IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

KARL EBERT, CAROL KRAUZE, and **JACKIE MILBRANDT,** individually and on behalf of all persons similarly situated,

Case No. 13-CV-3341 (DWF/JJK)

Plaintiffs,

-v-

GENERAL MILLS, INC.,

Defendant.

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION

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I. INTRODUCTION

GMI's opposition to class certification is premised on the claim that there are "other sources" of contamination in the proposed Class Area, and this case is thus inappropriate for class treatment because each homeowner will have to individually prove which polluter contaminated his or her property. Until this litigation, however, GMI had for decades assumed exclusive responsibility for this contamination, never once seeking to involve or implicate any other alleged polluter. Indeed, Plaintiffs' proposed Class Area is based upon a "plume" map GMI's own consultants drew to depict ***the area that GMI contaminated***, a map the MPCA to this day uses to delineate the area of contamination caused by GMI. Further, despite the opportunity to join additional alleged Class Area polluters as parties in this case, GMI has failed to follow through on its rhetoric and do so.[1] But most significant, GMI and its gaggle of experts do not contest the central proposition advanced by Plaintiffs and their expert here – that ***GMI has caused contamination throughout the entirety of the proposed Class Area***. GMI and its experts have conveniently ignored GMI's 30 years of admissions (detailed in the next section of this brief), including those GMI made to a different court to obtain insurance money for the very same contamination at issue here. In that case, GMI directly admitted 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."***

[1] *See*, Doc. 112, at ¶1(b), specifying that the deadline to add additional parties was June 26, 2014.

While Plaintiffs and their experts dispute that GMI can prove any other polluter has contributed to the Class Area contamination in any material way, even if GMI could establish this proposition, class certification would still be warranted. GMI completely disregards the body of well-established case law which holds certification is proper in these types of environmental cases even if there are multiple contributors to the class area contamination. Further, GMI is jointly and severally liable to the entire class even if other entities' contamination has commingled with GMI's contamination in the Class Area. Under joint and several liability principles, Plaintiffs and the Class need not apportion the relative contributions of GMI and others (if there were any) to the Class Area contamination; rather class-wide proof of the existence and extent of the contamination, and that GMI illegally caused it, is all that is required to hold GMI liable to the entire class. Certification to determine GMI's liability is thus appropriate, as many courts have held in very similar cases.

This case is indeed an ideal candidate for class treatment: several hundred properties have been contaminated by massive amounts of a highly toxic chemical dumped by General Mills, Inc. ("GMI") in a residential neighborhood. Determinations as to whether 1) GMI is liable to the owners of these properties, and 2) injunctive relief is warranted to compel comprehensive remediation can readily be made on a class-wide basis. Because these issues are so well suited to class-wide resolution, and common resolution of them is both cost effective and promotes judicial economy, the overwhelming majority of federal district and appellate courts to address similar issues in nearly identical environmental cases have endorsed class certification. *See*, *Olden v.*

LaFarge Corp., 383 F.3d 495 (6th Cir. 2004); *Mejdrech v. Met Coil Systems*, 2002 WL 1838141 (N.D. Ill. Aug. 12, 2002), *affirmed* 319 F.3d 910 (7th Cir. 2003); *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188 (6th Cir. 1988); *Smith v. Conoco Phillips Pipe Line Co.*, 2014 WL 1314942 (E.D. Mo. March 31, 2014); *Greene v. Will*, Case No. 09-CV-510, N.D. Ind. (opinion dated Jan. 29, 2013, Doc. 136-1);[2] *McHugh v. Madison-Kipp. Corp.*, Case No. 11-CV-724, W.D. Wis. (opinion dated April 16, 2012, Doc. 136-2); *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. Ill. (opinion dated Oct. 11, 2006, Doc. 136-3); *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); *LeClercq v. Lockformer Corp.*, 2001 WL 199840 (N.D. Ill. Feb. 28, 2001); *Cook v. Rockwell International 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 Corporation*, 141 F.R.D 58 (S.D. Ohio 1991). Two of these cases – *McHugh* and *Stoll* – involved vapor contamination, the exact type of contamination at issue here.

Beyond the weight of this legal authority, a compelling policy reason supports certification. As the court in *Bentley* noted, "[c]ases like this one, which require sophisticated scientific inquiries and expensive experts to opine about them, cost thousands and sometimes millions of dollars to litigate." (223 F.R.D. at 488) With class

[2] Unpublished case decisions and other exhibits referenced in this reply memorandum are attached to the Affidavit of Michael D. Hayes in Further Support of Plaintiffs' Motion for Class Certification, concurrently filed herein at Doc. 136.

certification, these complex, expensive inquiries can be resolved once in a single proceeding. Absent class certification, however, Como area property owners would not individually "have damages sufficient to justify such expense, even if they could afford it." (*Id.*)(*See also, Greene*, Doc. 136-1, at p. 7 (cost of individual suits of this type is "prohibitive")). Here, GMI has employed massive resources in its all-out effort to defeat class certification, including hiring six experts. Given GMI's size and litigation approach, few if any Como area property owners could afford to assert their legal rights individually against GMI if certification is denied. While GMI has issued a press release promising to "make this right for any impacted homeowner," its present efforts in this Court to blame others and require persons of modest means to individually sue GMI run directly counter to its public relations spin. Class certification is plainly warranted here.

II. FACTS RELEVANT TO CLASS CERTIFICATION

GMI's opposition memo presents a slanted and incomplete recitation of the "relevant background" (*See*, Doc. 117, at pp. 5-19), based largely on its experts' submissions. Besides the fact that virtually all of what GMI and its experts assert are disputed merits arguments, GMI fails to address the facts most relevant to class certification: GMI's common course of conduct caused the Class Area contamination, and GMI's repeated admissions that it did so.

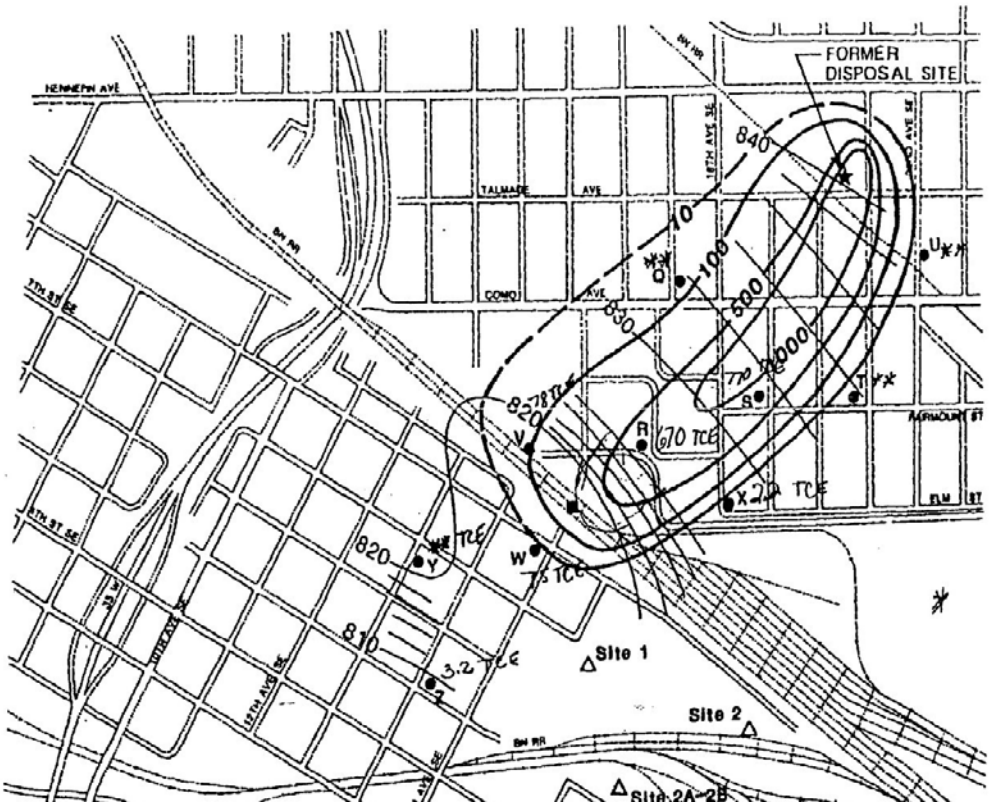
A. Since 1984, GMI Has Repeatedly Admitted Its Former Facility Is The Source Of TCE Contamination In The Class Area

Beginning in 1984, and even as recently as May of 2014, GMI has admitted – to government regulators, its own executives, its liability insurer, the public, and at least

two courts, including this one – 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 proposed Class Area has caused substantially all of that neighborhood's TCE contamination.

These are representative GMI admissions during that 30-year period:

- In 1984, GMI's environmental consultant, Barr Engineering, collected test data from 58 area groundwater wells, and then drew for regulators a depiction of the geographic boundaries of the contamination – called a "plume" – ***emanating from the GMI "former disposal site", and extending more than 3,000 feet off the GMI site to the southwest.*** This is the plume that Barr drew:



(Doc. 136-4) Barr's 1984 plume is virtually identical to the Class Area proposed by Plaintiffs. (*see* Doc. 87-1)

- October 1984: GMI executed a Consent Order with Minnesota's Pollution Control Agency (MPCA), which recites the 15,000 gallon disposal of "certain laboratory solvents" by GMI between 1947 and 1962, and includes a GMI-approved Remedial Action Plan 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 ..." (Doc. 136-5, Consent Order at p. 3; RAP at p. 1)(emphasis added).

- May 1985: in "intra-Company Correspondence," GMI executive Donald Thimsen advised GMI 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."(Doc. 136-6)(emphasis added)

The "mainly" residential area that Thimsen is describing is the proposed Class Area.

- June 1997: in litigation that GMI had initiated in a New Jersey State Court against its insurers (the "coverage litigation"), seeking money to address the GMI dumping and contamination at the former Facility, Barr's senior scientist, Allan Gebhard, provided the following sworn testimony concerning the "source of the contamination:"

  > "...the soil and groundwater contamination at the [GMI 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")..."*** (Doc. 136-7, at ¶ 5)(emphasis added)
  >
  > 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***." (*Id.* at ¶¶ 10-12)(emphasis added)
  >
  > "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." (*Id.* at ¶ 19) (emphasis added)

- June 1997: GMI moved for summary judgment in the coverage litigation, asserting in its memorandum that GMI's 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."*** (Doc. 136-8)(emphasis added)

- November 2013: Immediately after concern over possible TCE vapor intrusion into area homes was made public, GMI handed out a "Fact Sheet" to area residents, indicating, *inter alia*, that "***TCE is the primary chemical of concern associated with [GMI's] historic disposal.***" (Doc. 136-9, at p.1)(emphasis added) In early December, 2014, GMI issued a press release stating that the "cost of offered vapor mitigation systems would be fully paid for by General Mills" and that "[w]e want to make this right for any impacted homeowner." (Doc. 136-10)

- March 2014: GMI agreed to modify the 1984 Consent Order's Remedial Action Plan, and promised to address the threat of TCE vapor contamination in the proposed Class Area, based on the work outlined in Barr's February, 2014 "Final Sub-slab Sampling and Building Mitigation Work Plan," which was approved by the MPCA. Barr explained to MPCA 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 [GMI 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)***." (Doc. 136-11, at Section 1.1)(emphasis added)

The "mainly residential neighborhood south of the Site" is the proposed Class Area.

- May 2014: GMI argued before this Court its motion to dismiss Plaintiffs' Second Amended Complaint, making prominent reference (in both written and oral submission) to the GMI-agreed March 2014 modification to the Remedial Action Plan, asserting that the work promised in the Barr work plan

– ***which rested on the admission that GMI's historic dumping of TCE had caused TCE contamination in the proposed Class Area*** – rendered this Court powerless to hear Plaintiffs' RCRA claim. (Doc. 109, at p. 1)

B. Minnesota's Environmental And Health Agencies Have Concluded GMI Is The Source Of TCE Contamination In The Proposed Class Area

MPCA and MDH have likewise concluded that GMI's 15-year dumping of chemicals on its property caused the TCE contamination in the Class Area. For example:

- In 1984, MPCA required GMI to execute the Consent Order, described above. Since that time, MPCA has never required another entity to address in any manner TCE contamination in the proposed Class Area; nor has it publicly identified any other entity as a source of TCE contamination in the proposed Class Area.

- In November 2013, MPCA and MDH stated to area residents, without objection from GMI, that:

  "[GMI] Workers dumped volatile organic compound (VOC) solvents, ***primarily TCE***, in a soil absorption pit each year from 1947 until 1962." (Doc. 136-12, at p. 1)(emphasis added)

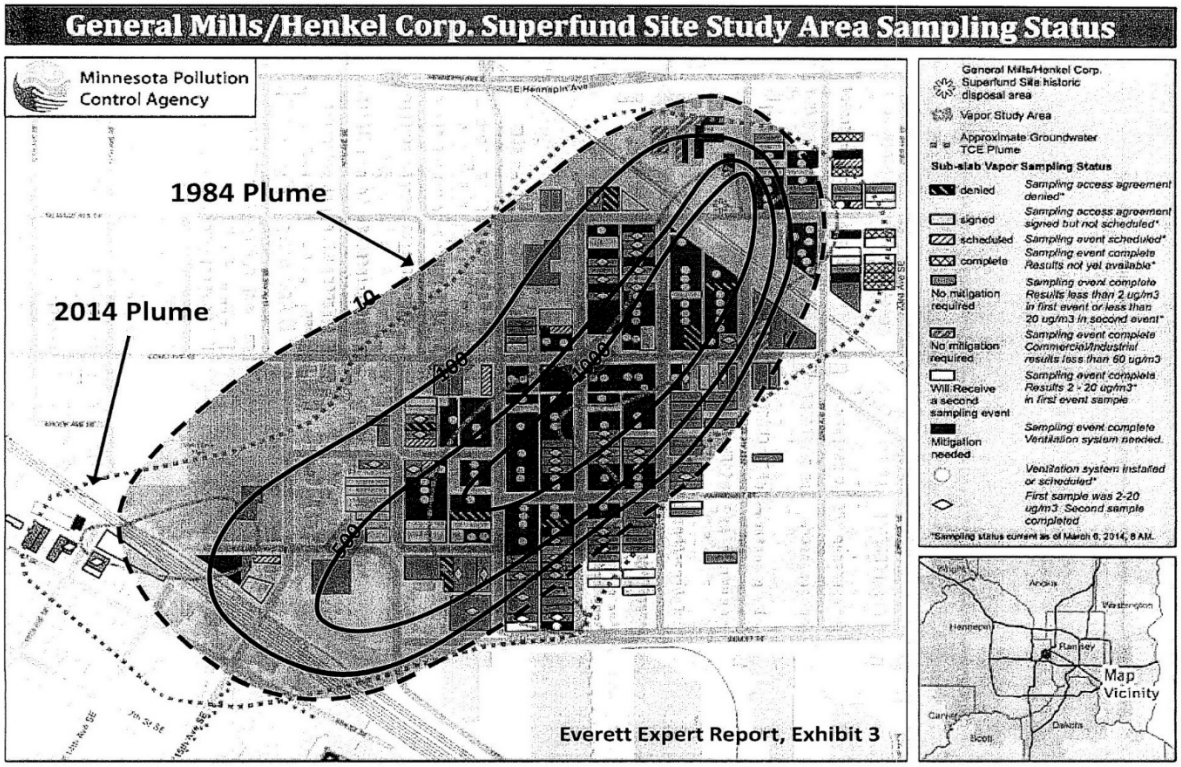
  "The source of the potential vapor intrusion [in the proposed Class Area]... is ***related to historic waste disposal activities*** at [the GMI site]." (Doc. 136-13)(emphasis added)

  "What we know: ***Main contaminant of concern: trichloroethylene (TCE) from on-site [GMI] disposal (1947-1962)***...The major VOC of concern at the General Mills site is trichloroethylene (TCE)." (Doc. 136-14) (emphasis added)

- In March 2014, MPCA and MDH publicly issued a "General Mills Soil Vapor Study Update," which stated, "***TCE disposal at the [GMI] site, from 1947 to 1962, created an area of groundwater contamination (known as a 'plume') that extends about one-half mile southwest***." (Doc. 136-15, at p. 1)(emphasis added)

The "area of groundwater contamination...that extends about one-half mile southwest" is the proposed Class Area.

- During 2013 and 2014, MPCA has regularly published on its website the "Approximate TCE Groundwater Plume" caused by GMI's dumping of chemicals on its property. That MPCA-drawn plume is nearly identical to the 1984 Barr-drawn plume, as shown below (*see* Doc. 136-16), with the Barr-drawn plume overlaying the MPCA-published plume:



The 2014 MPCA-drawn plume depicted above is identical to the Class Area proposed by Plaintiffs.

C. GMI's "Other Sources" Allegation Is Contradicted By GMI's Own Behavior And Failure To Provide Supporting Evidence

GMI's allegation that "other sources" have caused TCE contamination in the proposed Class Area contradicts the admissions and statements it has made over the last 30 years. None of those admissions can be reconciled with its new claim of "other

sources," and is belied by its actions, including but not limited to the fact that: 1) GMI ***has not sued*** any of these alleged "other sources," seeking either financial contribution to cleanup costs or responsible party designation for the contamination, and 2) GMI is ***the only polluter paying*** for the investigation of TCE contamination in the proposed Class Area. Indeed, just this past March, GMI agreed to modify its Consent Order with MPCA, committing itself to spend ***additional*** monies to investigate and attempt to remedy the TCE vapor contamination throughout the proposed Class Area. (Doc. 136-17) Moreover, nowhere does GMI dispute Plaintiffs' (and their expert's) central contention: GMI's historical dumping of toxic chemicals has caused TCE contamination ***"throughout the entirety of"*** the proposed Class Area. (Doc. 136-18, at p. 11)

GMI's "other sources" allegation furnishes none of the scientific detail that would accompany a credible allegation, including 1) how much TCE the "source" dumped into the environment (or where, or when, or how, or how deep); 2) how much of the proposed 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 proposed Class Area. While the latter is customarily depicted by the drawing of a "plume" of contamination, neither GMI nor any of its many litigation experts drew one depicting alleged other source contamination. Unwilling to venture such scientific precision, GMI instead resorts to vague speculation, such as that an area "auto body shop… ***may*** also have been a source," and that unidentified area businesses were "***probable users*** [not even probable dumpers] of solvents." (Doc. 117, at p. 13)(emphasis added)

GMI's failure to provide these basic scientific facts to support its "other sources" defense stands in striking contrast to those facts known – mostly through GMI's own admissions – about how GMI's dumping of toxic chemicals caused TCE contamination in the proposed Class Area, as shown by the following:

	"Other Sources" Alleged by GMI	**GMI's Hennepin Ave. Site**
What quantity of chemicals was released?	Not identified by GMI	Approximately 15,000 gallons (admitted by GMI)
Where did the releases occur?	Not identified by GMI	Into GMI's on-site pit, directly into the shallow groundwater
When did the releases occur?	Not identified by GMI	1947-1962 (admitted by GMI)
Has a "plume" been drawn to show the geographic extent of the contamination?	No	Yes (by GMI's environmental consultant and MPCA)
Has this entity acknowledged causing contamination in the proposed Class Area?	No	Yes (admitted by GMI, repeatedly, between 1984-2014)
Did MPCA identify this entity as causing contamination in the proposed 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 proposed Class Area?	No	Yes (since 1984)
Has this entity been sued by anyone for having caused contamination in the proposed Class Area?	No	Yes (by Plaintiffs)

D. Plaintiffs' Expert Has Opined That GMI Has Caused Groundwater And Vapor Contamination Throughout The Entire Class Area

Plaintiffs' expert, Dr. Lorne Everett, has submitted an expert report in which he opines, as follows:

> 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.

(Doc. 136-18, at p. 11) Dr. Everett concluded that the vapor intrusion risk is due to off-gassing of TCE and other chemicals from the contaminated groundwater. (*Id.* at p. 11) 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 impact; and that the chemical signatures on-site and in downgradient wells are consistent. (*Id.* at pp. 11-16) 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. (*Id.* at pp. 15-16) 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 GMI Facility. (*Id.* at pp. 19-22)

None of GMI's experts has opined that GMI is *not* the source of the TCE plume in the proposed Class Area. In their expert reports, Mercer and McHugh point to several sources they believe may be contributing to the groundwater contamination in the Como neighborhood—but as noted above they don't identify any portion of the Class Area that GMI itself did not contaminate. Dr. Everett reviewed these expert's reports and the data they rely upon, and has concluded that none of these potential sources is substantially contributing to the Class Area plume. (Doc. 134, at ¶¶ 1-23)

Dr. Everett has concluded that TCE is present in subslab vapor under homes throughout the entire proposed Class Area. (Doc. 136-18, at pp. 19, 26-28) 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. (*Id.* at pp. 23-26) Therefore, no scientifically sound principle supports GMI's argument that isolated non-detect or low TCE gas measurements show that homes sitting on top of the contaminated

plume are not impacted or threatened by the TCE released into the environment by GMI. (Doc. 134, at ¶ 24)[3]

III. PLAINTIFFS SEEK CLASS CERTIFICATION TO DETERMINE LIABILITY AND INJUNCTIVE RELIEF ISSUES ON A CLASS-WIDE BASIS

In its lengthy opposition brief, GMI largely ignores the mountain of environmental class action case law that supports class treatment on the liability and injunctive relief issues Plaintiffs here propose be determined on a class-wide basis. GMI further distorts what issues Plaintiffs have in fact proposed be certified, and how and when these issues in this case would be resolved. However, when the scope of certification Plaintiffs have requested is properly characterized, none of GMI's arguments withstand scrutiny.

Plaintiffs request that all case liability and injunctive relief issues be determined in a first, class-wide phase of the case, with individual damages determinations to follow in a second phase. This phased approach was certified not just in *Mejdrech*, but in the numerous other cases cited above from federal courts around the country, both well before and well after the Seventh Circuit decided *Mejdrech*. And most recently, a district court from within the Eighth Circuit, relying on *Mejdrech* and *LeClerq*, certified an environmental contamination case. *See Smith v. Conoco Phillips Pipe Line Co.*, 2014 WL 1314942 (E.D. Mo. March 31, 2014)

[3] Plaintiffs also disclosed the expert report of Dr. David Ozonoff, an expert on TCE exposure and health effects. (*see*, Doc. 121-1) GMI now concedes that "whether or not TCE can cause disease in humans . . . is not a disputed issue at class certification." (*See*, Doc. 120 at p. 15)

Under these directly on-point decisions, class certification is warranted to determine the defendant's liability to the Class and class-wide injunctive relief. *See, e.g.*, *Sterling*, 855 F.2d at 1197 (class certification proper to determine "defendant's liability"); *Greene*, Doc. 136-1, at p. 6 (granting certification on "the common issues of liability"); *McHugh*, Doc. 136-2, at pp. 2-3 (granting certification "for the limited purposes of determining defendant Madison-Kipp's liability for the alleged contamination, the geographical scope of contamination and classwide injunctive relief"); *Stoll v. Kraft Foods*, 2010 WL 3613828 at *6 (granting certification, ordering bifurcated proceedings "first adjudicating liability and then, if necessary, individual damages"); *Mejdrech*, 2002 WL 1838141 at *7 ("the Court finds class certification is the most efficient and manageable way to proceed in an action against Defendants for injunctive relief and determining liability"). 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 class-wide trial, but rather in "individual follow-on proceedings" (*Id.*)

After the geographical scope of GMI's contamination is determined in the class-wide trial, those class members who own property within the area of contamination move on to the next, individual stage of the case to seek to recover monetary damages. Conversely, if any class member owns property outside the area of contamination, the case ends as to that class member and GMI receives 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")).

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.*, *Greene*, Doc. 136-1, at p. 7; *Bentley*, 223 F.R.D. at 488) This bifurcated approach is also fair to GMI, 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, 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 the most efficient approach from the standpoint of the court system, as the certification proposed here would prevent courts and juries in potentially hundreds of individual cases from considering identical evidence and legal claims. The court in *Stoll*, a similar vapor intrusion case, found as follows on this issue:

> [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 ("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.”))

GMI suggests that hundreds of Como area homeowners “can pursue relief in court, either individually or banding together in groups to support the costs of experts.” (Doc. 117, at p. 10) This is unreasonable. The notion that hundreds of separate lawsuits involving identical evidence and legal claims would be preferable to a single class proceeding has been repeatedly rejected in the many environmental class certification decisions cited herein. GMI’s other suggestion, that there be one or more multi-plaintiff cases, is no better. GMI fails to explain how having one “individual” case with hundreds of name plaintiffs, or several “individual” cases with scores of named plaintiffs would be more efficient than a single class case. Further, GMI’s acknowledgement that numerous individual claims could be joined together in the same suits undercuts its (incorrect) position that the claims at issue here can only be determined on a property-by-property basis.

IV. GMI’S LEGAL ARGUMENTS AGAINST CLASS CERTIFICATION LACK MERIT

A. GMI’S “Other Sources” Arguments Lack Merit

GMI’s “other sources” defense, offered both as a challenge to the Rule 23(a)(3) typicality and Rule 23(b)(3) predominance elements (*See*, Doc. 117, at pp. 1, 5-7, 11-14, 20, 24-25, 32-37), is factually and legally insufficient. As noted, GMI has admitted that it has contaminated the entire Class Area, doesn’t offer any expert testimony to rebut Plaintiffs’ expert concerning GMI’s contamination being present throughout the Class

Area, and hasn't sued any "other source" polluters. GMI also ignores applicable case law and legal principles which require the rejection of GMI's contrived "other sources" defense to class certification.

Borrowing a tattered page from an old playbook, GMI 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 GMI here, has attempted to assert that other or multiple sources of contamination existed.

To begin with, *Mejdrech* was not a "single source" case, as GMI incorrectly claims. In *Mejdrech*, the defendants, just like GMI has here, attempted to point the finger at other entities for causing contamination in the class area, and even filed third-party claims against such alleged "other sources." (Doc. 136-19) Similarly, the defendants in *LeClercq* case did this as well. (*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)).

Numerous other courts have expressly held the presence of possible other or even multiple sources of contamination does not preclude certification in environmental cases. In *Bentley*, the court considered and squarely rejected the same multiple source argument made here by GMI:

> 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; *Greene,* Doc. 136-1, at p. 8; *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)).

GMI'S reliance on *Parko v. Shell Oil Co.*, 739 F.3d 1083 (7th Cir. 2014), is misplaced. *Parko* does not limit the Seventh Circuit's prior *Mejdrech* decision, as GMI incorrectly asserts. Indeed, the Seventh Circuit in *Parko* actually reaffirmed that *Mejdrech* was properly decided and remains good law. (*Id*. at 1087) ("in 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 or otherwise. Class certification was reversed because the district court had failed to conduct a rigorous analysis concerning class-wide exposure and damages. (*Id*. at 1087) *Parko* did not hold only "single source" environmental cases can be certified. To the contrary, it remanded the case 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").

Parko is inapposite. First, 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 proposed Class here all are directly exposed to or threatened by vapor contamination, which has necessitated the installation of mitigation systems throughout the proposed Class Area as an interim remedy until the vapor contamination is remediated. Second, 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, unlike *Parko*, Plaintiffs are not seeking certification of damages issues, but rather are seeking certification solely on the liability issues endorsed for class treatment in *Mejdrech* and the majority of other cases in this area.

For certification purposes, it is irrelevant whether GMI could prove its "other sources" defense. GMI 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. 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).

It is undisputed that GMI contaminated the groundwater in the Class Area. GMI has admitted this since 1984, and Plaintiffs' expert, Dr. Everett, has opined that GMI's disposal of toxic chemicals at the Facility has resulted in vapor contamination off-gassing from the groundwater plume throughout the Class Area. GMI has acknowledged that it is the source of vapor contamination in the Class Area by entering into the 2014 RAP Modification (Doc. 136-17) and installing mitigation systems throughout the Class Area. GMI's experts opine merely that there may be other, *additional* sources of this contamination. Even assuming that this disputed proposition is accurate, GMI would still be liable, under joint and several liability principles, for the contamination it caused, even if other polluters' releases have commingled with GMI's contamination in the Class Area.

B. Plaintiffs Are Adequate Representatives

GMI urges this Court to find that Plaintiffs have improperly "split" their claims and are not thus adequate Class Representatives because they have not asserted bodily injury and medical monitoring claims on their own behalf and on behalf of the proposed Class. (*See*, Doc. 117, at pp. 21-24) This argument is baseless.

Plaintiffs do not assert claims for bodily injury or disease for a basic reason – they are not presently sick and, hopefully, will never become sick. Plaintiffs thus have not "subjected putative class members' personal injury and medical monitoring claims to *res judicata*" (Doc. 117, at p. 21) by not asserting claims that have not accrued and can't,

in any event, be litigated on a class-wide basis. In *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 880 (1984), the Supreme Court held that class members are not precluded from asserting subsequent individual suits with claims that were not litigated in prior class proceedings. *See also, Cameron v. Tomes*, 990 F.2d 14, 17-18 (1st Cir. 1993); *Gunnells v. Healthplan Services, Inc.*, 348 F.3d 417, 432 (4th Cir. 2003); *Rodriguez v. Taco Bell Corp.*, 2013 WL 5877788 at **3-4 (E.D. Cal. Oct. 30, 2013) ("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"); *Bentley v. Honeywell International, Inc.*, 223 F.R.D. 471, 483-84 (S.D. Ohio 2004); *In re Light Cigarettes Marketing Sales Practices Litigation*, 271 F.R.D. 402, 415 (D. Me. 2010); *Gasperoni v. Metabolife, International, Inc.*, 2000 WL 33365948 at *4 (E.D. Mich. Sept. 27, 2000). In all of these cases, courts found that individual claims not actually litigated in prior class proceedings -- as would be the case here with any bodily injury or medical monitoring claims[4] filed by an absent class member after this class proceeding -- would not be barred by the class case. In *Bentley*, the court rejected the exact argument made here by GMI, 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.

[4] The Eighth Circuit has held that medical monitoring claims are not appropriate for class certification. *In re St. Jude Medical, Inc.*, 425 F. 3d 1116, 1121-23 (8th Cir. 2005) Thus, Plaintiffs have acted appropriately here in declining to assert claims which cannot be addressed on a class basis.

(223 F.R.D. at 483) The same findings are warranted here.

The cases GMI cites on this issue do not support a finding that Plaintiffs are inadequate class representatives. GMI's 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 GMI's 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. Bodily injury and medical monitoring claims are not asserted in this case -- 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.

GMI's other claim-splitting cases run contrary to *Cooper* and the other cases cited above, and should not be followed. Tellingly, none of GMI's cases even reference *Cooper*, let alone seeks to distinguish this binding Supreme Court precedent. Notably, GMI's position, if it were correct, would mean that no environmental contamination case could ever be certified for class treatment.

To the extent this Court has any concerns about future *res judicata* consequences, such concerns can be eliminated by an express finding in the certification order that future individual claims by Class Members for bodily injury or medical monitoring are not precluded. The Restatement (Second) Judgments at § 26 provides that subsequent

claims will not be limited or barred on claim splitting grounds if "the court in the first action has expressly reserved the plaintiff's right to maintain the second action."

C. The Typicality Requirement Is Met Because GMI Engaged In A Common Course Of Conduct Giving Rise To Claims By All Class Members Under The Same Legal Theories

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The Eighth Circuit has held the typicality requirement "is generally considered to be satisfied if 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). Here, the typicality element is plainly satisfied because Plaintiffs' claims, as well as those of all Class Members, arise out of GMI's 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.

GMI claims that typicality is lacking here because "the nature and extent of potential contamination varies by class member." (Doc. 117, at pp. 14-15, 24) GMI's "different levels of contamination" argument runs counter to well-established class certification case law in environmental cases. *See, LeClercq*, 2001 WL 199840 at **4-5 (differing levels of contamination in class area does not defeat typicality finding);

Mejdrech, 2002 WL 1838141 at *3-4 (differing levels of contamination and property features not relevant to typicality issues); *Ludwig*, 2003 WL 22478842 at *2 (differing levels and sources of arsenic contamination not a legitimate typicality factor); *Cannata*, Doc. 136-3, at pp. 7-8 (class certified despite "differing levels of contamination and chemicals in the proposed class area"); *Muniz*, 2005 WL 1243428 at *3 (rejecting defendant's typicality argument based on differing property locations and hydraulic conditions); *McHugh*, Doc. 136-2, at p. 11 (certifying class despite different levels of vapor contamination in the class area).

D. The Proposed Class Is Ascertainable

The proposed Class in this case consists of all persons and non-governmental entities that own residential property within the Class Area. (*See* Doc. 87 at ¶ 20) The Class Area is the area GMI has admitted to having contaminated and has fixed geographical boundaries depicted on a map. All Class Members can easily be identified from public property ownership records and furnished the notices required under Rule 23.

Courts in several environmental class action cases have certified classes defined, like here, by specific geographical boundaries. *See, Mejdrech*, 319 F.3d at 911 ("the class members' homes occupy a contiguous area the boundaries of which are known precisely"); *McHugh*, Doc. 136-2, at p. 2 (specified street addresses); *Stoll*, 2010 WL 3613828 at **2-4 (geographical boundaries on plume map); *Ludwig*, 2003 WL 22478842 at *1 (all property owners within village boundaries); *Muniz*, 2005 WL 1243428 at *1 (specified street boundaries); *Bentley*, 223 F.R.D. at 480 (geographical

boundaries on plume map). Under substantially identical circumstances, the court in the *Stoll* case found that the proposed class area was ascertainable and reasonably defined where it was co-extensive with an investigation area recognized by EPA and where Plaintiffs' expert had proffered an opinion that the entirety of the proposed class area was impacted or threatened by contamination caused by the defendant. (*Stoll*, 2010 WL 3613828 at **2-4)

The only environmental case GMI cites on this point, *Henke v. Arco Midcon*, 2014 WL 98277 (E.D. Mo. May 12, 2014), is easily distinguishable. In *Henke*, the proposed class was not defined by geographical boundaries, but was instead based on the vague criteria of whether there had been reported, unremediated spills. (*Id*. at *3) Further, plaintiffs' experts did not provide any evidence of contamination on class area properties other than the plaintiffs' and one other property. (*Id*. at *2) The situation here is markedly different; the Class Area is defined by objective, geographically certain criteria directly related to actual (and admitted by GMI) environmental impact.

E. GMI's Damages Arguments Are Irrelevant, As Plaintiffs Are Not Seeking Certification Of Any Damages Issues

Ignoring that Plaintiffs are not seeking certification of any damages issues, GMI advances several damages-related arguments, and even offers the opinions an expert, Richard Roddewig, on property value issues. These arguments and Roddewig's report are wholly irrelevant, given the scope of certification Plaintiffs have requested.

GMI claims that "there are no uniform diminution of property values" (Doc. 117, at p. 16), but does not explain how this assertion (which Plaintiffs will dispute at the

damages phase of the case)[5] has any bearing on class certification on the liability and injunctive relief aspects of Plaintiffs' claims. GMI also argues "putative Class Members' use and enjoyment of their properties varies significantly" (Doc. 117, at p. 17) and claims Karl Ebert's use of his basement is unusual, but ignores that these propositions are solely damages issues, not matters relevant to liability and injunctive relief. Finally, GMI asserts there "have been no uniformly incurred, recoverable CERCLA response costs" (*Id.* at pp. 18-19), but this, again, is exclusively a damages issue. None of these arguments have any relevance to the certification motion before this Court.

F. GMI'S Rule 23(b)(1) And (b)(2) Arguments Ignore Directly On-Point Case Law Granting Certification Under These Provisions

Plaintiffs' opening class certification memorandum cited to several decisions -- *Mejdrech, Stoll, Cannata, Bentley* and *Ludwig* -- where certification was granted under Rule 23(b)(1) and/or Rule 23(b)(2) in environmental cases involving the identical claims asserted here. GMI makes no attempt to distinguish any of these cases, and its arguments otherwise lack merit.

GMI opposes Rule 23(b)(1) certification by citing to off-point cases where the type of injunctive relief class members could seek was basic and uncomplicated and would not vary by individual class member. (Doc. 117, at pp. 28-29) But here, by

[5] Even though damages will be considered and addressed on an individual basis, Plaintiffs will advance expert testimony during the second phase of this case that all Class Area properties have suffered a significant percentage loss in value due to GMI's contamination. This common proof, applied to the specifics of each Class Area property, will support individual damages awards on the diminution in value issue.

contrast, where the type of injunctive relief at issue -- remediation of a large residential area, including several impacted groundwater aquifers -- could easily involve differing and inconsistent requests for remedial work on multiple properties and varying proposed clean-up objectives, there is a very real risk that individual suits brought by hundreds of area residents could result in the type of "inconsistent or varying adjudications" Rule 23(b)(1) was created to avoid.

GMI's Rule 23(b)(2) arguments should also be rejected. GMI asserts that Plaintiffs cannot prove that there is "something that General Mills has not already done that it could do that would benefit the entire putative class." (Doc. 117, at p. 30) This is incorrect: Plaintiffs have asserted and have expert support for the proposition that GMI has not sufficiently remediated the Facility – which is a continuing source of the vapor contamination in the Class Area – and has not remediated the groundwater to appropriate levels. These injunctive relief topics would clearly benefit all Class Members.

GMI also asserts the injunctive relief Plaintiffs have requested is property specific, and cannot be achieved by a "one-size-fits-all" injunction. (Doc. 117 at p. 30) This, too, is wrong, for several reasons. Significant components of the injunctive relief Plaintiffs are seeking are not property specific – rather, they are comprehensive, area-wide remedial efforts that GMI should have undertaken decades ago. GMI's argument that mitigation systems require customization, and hence cannot be the subject of class-wide injunctive relief, ignores that GMI has had no problem installing mitigation systems in nearly 200 homes to date. If GMI is ordered to install further mitigation

systems in the Class Area, GMI has proven that it would have no difficulty in complying with such a directive.

G. GMI's Standing And Seventh Amendment Arguments Are Baseless

Buried at the end of its 45 page opposition brief, GMI advances two additional attacks on the bifurcated certification approach for environmental cases endorsed by the Seventh Circuit in *Mejdrech* and by many other courts, based on standing and the Seventh Amendment. Neither defeats certification.

GMI claims that under the bifurcated certification approach, some class members lack standing "because they have not suffered any injury." (Doc. 117, at pp, 40-41) But Plaintiffs have alleged that the entire Class Area is contaminated (*See*, Doc. 87 at ¶¶ 2, 15), that remedial measures are needed to protect every Class Area property (*Id*., at ¶¶ 2, 4-5), and Plaintiffs have evidence from their experts to support these assertions of common injury to all Class Members. GMI may contend otherwise, but these are disputed factual issues to be determined at the merits phase of this case, not class standing issues. *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773 (8th Cir. 2013) and *Avritt v. Reliastar Life Ins. Co* , 615 F.3d 1023 (8th Cir. 2010) do not, as GMI incorrectly argues, create a different legal standard for standing in the Eighth Circuit than exists in the Seventh Circuit. Rather, *Halvorson* and *Avritt* are unremarkable in holding that classes should not be certified if common evidence will not establish the claims for all class members.

GMI also argues that bifurcated certification violates Seventh Amendment prohibitions, as explained by the Seventh Circuit in *In re Rhone-Poulenc Rorer, Inc.*, 51

F.3d 1293 (7th Cir. 1995) *Rhone Poulenc* was authored by Judge Posner, eight years before he authored *Mejdrech* on behalf of the same court. That court 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.

The class-wide proceeding Plaintiffs have proposed would resolve all liability issues, and leave only damages issues to be subsequently determined on an individual basis. The jury in these damages proceedings would not re-examine any jury findings from the class-wide proceeding, but rather would be instructed that GMI has been found liable for contaminating certain properties and that the questions of whether the class members have been damaged, and in what amount, are the only ones that remain to be determined.

V. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this Court grant their motion for class certification.

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