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11 *Laurie Lieberman, Dr. Jose Escarce, Craig Foster,*
12 *Maria Leon-Vazquez, Richard Tahvildaran-*
13 *Jesswein, Oscar De La Torre, and Ralph Mechur*

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15 UNITED STATES DISTRICT COURT
16 CENTRAL DISTRICT OF CALIFORNIA
17 WESTERN DIVISION
18

19 AMERICA UNITES FOR KIDS, et
20 al.,

21 Plaintiffs,

22 vs.

23 SANDRA LYON, et al.,

24 Defendants.
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No. 2:15-CV-02124-PA-AJW

DISCOVERY MATTER

**DEFENDANTS' RESPONSE
TO PLAINTIFFS' REQUEST
TO ENTER LAND PURSUANT
TO FED. R. CIV. P. 34(a)(2)**

Complaint filed: March 23, 2015

1 Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Defendants
2 Sandra Lyon, Jan Maez, Laurie Lieberman, Dr. Jose Escarce, Craig Foster,
3 Maria Leon-Vazquez, Richard Tahvildaran-Jesswein, Oscar De La Torre, and
4 Ralph Mechur (hereinafter, "Defendants") respond to Plaintiffs America
5 Unites for Kids and Public Employees for Environmental Responsibility
6 (hereinafter, "Plaintiffs") request to enter land.

7 Rule 34 does not "permit[] blanket discovery upon bare skeletal request
8 when confronted with an objection," and request for entry onto another party's
9 property to conduct testing calls for "a greater inquiry into the necessity for
10 inspection." *Belcher v. Bassett Furniture Indus., Inc.*, 588 F.2d 904, 908 (4th
11 Cir. 1978). Defendants provide this response subject to the following general
12 and specific objections.

13 14 GENERAL OBJECTIONS

15 1. Defendants object to this request in its entirety as it is irrelevant
16 and is not reasonably calculated to lead to the discovery of admissible
17 evidence. Plaintiffs have already alleged that they have located uses of PCBs
18 in excess of the TSCA threshold. Where such an allegation can be made, no
19 further attempt to locate additional TSCA violations is necessary. *See New*
20 *York Communities for Change v. New York City Dept. of Educ.*, 2012 WL
21 7807955, at *22 (E.D.N.Y. 2012).

22 2. Defendants object to this request in its entirety as it constitutes an
23 impermissible remedy that contradicts the directives of the lead agency. The
24 United States Environmental Protection Agency ("EPA") has succinctly stated
25 that "[t]he Toxic Substances Control Act (TSCA) does not require schools or
26 building owners to test caulk for PCBs" and that "EPA does not recommend
27 additional testing of caulk [at the Malibu Campus] unless dust or air samples
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1 persistently fail to meet EPA's health-based guidelines," which they have not.
2 Defendants' Request for Judicial Notice, Exhibits C and D. In the instant
3 lawsuit, Plaintiffs seek to challenge EPA's interpretation of TSCA and obtain
4 a directive of the Court that the statute does, in fact, mandate further
5 investigation. *See* Plaintiffs' First Amended Complaint, Prayer for Relief.
6 Therefore, the "discovery" sought by this inspection request constitutes, in
7 part, the final remedy sought in the action. Because the legal application of
8 TSCA to the Malibu Campus has not been decided by the Court, this request is
9 untimely and impermissible.

10 3. Defendants object to this request in its entirety as Defendants'
11 pending motion to dismiss merits a stay of any discovery. Stay of discovery is
12 appropriate when a pending motion is potentially dispositive of an entire case
13 or at least on the issue at which discovery is directed. *Pac. Lumber Co. v.*
14 *Nat'l Union Fire Ins. Co.*, 220 F.R.D. 349, 352 (N.D. Cal. 2003) (*citing*
15 *Panola Land Buyers Ass'n v. Shuman*, 762 F.2d 1550, 1560 (11th Cir. 1985);
16 *Church of Scientology of S.F. v. Internal Revenue Service*, 991 F.2d 560, 563
17 (9th Cir. 1993)).

18 4. Defendants object to the time and location specified for the entry
19 onto land as unreasonable and unduly burdensome to the extent that it does not
20 "specify a reasonable time, place, and manner for the inspection and for
21 performing the related acts." Fed. R. Civ. Proc. 34(b)(1)(A).

22 5. Defendants object to this request as overly broad, unduly
23 burdensome, and ambiguous to the extent that it does not "describe with
24 reasonable particularity each item or category of items to be inspected." Fed.
25 R. Civ. Proc. 34(b)(1)(B).

26 6. Defendants object to this request to the extent that it seeks
27 discovery that is unreasonably cumulative or duplicative.
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1 7. Defendants reserve all rights provided by the applicable Federal
2 Rules of Civil Procedure or by any order of the Court.

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4 SPECIFIC OBJECTIONS

5 A. **Locations**

6 8. Defendants object to the locations proposed in Plaintiffs' request
7 as overly broad, unduly burdensome, and unreasonably vague because the
8 request does not describe where on the Malibu Middle and High School and
9 Juan Cabrillo Elementary School campuses (collectively, the "Malibu
10 Campus") the requested inspection, photography, testing, or sampling would
11 occur. The Malibu Campus has scores of classrooms. Plaintiffs have not
12 specified with reasonable particularity the property to be inspected or the
13 locations to be inspected, as required by Rule 34.

14 9. Defendants object to the locations proposed in Plaintiffs' request
15 as overly broad, unduly burdensome, and unreasonably vague because the
16 request does not describe where any attendant testing of samples taken from
17 the school would occur.

18 B. **When**

19 10. Defendants object to the time proposed in Plaintiffs' request as
20 overly broad and unduly burdensome because it requests that Defendants'
21 right to enter commence while students and teachers still remain on campus
22 after school.

23 11. Defendants object to the time proposed in Plaintiffs' request as
24 overly broad and unduly burdensome because it requests that Defendants'
25 right to enter and disturb building materials occur prior to the end of the
26 school year, disrupting classrooms and classes that are currently occupied by
27 students and teachers at the Malibu Campus.

1 12. Defendants object to the time proposed in Plaintiffs' request as
2 overly broad, unduly burdensome, and unreasonably vague because it does not
3 set finite dates and times during which the inspection and related testing of
4 any samples will be completed.

5 **C. Manner of Inspection**

6 13. Defendants object to the manner of inspection proposed in
7 Plaintiffs' request as overly broad, unduly burdensome, and unreasonably
8 vague because it does not describe with reasonable particularity each item or
9 category of items to be inspected.

10 14. Defendants object to the manner of inspection proposed in
11 Plaintiffs' request as overly broad and unduly burdensome because it proposes
12 that Defendants' and/or their agents will inspect and disturb building materials
13 prior to the end of the school year, disrupting classrooms and classes that are
14 currently occupied by students and teachers at the Malibu Campus.

15 15. Defendants object to the manner of inspection proposed in
16 Plaintiffs' request as overly broad, unduly burdensome, and unreasonably
17 vague because it does not specify the manner in which sampling of non-caulk
18 building materials will be conducted or the types of samples that will be taken
19 and is unreasonably vague as to which non-caulk building materials will be
20 sampled.

21 16. Defendants object to the manner of inspection proposed in
22 Plaintiffs' request as overly broad, unduly burdensome, and unreasonably
23 vague because it does not specify the manner in which related testing of the
24 samples will occur.

25 17. Defendants object to the manner of inspection proposed in
26 Plaintiffs' request as being insufficiently detailed regarding the specifics of the
27 investigation. The subject site is currently regulated by EPA under TSCA.

1 While EPA will not constrain a property owner from undertaking further
2 investigation of its own property, Plaintiffs are not the current owner of
3 property. Any investigation conducted by Plaintiffs must adhere to the
4 regulatory requirements of TSCA, and contain documented measures, subject
5 to review by EPA, describing the exact investigation, sampling methodologies,
6 analytical parameters, materials handling requirements, QA/QC, split
7 sampling and data-sharing measures, reporting standards, and waste disposal
8 requirements. As to this last point, Plaintiffs' proposed investigation may
9 generate potentially hazardous wastes in quantities that are not insignificant.
10 Plaintiffs will be responsible to obtain a Generator Identification Number from
11 EPA, or utilize a contractor already possessing such an identification number,
12 and will be responsible for the ultimate disposal of solid and solid hazardous
13 waste generated from any investigation. Defendants therefore object to the
14 manner of inspection proposed in Plaintiffs' request as unreasonably vague
15 because it fails to acknowledge these issues or specify that it or a contractor
16 will adhere to regulatory requirements in conducting the proposed
17 investigation.

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1 RESPONSE TO REQUEST TO ENTER LAND

2 Pursuant to the general and specific objections raised above, Defendants
3 respond that they will not allow Plaintiffs and/or their agents to enter onto the
4 land of the Malibu Campus as requested.

5 Dated: April 29, 2015

6 Respectfully Submitted,

7 PILLSBURY WINTHROP SHAW
8 PITTMAN LLP
9 Mark E. Elliott
 Julia E. Stein

10 By: /s/ Mark E. Elliott

11 Mark E. Elliott
12 Attorneys for Defendants
13 SANDRA LYON, et al.
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1 I declare under penalty of perjury that the foregoing is true and correct. Executed
2 this 29th day of April, 2015, at Los Angeles, California.
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Helen Moreno
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1. I am over the age of 18 years and am not a party to the within cause. I am employed by First Legal Support Services in the City of Los Angeles, California.

3. On April 29, 2015, I served a true copy of the attached document(s) titled exactly **DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST TO ENTER LAND PURSUANT TO FED. R. CIV. P. 34(a)(2)** by delivering a copy thereof to the following:

I declare under penalty of perjury that the foregoing is true and correct. Executed this 29th day of April, 2015, at Los Angeles, California.

NAME: _____