

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

SUSAN and PATRICK STOLL, MARY and )  
CHARLES BOWLES, individually and on )  
behalf of all persons similarly situated, )

Plaintiffs, )

Case No. 09-CV-0364 LJM-DML

-v- )

KRAFT FOODS GLOBAL, INC., )

Defendant. )

JURY TRIAL DEMANDED

MEMORANDUM IN SUPPORT OF PLAINTIFFS’  
MOTION FOR CLASS CERTIFICATION

I. INTRODUCTION

Plaintiffs, Susan and Patrick Stoll and Mary and Charles Bowles, own and live in homes in Attica, Indiana located near a manufacturing facility (the “Facility”) formerly owned and operated by Defendant, Kraft Foods Global, Inc. After learning that their homes and more than 100 other homes in the area have been significantly impacted by toxic chemicals released from the Facility, Plaintiffs filed this class action lawsuit, seeking abatement of the contamination which plagues their homes, damages for diminished property values, and other appropriate damages and relief. The environmental problem at issue in this case is a most serious one. High levels of carcinogenic chemicals released at the Facility have impacted not just the soil and groundwater beneath these families’ homes, but have also invaded the air inside the homes. Indeed, many residents in this area have had air treatment and other “mitigation” systems installed in their homes, as a temporary measure to attempt to protect them from further exposure to this contamination.

Plaintiffs request that this case be certified as a class action. The law is well settled in this judicial circuit that class certification is warranted in environmental cases like this one. See, Mejdrech v. Met-Coil Systems Corp., 2002 WL 1838141 (N.D. Ill. Aug. 12, 2002), affirmed 319 F.3d 910 (7th Cir. 2003); Cannata v. Forest Preserve District of DuPage County, 06 C 2196, N.D. Ill. (slip opinion dated October 11, 2006, attached hereto as Exhibit A); Muniz v. Rexnord Corp., 2005 WL 1243428 (N.D. Ill. Feb. 10, 2005); Ludwig v. Pilkington North America, Inc., 2003 WL 22478842 (N.D. Ill. Nov. 4, 2003); LeClercq v. Lockformer Co., 2001 WL 199840 (N.D. Ill. Feb. 28, 2001). All of these cases involved substantially similar facts (residential areas polluted by adjacent industrial operations) and virtually identically plead legal claims (RCRA, negligence, private nuisance, trespass and willful and wanton misconduct).<sup>1</sup>

While all of these class certification decisions are applicable here, the Seventh Circuit's Mejdrech decision is particularly instructive. In Mejdrech, 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 residents of the more than 100 homes in the proposed Class area, thus under directly on-point Seventh Circuit authority, class certification is warranted here. Indeed, this case is particularly well suited for class treatment, given that Defendant has publicly admitted both that its former plant is the source of the

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<sup>1</sup> Counsel for Plaintiffs in this case also represented the plaintiffs and certified classes in the Mejdrech, Cannata, Ludwig and LeClercq cases, and these cases involved the same legal theories advanced here on behalf of the Stoll and Bowles families.

contamination, and that the geographical scope of the contamination overlaps the entire proposed class area.

As set forth further below, as all of the Rule 23 elements are met here, Plaintiff's motion for class certification should be granted.

## **II. NATURE OF THE CASE**

From 1957 through 1978, Defendant's predecessor, P.R. Mallory & Co., Inc. ("Mallory"),<sup>2</sup> owned and operated the Facility and related waste storage and disposal areas at and around East Park Avenue in Attica, Indiana. (First Amended Complaint, ¶ 9) Various hazardous substances, including trichloroethene ("TCE") and tetrachloroethene ("PCE"), were used at the Facility during Mallory's ownership and operation of the Facility. (*Id.* at ¶ 10) Mallory disposed of and released various hazardous substances, including TCE and PCE, into the environment at the Facility, resulting in contamination of nearby residential properties. (*Id.* at ¶ 11)

Hazardous substances and wastes, including TCE and PCE, have been released from the Facility and have migrated into the Class area. (*Id.* at ¶ 12) The groundwater and soil beneath Plaintiffs' and Class area homes is contaminated. (*Id.*) TCE and PCE vapors are present inside Plaintiffs' and Class area homes. (*Id.*) The entirety of the proposed Class area is either contaminated or threatened by this very serious contamination. (*Id.*)

The proposed class ("the Class") consists of all persons and non-governmental entities that own property or reside on property located within specified geographical boundaries in Attica. (First Amended Complaint, ¶ 16) These boundaries, which are presented on a map attached to Plaintiffs' First Amended Complaint as Exhibit 1 and attached to this brief as Exhibit

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<sup>2</sup> Mallory no longer exists as a legal entity; through a series of mergers and name changes it has become Kraft Foods Global, Inc., the named defendant in this suit. Defendant has filed court papers claiming that it is the successor in interest to Mallory with respect to environmental issues concerning the Facility, and has also informed the U.S. E.P.A. and residents of Attica that Defendant is responsible for addressing environmental contamination issues relating to the Facility.

B,<sup>3</sup> represent the area in Attica which, based on sampling results, Defendant has acknowledged is either contaminated or threatened by contamination emanating from the Facility. Defendant has offered to install air treatment or other temporary systems inside all homes in the proposed Class area. (See, Exhibit C hereto, November 2008 Newsletter distributed by Defendant, and Exhibit D hereto, April 29, 2009 email communication from Defendant's consultant to U.S. E.P.A. adding thirteen additional homes based on recent test results)

Plaintiffs' First Amended Complaint (Doc. 39) asserts five legal claims. Plaintiffs allege a claim under the federal Resource Conservation and Recovery Act ("RCRA"), as well as common law negligence, private nuisance, trespass, and willful and wanton misconduct claims. Plaintiffs seek injunctive relief under their RCRA and common law claims in the form of an order restraining and enjoining Defendant from allowing continued contamination of the Class area, and compelling Defendant to abate the contamination it has caused in the Class area. Should Plaintiffs prevail on their RCRA claim, they are entitled under the RCRA statute to recover their attorneys' fees and expenses, including expert witness fees. Plaintiffs also seek, under their common law claims, lost property value damages, other compensatory damages, and punitive damages. As discussed further below, classes have been certified in the Mejdrech and other cases decided in this Circuit which involved the identical legal claims and same types of relief involved here.

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<sup>3</sup> Defendant's own consultant created this figure, which was an exhibit to Plaintiffs' original Complaint. As an exhibit to the First Amended Complaint, it has been modified only to add a triangular area of 13 additional homes to the Class area, based on test results received by Plaintiffs after this suit was filed. (See, First Amended Complaint, ¶ 16, fn1)

### III. ARGUMENT

#### (a) Legal Standards and Precedents

As this Court has stated, “[t]he propriety of class certification does not depend on the outcome of the suit or on whether a party will prevail on the merits, but whether the requirements of Rule 23 are met.” Balogun v. Midland Credit Management, Inc., 2007 WL 2934886 at \*3 (S.D. Ind. Oct. 5, 2007)(McKinney, J.) 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). Balogun, *supra* at \*\*3-4.

Class actions of this sort are consistently certified in this Federal Circuit, *see, e.g.*, Mejdrech, *supra*; Cannata, *supra*; Muniz, *supra*; Ludwig, *supra*; LeClercq, *supra*, and in other circuits as well. *See, e.g.*, Sterling v. Velsicol Chemical Corp., 855 F.2d 1188 (6th Cir. 1988); Bentley v. Honeywell International, 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). Consistent with the established precedent of certifying classes of residents impacted by environmental contamination, *supra*, the following Rule 23(a) requirements are satisfied here, as follows:

#### (b) Rule 23(a) Requirements

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 are satisfied in this case.

***(1) numerosity is satisfied***

Rule 23(a)(1) requires that the class be so large that joinder of all members is “impracticable.” Classes with more than one hundred persons generally satisfy the numerosity requirement of Rule 23(a)(1). See, Ludwig, supra at \*2. Here, Plaintiffs allege that approximately 129 homes (more than 200 persons) are impacted by the subject contamination emanating from the Facility. The alleged impacted area derives from Defendant’s own submissions to the public and U.S. E.P.A. The element of numerosity is plainly satisfied here.

***(2) commonality is satisfied***

The Rule 23(a)(2) commonality element “does not require that all or even most of the issues in the litigation be common issues; generally one common issue is enough.” Hill v. Shell Oil, 2002 WL 663583 at \*2 (N.D. Ill. March 28, 2002). As the Seventh Circuit has held, a “common nucleus of operative fact is sufficient to satisfy the commonality requirement of Rule 23(a)(2).” Keele v. Wexler, 149 F.3d 589 (7th Cir. 1998); Rosario v. Livaditis, 963 F.2d 1013 (7th Cir. 1992). This exists when the defendant has engaged in standardized conduct towards members of the proposed class. Mejdrech, supra, 2002 WL 1838141 at \*3. In Mejdrech and the other above cited environmental cases, the commonality element was 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. Defendant in this case permitted carcinogenic 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.” This typicality requirement has been described as follows:

Typicality requires the named Plaintiffs to demonstrate that their claims arise from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory.

Garner v. Healy, 184 F.R.D. 598, 603 (N.D. Ill. 1999). Typicality and commonality are closely related and often overlap. Ludwig, supra at \*4. See, also, Whitten v. ARS Nat’l Servs., Inc., 2001 U.S. Dist. LEXIS 15472 (N.D. Ill. Sept. 26, 2001) (the issue of typicality should be liberally considered). Indeed, since the Seventh Circuit’s Mejdrech decision, at least two courts in this district have analyzed the commonality/typicality elements in the context of whether there are questions of law and fact common to members of the proposed class in a pollution case. See, Muniz, supra (noting that while some differences exist, underlying questions remain as to whether or not the defendants’ conduct caused contamination of the proposed class area and, if so, to what extent defendants should be held liable); Ludwig, supra (finding that differing levels, and even different sources, of arsenic contamination did not overshadow the common questions presented by plaintiffs such as whether defendant mishandled arsenic containing waste and whether that waste migrated from defendant’s property to other properties in the proposed class area). Both courts concluded that the typicality element was met in cases very similar to this one.

Here, the Stoll and Bowles families 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 residents in the proposed Class area,

such as: whether there have been releases of hazardous substances and wastes, including TCE and PCE, at and from the Facility; whether such releases have migrated into and contaminated and/or threatened properties within the Class area; whether Defendant is legally responsible for the contamination in the Class area; whether Plaintiffs and the Class have been damaged by the contamination caused by the Facility; and whether Defendant should be ordered to abate the contamination present in the Class area. (See, First Amended Complaint, ¶ 18)<sup>4</sup>

The resolution of each of these liability issues is made easier, in the class action context, by the clear guidance from the Seventh Circuit's Mejdrech decision that cases of this sort be bifurcated into trials of liability and, when meritorious, damages. 319 F.3d at 912 (noting that if the questions common to the class are answered against defendants in a liability trial, plaintiffs would then have to prove the fact and extent of their individual injuries in another proceeding). 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.

**(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

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<sup>4</sup> Plaintiffs are seeking class-wide relief under RCRA (for injunctive relief) and Indiana 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, Muniz, supra, citing, Clancey v. McBride, 338 Ill. 35, 40 (1929); Newberg on Class Actions § 16.22 (3rd ed.).

outcome of the case to ensure vigorous advocacy; and (3) does not have interests antagonistic to those of the class. Ludwig, supra, at \* 3.

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' attorneys are the same lawyers who obtained favorable class certification rulings in 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 settlements.

Plaintiffs' interests are the same as those of the other proposed Class members. Because their properties are 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 Defendant. Plaintiffs have no personal interests which are antagonistic to 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) Rule 23(b) Requirements**

Rule 23 only requires that Plaintiffs seeking class certification satisfy one of the three provisions -- (b)(1), (b)(2) or (b)(3) -- of Rule 23(b). See, Balogun, supra at \*4. 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, 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 hundreds 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 Defendants have 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 Defendant’s misconduct, Class members own and reside in properties that are either contaminated or threatened with contamination emanating from the Facility. Injunctive relief -- under Plaintiff’s RCRA and common law claims -- is a significant goal of this case. Under similar circumstances, the courts in the Cannata, Mejdrech, 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. There is considerable overlap between the commonality/typicality requirements of Rule 23(a) and the predominance requirements of Rule 23(b). See, Flanagan v. Allstate Insurance Company, 228 F.R.D 617, 619 (N.D. Ill. 2005).

All of the above cited environmental class certification decisions -- Mejdrech, 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 another case, Sterling v. Velsicol Chemical Corp., 855 F.2d 1188 (6th Cir. 1988), 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." Id. at 1197. The Sterling court went on to explain:

In the instant case, each class member lived in the vicinity of the landfill and allegedly suffered damages as a result of ingesting or otherwise using the contaminated water. Almost identical evidence would be required to establish the level and duration of chemical contamination, the causal connection, if any, between the plaintiffs' consumption of the contaminated water and the types of injuries allegedly suffered, and the defendant's liability.

Id. 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, 223 F.R.D. at 486-488.

Permitting this case to proceed as a class action is not just permissible under the Rule 23 requirements discussed *supra*; rather, as the Seventh Circuit and every trial court in this Circuit which has considered the issue has 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, well more than 100 if individual suits would be required -- over essentially the same issues (i.e., whether Defendant caused 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 Defendant. See, Hill, supra at 620 (by certifying case as a class action, "both the courts and the parties are able to avoid repetition in discovery and in the courtroom"); and Ludwig, supra at \*7 (noting the inefficiency to both parties by insisting on multiple, perhaps even hundreds of, trials involving the same evidence).

#### 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: July 2, 2009

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

Norman B. Berger, an attorney, hereby certifies that a true and correct copy of the foregoing **Memorandum in Support of Plaintiffs' Motion for Class Certification** was on July 2, 2009 electronically served on all counsel of record as a result of the CM/ECF filing of this document.

s/ Norman B. Berger \_\_\_\_\_