerly owned and operated by Defendant, General Mills, Inc. ("GMI"). After learning that their home and numerous other homes in the area have been impacted or threatened by toxic vapors released from the Facility, Plaintiffs asserted class action claims in this lawsuit, seeking abatement of the vapor contamination that plagues their homes, damages for diminished property values, and other appropriate property-related damages and relief. While the environmental problem at issue in this case most definitely threatens the health of the residents in this area, personal injury claims are not asserted in this case. Rather, Plaintiffs seek class treatment solely of their property damage and injunction/remediation claims, certification of which would not prevent any

person who believes he or she has suffered a bodily injury from filing his or her own, individual personal injury lawsuit against GMI.

Plaintiffs request that this case be certified as a class action. The law is well settled that class certification is warranted in environmental property damage and remediation cases like this one. Numerous federal courts -- both at the appellate and district court levels -- have authorized class certification in suits which involved substantially similar facts (residential areas polluted by adjacent industrial operations) and the same legal claims involved here.

As set forth further below, because all of the Rule 23 requirements are met here, Plaintiffs' motion for class certification should be granted.

II. NATURE OF THE CASE

The chemical at the heart of this case, trichloroethylene ("TCE"), is a toxic substance. The United States Environmental Protection Agency ("USEPA") has determined that TCE is "likely to be carcinogenic in humans by all routes of exposure." (See, Affidavit of Michael D. Hayes, separately filed as Doc. 16, at ¶ 11) The Minnesota Department of Public Health ("MPH") has concluded that "the main health concerns from the lowest exposures to TCE are the risk of immune system effects such as changes contributing to autoimmune disease and increased risks of heart defects in the developing fetus if the mother is exposed in the first trimester. At higher levels, TCE may increase the risk of harm to the central nervous system, kidney, liver, and male reproductive systems." (Id. at ¶ 12) MDP has also concluded that "TCE is a carcinogen" linked to kidney cancer, non-Hodgkin's lymphoma, and liver cancer. (Id.)

The MPCA has notified Plaintiffs and their neighbors in the Como neighborhood that exposure to TCE vapors implicates serious health concerns. "Groups considered to be more sensitive to potential health effects from breathing TCE vapor include unborn children, infants, children, and people with impaired immune systems. Because of the risk of heart defects occurring in developing fetuses, the MDH is concerned about TCE exposures in women who are pregnant or who may become pregnant." (See, Hayes Affidavit, Doc. 16, at ¶ 13)

According to documents GMI has submitted to the MPCA, GMI owned and operated a research facility at 2010 East Hennepin Avenue in Minneapolis from 1930 - 1977. (See, Hayes Affidavit, Doc. 16, at ¶ 5) From 1947 until at least 1962, GMI disposed of 1,000 gallons or more of waste solvents per year by burying them in perforated drums at the Facility. (Id. at ¶ 6) The disposal was mainly of a cleaning solvent known as but included other types of solvent chemicals. (Id.) GMI estimates that by 1981 nearlyµ all of the solvents it buried in the ground had migrated through the soils and into the groundwater beneath the Facility. (Id. at ¶ 7)

The TCE contamination GMI caused at its Facility has migrated through the groundwater and contaminated the groundwater which underlies adjacent residential areas. (Hayes Affidavit, Doc. 16, at ¶ 7) Groundwater is shallow (less than 20 feet below ground surface, which is less than 5 feet below most basements) in the Como neighborhood, therefore area homes are threatened by "vapor intrusion," the off-gassing of chemical vapors from the TCE contaminated groundwater. (Id.) Several years ago, GMI began looking at the vapor intrusion threats its Facility was posing to neighboring

properties, but did not perform any vapor testing underneath area homes until late 2013. (Id. at ¶ 8) GMI's prior sampling had indicated the presence of an extensive "vapor cloud" in the nearby residential area. (Id.) GMI originally proposed to MPCA to offer mitigation systems to all homes on blocks where soil gas concentrations were detected, but reconsidered and has recently decided to collect samples in the sub-slab areas under homes and offer mitigation only to homes where a sub-slab test result indicated TCE gas in excess of 20 µg/m3. (Id.) GMI has admitted that up to 200 homes may require mitigation systems. (Id. at ¶ 9)

GMI's recent sub-slab sampling under homes in the proposed Class Area has detected TCE vapors at locations throughout the Class Area, including levels as high as 15,000 µg/m3. (Id. at ¶ 10) The state action level for sub-slab TCE gas is currently 20 µg/m3. (Id.)

Plaintiffs' Complaint (Doc. 1) asserts five legal claims on a class basis. Plaintiffs allege a claim under the federal Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), as well as common law negligence, private nuisance, trespass, and willful and wanton misconduct claims. Plaintiffs seek injunctive relief, in the form of an order restraining and enjoining GMI from allowing continued contamination of the Class Area, and compelling GMI to abate the contamination it has caused at the Facility and in the Class Area. Plaintiffs also seek damages for lost property values, other compensatory damages, and reimbursement under CERCLA for the costs they have to date and will in the future incur related to the vapor intrusion contamination on their properties. As discussed further below, classes have been

certified in numerous federal cases that involved the identical legal claims and same types of relief involved here.

III. ARGUMENT

Environmental class actions of this sort, involving property damage and remediation claims, have been certified by numerous federal district courts from across the nation. See, Greene v. Will, Case No. 09-CV-510, N.D. Indiana (opinion dated Jan. 29, 2013, attached hereto as Exhibit A); McHugh v. Madison-Kipp Corp., Case No. 11-CV-724, W.D. Wisconsin (opinion dated April 16, 2012, attached hereto as Exhibit B); Stoll v. Kraft Foods Global, Inc., 2010 WL 3613828 (S.D. Ind. Sept. 6, 2010); Cannata v. Forest Preserve District of DuPage County, Case No. 06 C 2196, N.D. Illinois (opinion dated October 11, 2006, attached hereto as Exhibit C); Muniz v. Rexnord Corp., 2005 WL 1243428 (N.D. Ill. Feb. 10, 2005); Bentley v. Honeywell International, Inc., 223 F.R.D. 471 (S.D. Ohio 2004); Ludwig v. Pilkington North America, Inc., 2003 WL 22478842 (N.D. Ill. Nov. 4, 2003); Mejdrech v. Lockformer Co., 2002 WL 1838141 (N.D. Ill. Aug. 12, 2002); LeClercq v. Lockformer Co., 2001 WL 199840 (N.D. Ill. Feb. 28, 2001); 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). Several federal appellate courts, as well, have affirmed certification rulings in these types of cases. See, Olden v. Lafarge Corp., 383 F.3d 495 (6th Cir. 2004); Mejdrech v. Met-Coil Systems Corp., 319 F.3d 910 (7th Cir. 2003); Sterling v. Velsicol Chemical Corp., 855 F.2d 1188 (6th Cir. 1988); see also, Gintas v. Bouchard Transportation Co., 596 F.3d 64 (1st Cir. 2010)(reversing denial of class certification in environmental property damage case). Based on this established

precedent in favor of certifying classes of property owners impacted by environmental contamination, Plaintiffs request the entry of an order certifying the claims in this case for class treatment.

In Mejdrech, supra, after the district court granted class certification, the Seventh Circuit conducted an interlocutory review (under Federal Rule 23(f)) of the trial court's certification ruling "in order to determine the appropriateness of class action treatment in pollution cases." 319 F.3d at 910. In affirming the grant of class certification, the Seventh Circuit specifically endorsed the use of the class device in environmental contamination cases to resolve two major issues on a class-wide basis: "whether there was unlawful contamination and what the geographical scope of the contamination was." Id. at 912. These same questions apply equally here to Plaintiffs and the other owners of the homes in the proposed Class Area. Indeed, in two of the above cited cases -- McHugh and Stoll -- certification was granted to resolve these common questions in the context of vapor intrusion contamination in residential areas substantially similar to the vapor intrusion contamination alleged in this case.

(a) Rule 23 Requirements - Overview

As this court has held, "[a] class action serves to conserve the resources of the court and the parties by permitting an issue that may affect every class member to be litigated in an economical fashion." Karsjens v. Jesson, 283 F.R.D. 514, 517 (D. Minn. 2012), citing General Telephone Co. of Southwest v. Falcon, 457 U.S.147, 155 (1982) "When a question arises as to whether certification is appropriate, the court should give the benefit of the doubt to approving the class." Karsjens, supra, at 517.

To prevail on the current motion for class certification, Plaintiffs must satisfy the four requirements of Rule 23(a) and at least one subsection of Rule 23(b). As discussed below, as all of these Rule 23 prerequisites are clearly met in this case, Plaintiffs motion for class certification should be granted.

(b) Each of the Four Requirements of Rule 23(a) are Met

Rule 23(a) provides that an action may proceed as a class action when plaintiffs demonstrate that:

(1) the class is so numerous that joinder of all members is impracticable;
(2) there are questions of law or fact common to the class;
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
(4) the representative parties will fairly and adequately protect the interests of the class.

Each of these Rule 23(a) requirements is satisfied in this case.

(1) numerosity is satisfied

Rule 23(a)(1) requires that the class be so numerous that joinder of all members is impracticable. "In general, a putative class exceeding 40 members is sufficiently large to make joinder impracticable." Alberts v. Nash Finch Company, 245 F.R.D. 399, 409 (D. Minn. 2007)(certifying class of 74 persons); Lockwood Motors, Inc. v. General Motors Corp., 162 F.R.D. 569, 574 (D. Minn. 1995); Newberg on Class Actions at §3.5 (4th Ed. 2002) ("the difficulty inherent in joining as few as 40 class members should raise a presumption that joinder is impractical, and the plaintiff whose class is that large or larger should meet the test of Rule 23(a)(1) on that fact alone.")

Here, the Class Area consists of over 200 residential properties owned by well more than 100 persons and legal entities (see, Doc. 1 at ¶ 19),[1] an amount several times the presumptive numerosity threshold recognized by courts and commentators. The Class Area is ascertainable by geographic boundaries, and every owner of Class Area property can easily be identified and furnished the notices required under Rule 23, assuring that their due process rights are protected. The boundaries of the Class Area are based on objective criteria. It is undisputed that the TCE vapor contamination at issue here is off-gassing from a TCE-contaminated groundwater plume present beneath a large portion of the Como neighborhood. Based on currently available information, the MPCA has identified the approximate geographical boundaries of this groundwater TCE plume, and that MPCA-defined area is the area that Plaintiffs have designated as the proposed Class Area. (See, Doc.1-1, Class Area map attached as exhibit to Plaintiffs' Complaint) Moreover, Plaintiffs' environmental expert -- a nationally recognized expert on vapor intrusion issues -- has reviewed the existing sampling data and has concluded that all homes in the proposed Class Area are impacted or threatened with TCE vapor intrusion. (See Affidavit of Dr. Lorne G. Everett, separately filed as Doc. 17, at ¶ 3) Under substantially identically circumstances, the court in the Stoll case, supra, found that the proposed class area was ascertainable and reasonably defined where it was coextensive with an area of possible contamination recognized by an environmental agency and where plaintiffs' expert had proffered an opinion that the entirety of the proposed class

[1] Plaintiffs are informed that there are several persons and legal entities that own multiple properties in the Class Area (primarily for rental to college students and others), which is why the number of Class member owners is somewhat less than the number of Class Area properties.

area was impacted or threatened by contamination caused by the defendant. Stoll, supra, 2010 WL 3613828 at **2-4.

(2) commonality is satisfied

The Rule 23(a)(2) commonality element requires that there be "common contentions" of fact or law that are capable of "classwide resolution." Karsjens, supra, 283 F.R.D at 518 (citing Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct 2541, 2550-51) Here, Plaintiffs have alleged and are prepared to prove that GMI engaged in a waste disposal practice that has contaminated the Class Area, that remediation is necessary throughout the Class Area, and that owners of Class Area properties have been damaged by GMI's contamination. These are clearly "common contentions" that can be determined on a classwide basis through common proof.

In Mejdrech and the many other above cited environmental cases, the commonality element was deemed established based upon the plaintiffs' allegations that the defendant engaged in standardized conduct which caused contamination in the proposed class areas. The result should be no different here. GMI engaged in waste disposal activities that caused toxic substances to move off-site of the Facility and into the proposed Class Area. The commonality element is thus met here.

(3) typicality is satisfied

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." As the Eighth Circuit has held, the typicality requirement "is generally considered to be satisfied if the claims or defenses of the representatives 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, 688 F. 2d 552, 561-62 (8th Cir. 1982).

Here, Plaintiffs advance the same legal claims on behalf of the proposed Class that they advance for themselves. And, the claims asserted here are premised upon certain core questions of law and fact common to all owners and residents in the proposed Class Area, such as: whether there have been releases of hazardous substances and wastes, including TCE, at and from the Facility; whether such releases have migrated in vapor form into and contaminated and/or threatened properties within the Class Area; whether GMI is legally responsible for the vapor contamination in the Class Area; whether Plaintiffs and the Class have been damaged by the vapor contamination caused by the Facility; and whether GMI should be ordered to abate the vapor contamination present in the Class Area. (See, Complaint, Doc. 1, at ¶ 20.)[2]

Because Plaintiffs' liability and injunctive relief claims, as well as those of the proposed Class, arise from the same events, practices, and course of conduct; are based on the same legal theories; and require the resolution of common questions of law and fact, the Rule 23(a)(3) element of typicality is satisfied.

[2] Plaintiffs are seeking class-wide relief under CERCLA (for recovery of environmental response costs) and Minnesota common law (for injunctive relief and property related damages). Plaintiffs are not seeking to recover any damages in this case related to personal injuries. Accordingly, the class-wide pursuit of injunctive and monetary relief for damage to property in this case does not preclude any class members from separately bringing individual, personal injury suits. See, Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 880-82 (1984); Bentley v. Honeywell Int'l Inc., 223 F.R.D. 471, 483 (S.D. Ohio 2004); Sullivan v. Chase Investment Services of Boston, Inc., 79 F.R.D. 246, 265 (N.D. Cal 1978). See, also, Newberg on Class Actions at §16.22 (4th Ed. 2002).

(4) adequacy of representation is satisfied

Rule 23(a)(4) mandates that "the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). The adequacy requirement is satisfied where the named representative: (1) has retained competent counsel; (2) has a sufficient interest in the outcome of the case to ensure vigorous advocacy; and (3) has interests that are sufficiently similar to those of the class such that it is unlikely that their goals and interests will diverge. Karsjens, supra, 283 F.R.D. at 519.

As to the first prong of the adequacy requirement, Plaintiffs have retained counsel experienced in environmental class action lawsuits and in environmental law generally. Plaintiffs' counsel has acted diligently in seeking relief for the proposed class and will continue to do so. Moreover, Plaintiffs are represented by the attorneys who obtained favorable class certification rulings in McHugh, Stoll, Cannata, Mejdrech, LeClercq, and Bentley, supra, and the appellate court affirmance in the Seventh Circuit in Mejdrech, supra, all of which are cases which ultimately resulted in multi-million dollar class recoveries. Further, Plaintiffs' counsel have specific experience litigating class action cases involving vapor intrusion issues, most recently the McHugh and Stoll cases. (See, Hayes Affidavit, Doc. 16, at ¶ 14)

Plaintiffs' interests are the same as those of the other proposed Class members. Because their home is located near the Facility, in the same area where other residential properties are either contaminated or threatened with harmful contaminants from the Facility, they have a strong incentive to vigorously prosecute these claims against GMI and make their home and the entire Class Area safe. Plaintiffs have no personal interests

which are antagonistic to or diverge from the interests of the proposed Class. Thus, the second and third prongs of the adequacy of representation requirement are plainly met here as well.

(c) The Requirements of Each Provision of Rule 23(b) are Met

Rule 23 requires that Plaintiffs seeking class certification satisfy at least one of the three provisions -- (b)(1), (b)(2) or (b)(3) -- of Rule 23(b). Here, Plaintiffs are entitled to certification under any and all of these three Rule 23(b) provisions.

(1) certification is warranted under Rule 23(b)(1)

A class action may be maintained under Rule 23(b)(1) if "[t]he prosecution of separate actions by or against individual members of the class would create inconsistent or varying adjudications . . . which would establish incompatible standards of conduct for the party opposing the class." Fed.R.Civ.P. 23(b)(1). The courts in the Mejdrech, Stoll, Cannata and Ludwig cases, under factual and legal circumstances analogous to those present here, each certified classes under Rule 23(b)(1) based on a concern that scores of separate cases could lead to varying adjudications. This is especially so here where a significant focus of this case is on obtaining injunctive relief -- investigation and abatement of contamination present throughout the Class Area -- which needs to be decided and implemented on a uniform basis.

(2) certification is warranted under Rule 23(b)(2)

Certification under Rule 23(b)(2) is appropriate where the defendant has acted "on grounds generally applicable to the class, thereby making appropriate injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed.R.Civ.P.

23(b)(2). This requirement is met in this case. As a result of GMI's misconduct, Class members own properties that are either contaminated or threatened with contamination emanating from the Facility. Injunctive relief is a significant goal of this case. Under similar circumstances, the courts in the Mejdrech, Stoll, Cannata, and Bentley cases found that Rule 23(b)(2) certification was appropriate, notwithstanding that damages were also sought. The same result is warranted again here.

(3) certification is warranted under Rule 23(b)(3)

Rule 23(b)(3) requires (1) that common questions of law or fact predominate; and (2) that proceeding as a class action is the superior form of adjudication. All of the above cited environmental class certification decisions -- Mejdrech, McHugh, Stoll, Cannata, LeClercq, Ludwig, Muniz, and Bentley -- like this case, involved claims for injunctive relief and property damage recovery arising from the release of hazardous substances into the environment and, in all of these cases, Rule 23(b)(3) classes were certified. Moreover, the certification ruling in Mejdrech was reviewed under Rule 23(f) -- and affirmed without modification -- by the Seventh Circuit. The Seventh Circuit's opinion (affirming certification) did not merely hold that certification was a reasonable or a fair exercise of the district judge's discretion under Rule 23; rather, the Seventh Circuit proclaimed the trial court's certification finding was "indeed right." 319 F.3d at 911.

In Sterling, supra, the district court had certified a class of property owners and residents of an area that had been contaminated by the defendant corporation's landfill. In affirming certification, the Sixth Circuit held that "where the defendant's liability can be determined on a class-wide basis because the cause of the disaster is a single course of

conduct which is identical for each of the plaintiffs, a class action may be the best suited vehicle to resolve such a controversy." 855 F.2d at 1197. The Sixth Circuit acknowledged that even though the nature and amount of damages sustained by the class members may vary, common issues still predominate, and a class action is the best suited vehicle to resolve the case. Id. See, also, Bentley, supra, 223 F.R.D. at 486-488. As GMI's alleged waste disposal practices are "a single course of conduct which is identical" for each member of the Class, certification is warranted here.

Permitting this case to proceed as a class action is not just permissible under the Rule 23 requirements discussed *supra*; rather, as the overwhelming majority of courts which have considered this issue have held, certification under these circumstances is a superior method of adjudicating Plaintiffs' claims and those of the proposed Class. Requiring duplicative discovery and multiple trials -- here, scores of them if individual suits would be required -- over essentially the same issues (i.e., whether GMI caused vapor contamination of the proposed Class Area, and what the geographical boundaries are of the contamination) would be wasteful and unfair to the families impacted here and to GMI. See, Ludwig, supra at *7 (noting the inefficiency to both parties by insisting on multiple trials involving the same evidence).

The common issues proposed for class treatment here can be resolved through common proof, much of it from expert testimony. Class treatment would not present any manageability or other problems. By contrast, requiring each home owner to proceed with their claims individually would be inefficient, wasteful, and unfair to the families impacted. As the court noted in in certifying a class in the Bentley case:

> Cases like this one, which require sophisticated scientific inquiries and expensive experts to opine about them, cost thousands and sometimes millions of dollars to litigate. As Plaintiffs suggest, 'few, if any, residents would have damages sufficient to justify such expense, even if they could afford it.'

223 F.R.D. at 488. The same is true here. Further, resolving the claims for Class Area-related injunctive relief in a single class case makes more sense than doing so in more than 100 individual suits, and would avoid the problem of inconsistent and perhaps conflicting results.

IV. CONCLUSION

Plaintiffs have satisfied all four elements of Rule 23(a) and at least one of the elements of 23(b), and as a result respectfully request that this Court enter an order certifying this case as a class action under Federal Rule 23(b)(1), (b)(2), and (b)(3).

Dated: December 10, 2013

Respectfully submitted,

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