Charles Avrith (SBN 96804)
NAGLER & ASSOCIATES
2300 S. Sepulveda Boulevard
Los Angeles, California 90064-1911
Telephone: (310) 473-1200
Facsimile: (310) 473-7144
Email: cavrith@nagler.com

Attorneys for Plaintiffs America Unites for Kids and Public Employees for Environmental Responsibility

Paula Dinerstein (admitted Pro Hac Vice)
Public Employees for Environmental Responsibility
2000 P. Street NW, Ste. 240
Washington, DC 20036
Telephone: (202) 265-7337
Email: pdinerstein@peer.org

Attorneys for Plaintiff Public Employees for Environmental Responsibility

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

AMERICA UNITES FOR KIDS, et al.,

Plaintiffs,

v.

SANDRA LYON, et al.,

Defendants.

CASE NO. 2:15-cv-02124-PA-AJW

DISCOVERY MATTER

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EX PARTE APPLICATION FOR EXPEDITED DISCOVERY

Complaint filed: March 23, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES (cont'd)

Page(s)

STATUTES

OTHER

Plaintiffs America Unites for Kids and Public Employees for Environmental Responsibility ("Plaintiffs") respectfully submit this memorandum of points and authorities in support of their ex parte application for expedited discovery under Fed. R. Civ. P. 34(a)(2).

INTRODUCTION

On March 23, 2015, Plaintiffs, two non-profit organizations, filed this citizen's suit action to restrain clear violations, in excess of 10,000 times the allowable limits, of the Toxic Substances Control Act ("TSCA") at the Malibu Middle and High School ("MHS") and Juan Cabrillo Elementary School ("JCES") (collectively, the "School"), which are part of the Santa Monica-Malibu Unified School District (the "District"). Defendants are administrators and members of the District's Board of Education. Plaintiffs are filing a First Amended Complaint ("FAC") this date.

The School is contaminated with polychlorinated biphenyls ("PCBs"), a "highly-toxic carcinogen." *Midlantic National Bank v. New Jersey Department of Environmental Regulation*, 474 U.S. 494, 497 (1986). TSCA and the regulations thereunder (the "PCB Regulations") prohibit the use of materials containing PCBs at concentrations of 50 parts per million ("ppm") or greater, whereas the results of the limited testing conducted to date show levels up to 570,000 ppm.

Concurrently with the filing of this application, Plaintiffs are also filing a motion for preliminary injunction, seeking the prompt removal of all caulk in those rooms which Defendants' testing has shown contain 50 ppm or more PCBs. However, only a small portion of the total number of rooms in the Malibu School (estimated at 80 regularly occupied rooms) has been tested for PCBs in building materials, and it is a virtual certainty that many of the so-far untested rooms built with the same building materials also have illegal levels of PCBs. Defendants have taken the position that they will not test any more caulk or other building materials, but that they will remediate any such materials found to violate TSCA. Thus,

allowing Plaintiffs to test materials in the School is necessary to support Plaintiffs' claim that the illegal PCB-contamination is widespread and should be removed.

Allowing Plaintiffs access to the School now instead of after the Scheduling Conference will allow the prompt identification of illegal PCBs in rooms not already tested. This will enable Plaintiffs to obtain, on an expedited basis, preliminary injunctive relief requiring remediation of the newly-identified, illegal PCBs before the beginning of the 2015/16 school year so that teachers and students do not have to study and learn in an illegal, dangerous environment for another year. [1]

ARGUMENT

I. Discovery is Appropriate under Rule 34(a)(2).

Fed. R. Civ. P. 34(a) ("Rule 34(a)") provides that:

> A party may serve on any other party a request within the scope of Rule 26(b):
>
> ....
>
> (2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

This Rule has often been applied to permit environmental testing where environmental contamination or damage is alleged. *E.g. Martin v. Reynolds Metal Corp.* 297 F.2d 49, 57 (9th Cir. 1961) (permitting pre-litigation discovery for anticipated case alleging damage from pollution on cattle ranch, including testing samples of forage, feed, air, water and soil); *Cal. Sportfishing Protection Alliance v.*

---

[1] See the discussion of the potential for exposure and the health risks of PCBs in the First Amended Complaint at ¶¶ 34-49, and the accompanying Declaration of Paul Rosenfeld, Ph.D. ("Rosenfeld Decl.") at ¶¶ 9-12, 14, 46. Mr. Rosenfeld is an environmental chemist retained by Plaintiff America Unites as a consultant in this matter.

Chico Scrap Metal, Inc., 2014 U.S. Dist. LEXIS 61069 at *4-5, 2014 WL 1664936 (E.D. Cal. April 25, 2014) (testing of stormwater discharges for metals and PCBs); *United States v. Acquest Wehrle*, 2010 U.S. Dist. LEXIS 41263 at *1 (W.D.N.Y. April 27, 2010) (permitting entry on land to conduct ecological and hydrological sampling and testing in Clean Water Act citizen suit); *Coldani v. Hamm*, 2008 U.S. Dist. LEXIS 79608 at *3, 2008 WL 3992719 (E.D. Cal. Aug. 25, 2008) (permitting testing of ranch's soil, sediment and groundwater for contamination); *Ark. Game & Fish Comm'n v. United States*, 74 Fed. Cl. 426, 434 (Fed. Cl. 2006) (allowing installation of instruments to measure water levels in case alleging damage to natural resources); *Teer v. Law Eng'g & Envtl. Services,* 176 F.R.D. 206, 207 (E.D.N.C. 1997) (allowing access to property to take soil and water samples, and other things necessary to determine the extent of pollution); *United States v. Moss-American*, 1977 U.S. Dist. LEXIS 14908 at *5-*7 (E.D. Wis. July 20, 1977) (entry onto land to take surface and core samples including samples from earthen floors of buildings).

As Rule 34(a) indicates in the portion quoted above, the scope of discovery for entry into land to take samples, etc. encompasses the full scope of discovery under Fed. R. Civ. P. 26(b) ("Rule 26(b)"). That Rule, in turn, provides in part that:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 26(b)(1).

The Supreme Court has made clear that the discovery rules "are to be accorded a broad and liberal treatment." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). As with the other discovery rules, Rule 34(a)(2) has a "broad scope," *Sportfishing Protection,* 2014 US. Dist. LEXIS 61069 at *6, and "is designed to permit 'the broadest sweep of access.'" *Versatile Metals v. Union Corp.*, 1986 U.S.

Dist. LEXIS 21801 at *3, 1986 WL 8720 (E.D. Pa. August 7, 1986) (quoting Wright & Miller, Federal Practice and Procedure § 2206 at 607 (1970)).

The discovery sought here easily meets the relevance criteria of Rule 26, in that it is essential to determine to what extent building materials at the Schools violate TSCA as alleged. After the initial testing of building materials in ten rooms, Defendants have refused to test any more building materials, and Plaintiffs have been able to obtain samples for independent testing in only a relatively small number of additional rooms.[2] When Defendants' consultants did validation testing of Plaintiffs' so-called "independent" testing, in nine of the independently-tested rooms (and a hallway) they found that the levels of PCBs were uniformly above legal limits, and in fact much higher than even the independent testing had found. *Id.* at ¶ 129. There is every indication that illegal PCB contamination is widespread at the Malibu Schools based upon the existing test results and the fact that the other pre-1980 rooms were constructed around the same time and with the same building materials as rooms which have already tested above legal limits. Thus, there is every reason to believe that testing of the remainder of pre-1980 rooms will yield relevant evidence regarding TSCA violations in these rooms. *See, e.g.,* Rosenfeld Decl. ¶43:

> "I am informed that the School has a total of approximately 80 rooms. Caulk in only about 30 of the rooms has been tested to date. Based on the results to date—17 rooms have caulk with PCBs over the regulatory limit--it is a virtual certainty that many of the untested rooms which teachers and students are using daily contain PCB contaminated caulk in excess of the legal limit. I base

[2] *See* FAC ¶¶ 69, 70, 80, 82, 83, 103, 109.

> this conclusion, on among other things: (a) my professional experience in these types of investigations; (b) the high percentage of caulk with PCBs over 50 ppm in the rooms tested; (c) the fact that rooms containing PCB-contaminated caulk are found throughout the Schools; (d) the magnitude of the PCBs found in the caulk; (e) the lack of any reason to believe that caulk used in the tested rooms was different than the caulk used in adjacent, untested rooms; and (f) the lack of any apparent reason to believe that tested rooms are not representative of the untested rooms."

Limitations are placed on such relevant discovery only when the court determines that the discovery is:

> (i) unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
>
> (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of discovery in resolving the issues.

Rule 26(b)(2)(C).

None of these circumstances apply here. This discovery is not cumulative or duplicative, and Plaintiffs had no other opportunity to obtain this discovery, since no other discovery has occurred. There is no other way these results can be obtained.

Plaintiffs intend to conduct the discovery at their own expense in a manner that will not disrupt or damage the Malibu Schools.

As set forth in Plaintiffs' First Request to Enter Land Pursuant to Fed. R. Civ. P. 34(a)(2), attached as Exhibit 6 to the accompanying Declaration of Charles Avrith ("Avrith Decl."), Plaintiffs plan to use qualified professionals to take up to four small caulk samples in each pre-1980 regularly occupied room. They will also do spot sampling of joint compound and other building materials which might contain PCBs, either because they were initially manufactured with PCBs, or because they became contaminated with PCBs from nearby PCB-containing materials. The samples will be placed in sealed containers and sent for laboratory analysis, and thus have no potential to harm anyone at the School. All of the initial testing is expected to be done in a two and a half day period, from Friday afternoon after school lets out until the end of Sunday, April 17-19, 2015. If the initial testing is not completed in one weekend, it will be completed the following weekend of April 24-26.[3]

The sampling and testing will be performed at Plaintiffs' expense,[4] without any damage to the School or any risk to its occupants, and during a short period when school is not in session.

II. There is Good Cause for the Grant of Expedited Discovery

Unless the parties so stipulate, or the court so orders, discovery may not be propounded prior to the parties' conference under Rule 26(f), which must take place at least 21 days before the initial Case Management Conference. Fed. R. Civ. P. 26(d), (f).

---

[3] If the spot sampling of non-caulk materials reveals illegal levels of PCBs, necessitating a more comprehensive testing of these materials, Plaintiffs' representatives will need to return to the School.

[4] Plaintiffs will request reimbursement of its sampling and testing costs under 15 U.S.C. §2619(e) at the end of the case.

> However, courts may permit expedited discovery before the Rule 26(f) conference upon a showing of good cause. … Good cause exists where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party.

Countrywide Fin. Corp. Derivative Litig., 542 F. Supp. 2d 1160, 1179 (C.D. Cal. 2008) (citations and internal quotation marks omitted); *accord Apple Inc. v. Samsung Elecs. Co.*, 768 F. Supp. 2d 1040, 1044 (N.D. Cal. 2011). Moreover, Judge Percy's Standing Order advises counsel to begin to actively conduct discovery before the Scheduling Conference. Standing Order ¶ 3 (b).

Here there is a need for expedited discovery and no prejudice to Defendants. As noted above, there is good cause because teachers and students are continuing to be exposed to illegal levels of PCBs, which accumulate in their bodies, and are more likely to cause illness the longer exposure continues. FAC ¶¶ 13, 16, 34, 39. 41-49; Rosenfeld Decl. at ¶46 and Ex. 28, p. 2. *See also Utility Solid Waste Activities Group v. EPA*, 236 F. 3d 749, 750 (D.C. Cir. 2001) ("PCBs are also carcinogenic and toxic, and may cause immune system suppression, liver damage, endocrine disruption in humans and animals and skin irritations. These dangers are compounded by the remarkable stability of PCB compounds, which bioaccumulate in fatty tissue and are readily absorbed through the skin and respiration, as well as through ingestion of animals exposed to PCBs.").

Without expedited discovery, Plaintiffs will need to wait 21 days for Defendants to answer the Complaint and additional time until after a Rule 26(f) conference can be scheduled and held, and then Defendants will have 30 days to respond to the Rule 34 request. Rule 34(b)(2)(A). In other words, several months could elapse before this sample collection and testing could occur. Expedited discovery is needed so that students and staff can avoid months of additional exposures to PCBs, and to inform the Court's consideration of Plaintiffs' requests for preliminary and permanent injunctive relief.

Plaintiffs will be entitled to this discovery in the normal course, and the burden, if any, on Defendants will be not be any different if the discovery is done now versus later. Conducting the discovery earlier will ensure the more prompt protection of the health and safety of teachers and students, and allow this litigation to progress more expeditiously.

In determining whether good cause exists, factors commonly considered by courts include, but are not limited to:

> (1) whether a preliminary injunction is pending; (2) the breadth of the discovery requests; (3) the purpose for requesting the expedited discovery; (4) the burden on the defendants to comply with the requests; and (5) how far in advance of the typical discovery process the request was made.

American LegalNet, Inc. v. Davis, 673 F. Supp. 2d 1063, 1067 (C.D. Cal. 2009).

Here, all of these factors weigh in favor of the grant of expedited discovery. A motion for preliminary injunction is being filed today concerning the remediation of rooms already found to be in violation of TSCA, and an additional preliminary injunction may be filed based on the results of the expedited discovery, if, as expected, it finds additional violations. The purpose of the discovery is to obtain evidence concerning the central issue in this case. The discovery requests are narrow enough to be completed with a few days of sampling at times when school is not in session. There is essentially no burden on the Defendants, and while the discovery is being requested at the outset of the case, as noted above, there is no additional burden inherent in doing it now versus later, and there is an important benefit in terms of protecting public health.

III. Defendants' Opposition Is Baseless

Based on discussions between counsel, Plaintiffs anticipate that Defendants will argue that additional testing of caulk and other building materials should not be

permitted because the U.S. Environmental Protection Agency ("EPA") has directed them not to test further building materials for PCBs, but only air and dust to determine if EPA's health guidelines are exceeded. (Avrith Decl. ¶5 and Ex. 1 thereto) This is simply not the case.

Although EPA did state at one point that it "did not recommend additional testing of caulk" unless air and dust samples failed to meet EPA's health guidelines (Avrith Decl. Ex. 3 (emphasis added)), EPA never directed Defendants not to do additional caulk testing, and in fact anticipated that they might do so. In an October 31, 2014 letter from the EPA Region 9 Administrator to Sandra Lyon (Avrith Decl. Ex. 4), EPA stated the following:

> "As you know, the federal Toxic Substances Control Act (TSCA) and implementing regulations prohibit the use of caulk containing PCBs at or above 50 ppm. When such caulk is found, it must be removed and disposed of in accordance with TSCA."

EPA then acknowledged the School District's plan to remove caulk then currently known and verified to contain illegal levels of PCBs, as well as "any newly discovered PCB-containing caulk . . . ". *Id.*

Thus, EPA expressed its understanding that Defendants, or someone else, could perform tests to "newly discover[] PCB-containing caulk," and that if that testing revealed PCB levels above legal limits, removal would be required. In fact, the District did do further testing of caulk and determined that nine more rooms and a hallway violated TSCA, and so informed EPA. FAC ¶¶128-29.

In addition, EPA has repeatedly disclaimed any regulatory oversight of the District's testing of materials for PCBs, so it could not possibly prohibit such testing. On June 4, 2014, EPA submitted comments to the District on its PCB plans which clarified that EPA's "formal role" would be limited to approving and overseeing removal plans when caulk above regulatory limits had already been identified, as well as providing technical assistance. (Avrith Decl. ¶6 and Ex. 5

thereto) *See also* Avrith Decl. Ex. 4 (stating that testing and removal of caulk "is not required to be part of the enclosed approval," which applied only to addressing the substrate in contact with caulk that was to be removed).

Therefore, Defendants cannot legitimately claim that they have been prohibited from further caulk testing by EPA. Even if that were the case, which it is not, it would not mean that Plaintiffs are not entitled to discovery under Rule 34 to conduct such testing. The purpose of TSCA's citizen suit provision is to allow citizens to enforce TSCA when EPA is not doing so, and nothing in Rule 34 would prevent discovery of information that is potentially relevant to a claim of ongoing violations of law in a citizen suit simply because the enforcement agency is not seeking that information itself. *See Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 62 (1987) (The central purpose of citizens' suits is to allow citizens "to abate pollution when the government cannot or will not command compliance").

CONCLUSION

For the reasons set forth above, this Court should grant Plaintiffs' Application for expedited discovery in accordance with the discovery request attached as Exhibit 6 to the Avrith Decl.

Respectfully submitted,

Dated: April 1, 2015

NAGLER & ASSOCIATES

By: _____
Charles Avrith
Attorneys for Plaintiffs America Unites for Kids and Public Employees for Environmental Responsibility

Dated: April 1, 2015

PAULA DINERSTEIN

_____
Attorneys for Plaintiff Public Employees for Environmental Responsibility