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 Plaintiffs 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

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' AMENDED MOTION TO DISMISS, OR IN THE ALTERNATIVE, STAY

Hearing Date: June 8, 2015
Hearing Time: 1:30 p.m.
Judge: Hon. Percy Anderson
Courtroom: 15

Complaint filed: March 23, 2015

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I. INTRODUCTION

In opposition to Plaintiffs' motion for preliminary injunction, Defendants argued that Plaintiffs could not establish a likelihood of success because: (1) the EPA has primary jurisdiction; (2) Plaintiffs' claim was moot; and (3) Plaintiffs' pre-suit notice was defective. (Dkt. 39, at 9-16) The Court rejected these arguments, finding that Plaintiffs "established that they are likely to prevail on their claims." (Dkt. 47, at 4) Nonetheless, a mere three days after the Court issued its preliminary injunction ruling, Defendants filed the instant amended motion to dismiss or stay (the "Motion"), which makes the exact same arguments that the Court had just rejected. Defendants do not even attempt to explain how the Court's 3-day old ruling was incorrect.

Defendants' arguments are even weaker in the instant context of a motion to dismiss than a motion for preliminary injunction. In opposing the motion for preliminary injunction, Defendants were allowed to submit evidentiary materials to support their baseless arguments. Here, Defendants must demonstrate a defect from the face of the First Amended Complaint (the "FAC") or from documents referenced therein or subject to judicial notice. Defendants have not done so, as there is no such defect.

As demonstrated below, the primary jurisdiction doctrine does not apply because, among other things, Congress has expressly provided for citizen's suits. Under TSCA, a citizen's suit is precluded only when the EPA "has commenced and is diligently prosecuting a proceeding for the issuance of an order…to require compliance with this Act." 15 U.S.C. §2619(b)(1)(B). Because Defendants are unable to point to anything in the FAC (or anywhere else for that matter) demonstrating that the EPA is prosecuting such an action, Defendants' primary jurisdiction argument fails.

Similarly, Defendants' mootness argument fails because there is nothing in the FAC or in any document properly before the Court showing that the requested

relief is unnecessary. Even assuming that the Court could properly consider Defendants' contention in their memorandum of points and authorities ("Defts.' Mem.") that they intend to remove illegal caulk in the limited areas already tested by the end of the summer, such representation does not make the matter moot because: (1) there is no legally binding commitment to remediate these areas; and (2) as the FAC alleges, the illegal PCB contamination is widespread throughout the School and not limited to the specific areas that Defendants have tested.

Finally, as the Court has already found, Plaintiffs' pre-suit notice was sufficiently specific to comply with the applicable regulation. The law does not require Plaintiffs to provide Defendants with the irrelevant detail about which Defendants are complaining.

Accordingly, the Court should deny Defendants' Motion.

II. SUMMARY OF THE FAC'S MATERIAL ALLEGATIONS[1]

In November 2013, the District's limited testing revealed that caulk in four of the School's rooms had PCB levels above the legal limit of 50 ppm. (FAC ¶63.) Thereafter, the District refused to conduct any further testing of caulk. (*Id.* ¶69.) Accordingly, independent testing of additional rooms was conducted. The results, which were submitted to the District in July and September 2014, and January 2015, showed illegal levels of PCBs - - up to 7,000 times the legal limit - - in an additional 12 rooms. (*Id.* ¶¶ 80, 83, 103, 109.)

In August 2014, the District told the EPA about its "voluntary" plan to remove caulk containing PCBs in excess of the legal limit. (FAC ¶101.) The EPA did not approve the District's voluntary plan to remove the illegal caulk. EPA

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[1] It is black letter law that in ruling on a motion to dismiss, the Court must "accept as true all of the factual allegations set out in plaintiff's complaint, draw inferences from those allegations in the light most favorable to plaintiff, and construe the complaint liberally." *Rescuecom Corp. v. Google Inc.*, 562 F. 3d 123, 127 (2d Cir. 2009).

approved only that portion of the District's plan regarding the PCBs remaining in the substrate (known as PCB Remediation Waste) after removal of PCB-containing caulk. (*Id.* ¶113.)

On January 12, 2015, Plaintiffs gave the requisite notice of intent to sue in accordance with 15 U.S.C. §2619(b) and 40 C.F.R. 702.62. (FAC ¶121.) On March 23, 2015 - - the day this action was filed - - the District publicly disclosed that its "verification" testing in the rooms where the independent testing had been conducted showed the presence of illegal levels of PCBs in caulk in 10 additional rooms at the School. (*Id.* ¶129.) The District took 24 samples from 10 rooms and in each case, illegal levels of caulk- - up to 11,000 times the regulatory limit--were found. (*Id.*)

The illegal PCB contamination is widespread throughout the School, and not limited to the rooms already tested. (FAC ¶127.) The testing conducted to date has demonstrated the illegal continued use of caulk above TSCA's limits in 17 rooms in ten different buildings. (*Id.* ¶132.) It is more than reasonable to infer that other rooms in those buildings, as well as in other buildings, which were built at the same time and using similar materials, also contain illegal levels of PCBs. (*Id.* ¶¶ 127 and 134.)

As of February 2015, the District had spent approximately $4 million for consultants, public relations firms and lawyers, but had not removed one ounce of contaminated caulk.[2] (FAC ¶131.) By continuing an unauthorized use and failing to remove PCBs at over 50 ppm in the School, Defendants are in violation of the law. (*Id.* ¶136.)

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[2] As of today's date, the District had spent approximately $6 million, but has still not remediated a drop of illegal caulk.

III. ARGUMENT

A. TSCA Imposes An Absolute Ban On Use Of PCBs Over 50 PPM

Defendants attempt to support their Motion by arguing that even if they violate EPA's regulatory threshold of 50 ppm (in this case by as much as 11,000 times), there is nothing to enforce under TSCA as long as they are meeting EPA's suggested guidelines for air concentrations. This is an utterly inaccurate portrayal of TSCA and its implementing regulations. Defendants' attempt to make it appear that the 50 ppm limit is some sort of arbitrary technical requirement that has nothing to do with human health is refuted by congressional action in TSCA and EPA's findings in its regulations. This Court should reject Defendants' contention that the discovery of PCBs at thousands of times above the legal limit dispersed throughout the School is not a cause for concern or a basis for legal action.

PCBs, unlike lead, asbestos or any other chemical, are subject to a near-total ban under TSCA, and may not legally stay in place. 15 U.S.C. §2605(e)(2)(A) states:

> "Except as provided under subparagraph (B), effective one year after the effective date of this Act [January 1, 1977] no person may manufacture, process, or distribute in commerce or use any polychlorinated biphenyl in any manner other than in a totally enclosed manner."

TSCA provides that EPA can make exceptions to this ban by notice and comment rulemaking, based upon a finding that a particular manufacture or use of non-totally enclosed PCBs "will not present an unreasonable risk of injury to health or the environment." 15 U.S.C. § 2605(e)(2)(B); § 2605(e)(3)(B). However, with regard to caulk and other building materials, EPA has not done so. To the contrary, in the rules implementing TSCA's PCB ban, the EPA Administrator found that:

> "[T]he 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, the high probability of human and environmental exposure to PCBs and PCB Items from manufacturing processing, or distribution activities; the potential hazard of PCB exposure posed by the transportation of PCBs or PCB Items within the United States; and the evidence that contamination of the environment by PCBs is spread far beyond the areas where they are used...."

40 C.F.R. 761.20 (emphasis added).

The courts have recognized the unique status of PCBs under TSCA and the congressional determination that their continued use poses unreasonable health risks:

> Section 6(a) governs the regulation of all chemical substances other than PCBs while § 6(e) governs the regulation of PCBs. In singling out PCBs for special treatment under § 6(e), Congress made an unrebuttable finding that PCBs pose an unreasonable risk of injury to health and the environment.

Walker v. EPA, 802 F. Supp. 1568, 1571 (S.D. Tex. 1992), citing *Dow Chemical Co. v. Costle,* 484 F. Supp. 101, 102 & n.1 (D. Del. 1980). *See also United States v. M/V Sanctuary*, 540 F.3d 295, 297 (4th Cir. 2008) ("The health and environmental risks associated with PCBs are undisputed. EPA has determined that PCBs are 'toxic and persistent,' may be oncogenic, and 'may cause reproductive effects and developmental toxicity in humans.' Disposal of Polychlorinated Biphenyls (PCBs), Part IV, 63 Fed. Reg. 35,385 (June 29, 1998)").

In sum, TSCA and its implementing regulations make the continued use of any items containing PCBs at concentrations at or above 50 ppm illegal. There is no exception on this ban where air concentrations of PCBs meet EPA's suggested guidelines.[3] No amount of dusting or air testing can avoid a TSCA violation, or an unreasonable risk to health, when items containing PCBs at or above 50 ppm are in use. And no EPA informal communications or guidelines can change TSCA's implementing regulations which direct that leaving PCBs over 50 ppm in place is illegal because it creates an unreasonable health risk.[4]

B. The Doctrine Of Primary Jurisdiction Does Not Apply Here

Defendants argue for the application of the doctrine of primary jurisdiction on the grounds that remediation of PCB contamination at the School is within the EPA's expertise and any action by the Court could interfere with the EPA-approved remediation plan. The Court has rejected this argument before, and should do so again.

First, there is nothing in the FAC or any document properly before the Court showing that, as a matter of law, the Court's involvement would interfere with or be inconsistent with any alleged EPA approval or expertise. In fact, the EPA has not

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[3] EPA has cautioned that its guidelines should be used with an appreciation of the uncertainty surrounding the estimates." EPA's estimates also do not "consider the direct ingestion of, or contact with, PCB contaminated building materials…." (FAC ¶27) Moreover, EPA's guidelines are not reliable. (*Id.* ¶29.) Furthermore, as EPA has stated, its guidelines "assum[e] a background scenario of no significant PCB contamination in building materials…." EPA, Public Health Levels for PCBs in Indoor School Air, available at www.epa.gov/pcbsincaulk/maxconcentrations.htm Here, there is significant PCB contamination of caulk--up to 11,000 times the legal limit.

[4] Defendants attempt to refute Plaintiffs' claims that air testing has no regulatory basis, and no bearing on whether TSCA has been violated, by pointing to permissible exposure limits for occupational exposures to PCBs in air set by the Occupational Safety and Health Administration (OSHA). (Defts.' Mem., at 5 n. 1.) Plaintiffs have not brought suit under OSHA law but under TSCA, which in fact contains no regulatory standards for indoor air, but does prohibit the continued use of any items containing PCBs at or above 50 ppm.

approved the Defendants' plan to remove illegal caulk.[5] Moreover, Defendants have not shown why EPA's expertise is needed given that TSCA and its implementing regulations make the use of materials containing PCBs at over 50 ppm per se illegal. *See New York Communities for Change v. New York City Dept' of Educ.*, 2013 WL 1232244, at *6 (E.D.N.Y. Mar. 26, 2013). As this Court found in its ruling on Plaintiffs' Motion for Preliminary Injunction:

> "Whether intentionally misleading or merely unintentionally confusing, by conflating the PCB-containing caulk with the 'remediation waste,' Defendants have overstated the degree to which the relief Plaintiffs seek conflicts with EPA's expertise and considered judgment. As a result, the Court is not convinced that Plaintiffs are unlikely to prevail because, as Defendants argue, the EPA has primary jurisdiction over this dispute to which the Court should defer. Although, in August 2014, EPA informed the District that it 'does not recommend additional testing of caulk unless dust or air samples persistently fail to meet EPA's health-based guidelines,' (Original Daugherty Decl., Ex. F), nothing in the record to date suggests that an order requiring the removal of PCB-containing caulk would be contrary to or interfere with the EPA's expertise."

(Dkt. No. 47, at 4 (citation omitted))

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[5] Defendants previously claimed in their Opposition to Plaintiffs' Motion for Preliminary Injunction that moving up the planned timing of caulk removal in the ten rooms from March 2016 to the end of July 2015, as Plaintiffs had sought, would require EPA approval to change the supposedly EPA-approved plan, resulting in further delays in remediation. (Dkt. No. 39, at 6.) Now, Defendants repeatedly represent that they plan to remove all caulk "verified" by the District to be at or above 50 ppm by August 2015. (Defts.' Mem., at 9, 11.) Apparently, Defendants were able to achieve this change in plans without any delay or need for EPA approval. This is because there was no EPA approval of the timeframe in the first place.

More fundamentally, the primary jurisdiction doctrine is simply not applicable, where, as here, Congress has provided for citizen's suits to enforce the law. Congress has specifically limited the situations in which EPA involvement would prohibit a citizen's suit. A citizen's suit may not proceed only if "the Administrator has commenced and is diligently prosecuting a proceeding for the issuance of an order under section 16(a)(2) [15 USCS § 2615(a)(2)] to require compliance with this Act [15 USCS §§ 2601 et seq.]." 15 U.S.C. § 2619(b)(1)(B). Because there is no dispute that EPA has not commenced any proceeding for issuance of an order to enforce TSCA here, Plaintiffs are authorized by TSCA to bring this suit to restrain violations of that Act.

Extensive case law holds that application of the doctrine of primary jurisdiction would frustrate congressional intent in providing for citizen suit provisions. *E.g., PMC, Inc. v. Sherwin-Williams Co.,* 151 F.3d 610, 619 (7th Cir. 1998) ("Appl[ying] the doctrine of primary jurisdiction…would be an end run around [the citizen's suit provisions of] RCRA. …."); *Ass'n of Irritated Residents v. Fred Schakel Dairy*, 2008 U.S. Dist. LEXIS 25257, *41 (E.D. Cal. Mar. 28, 2008) (because Congress has empowered citizens to bring suits, "[t]his Court could not in good faith unilaterally strip United States citizens of rights given them by their government"); *California Sportfishing Protection Alliance v. City of W. Sacramento*, 905 F. Supp. 792, 807, n. 21 (E.D. Cal. 1995) (primary jurisdiction "doctrine has no application here because Congress has expressly set forth the ground rules for citizen suits and only bars penalty actions in specified circumstances"); *Committee to Save Mokelumne River v. East Bay Mun. Util. Dist.,*1993 U.S. Dist. LEXIS 8364, at *26 (E.D. Cal. Mar. 2, 1993) ("Every district court presented with a primary jurisdiction argument in a case involving a Clean Water Act ('CWA') citizen suit has rejected the suggestion that they defer to either state or federal regulatory agencies" (collecting cases)); *Apalachicola Riverkeeper v. Taylor Energy Co., LLC*, 954 F. Supp. 2d 448, 460 (E.D. La. 2013) ("If Congress had intended for

the primary jurisdiction doctrine to bar citizen suits, it would have included the doctrine among the specifically delineated circumstances under which citizen suits are barred").

The most directly relevant case, *New York Communities, supra*, concerned a citizen suit under TSCA to remediate PCBs in NY schools. In that case, the court rejected the application of primary jurisdiction doctrine because Congress had provided for citizen suits and because that case, like this one, did not turn on a technical interpretation of any Agency regulation, or any particular expertise. 2013 WL 1232244, at *6.[6]

Defendants' reliance on *Friends of Santa Fe County v. Lac Minerals*, 892 F. Supp. 1333, 1347-48, 1350 (D.N.M. 1995), is not justified. In that case, the state environmental agency had conducted extensive hearings in which the plaintiffs had participated, had issued a permit and an administrative consent order that required the defendants to undertake specific investigative and remediation efforts, and continued to exercise regulatory oversight. There is nothing of the sort here. Moreover, the *Santa Fe* decision has been criticized as inconsistent with the rulings of the majority of courts with respect to primary jurisdiction in citizen suits. *See, e.g., Stewart-Sterling One, L.L.C. v. Tricon Global Rests., Inc.*, 2002 U.S. Dist. LEXIS 15746, 19-21 (E.D. La. Aug. 9, 2002) ("[T] the majority of courts to address the doctrine in the context of a RCRA citizen suit have concluded either that application of the doctrine is inappropriate except in truly extraordinary circumstances or that it is wholly inapplicable in light of RCRA's express

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[6] Defendants attempt to distinguish *New York Communities, supra,* because there "EPA offered no approval or disapproval of the City's voluntary proposal to address the ballasts over a ten-year period." (Defts.' Mem., at 18.) This argument ignores that the basis for the holding in that case was TSCA's citizen's suit provision and the fact that TSCA cases removal do not require any particular expertise. In any case, exactly the same thing is true here, as EPA has not approved Defendants' voluntary plan to remediate some of the TSCA violations at the School.

delineation of what agency action will preclude a citizen suit") (citations omitted). Likewise, TSCA specifically delineates what type of EPA action will preclude a citizen suit – namely a formal enforcement action – and that has not occurred here.

C. This Case Is Not Moot

As Defendants state, a case is moot when the relief sought can no longer be given or is no longer needed. (Defts.' Mem., at 19.) This is not the case here.

Plaintiffs seek the following relief, in addition to declaratory relief and attorneys' fees:

> "Issue preliminary and permanent injunctive relief requiring Defendants to (i) cease all use of caulk and other materials at the Malibu Schools containing PCBs at concentrations of 50 ppm or greater or having surface concentrations of PCBs above 10 ug per 100 cm^2, including all caulk of like kind and age to caulk which has tested above the regulatory limits; (ii) promptly remove all building materials containing 50 ppm or more PCBs or which have surface concentrations of PCBs above 10 ug per 100 cm^2 from the Malibu Schools, including caulk of like kind and age to caulk which has tested above the regulatory limits; and (iii) dispose of such materials in accordance with the TSCA Regulations . . . ."

(FAC Prayer for Relief, §B.)[7]

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[7] Contrary to Defendants' repeated assertions, Plaintiffs do not seek comprehensive testing as a remedy. The remedy they seek is to restrain violations of TSCA occurring at the School in the form of continued use of building materials which contain 50 ppm or more PCBs. Plaintiffs have sought discovery, under Rule 34(a), which involves sampling and testing of materials at the School in order to support their allegations that violations of TSCA are widespread at the School, including in materials which have not previously been tested. This discovery is intended to support Plaintiffs' allegations, but is not a remedy they seek.

Defendants claim that their voluntary plan to remediate 15 window or door "areas" during the upcoming summer break moots the need for the requested injunctive relief. This is not the case for several reasons. First, Defendants' plan to remediate 15 window or door areas is a far cry from addressing all of the TSCA violations at the School encompassed in the FAC, which include all caulk and other building materials which contain 50 ppm or more PCBs at the School, including caulk of like kind and age to caulk which has already tested over regulatory limits in dozens of rooms not slated for remediation by Defendants. Defendants' proposed remediation does not even cover caulk in other windows or doors in the same rooms or buildings where violations of TSCA -- often at thousands of times the regulatory limit -- have already been confirmed by Defendants' own testing. Indeed, Defendants affirmatively assert that they will not remediate other areas and that they are not required to do so. (See Defts.' Mem., at 2 (claiming that only "known," *i.e.*, already tested, materials with illegal PCBs are required to be removed under TSCA).) Thus, Defendant's planned remediation falls far short of the relief sought in the FAC.

Second, it is difficult to understand how Defendants can claim this case is moot when they admit that there are ongoing violations of TSCA at the School. Apparently their claim rests upon their plan to address these violations in the future by so-called "Best Management Practices," which is really no more than dusting with wet rags. (See Defts.' Mem., at 7) However, even where a Defendant has actually ceased an illegal activity, much less represented that they will do so in the future, a case does not become moot unless "there is no reasonable expectation that the wrong will be repeated." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953) (quoting *United States v. Aluminum Co. of America*, 148 F.2d 416, 448 (1945)). As the Supreme Court has stated:

> "It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the

> legality of the practice.' *City of Mesquite*, 455 U.S. at 289. 'If it did, the courts would be compelled to leave 'the defendant . . . free to return to his old ways.'' 455 U.S. at 289, n. 10 (citing *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953)). In accordance with this principle, the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: 'A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.' *United States* v. *Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968). The 'heavy burden of persuading' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness."

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc., 528 U.S. 167, 189 (2000).[8]

Here, there is no reason to believe that Defendants will not continue to violate the law. Defendants have represented only that they will abate some but not all of their alleged TSCA violations. Moreover, Defendants' past conduct demonstrates a decided preference for delay over compliance – even when such delay entails the expenditure of millions of dollars in legal and environmental consulting fees. (*See* FAC ¶131.) It has been over a year and a half since Defendants learned of TSCA violations at the School in November 2013, and they have yet to remediate a single ounce of caulk. (*Id.* ¶¶59, 63, and 131.) Until August 2014, Defendants actually

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[8] The cases cited by Defendants, *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) and *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990), are not to the contrary. *County of Los Angeles* requires for a finding of mootness that "there is no reasonable expectation that the alleged violation will recur," and that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." 440 U.S. at 631 (internal quotation marks and citations omitted). *Mosley* likewise requires that there is no reasonable likelihood that the wrong will be repeated. 920 F.2d at 414.

flouted the law by taking the position that they could leave caulk in violation of TSCA in place until the buildings in question were renovated or demolished, or at the least for 15 years. (*Id.* ¶77.) In August 2014, Defendants finally agreed to remove the caulk in four window areas sooner, but only in those areas and still not until the end of another whole school year. By then, Defendants had been informed (in July 2014) of independent testing showing additional serious TSCA violations in three more rooms, including results finding PCBs at a level over 7000 times the legal limit. (*Id.* ¶¶ 80-83.) However, their August 2014 "voluntary agreement" completely ignored those violations. (*Id.* ¶101.) No plans were made to remediate those violations (other than one door) or others subsequently validated by independent testing in nine more rooms until after the Notice of Intent to file this suit. (FAC ¶¶ 103, 109.) In March 2015, Defendants purported to give themselves a year or more to remediate the violations in ten of the 12 additional rooms where TSCA violations had been found in independent testing, and only because of pressure from an impending lawsuit. (*Id.* ¶128.)

Still, after all of this resistance and delay, none of this remediation has actually occurred. There is no legally binding commitment to remediate even the "areas" in 15 rooms which Defendants now represent is slated for this summer. *See Kidder, Peabody & Co. v. Maxus Energy Corp.*, 925 F.2d 556, 563 (2d Cir. 1991) (representation that conduct will cease does not moot a claim absent a binding, judicially-enforceable agreement).

In short, there is every reason to believe that Defendants will "return to their old ways" concerning TSCA violations, or more accurately, that they will never leave their "old ways," especially since they take the position that only TSCA violations "known" to them, *i.e.* based on their own testing, need be remediated. Even assuming Defendants can be counted upon to remediate some of the caulk in 15 rooms this summer, they are still refusing to abate the rest of the TSCA

violations throughout the Schools that are alleged in the FAC. This case is far from moot.

The cases cited by Defendants are not to the contrary, but involve situations where a clean-up of all of the pollution alleged by the Plaintiffs was mandated by formal action by government agencies and was already underway. In *City of Fresno v. United States*, 709 F. Supp. 2d 888, 892-93 (E.D. Cal. 2010), several state and federal agencies had entered into agreements, orders and an approval of a remedial action plan concerning the clean-up of the site over several years. In *W. Coast Home Builders, Inc. v. Aventis Cropscience, USA Inc.*, 2009 U.S. Dist. LEXIS 74460 at *12 (N.D. Cal. 2009), remediation was occurring under a consent order with a state agency. Similarly, in *Davis Bros. v. Thornton Oil Co.*, 12 F. Supp. 2d 1333, 1335 (M.D. Ga. 1998), the site was in the process of being cleaned up under orders from a state agency. In our case, there is no EPA mandate or approval (except as to PCB remediation waste after illegal caulk is removed) and no remediation has begun at all. Accordingly, these cases do not apply.

D. Plaintiffs Provided Sufficient Notice Under TSCA

As this Court found when it ruled on the preliminary injunction motion:

> "Although Plaintiffs' Notice of Intent to File Suit identifies the rooms at the campus in which testing has shown caulk containing concentrations of PCBs in excess of 50 ppm, and information concerning suspicions that caulk installed in other locations at MHS and JCES built at the same time prior to 1980, and presumably using the same types of materials that testing has shown contain concentrations of PCBs in excess of 50 ppm, Defendants nevertheless assert that the Notice of Intent to File Suit must identify the precise location on each window where the caulk contains PCBs in excess of 50 ppm. Nothing in the TSCA's statutory or regulatory language requires that level of specificity. . . . Here, Defendants have been

> provided notice that caulk used on the windows of buildings at MHS and JCES constructed prior to 1980 may contain PCBs in concentrations that exceed the levels allowed by EPA. Whatever deficiencies may exist in Plaintiffs' Notice, those deficiencies are unlikely to jeopardize the likelihood that Plaintiffs will ultimately prevail."

(Dkt. 47, at 4 (citation omitted).)

Case law has consistently rejected the argument that pre-suit notices must provide the type of detail that Defendants are demanding. *E.g.*, *NY Cmtys. for Change v. NY Dept. of Educ.*, 2012 WL 7807955, at * 11 (E.D.N.Y. Aug. 29, 2012) (citations omitted), which Defendants cite, states as follows:

> "In this case, however, there is no question as to the nature of the contaminant alleged to be involved and the plaintiff's notice letters clearly state that the defendants' violations relate to PCBs leaking from the light ballasts of specific types of lights found in virtually all of the City schools.... To the extent that defendants object to the failure of the notice letters to identify each and every leaking PCB ballast ....all the regulations require is that the notice be sufficient to provide defendants with information so that they can identify the problem."

Plaintiffs' Notice here clearly provided Defendants with notice "sufficient to provide (them) with information so that they can identify the problems." And, in fact, this is just what Defendants did. Based on the information in the Notice, Defendants took 24 samples in ten of the rooms that had been independently tested and verified that there were illegal levels of PCBs in all 24 samples.

In sum, Plaintiffs' Notice of Intent to Sue sufficiently apprised Defendants of the alleged violations and is not a basis for a dismissal or stay of this suit.

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IV. CONCLUSION

Defendants have advanced no valid reasons why this case should be either dismissed or stayed. It should proceed to adjudication on the merits.

Respectfully submitted,

Dated: May 18, 2015

NAGLER & ASSOCIATES

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

Dated: May 18, 2015

PAULA DINERSTEIN

_____
Attorneys for Plaintiff Public Employees for Environmental Responsibility