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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

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

Hearing Date: May 4, 2015
Hearing Time: 1:30 p.m.
Judge: Hon. Percy Anderson
Courtroom: 15

Complaint filed: March 23, 2015

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I. INTRODUCTION

Plaintiffs, two non-profit organizations, bring 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.

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 testing here show levels up to 570,000 ppm. Shocking, as it may be, although Defendants have acknowledged these violations, they have not remediated them, thereby putting the health of children and teachers at risk.[1] Instead of remediating, Defendants have spent over $4,000,000 on lawyers and environmental and public relations consultants to "manage in place" the illegal contamination and try to convince the community that the School is safe.

To date, most of the PCB-contamination at the school has been found in caulk, which is a material used to seal gaps to make windows, door frames and joints in buildings air tight and water tight. Although only limited testing has been conducted to date, caulk with PCBs over 50 ppm have already been found in at least

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[1] Also amazingly, the United States Environmental Protection Agency (the "EPA") appears to be letting the Defendants get away with this brazen violation of the law. Congress expressly provided for citizen's suits to enforce TSCA where, as here, the EPA is not enforcing the law. *See Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 62 (1987) ("The central purpose of citizen's suits is to allow citizens to abate pollution when the government cannot or will not command compliance.").

17 rooms at the School.[2] Plaintiffs will prove that illegal PCB contamination exists throughout the school, but, in the meantime, there is no valid reason why students and teachers should continue to be exposed to unlawful levels of PCB contamination in the rooms that have already been tested. Defendants have committed to remediate the caulk in 5 of those rooms by June 15, 2015. Plaintiffs now move for a preliminary injunction requiring Defendants to immediately cease use of the other 10 rooms that Defendants' own testing has shown to have illegal levels of PCBs in caulk (the "PI Rooms")[3] and remediate the caulk in them by July 31, 2015.

As demonstrated in more detail below, Plaintiffs have satisfied all the requirements for issuance of the requested relief. First, Plaintiffs have established a likelihood of success. Defendants do not, and cannot, dispute that TSCA and the PCB Regulations prohibit the use of caulk containing PCBs in excess of 50 ppm and that such caulk must be remediated. There is also no dispute that the 10 PI Rooms have caulk with PCBs over 50 ppm. Defendants' own testing confirmed the presence of illegal levels of PCBs in those rooms.

Second, Plaintiffs will suffer irreparable injury if the preliminary injunction is not granted. PCBs bioaccumulate in humans, and every day that students and teachers are exposed to these highly-toxic substances increases their chances of contracting cancer or other serious diseases linked to PCBs. Students and teachers should not be required to study and learn in an illegal and contaminated

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[2] Defendants have cynically refused to do any further testing of caulk. Accordingly, concurrently with the filing of this motion, Plaintiffs are filing an ex parte application with the Magistrate Judge for an order giving them access to the School pursuant to Fed. R. Civ. P. 24(a)(2) to collect samples for comprehensive testing of caulk and other building materials on an expedited basis.

[3] The 10 PI Rooms are: (1) MHS 3; (2) MHS 7; (3) MHS 401; (4) MHS 505; (5) MHS 704 (interior); (6 MHS 704 (exterior hallway); (7 JCES 18; (8) JCES 19; (9) JCES 22; and (10) JCES 23.

environment for another school year. Nor should parents have to make the difficult choice of finding another school for their children or risking their children's health.

Third, the balance of the equities clearly favor Plaintiffs. Failure to grant the preliminary relief will needlessly increase students' and teachers' risk of serious illness. On the other hand, removal of the contaminated caulk promptly will only require the Defendants to expend money to do what the law requires them to do sooner rather than later. Finally, prompt remediation of illegal contamination is clearly in the public interest.

Accordingly, the Court should grant Plaintiffs' motion.

II. BACKGROUND

A. The Parties

Plaintiff America Unites for Kids, formerly known as Malibu Unites ("America Unites") is a non-profit organization, whose mission is to ensure environmental health excellence in schools for children and educators. America Unites' members and supporters include parents, students and staff at the School, and it advocates for the removal of PCBs from the School. (DeNicola Decl. ¶2)[4]

Plaintiff Public Employees for Professional Responsibility ("PEER") is a non-profit educational and advocacy incorporation, which advocates for public employees concerned with environmental issues, including the "Concerned Malibu/Cabrillo Teachers," a group of 30 teachers and staff at the Schools. (Dinerstein Decl. ¶2)

Defendants Sandra Lyon and Jan Maez are the District's Superintendent and Associate Superintendent and Chief Financial Officer, respectively. Defendant Laurie Lieberman is the President of the District's Board of Education. The other

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[4] "___ Decl." refers to the accompanying declarations of Jennifer DeNicola, Paula Dinerstein, Paul Rosenfeld, Ph.D., Beth Lucas, Caren Leib, Hope Edelman, Jude Brown, Soniya Perl, Kathy Feig, Lisa Lambert, Brigette Leonard and Gisselle Borress filed by Plaintiffs in support of this motion.

defendants are members of the District's Board of Education. (DeNicola Decl. ¶5) Plaintiffs are suing defendants in their official capacities.

B. PCBs And Their Adverse Health Effects

PCBs are man-made substances. Until TSCA banned their manufacture in the late 1970's, PCBs were used in numerous applications. One common use of PCBs was as a plasticizer in caulk. PCBs gave the caulk flexibility. (Rosenfeld Decl. ¶8)

PCBs do not readily break down in the environment. Due to their persistent nature, materials made with PCBs before they were banned in the late 1970's continue to have high levels of PCBs today. (Rosenfeld Decl. ¶9)

In TSCA, which was enacted in 1976, Congress imposed a near-total ban on PCBs because of the "extreme threat PCBs pose to human health and the environment." *United States v. Commonwealth Edison Co.*, 620 F. Supp. 1404, 1408 (N.D. Ill. 1985). In the PCB Regulations, the EPA Administrator found that "the manufacture, processing, and distribution in commerce of PCBs at concentrations of 50 ppm or greater and PCB Items with PCB concentrations of 50 ppm or greater present an unreasonable risk of injury to health within the United States. This finding is based upon the well-documented human health and environmental hazard of PCB exposure…." 40 C.F.R. §761.20.

According to EPA, "PCBs have been demonstrated to cause a variety of serious health effects. PCBs have been shown to cause cancer and a number of serious non-cancer health effects in animals, including effects on immune systems, reproduction systems, nervous systems, and endocrine systems. Studies in humans provide supportive evidence for the potential carcinogenicity and non-carcinogenic effects of PCBs." (Rosenfeld Decl. ¶11 and Ex. 2 thereto)

In 2013, the International Agency for Research on Cancer ("IARC"), a specialized agency of the World Health Organization, reassessed the carcinogenicity of PCBs. The Working Group, composed of 26 experts from 12 countries, considered more than 70 independent epidemiological studies. The Working Group

classified PCBs as carcinogenic to humans on the basis of sufficient evidence of carcinogenicity in humans and experimental animals. (Rosenfeld Decl. ¶12 and Ex. 3 thereto)

C. PCBs In Schools

Many of the School's buildings were built prior to 1979. (DeNicola Decl. ¶10 and Ex. 1 thereto) Caulk and other materials containing PCBs were used in schools built from the 1950's through the 1970's. A September 2012 report by the EPA, states as follows:

> "Caulk containing [PCBs] was used in some buildings, including schools in the 1950's through the 1970's. PCBs were used as a plasticizer in caulk, added either during manufacture or mixed on site prior to installation. Other potential sources of PCBs, such as fluorescent light ballast capacitors, were also used in school buildings during that era…. Materials and components containing PCBs are still present today in many of these older buildings. PCBs are semi-volatile organic chemicals and can be transported in and around buildings through vaporization into the air and through absorption into dust and materials. PCBs may be present in the air, dust, soil and on surfaces in and around school buildings leading to the potential for occupant exposure through multiple routes."

(Rosenfeld Decl. ¶13 and Ex. 5 thereto)

Students and teachers may be exposed to PCB in a number of ways: (a) inhalation of PCBs which have vaporized into the air from the contaminated caulk or other building materials; (b) contact with caulk and any surrounding materials into which the PCBs may have been released or contact with contaminated soil adjacent to school buildings; and (c) particularly considering the young ages of

school children, through ingestion of caulk or other PCB-containing materials. (Rosenfeld Decl. ¶¶14, 36 and Ex. 27 thereto)

D. The District Finds Illegal PCB Contamination At The School

In 2009 and 2010, the District conducted environmental reviews in connection with planned improvements at the School. Arcadis, the District's environmental consultant, reported that soil at the School was contaminated with PCBs as well as with other toxins and pesticides. Arcadis concluded that pesticides and PCBs were present at concentrations that presented an "unacceptable health risk" and proposed a removal action plan. This plan was carried out during the summer of 2011, when the District removed about 1,180 cubic yards of soil. (Rosenfeld Decl. ¶15 and Exs. 4 and 6 thereto)

Neither Arcadis nor the District attempted to determine the source of the PCBs in the soil, or to test building materials to determine if they also contained PCBs which may have migrated to nearby soils. (Rosenfeld Decl. ¶16 and Ex. 4 thereto)

The District did not disclose this PCB contamination to parents or teachers at the School. The PCB contamination and soil removal was first publicly revealed by news reports in about October 2013. (Denicola Decl. ¶¶7, 9)

In October 2013, several teachers wrote to the District with concerns that medical conditions they suffered may have been caused by the school environment. They pointed to three diagnoses of thyroid cancer among them within the preceding six months, several other cases of thyroid disease, and cases of migraines, rashes, hair loss, respiratory problems and bladder cancer. The teachers asked for environmental testing and for access to testing that had already occurred.[5] (Dinerstein Decl. ¶3 and Ex. 1 thereto; Leonard Decl. ¶¶4, 6)

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[5] In the two year period following the soil removal, three teachers then working at the MHs campus were diagnosed with thyroid cancer. As of today, at

(continue...)

In October 2013, following the public revelation of these medical issues among teachers and of the 2011 removal of PCB-contaminated soil, a group of Malibu parents advocated for immediate testing of all of the school rooms as well comprehensive soil testing. Although no comprehensive testing was performed at that time, at the parents' insistence, ten of the School's rooms were tested for PCBs in caulk. (DeNicola Decl. ¶¶ 8, 11)

Results of testing caulk or other solid materials for PCBs are expressed as parts per million ("ppm"). As discussed below, federal regulations prohibit use of materials containing PCBs at concentrations of 50 ppm or greater. All of the caulk samples contained some level of PCBs. Four of the ten rooms tested had caulk samples with PCB levels above the regulatory threshold of 50 ppm. Rooms 1, 5 and 8 in Building E had caulk with PCB levels of 164, 98.70 and 52.80 ppm, respectively. The library had caulk with a PCB level of 1,868 ppm. (DeNicola Decl. ¶12; Rosenfeld Decl. ¶18 and Ex. 7 thereto)

The PCBs used in caulk and other building materials are chemical mixtures made up of a variety of related compounds known as congeners. PCB congener 126 is a dioxin-like chemical which is highly stable and resistant to biodegradation, and the most toxic of all of the PCB congeners. PCB 126 is orders of magnitude more toxic than other PCB congeners and PCB commercial mixtures. Significantly, the caulk in each of these four rooms with PCB concentrations over 50 ppm contained PCB 126. (DeNicola Decl. ¶13; Rosenfeld Decl. ¶19 and Ex. 8 thereto)

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least three student alumni (each approximately 28 years old) and two more former teachers have also been diagnosed with thyroid cancer. There are also at least 14 known cases of thyroid disease among teachers, and three cases of melanoma or pre-melanoma (a cancer which is also associated with exposure to PCBs) among teachers and former teachers, as well as other serious health problems. (DeNicola Decl. ¶6; Lambert Decl. ¶¶4-5; Leonard Decl. ¶¶4, 6)

E. The District's Refusal To Test Any More Rooms For PCB-Contaminated Caulk

Notwithstanding these results, and notwithstanding America Unites' repeated requests for same, the District steadfastly refused to conduct any further testing of the caulk at the School. On August 12, 2014, America Unites submitted to the District a Memorandum containing "Recommendations For PCB Investigation at Malibu Middle & High" which contained a plan for thorough testing and remediation throughout the Malibu Schools. This plan was never acknowledged or followed. Also on August 12, 2014 at a public gathering, parents offered to pay for full testing of all of the caulk at the School. The District did not accept this offer. (DeNicola Decl. ¶16)

Since December 2013, the District has tested only air and dust in selected rooms. It is impossible to determine from air and dust tests whether PCBs in caulk or other materials exceed the regulatory threshold of 50 ppm.[6] Moreover, such testing is inherently unreliable and subject to manipulation. (Rosenfeld, Decl. ¶¶35-42 and Exs. 25-31 thereto; DeNicola Decl. ¶¶28-33 and Exs. 6 and 7 thereto)

F. Independent Testing Reveals Widespread Illegal PCB Contamination At The School

Because of the District's refusal to conduct any more tests of the caulk, America Unites conducted its own "independent" testing. (DeNicola Decl. ¶18)

Testing of caulk samples collected in May 2014 showed that the caulk in three rooms had caulk in excess of the ppm regulatory limit. Two of the rooms had

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[6] The EPA has posted "suggested" screening levels for concentrations of PCBs in air. The EPA's guidelines do not provide an exemption to TSCA regulations prohibiting the use of PCBs at concentrations over 50 ppm. TSCA requires that any exceptions to its regulations be promulgated in a rulemaking procedure in accordance with the notice and comment requirements of the Administrative Procedure Act. 15 U.S.C. § 2605(e)(4). None of this has occurred.

caulk with PCBs above 340,000 ppm, i.e., more than 7,000 times the regulatory limit.[7]

- Window caulking from JCES room 19 contained 340,000 ppm PCBs, 7,000 times the regulatory limit.
- Interior door caulking from MHS room 506 contained 370,000 ppm of PCBs.
- Caulking from the interior of a window in the physical education faculty office at MHS contained 190 ppm of PCBs.

(Rosenfeld Decl. ¶23 and Ex. 10 thereto) These results were submitted to the District on July 17, 2014. (Dinerstein Decl. ¶4)[8]

Laboratory testing of additional caulk samples collected in August 2014 showed that the caulk from four other rooms at the School exceeded regulatory limits, with two of these in the hundreds of thousands of ppm PCBs.

- MHS room 401 had 146,000 ppm PCBs in the caulk in the interior of an office window.
- MHS room 505 in the Angel Building had 231,000 ppm PCBs in the caulk of an interior door frame.
- MHS room 205 in the Mako Building had 200 ppm PCBs in the caulk of an interior door frame.

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[7] The testing also found that in addition, dirt samples taken from three classrooms (MSH rooms 1, 2 and 5) contained higher levels of PCBs than the highest level found by Arcadis in 2009 in outdoor soil, which Arcadis found posed an "unacceptable health risk," leading to the 2011 soil removal action. (Rosenfeld Decl. ¶25)

[8] In October 2014, America Unites asked the laboratory to re-test the caulk from the two rooms with the highest PCB concentrations (Juan Cabrillo Room 19 and the High School woodshop room) for congener 126, the most toxic of all of the PCB congeners. These new tests found the presence of congener 126 at 122 ppm in Juan Cabrillo Room 19 and 57 ppm in the woodshop – up to more than two million times more toxic than the EPA's regional screening levels for PCB 126. (Rosenfeld Decl. ¶24 and Exs. 11 and 12 thereto)

- MHS room 7 in Building E (Blue Building) had 190 ppm PCBs in the caulk in the interior of a window frame.

(Rosenfeld Decl. ¶26 and Ex. 13 thereto) America Unites published these results on September 23, 2014. (DeNicola Decl. ¶22; Dinerstein Decl. ¶9)

On October 6, 2014, Plaintiffs wrote to Defendant Lyon and specifically asked "what information the District needs to identify and verify the presence of PCBs above TSCA limits." Plaintiffs also requested that if the District considered the independent tests deficient, that the District specify in what manner they were considered deficient. Plaintiffs did not receive any response to this letter. (DeNicola Decl. ¶23 and Ex. 2 thereto)

Additional samples were collected and tested by America Unites in September 2014. The laboratory reports showed that caulk from six other rooms had PCBs in excess of the 50 ppm regulatory limit.

- MHS room 704 had 4,700 ppm PCBs in caulk in a door frame in the hallway.
- MSH room 3 had PCBs in caulk at 330 ppm.
- JCES room 22 had 74,000 ppm PCBs in interior window caulk.
- JCES room 18 had 110,000 ppm PCBs in interior window caulk.
- JCES office had 710 ppm PCBs in interior window caulk.
- JCES Room 23 had 85,000 ppm PCBs in interior window caulk,

(Rosenfeld Decl. ¶¶27-28 and Exs. 14-19 thereto) These test results were provided to the Defendants in January 2015. (Dinerstein Decl. ¶11)

G. The District's Inadequate Remediation Plan

In April 2014, the District's environmental consultant, Environ, prepared a remediation plan which proposed leaving in place caulk testing above the 50 ppm regulatory limit for PCBs, and only removing such caulk in connection with a renovation or demolition of the building in question, even though no such demolitions or renovations are scheduled. Environ proposed to "manage in place"

those PCBs and other suspected PCB-containing materials in the interim. Management in place consisted of cleaning and ventilation. (DeNicola Decl. ¶27; Rosenfeld Decl. ¶32 and Ex. 22 thereto)

After Plaintiffs' complained, Environ, on behalf of the District, submitted revised remediation plans. According to an October 31, 2014 letter from the EPA, the District had committed to remove by June 30, 2015, caulk from window areas in the four rooms its own testing had shown to contain PCBs over 50 ppm (i.e., MSH rooms 1, 5 and 8, and the Library); and (b) in the interior doorframe of MHS room 506 (also known as the "woodshop").[9] The District also committed to remove from the [Schools] any newly-discovered PCB-containing caulk within one year after the District "verifies" that the caulk contains PCBs at or above 50 ppm. (DeNicola Decl. ¶27; Rosenfeld Decl. ¶33 and Ex. 23 thereto)

Even though a reasonable person would believe that caulk in the untested rooms (which is similar to the caulk in the tested rooms) would also contain illegal levels of PCBs, the District has no plan to identify the extent of the PCB-caulk contamination in buildings built before 1980, or to test other building materials to which PCBs may have migrated. (DeNicola Decl. ¶28; Rosenfeld Decl. ¶33) Instead, the District proposed to test air and dust only; as noted above, such tests does not trigger TSCA's 50 ppm prohibition and is inherently unreliable and subject to manipulation.

H. The District's Belated Verification Of The Independent Testing

On January 12, 2015, Plaintiffs served their Notice of Intent to Sue required by 40 C.F.R. 702.61. The Notice of Intent to Sue stated that Plaintiffs intended to seek an injunction restraining Defendants from violating TSCA by, among other things, failing to remove the caulk in the rooms where Plaintiffs' testing had shown

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[9] MHS room 506 was the room identified in testing as having 370,000 ppm PCBs in the caulk.

that caulk contained PCBs in excess of 50 ppm. (Dinerstein Decl. ¶11 and Ex. 14 thereto)

On March 23, 2015--the day this action was filed--the District posted on its website a March 20, 2015 letter from Environ to the EPA concerning the results of its "verification" of Plaintiffs' independent testing. The results are frankly shocking. The District tested a total of 24 samples in 10 rooms. Each of the 24 samples had PCB over the 50 ppm regulatory limit, with most over 100,000 ppm (i.e., two thousand times the regulation limit) and measurements up to 570,000 ppm. (Dinerstein Decl. ¶13 and Ex. 32 thereto (at Table 3)) The following table summarizes the result of Environ's "verification" testing.

Room	Independent Results (ppm)	Environ Results (ppm)
MH3 3	330	1,800 1,800
7	190	330 1,800
505	23,000	220,000
401	146,000	190,000
704 inside office		4,500 1,800 1,500
704 hallway	4,700	3,800
JCES 18	110,000	280,000 270,000 230,000
19	340,000	390,000 570,000 560,000
22	74,000	290,000 470,000 220,000
23	85,000	350,000 440,000 280,000 180,000

Notwithstanding that the District has been sitting on some of the independent results since July 2014, according to Environ's March 20, 2015 letter to the EPA, the District plans to "address" these ten rooms "within one year of validation of the [independent] sampling results." (Dinerstein Decl. Ex. 22, at p. 4) In other words, the District proposes to have students and teachers using rooms that they have known for a long time contain PCBs well in excess of the legal limit for at least another year.[10] This additional long-term exposure to PCBs thousands of times over the legal limit is a flagrant violation of TSCA, not to mention flagrant disregard of students' and teachers' health and safety.

III. ARGUMENT

A. America Unites Has Standing

TSCA citizens' suit provision provides that "any person" may commence a civil action…against any person who is alleged to be in violation of [TSCA] or any rule promulgated [thereunder]…to restrain such violation." 15 U.S.C. §2619(a)(1).[11] Plaintiffs, non-profit organizations, are persons who have standing to bring this action.

An organization has standing to sue in a representative capacity if: (a) at least one member has standing, in his or her own right, to present the claim asserted by the association; (b) the interests sought to be protected are germane to the association's purpose; and (c) neither the claim asserted nor the relief requested

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[10] Moreover, the District arrogated to itself the right to seek an extension of time to remediate "[i]n the event that the procedures…cannot be implemented within one year following identification and verification." (Dinerstein Decl. Ex. 22, at p. 4 fn. 9)

[11] A TSCA citizen's suit may not be brought until the expiration of 60 days after the plaintiff has given notice of intent to sue. 15 U.S.C. §2619(b)(1)(A). Plaintiffs served the Notice of Intent to File Suit on January 12, 2015. In addition, a TSCA citizen's suit may not be brought if the EPA has "commenced and is diligently prosecuting a proceeding…to require compliance with TSCA." The EPA has not filed such a proceeding.

requires that the members participate individually in the suit. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977).

America Unites satisfies all three requirements. First it has numerous members and supporters who are injured by the District's failure to comply with the law, and thus would have standing to sue in their own right. Some examples follow:

Beth Lucas

Beth Lucas' son attended MHS from 2011/12 to 2013/14. When he was six, Ms. Lucas' son was diagnosed with an aggressive form of cancer called Medulloblastoma. He survived his battle with cancer, and was a healthy child until he started at MHS and began experiencing, among other things, debilitating migraines, but only when he was in school, never during breaks. Once the PCB contamination at the school came to light, the son's physician recommended that he be removed from the school due to the significant risks PCBs pose to all children, but especially to a child who has been treated for cancer. He is now home-schooled, and his social life and happiness have suffered greatly because he can't attend school with his friends. (Lucas Decl. ¶¶3-4)

Ms. Lucas' daughter is currently enrolled in MHS. Ms. Lucas is going to remove her from the school if the PCBs are not removed. Ms. Lucas is very stressed to be faced with the choice of sending her children to a PCB-contaminated school or to be faced with extraordinarily long drives to drive them into other public schools or to spend money that she doesn't have on a private school tutor. Ms. Lucas's daughter will be very upset by being removed from her school and friends. (Lucas Decl. ¶5)

Jude Brown

Jude Brown has a 6 year old daughter at JCES. She takes her daughter from school on Tuesday and Wednesday to teach her computer, arts and science, because these subjects are taught in a building with excessively-high levels of PCBs. The District Superintendent threatened Ms. Brown's daughter with truancy proceedings.

Ms. Brown is paying for art and science supplies and computer programs to teach these subjects to her daughter, which is a financial burden for her. (Brown Decl. ¶3) Ms. Brown will remove her daughter from the School if the PCBs are not remediated, which will upset her daughter because her friends are there. (Brown Decl. ¶¶3-4)

Caren Leib

Caren Leib's daughter is in the 9th grade at MHS. Her daughter was taking art, but decided to take physical education instead because she was scared of the PCBs found in the Art Room (Room 505). Her daughter is scared to touch the soil and buildings at the school, and is bothered by the yellow tape blocking off toxic areas. (Leib Decl. ¶3)

Ms. Leib's son is in the sixth grade at MHS. He is currently in many classrooms with illegal levels of PCBs, including Building E, the Music Room, to Art Room and the Library. If the PCBs are not cleaned up, Ms. Leib plans to enroll her son in another school next year. (Leib Decl. ¶5)

Hope Edelman

Ms. Edelman's daughter was in sixth grade at MHS for the 2013/14 school year. Because the District did not remediate the PCBs, Ms. Edelman removed her daughter from the school and enrolled her in private school. Tuition payments have been a financial burden on her. (Edelman Decl. ¶1). (*See also* DeNicola Decl. ¶3; Perl Decl. ¶¶5-6; Borress Decl. ¶3; Feig Decl. ¶¶3-4; Lambert Decl. ¶¶3, 7)

American Unites meets the other two standing requirements for organizations. The remediation of PCB contamination is central to America Unites' purpose, which is to advocate for removal of PCB contamination at the School. (DeNicola Decl., ¶2) Moreover, individualized proof is not necessary. Plaintiffs are not seeking damages, but declarative and injunctive relief which would benefit all their members and supporters. *See Associated General Contractors of America v. Metropolitan Water Dist. Of Southern California*, 159 F.3d 1178, 1181 (9th Cir. 1998).

B. America Unites Has Established The Requirement For Preliminary Injunctive Relief

An applicant for preliminary injunctive relief must establish: (a) she is likely to succeed on the merits; (b) she is likely to suffer irreparable harm in the absence of preliminary relief; (c) the balance of equities tips in her favor; and (d) an injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). America Unites has made a compelling showing as to each of these elements.

1. America Unites Will Succeed On The Merits

As demonstrated in Section a. below, it is indisputable that TSCA prohibits the use of materials containing PCBs at concentrations of 50 ppm or greater. And, as demonstrated in Section b. below, it is indisputable that Defendants are using materials containing PCBs with concentrations greater than 50 ppm. Thus, Plaintiffs have shown that they are likely to succeed on the merits. Indeed, it is certain that Plaintiffs will prevail.

a. TSCA Prohibits The Use Of Materials Containing PCBs At Concentrations Of 50 PPM Or Greater

TSCA provides in pertinent part as follows:

> "(A) Except as provided under subparagraph (B), effective one year after January 1, 1977, no person may use any polychlorinated byphenyl in any manner other than in a totally enclosed manner.
>
> "(B) The Administrator may by rule authorize the …use…of any polychlorinated biphenyl in a manner other than in a totally enclosed manner if the Administrator finds that such …use…will not present an unreasonable risk of injury to health or the environment."

15 U.S.C. §2605(e)(2) ("Section 2605(e)(2)").

The use of PCBs in caulk is not a use in a "totally enclosed manner." TSCA defines "totally enclosed manner" as a manner that "will ensure that any exposure of human beings or the environment to PCBs will be insignificant as determined by the Administrator by rule." Section 2605(e)(2)(C). The EPA Administrator has not made any such finding with respect to caulk. To the contrary, the TSCA regulations state that "any exposure of human beings or the environment to PCBs may be significant" and thus that "a totally enclosed manner" means "a manner which results in no exposure to humans or the environment to PCBs." 40 C.F.R. 761.20 (emphasis added) It is not rationally disputable that the use of PCBs in caulk results in exposure of humans and the environment to PCBs.

In addition, the EPA Administrator has not issued a rule authorizing the use of PCBs in caulk or made a finding that the use of PCBs in caulk will not present an unreasonable risk of injury to human health or the environment. To the contrary, the TSCA regulations expressly state that PCBs at concentrations of greater than 50 ppm present an "unreasonable risk of injury to human health and the environment." 40 C.F.R. 761.20. Thus, TSCA's regulations expressly provide that, with certain inapplicable exceptions, "[n]o person may use any PCB, or any PCB Item regardless of concentration, in any manner other than a totally enclosed manner, except [for] excluded PCB products as defined in §761.3." 40 C.F.R. 761.20(a). A "PCB Item" is defined as "anything that deliberately or unintentionally contains or has as part of it any PCB or PCBs." 40 C.F.R. 761.3 (1999). "Excluded PCB products" are defined as PCB materials which appear at concentrations less than 50 ppm. 40 C.F.R. 761.3.

Accordingly, TSCA prohibits the Defendants' continued use of caulk containing PCBs over 50 ppm because: (a) the PCBs in caulk are not being used in a "totally enclosed manner;" and (b) the PCB regulations expressly prohibit the use of materials containing PCBs over 50 ppm. *See, e.g.*, EPA, Facts About PCBs In Caulk, www.epa.gov/pcbsincaulk/guide/guide-sect1.htm ("The use of PCBs in caulk

is not authorized under TSCA's PCB regulations."); EPA, Current Best Practices for PCBs in Caulk Fact Sheet-Removal and Clean-Up of PCBs in Caulk and PCB-Contaminated Soil and Building Material, www.epa.gov/pcbsincaulk/caulkremoval.htm ("Caulk containing PCBs at levels ≥ 50ppm is not authorized for use under the PCB regulations and must be removed.").

There is no dispute that TSCA prohibits Defendants' continued use of caulk containing PCBs over 50 ppm. Indeed, the EPA has repeatedly stated that the District must remove any caulk at the School containing PCBs at 50 ppm or greater. *See, e.g.*, April 25, 2014 letter from EPA to America Unites ("Generally, when testing of caulk or other building materials in structures show PCBs are present at or above 50 ppm, the PCB regulations…require that the PCB-containing material be removed.") (DeNicola Decl. ¶5 and Ex. 5 thereto); October 31, 2014 letter from EPA to the District ("As you know, [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."). (Rosenfeld Decl. ¶33 and Ex. 23 thereto)

b. The Contaminated Rooms Have Caulk Containing PCBs At Levels Greater Than 50 PPM

As discussed above, Defendants' own testing has demonstrated the presence of illegal levels of PCBs in caulk in the 10 PI Rooms. Thus, there is no question that the use of caulk in each of the 10 PI Rooms violates TSCA and that such caulk must be remediated.

The Court should issues a preliminary injunction enjoining the use of those rooms immediately and requiring the Defendants to remove the caulk in all the PI Rooms by July 30, 2015, so that students and teachers can have a safe and legal environment when they return for the 2015/16 school year.

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2. America Unites' Members Will Suffer Irreparable Injury In The Absence Of A Preliminary Injunction

As noted above, a plaintiff seeking an preliminary injunction must establish that irreparable harm is likely to result in the absence of the injunction. Irreparable harm is harm that which cannot be prevented or fully rectified by the entry of final judgment after trial. *Roland Mach Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984).

Congress enacted TSCA and gave citizens the right to seek an injunction to restrain violations of the statute because it found that PCBs presented an "extreme threat…to human health and the environment." *See Commonwealth Edison, supra*, 620 F. Supp. at 1408. Thus, the likelihood of irreparable injury follows necessarily from Defendants' violation of TSCA. *See, e.g., Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001) (holding that irreparable injury was presumed where defendants engaged in acts prohibited by statute); *United States v. Nutri-cology, Inc.*, 982 F.2d 394, 398 (9th Cir. 1992) ("the passage of the statute itself is itself an implied finding by Congress that violations will harm the public."); *see also Burlington N.R.R. Co. v. Dept. of Revenue*, 934 F.2d 1064, 1074 (9th Cir. 1991) ("The standard requirements for equitable relief need not be satisfied when an injunction is sought to prevent the violation of a federal statute which specifically provides injunctive relief."). *But see Enyart v. Nat'l Conference Bar Examiners, Inc.*, 630 F.3d 1153, 1165 (9th Cir. 2011) (declining to decide whether violation of a statute constitutes irreparable harm or whether irreparable harm can be presumed based on such a statutory violation).

In any case, the undisputed evidence shows that failure to issue the requested relief will result in irreparable injury. It is undisputed that (a) PCBs cause cancer and other serious illnesses; (b) that teachers and students are exposed to PCBs in caulk through ingestion, contact or inhalation of PCBs into the air from the caulk; and (c) PCBs bioaccumulate in the body. Thus, every day that students and teachers

learn and teach in classrooms with caulk containing PCBs increases their chances of contracting one of the serious diseases with which PCBs are linked. (DeNicola Decl. ¶33; Rosenfeld Decl. ¶46 and Ex. 28 thereto, at p. 1) ("PCBs build up in our bodies over time and PCB exposure over a long period of time can be harmful to our health"); *Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749, 750 (D.C. Cir. 2001) ("PCB 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"). Indeed, Defendants are proposing at least a year of continued exposure to levels of PCBs in excess of 10,000 times the legal limit.

Moreover, Plaintiffs' members will suffer irreparable injury because, absent the requested relief, they will have to choose between the financial burden and social difficulties of sending their children to other schools, or worrying about the harmful effects of PCBs on their children's health. These types of harm cannot be prevented or fully rectified by entry of final judgment after trial. *See Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 545 (1987) (environmental injury "can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable"); *accord Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Many other cases in various contexts have held that threats to health constitute the type of irreparable harm to support the issuance of a preliminary injunction. *See, e.g., Harris v. Board of Supervisors*, 366 F.3d 754 (9th Cir. 2004); *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011); *Oster v. Lightbourne*, 2012 U.S. Dist. LEXIS 28126 (N.D. Cal. 3/2/12); *Bowen v. Consol. Elec. Distribs.*, 461 F. Supp.2d 1179 (C.D. Cal. 2006).

We anticipate that Defendants will argue that the teachers' and students' increased risk of serious illness from exposure to illegal PCBs during the pendency of this case is not large. It is not true, and it is irrelevant. Plaintiffs need only demonstrate a likelihood of irreparable injury, "irrespective of the magnitude of the

injury." *Simula, Inc. v. Autoliv, Inc.*, 175 F. 3d 716, 725 (9th Cir. 1999); *accord Dennis Melancin, Inc. v. City of New Orleans*, 703 F. 3d 262, 279 (5th Cir. 2012) ("[I]t is not so much the magnitude but the *irreparability* that counts for purposes of a preliminary injunction.") (internal quotes omitted; emphasis in original).

3. Balance Of Hardship

"The real issue in this regard is the degree of harm that will be suffered by the plaintiff or the defendant if the injunction is *improperly* granted or denied." *Scotts Co. v. United Industries Corp.*, 315 F.3d 264, 284 (4th Cir. 2002) (emphasis in original). The balance of hardships clearly favors Plaintiffs.

As discussed above, Plaintiffs' members will suffer irreparable injury to their health unless the injunction is granted and the PCB-contamination is remediated promptly. On the other hand, it is indisputable that Defendants are in violation of the law. Thus, requiring Defendants to remediate the PCB contamination promptly instead of at some undefinable time in the future will only require the District to expend money to comply with the law sooner rather than later. This is not a hardship, let alone a hardship that outweighs the risks to students' and teachers' health.

4. Public Interest

Courts of equity "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter, supra*, 555 U.S. at 24. The public interest is served by requiring Defendants to comply with the law. *See, Thalheimer v. City of San Diego*, 645 F.3d 1109, 1128-29 (9th Cir. 2011). The public interest is also served by having a school that is free from PCB contamination. *See Alliance for the Wild Rockies, supra*, 632 F.3d at 1540 ("On the side of issuing the injunction, we recognize the well-established public interest in preserving nature and avoiding irreparable injury.") (internal quotation marks omitted).

C. The Court Should Waive The Bond Requirement

Fed. R. Civ. P. 65(c) provides for the posting of security "in an amount that the court considers proper to pay the costs and damages sustained by any party to have been wrongfully enjoined or restrained." Notwithstanding the Rule's language, the Court has the authority to waive the bond requirement. *See Diaz, supra*, 656 F. 3d at 1015. The Court retains discretion "as to the amount of security required, *if any*." (*Johnson v. Conturier*, 572 F. 3d 1067, 1086 (9th Cir. 2009) (emphasis in original) (internal quotation marks and citations omitted)).

The Court should waive the bond requirement or require only a nominal bond for the following reasons. First, as discussed above, there is no realistic likelihood of harm to the Defendants because Plaintiffs are certain to prevail. *See, e.g., Scherr v. Volpe*, 466 F. 2d 1027, 1035 (9th Cir. 1972) (affirming waiver of bond requirement where a strong likelihood of success on the merits was shown).

Second, Plaintiffs are non-profit organizations with limited resources. A high bond requirement could effectively deny Plaintiffs the ability to obtain preliminary relief. *See, e.g., Save Our Sonoran, Inc. v. Flowers*, 408 F. 3d 1113, 1126 (9th Cir. 2005) (stating that defendant's argument that bond was too low "contradict(s) our long standing precedent that requiring nominal bonds is perfectly proper in public interest litigation"); *GoTo.com v. Walt Disney Co.*, 202 F. 3d 1199, 1211 (9th Cir. 2002) (holding that district court properly ordered nominal bond where higher amount demanded by defendant would effectively preclude injunctive relief).

IV. CONCLUSION

For the reasons set forth above, the Court should issue a preliminary injunction and order that Defendants are: (1) restrained and enjoined from using MHS room nos. 3, 7, 401, 505, 704 (interior) and 704 (exterior hallway), and JCES room nos. 18, 19, 22 and 23 for any educational purpose until the remediation described in (2) below is completed; and (2) required to remove and dispose of all

caulk, and remediate any other materials contaminated with PCBs, in those rooms in accordance with TSCA and regulations thereunder by July 31, 2015.

Respectfully submitted,

Dated: April 1, 2015

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Dated: April 1, 2015

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