

STATE OF MICHIGAN
WAYNE COUNTY CIRCUIT COURT

MOHAMMED O. AHMED, HADEER AHMED,
NORIEAH AHMED, SAMIRA ALASBAHI,
WILLIAM ALI, MAHMOUD AND IBTISAM
IBARA, and other persons similarly situated,

Class Action Plaintiffs,

v

SEVERSTAL NORTH AMERICA, INC., a
Delaware corporation,

Defendant.

Case N^o: 04-438968-CE

Hon. Michael F. Sapala

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**PLAINTIFF'S REPLY BRIEF IN SUPPORT OF
MOTION FOR CERTIFICATION OF CLASS ACTION**

November 28, 2005

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This Court should grant the motion to certify a class action because this case has merit, the standards for certification have been met, and courts around the state and country say that proceeding as a class is the best way to handle cases just like this one.

I. THE PARTICULATE PROBLEM IN SOUTH DEARBORN

Residents of the South End neighborhood of Dearborn suffer a two-fold particulate problem: the air they breathe is polluted with tiny particles,¹ and black dust is constantly deposited on their homes and property. The air pollution and dust interfere with residents' use of their property, cause them to worry about their health, and diminish property values.² The particulates are thus a neighborhood problem by their very nature. This is confirmed by air dispersion modeling, by Dr. George Thurston of NYU Medical School, by survey responses, and by a local school principal.³

Severstal claims it is not the only source of this pollution, and we have never said otherwise. What we have said is that Severstal is the biggest polluter, and this is true for both the fine particles in the air as well as the dust. Dr. Phillip Hopke conducted an analysis called receptor modeling for an air monitor in the neighborhood that identified the type and quantity of fine particles in the air.⁴ The result confirms that particles from steel-making are the largest local source of pollution. Because some fine particles are visible in dust,⁵ Dr. Hopke's conclusion helps understand the source of both the air pollution and the dust problem. Contrary to Severstal's brief, however, the receptor modeling of fine particles is not the only basis for this conclusion.

¹See MICHIGAN'S 2003 ANNUAL AIR QUALITY REPORT, p. 42 (Oct. 2004) (**Ex 6 to Plaintiffs' Motion for Class Certification**). The health effects are described in the affidavit of Dr. George Thurston of New York University (**Ex 3**).

²See excerpts from depositions of Named Plaintiffs documenting the nature of the pollution and impacts of the dust (**Ex 3 to Plaintiffs' Response to Severstal's Motion for Partial Summary Disposition**), Affidavit of Philip Gaglio (**Ex 4**), Affidavit of William Walsh (**Ex 5**).

³See surveys completed by South Dearborn residents (**Ex 1C**) and map showing location of survey respondents (**Ex 1A**); Affidavit of Dr. Thurston (**Ex 3**); Affidavit of Glen Maleyko (**Ex 13**); Fresh Air for South Dearborn, *Sierra Magazine* (**Ex 15**).

⁴Report of Dr. Phillip Hopke (**Ex 11-A to Plaintiffs' Motion for Class Certification**).

⁵See Affidavit of Dr. Thurston (**Ex 3**).

Another basis is a set of diagrams created by consultant Lawrence Hands to show the wind direction on days when the pollution is particularly bad.⁶ From April 18 to November 13 of this year, air in the South End reached unhealthy levels on 75 days – 38% of the total.⁷ The diagrams show the wind blows from Severstal’s direction on the vast majority of those bad days.

A third basis for concluding Severstal is a big polluter is the chemical analysis of dust from the Plaintiffs’ homes.⁸ Basic analyses confirm the presence of steel-making particles at each home. More advanced analyses show materials in the samples that are “local to steel processing.” The most advanced analysis shows that at least 29% of the dust comes from iron and steel-making.⁹ Severstal analyzed dust samples, too, but refuses to turn them over.

Finally, Severstal has its own “particulate problem.” It has been cited by the DEQ at least 22 times this year for violations of air pollution regulations – one of the worst records in the state.¹⁰ Severstal’s blast furnaces and the building where its basic oxygen furnace is housed do not have modern pollution controls, causing the emission of tons of particulates that prevailing winds disperse into the South End.¹¹ In sum, a great deal of science, including receptor modeling, wind diagrams, and dust analyses confirm that Severstal’s problem is the neighborhood’s problem.

⁶Second Affidavit of Lawrence Hands and Exhibit 2A attached thereto (**Ex 2**). Responding to Severstal’s consultant’s suggestion, Mr. Hands revised the pollution roses in his original affidavit with a larger data set, but the results remain consistent.

⁷See Air Monitoring Statistics (days with PM_{2.5} over 40) (**Ex 12 to Plaintiffs Reply to Severstal’s Motion for Stay**). This does not count the 12 days (Sept. 28 - Oct. 9) when the monitor was shorted out and did not provide data. The EPA warns that air is unhealthy for sensitive groups when PM_{2.5} levels are higher than 40.4 µm/m³. EPA, THE PARTICLE POLLUTION REPORT, p. 5 (**Ex 7 to Plaintiffs Motion for Class Certification**).

⁸See Second Affidavit L. Hands and Exhibits 2E, 2F, and 2G attached thereto (**Ex 2**).

⁹The advanced analysis uses techniques called polarized light microscopy, reflective light microscopy, scanning electron microscopy, and energy-dispersive x-ray spectrometry. It states that only 11% of the sample is clearly *not* iron, steel or slag-related.

¹⁰See Plaintiffs’ Response to Severstal’s Motion for Stay, pp. 5-6, and cited exhibits.

¹¹See Second Affidavit of L. Hands and Exhibits 2C and 2D attached thereto (**Ex 2**); Affidavit of L. Hands and Exhibits 10I, 10J, 10K, and 10L attached thereto (**Ex 10 to Plaintiffs’ Motion for Class Certification**). Mr. Hands has not modeled fine particulates because there has not been a ready fine particulate model available.

II. THE CLASS CERTIFICATION PREREQUISITES

A. Numerosity

Severstal argues that “numerosity” is lacking because the class definition does not contain a “temporal element.” To the contrary, the definition does include a temporal element: all people “that *currently* reside” in the defined neighborhood. If the temporal element must be a range of dates, as Severstal argues, the pleadings supply the start date (January 30, 2004). *See Cook v Rockwell Int’l Corp*, 151 FRD 378 (ED Colo 1993) (finding temporal element in pleadings).

B. Commonality

Severstal’s argument that individualized issues “overwhelm” common issues is without merit. Many similar cases say that the primary, complex questions about whether a defendant’s conduct polluted a neighborhood predominate, even if there are individual differences among class members. And many of the individual issues in this case can be handled with generalized proofs.

1. Common Issues

The primary issues in this case are whether and how much Severstal pollutes the air in the South End. Plaintiffs will use the information highlighted in the first section to show that Severstal pollutes a great deal. Severstal will try to show it is only a minor source of the pollution; that other sources pollute the South End more than it does; and that the documented violations are innocuous for some reason. In addition, Severstal has pled affirmative defenses that include compliance with applicable laws, preemption, a consent decree with EPA, previous abatement of nuisance conditions, and intervening acts of third parties (presumably those other pollution sources).

If each family in the South End sued Severstal on their own, the same evidence would be presented on all these issues 1,100 times. For this reason, issues like the ones just listed are routinely held to create commonality in environmental class action cases. Class certification is appropriate in these cases “even though there is not a complete identity of facts relating to all class members, so long as a ‘common nucleus of operative facts’ is present.” *Oakwood v Ford Motor Co*, 77 Mich App 197, 209-10; 258 NW2d 475 (1977). The common nucleus of operative facts in *Oakwood* was whether a number of industrial plants, including the Rouge Steel mill, “violated the laws of Michigan by the discharge of certain gases and particulate matter.” *Id.* at 210.

Severstal tries to explain away *Oakwood* by saying certification was predicated on a finding that the old GCR court rules did not require common issues to predominate over individual issues. But the *Oakwood* court specifically said, “[a]ssuming, arguendo, that a requirement of predominance nonetheless inheres...we hold that plaintiffs have satisfied this prerequisite.” 77 Mich App at 209. In finding that common issues predominated over individual ones, the *Oakwood* court noted all the same arguments Severstal makes in its brief:

While some plaintiffs are specific in describing the offending effluent, many others point to multiple emissions and still others are silent on the precise cause of the alleged pitting, corrosion and dust. In addition, some plaintiffs charge defendants with damaging their health; and others do not. A few assert noise and vibration damage; but most do not. Moreover, as would be expected, some class members are longtime residents of the neighborhood, while others are more recent arrivals. In essence, then, plaintiffs are a heterogeneous lot, whose common tie is geographical (in that they together endure the alleged discharges from defendants’ concurrent operations), and whose damages are different in degree, and to a limited extent, in kind. *Id* at 205.

Despite the heterogeneity of the neighborhood, and the resulting individualized issues, the *Oakwood* court held that two common issues predominated: “(1) whether defendants’ distinct operations have violated and continue to violate local, state and Federal air pollution standards, and (2) whether the various defendants have released and continue to release contaminants which ‘substantially impair...the comfort or enjoyment of adjacent premises.’” *Id* at 214.

The predominance of common issues over individual ones led to certification in *Olden v Lafarge Corp*, 383 F3d 495 (6th Cir 2004), as well. Like Severstal, the defendant in *Olden* argued that individual issues “overwhelm[ed]” common ones. The Sixth Circuit rejected that argument for the same reasons it was rejected in *Oakwood*. To the defendant’s arguments that there were other pollution sources and the impacts varied depending on the location of homes, the court replied, “defendant does not allege that the toxins from these sources are indistinguishable from the toxins from Lafarge’s plant * * * Moreover, damages can be reduced to reflect the proportion of the class’s injury not caused by the defendant.” 383 F3d at 508. To the defendant’s argument that the kind and degree of damages were too individualized to handle as a class, the court replied:

[I]ndividual damage determinations might be necessary, but the plaintiffs have raised common allegations which would likely allow

the court to determine liability (including causation) for the class as a whole* * *[Although] some named plaintiffs present a number of minor examples of specific property damage (roof damage, dead rose bushes, damaged window pane, peeling stain on deck, rusting of automobile), these examples seem to be no more than illustrative of the common argument that the class's properties are regularly covered in cement dust, causing minor property damage and a predictable reduction of property value and enjoyment of the property. 383 F3d at 508.

Severstal argues the *Olden* court certified the class because it could appoint a special master on damages; the above shows the court certified the class because common issues predominated.

The result is the same in many similar cases. In *Sterling v Velsicol Chemical Corp*:

[W]here 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. 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 type of injuries allegedly suffered, and the defendant's liability. 855 F2d 1188, 1197 (6th Cir 1988).

In *Mejdreck v Lockformer Co*, the court held that the defendant's contamination of groundwater from a leaking storage tank was "standardized conduct towards all proposed class members." 2002 WL 1838141 (ND Ill. Aug. 12, 2002), *aff'd*, 319 F3d 910 (7th Cir 2003). Despite such differences as whether a class member had a water well or whether the contaminants were detected in the well, the court held that "[n]one of the differences...are sufficient enough to overshadow the underlying questions of whether or not Defendants' conduct caused contamination in the area, and, if so, to what extent Defendants should be held liable." *Id.*

The rule is that where a defendant's single course of conduct affects many people, differences in how (or how much) it affects them do not defeat commonality. This includes even highly individualized questions about damages. *See Dix v American Bankers Life*, 429 Mich 410, 418-19; 415 NW2d 206 (1987) ("[N]o two claims are likely to be exactly similar. Almost all claims will involve disparate issues of law and fact to some degree.") In *Northfield Construction Co v City of St Clair*, the court said "claims need not be identical in such matters as the individual amount of

damages, so long as common issues predominate and a judicial economy will be realized through the class action procedure.” 399 Mich 184; 249 NW2d 290 (1976).¹²

2. Individual Issues Subject to Generalized Proof

Even if there is significant heterogeneity of potential class members, the reality is that many of the impacts of pollution on a neighborhood are subject to generalized proof. This is illustrated by the discussion of *Olden*, above, and it is illustrated in other pollution cases, too. See *Boggs v Divested Atomic Corp*, 141 FRD 58, 67 (DC Ohio 1991) (“generalized impact of the plant’s operations on real property values” would require evidence that would be “virtually identical in each case.”); *Henry v Dow Chemical Co*, 2005 WL 3027662 (Oct 21, 2005) (**Ex 20**) (“Almost identical evidence would be required to establish...damages allegedly suffered.”).

The same is true in this case. As was the case in *Cook, supra*,¹³ dispersion modeling shows that people in the South End are more exposed to Severstal’s pollution than the general public, providing a reasonable boundary to identify the area where impacts are highest.¹⁴ Further, the kinds of harms suffered by people within that area are consistent. The affidavits and deposition testimony of the named Plaintiffs are consistent with the 121 survey responses; and those survey responses are consistent with each other.¹⁵ The residents all complain about dust that requires cleaning, painting, and replacement of ruined items. Most of them complain about having to keep windows closed, having to stay inside, and even having to leave the neighborhood at times to get away from the pollution. As financial analyst Phillip Gaglio explains, these types of interferences create similar

¹²See also NEWBERG ON CLASS ACTIONS, § 3:16 (“[M]ost courts have declined even to consider [the argument that differences in damages makes a plaintiff’s claim atypical], and nearly all those that have ruled on it have rejected it outright.”); *Campbell v New Milford Bd of Education*, 36 Conn. Super. 362 (“The fact that there may have to be individual examination on the issue of damages has *never* been held to bar certification of class.”) (emphasis added). *Accord, Vanderbroek v Commonpoint Mortgage Co*, 2004 WL 1778933 (**Ex 23**); *Gonek v Workers Disability Compensation*, 2002 WL 77134 (Mich App Jan. 18, 2002) (**Ex 24**); *A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 600; 654 NW2d 572 (2002).

¹³151 FRD at 384.

¹⁴See Affidavit of L. Hands and Exhibits 10I, 10J, 10K, and 10L attached thereto (**Exhibit 10 to Plaintiffs Motion for Class Certification**); Second Affidavit of L. Hands and exhibits 2C and 2D attached thereto (**Ex 2**).

¹⁵Surveys completed by South Dearborn residents (**Ex 1C**).

damages across the neighborhood, which can be quantified and which are subject to common evidence related to the costs of mitigating these problems.¹⁶

The same is true for property values. As appraiser William Walsh explains, diminishment in property values near a pollution source can be calculated as an area-wide adjustment throughout the neighborhood.¹⁷ To the extent that differences in the needed adjustment exist based on proximity to Severstal, sub-classes may be used. Or damages can be awarded to the class in the aggregate with a formula for distribution. *See* NEWBERG §§ 10:2, 10:3.¹⁸ Even where individual proofs are required, documentary evidence can often be used (deeds, leases, assessment records, etc). Remaining issues can be bifurcated, with individual questions handled last.¹⁹

3. Red Herrings

Severstal makes some other arguments about commonality that should also be rejected. For example, Severstal argues that “much energy must be devoted to determining who has standing,” since there are three categories of residents (owners, renters, and occupiers). This argument has no merit. The question of standing to pursue nuisance and MEPA claims for pollution dispersed throughout the neighborhood is a common legal question applicable to all class members.²⁰ If a renter has standing, all renters in the South End have standing. The same goes for owners and for occupiers. So if much energy must be devoted to the issue, standing is better suited to class treatment. The only individual question is whether a *particular* resident is a renter, owner, or occupier, which is a simple and straightforward determination.

¹⁶Affidavit of Phillip Gaglio (**Ex 4**); Database of Questionnaire/Survey responds (**Ex 1B**).

¹⁷Affidavit of William Walsh (**Ex 5**).

¹⁸For collection of cases and guidelines for use of aggregate damages in class actions, *see In re Broadcom Corp Securities Lit*, 2005 WL 1403756 (CD Cal June 3, 2005).

¹⁹*See Olden*, 383 F3d at 509 (“[A] court can await the outcome of a prior liability trial before deciding how to provide relief to the individual class members.”) (citation omitted).

²⁰That this is a common question applicable to the class as a whole is demonstrated by the public nuisance summary disposition motion, which includes questions of standing. If each resident pursued its public nuisance claim individually, as Severstal seems to advocate, the parties would submit identical briefing for each case because the legal issues are identical for each resident.

Severstal also argues that whether a particular class member wants money damages is an individual issue. This is also irrelevant. Whether a particular class member wants to collect money he or she is entitled to has no bearing on whether a single course of conduct by Severstal has affected many people. If some residents would rather not be compensated, they can choose not to collect; this happens in consumer class actions all the time.

Finally, Severstal argues that its “coming to the nuisance” defense raises “a host of issues” requiring individual analyses. It is not clear the defense even applies in this case.²¹ Nor is it clear that the defense would apply differentially in the South End, because Severstal does not give a date when it thinks the nuisance started. The two dates Severstal mentions are 1917, when the steel mill was built, and 2004, when Severstal acquired the assets. None of the residents were living in the South End in 1917, and almost all of them were there in 2004. Finally, as noted above, the court in *Oakwood* noted there was significant variation in how long people had lived in the area, yet that did not prevent certification (“some class members are longtime residents of the neighborhood, while others are more recent arrivals”).

C. Typicality

Typicality considers whether the named plaintiffs claims contain the same “common core of allegation[s]” as the rest of the class members’. *Neal v James*, 252 Mich App 12, 21; 651 NW2d 181 (2002). Where the injuries can be traced to the same course of conduct by the defendant, the claims are typical. *Id.*; *Olden v LaFarge*, 203 FRD at 270; 35A CJS Fed Civ P § 96 (“[I]f the claims of the named plaintiffs and the putative class members involve the same conduct by the defendant, typicality is established, regardless of factual differences.”).

This standard is met for all the reasons commonality is met. Severstal’s conduct with respect to the class is the same. The causes of action are the same. The fact that the named Plaintiffs are seeking personal injury damages – due to *mandatory* joinder – and the class is not, is irrelevant. It

²¹Severstal cites *Barth v Christian Psychopathic Hospital Assocto* support its argument, but conveniently omits the first sentence of the quoted paragraph: “This is *not* of that class of cases where the plaintiffs have come to the nuisance. . . .” 196 Mich 642 (1917) (emphasis added). Further, the defense does not apply in damage cases. *See Edwards v Allouez Mining Co*, 38 Mich 46 (1878) (it was “beyond question” that defendant’s mine, which existed when plaintiff bought adjoining property, caused legal injury for which the plaintiff could get money damages).

was irrelevant in *Oakwood* (“some plaintiffs charge defendants with damaging their health; and others do not”), and it was irrelevant in *Danyo v Great Lakes Steel Corp*, 93 Mich App 91; 286 NW2d 50 (1979), which is discussed in the last section.

In *Bonnett v Education Debt Services Inc*, the named plaintiff asserted several claims in her complaint, some unique to her and others shared with the proposed class. 2003 WL 21658267 (ED Pa 2003). The court held the additional claims did not render her representative claims atypical because “[her] claims against the Defendants arise from the same initial event or practice – the letter(s) – as those asserted by the Class.” A court rejected a similar argument in *Smith v Montgomery County*, 573 F Supp 604 (DC Md 1983):

In this case the basic claims of the class members are identical as to the legal theory of liability as well as to the underlying facts. That members of the class may make additional claims based on privacy concerns for strip searches conducted in non-public places does not render the claims atypical. As this Court has already observed: “Factual differences will not necessarily render a claim atypical if the representative's claim arises from the same event, practice or course of conduct that gives rise to the claims of the class, and is based on the same legal theory.” *Id* at 612.

See also, 32B AM JUR 2D FEDERAL COURTS § 1906: “fact that the representative settles an individual claim against one defendant does not create an antagonism which renders inadequate representation of class claims against the remaining defendants in the action”).

D. Adequacy

Severstal argues certification should be denied because the named Plaintiffs are not adequate representatives. Severstal supports its argument with a series of negative depictions of each named Plaintiff that are meant to draw attention from the real issue, which is whether their interests conflict with those of the class. The adequacy inquiry serves to uncover conflicts of interest between named parties and the class members. “A class representative must be part of the class and possess the same interest and suffer the same injury as the class members.” *Amchem Products Inc v Windsor*, 521 US 591, 625-26, including part of n20 (1997) (citations and internal quotations omitted). Here, the named Plaintiffs live in representative locations in the neighborhood, and they suffer from the same pollution that is widespread there. Therefore, they are adequate under the relevant legal standard.

If the issue is instead whether these Plaintiffs are the *type* of people who will act in the class’s best interests, they are more than adequate in that sense, too.

1. Severstal’s Caricatures of the Named Plaintiffs

There is no conflict between the named Plaintiffs’ interests and those of the other class representatives, and Severstal points to none. In fact, each of the named Plaintiffs testified that their primary motive in this lawsuit was the betterment of their neighborhood.²² Proving that no good deed goes unpunished, Severstal takes some of them to task for this, arguing that their motives are not *selfish* enough to be adequate class representatives.

When Severstal does try to caricature these people with its irrelevant personal attacks, the caricatures are just wrong. The best example is the lead Plaintiff, Mohammed “Tony” Ahmed. Severstal says Mr. Ahmed is not an adequate class representative “because of his conflicting accounts of what he seeks in the lawsuit.”²³ Severstal quotes from Mr. Ahmed’s deposition to argue that since he told a newspaper reporter he did not want “a million dollars,” his claim for damages in this lawsuit is inconsistent with that. *Id.* Yet later in the deposition, in response to questions *from Severstal’s counsel*, Mr. Ahmed clarified that he meant money was not an acceptable substitute for Severstal curbing its air pollution:

- Q. It says, “I don't even want a million dollars. Just fix the problem.” That's what it says.
- A. I don’t think I say that.
- Q. You didn’t mention a million dollars at all in your statement to the reporter?
- A. Pay me million dollars to be -- pay me 100 million dollars, I will not accept it. I want to live in peace, in good environment. I want to enjoy life. Whatever left in my life, I want to live it.
- Q. And I take that to mean that your main goal here is to fix the problem?
- A. Fix the problem.
- Q. And money is secondary?
- A. Yes. * * *²⁴

²²See for example, **Ex 15**, *Sierra* magazine article; **Ex 9**, Alasbahi dep., pp 15 and 39-40; **Ex 6**, Mohammed Ahmed dep., pp 50-51.

²³Brief in opposition, p 20.

²⁴**Ex 6**, Ahmed dep., pp 50-51.

Severstal also claims the Ijibaras are not adequate representatives because they are trying to sell their house and move out of the neighborhood. Severstal ignores the facts that (1) the Ijibaras are trying to sell their house because of the air pollution; and (2) they are not able to sell it because of the air pollution.²⁵ These facts make the Ijibaras highly representative of the diminished property values claim. Further, due to a lack of buyer interest and a notice they received from City of Dearborn, the Ijibaras took their house off the market a couple months ago.²⁶

Severstal also mis-characterizes Norieah Ahmed's testimony to create an apparent conflict between interrogatory answers (prepared for her by counsel) and her answers in deposition about how she has been affected by the air pollution. Yet both the interrogatory answers and deposition testimony describe Ms. Ahmed's stress from worrying about her family's illnesses.²⁷ Likewise, the characterization of William Ali as a liar because he did not think to amend his bankruptcy petition when he became a named Plaintiff in the *Dearborn Industrial Generation* case is ridiculous – Mr. Ali did not think he would obtain financial compensation in that case, and in fact he did not.²⁸ As it did with Tony Ahmed, Severstal tries to use Samira Alasbahi's altruistic motives against her, arguing that because she is after pollution abatement and not money damages she would not look out for the best interests of the class.

The caricatures Severstal draws of the named Plaintiffs are irrelevant to adequacy. The standard is whether there is *genuine antagonism* between the interests of class representatives and class members:

Differences in the interests of class representatives and other class members are not dispositive under FR Civ P 23(a)(4); the key question is whether the interests are antagonistic. The fact that some class members may personally view the defendant's alleged conduct with apathy or even approval does not create a conflict which will defeat class certification if the claims, defenses, and legal interests asserted by the named representatives will adequately protect the legal rights of the class. Not all class members need be aggrieved by,

²⁵Ex 11, M. Ijibara dep., pp 5 and 11.

²⁶Ex 18, notice from City of Dearborn.

²⁷Exhibits 11 and 16 to Severstal's brief in opposition.

²⁸Ex 14, Affidavit of William Ali.

or desire to challenge, the defendant's conduct in order for some to seek relief in a class action. * * * Furthermore, the fact that the representative settles an individual claim against one defendant does not create an antagonism which renders inadequate representation of class claims against the remaining defendants in the action.

32B AM JUR 2D FEDERAL COURTS § 1906. *See also Demitropolous v Bank One Milwaukee*, 915 F Supp 1399, 1418-19 (ND Ill 1996) (fact that class representative was more interested in pursuing one claim than others did not render his claims atypical, nor did it suggest he would not fairly and adequately represent the class). None of the concerns Severstal raises create genuine antagonism between class representatives and class members.

2. The Named Plaintiffs are Ideal Representatives

If it is somehow necessary to show that the named Plaintiffs are ideally suited to represent their neighborhood, we can show that too. The proof is in their long history of community involvement and concern about this problem.²⁹ Most are long-time residents of the neighborhood, and some have lived there all their lives. They are board members of groups like the Concerned Residents for South Dearborn, the American Yemeni Women's Association, the Arab Community Center for Economic and Social Services ("ACCESS"), and the Salina School PTO. Norieah Ahmed and Samira Alasbahi work at the schools, and William Ali works in the neighborhood parks.

All the named Plaintiffs have been active on the air pollution problem in the South End. This includes meetings and discussions in the neighborhood; contacting governmental agencies and Severstal; and keeping pollution logs. Air pollution is not the only community issue they have worked on, either. Some of them have tried to get the City of Dearborn to plant trees in the South End, and some are working to oppose the siting of the Detroit Intermodal Freight Terminal there. Five of the named Plaintiffs were class representatives in the *Dearborn Industrial Generation* case mentioned in Severstal's brief. In that case, they obtained abatement of a noise problem with no remuneration for themselves. In short, these people are long-time residents with deep family roots and a track record of community service. Who better to represent this community?

²⁹In their depositions, the named Plaintiffs testify to the facts listed in this argument section. We direct the reader to the excerpted pages attached as **Exhibits 6-12**.

E. Superiority

Proceeding as a class in this case is superior to other methods of adjudication to promote the convenient administration of justice. MCR 3.501(A). Time after time, courts have held that certifying pollution cases like this one is more convenient and more just than proceeding with numerous individual trials – whether that means trials for the 1,100 total households in the South End or even just the 129 households that are comprised by the named Plaintiffs and the survey respondents. *Oakwood, supra*, at 215-17 (each case would involve 38 common witnesses, and “2 years and 30 weeks of solid trial time would be needed for plaintiffs’ proofs. With defendants’ cases added, it could take 3 1/2 years to try this matter.”); *Olden, supra*, at 508-9; *Sterling, supra*, at 1179; *Cook, supra*, at 389; and *Mejdreck, supra*.

Two of the best examples of why cases like this should be certified are circuit court decisions issued this year in Michigan. Five weeks ago, in *Henry v Dow Chemical Co*, the 10th Circuit Court certified a class of approximately 2,000 persons alleging reduced property values from soil contamination in the Tittabawassee River, with the class defined by the geographic boundary of the river’s flood plain. 2005 WL 3027662 (Saginaw Co. Cir. Ct., Oct. 21, 2005) (**Ex 20**). The court rejected arguments from the defendant very similar to those made by Severstal in this case. A year ago, in *Brush v Textron*, the 14th Circuit Court certified a class of property and auto owners affected by air pollution from a manufacturing facility. File No.04-42918-NZ (Mukegon Co. Cir. Ct., Nov. 4, 2004) (**Ex 21**). The key to the court’s determination was that certification was not sought for personal injury claims, which is also true in this case.

There are many, many other cases like this. In *Boggs v Divested Atomic Corp*, while certifying a class of property owners affected by air pollution from radioactive emissions, the court held that common issues predominated and proceeding as a class was superior so as to avoid repetition of complex scientific proofs:

Common issues of liability, causation, and remedies not only predominate but overwhelm individualized issues. If these claims were tried separately, the amount of repetition would be manifestly unjustified. To the extent that each claim of each plaintiff depends upon proof concerning the history of operations at the plant, the nature, timing, extent and cause of emissions, the kinds of remedies, if any, appropriate to address potential future emissions, the need for

medical monitoring, are the generalized impact of the plant's operations on real property values, that proof would be virtually identical in each case. It would be neither efficient nor fair to anyone, including defendants, to force multiple trials to hear the same evidence and decide the same issues. 141 FRD 58, 67 (SD Ohio 1991).

Coponen v Wolverine Pipeline Inc certified a class of 1,200 Jackson County residents alleging property damage from a pipeline rupture. 2004 WL 2196487 (Mich App Sept. 30, 2004) (Ex 22). Noting that “there is likely to be disparity in the damages suffered by the class members,” the court nevertheless found that “there is no requirement that all questions necessary for ultimate resolution be common to members of the class.” Like *Brush v Textron*, the court excluded individual claims for personal injury from the class proceeding.

Danyo v Great Lakes Steel Corp affirmed certification of a class of residents in the Delray area of Detroit for claims related to particulate and other air pollution from a steel mill and three other industrial facilities. 93 Mich App 91; 286 NW2d 50 (1979). Claims included property damage for all class members and personal injury claims for some. The court described the case as “indistinguishable from *Oakwood*” *supra*. 93 Mich App at 95.

Bentley v Honeywell Intern'l, Inc certified a class of over 10,000 people who either lived on property over a groundwater contamination plume or received their water from the municipal water supply contaminated by the plume. 223 FRD 471 (SD Ohio 2004). Certification was appropriate despite the “the existence of multiple sources of contamination over a period of time” and despite “the mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant’s liability have been resolved.” The court explained:

[I]ndividual members, even if they have some interest in controlling the litigation, likely do not have the financial means to do so. 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.” *Id* at 488.

The same results, for mostly the same reasons, were reached in the air pollution cases *Richardson v American Cyanamid Co*, 672 So2d 1161 (La App 1996); *Biechele v Norfolk & Western RR Co*, 309 FSupp 354, 355 (ND Ohio 1969); and *Marr v WMX Technologies Inc*, 1996 WL 694634

(Conn Superior Ct 1996) (**Ex 25**); *Rivera v United Gas Pipeline Co*, 613 So2d 1152 (La App 1993). The same results were also reached in the groundwater pollution cases *Ludwig v Pilkington North America Inc*, 2003 WL 22478842 (ND Ill. Nov 4, 2003); *Yslava v Hughes Aircraft Co*, 845 F Supp 705, 713 (D Az. 1993); *Muniz v Rexnord Corp*, 2005 WL 1243428 (ND Ill. Feb. 10, 2005); *Bates v Tenco Services Inc*, 132 FRD 160 (D SC 1990); *LeClercq v Lockformer Co*, 2001 WL 199840 (ND Ill Feb. 28, 2001).

While not precedential, it is interesting that Severstal's predecessor, Rouge Steel Company, stipulated to the certification of a class action the last time it was sued for air pollution. See *Weiss v Rouge Steel Co*, Case No. 98-816224-NZ (**Ex 19**). The stipulated class covered a much larger area and many more people than the class sought here. (The lead plaintiff, for example, lived in Melvindale, upwind of the steel mill). The stipulated class also included personal injury claims.

CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court certify the class.

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