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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

DISCOVERY MATTER

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

Complaint filed: March 23, 2015

Plaintiffs respectfully submit this reply memorandum in support of their ex parte application for expedited discovery under Fed. R. Civ. P. 34(a)(2). As demonstrated below, Defendants have failed to rebut Plaintiffs' showing that good cause exists for the requested relief.

I. DISCOVERY IS APPROPRIATE UNDER RULE 34(a)(2)

Contrary to Defendants' conclusory contentions, the discovery requested is directly relevant to Plaintiffs' allegations that illegal PCB-contamination is widespread throughout the School, including in rooms where building materials have not previously been tested. Like all proper discovery, it seeks evidence that will be relevant to the determination of the merits, *i.e.*, what TSCA violations need to be abated. Because Defendants have cynically refused to test the caulk in any further rooms, the discovery is necessary to support Plaintiffs' claims.

Defendants argue that the discovery sought is an "end run" which seeks to obtain a final remedy sought in the case. This is irrelevant, and in any case not correct.[1] Plaintiffs seek the remedy provided in TSCA's citizen suit provision, to restrain violations of the Act, 15 U.S.C. § 2619(a), namely the continued use of materials containing PCBs in violation of TSCA,[2] and the removal and remediation of building materials containing PCBs above legal limits.

Defendants attempt to distinguish the numerous cases Plaintiffs cited that have allowed testing in environmental cases on the ground that none involve TSCA. Defendants contend that, according to their expert, the statute has been expressly

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[1] The prayer for relief in the First Amended Complaint does not include PCB source testing. Defendants cite to p. 29 of the First Amended Complaint; however there is nothing about seeking comprehensive source testing there or anywhere in the First Amended Complaint.

[2] Defendants contend that "prior to granting discovery in the form of sampling, this Court must first reach the ultimate question posed in Plaintiffs' Complaint as to whether they are entitled to the remedy they seek at all." It is unclear what this means. There is no dispute that Congress has explicitly authorized citizen's suit like this one for injunctive relief to restrain violations of TSCA. 15 U.S.C. §2619(a).

construed by EPA to permit "management in place" of substances otherwise banned by the statute. Defendants' argument flies in the face of the law; TSCA and the EPA's regulations thereunder expressly prohibit the use of PCBs over 50 ppm. 15 U.S.C. §2605(e)(2)(A); 40 C.F.R. 761.20. Indeed, the EPA has repeatedly stated, including to the Defendants, that PCB-contamination over 50 ppm is illegal and must be removed. *See, e.g.,* 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."); October 31, 2014 letter from EPA to the Defendants (attached as Exhibit 4 to the Avrith Decl., Dkt. 18-6) ("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.").

Defendants also contend that the EPA has stated that TSCA does not require schools to test caulk for PCBs and that EPA does not recommend that schools do such testing. That is irrelevant. The EPA does not prohibit schools (let alone Plaintiffs suing schools) from testing, and its correspondence with the Defendants clearly anticipates that such testing will occur. *See, e.g.,* October 31, 2014 letter from EPA to the Defendants (attached as Exhibit 4 to the Avrith Decl., Dkt. 18-6) ("[T]he District proposes to remove…any newly discovered PCB-containing caulk…."). Indeed, Defendants' expert admits that Defendants did do testing of caulk on February 28, 2015, the EPA's recommendation notwithstanding. (Daugherty Decl., p. 18 at ¶5)

In any case, whether or not the law requires schools to test for caulk, and whether or not the EPA recommends it, Plaintiffs have a right to conduct discovery to prove their case. None of the Rule 34 cases involving environmental sampling that Plaintiffs cited involved sampling that was required by law. Rather, just like

here, the sampling was relevant to the allegations in the case concerning environmental contamination. Defendants do not cite any authority to the contrary.

Defendants' extensive arguments that EPA has approved how they are handling PCBs at the School are nothing but a smokescreen. EPA is not a defendant in this case because it is a citizen enforcement suit against violators of TSCA, seeking to abate their violations. The fact that EPA Region 9 may be condoning Defendants' efforts to avoid finding violations of the laws by not testing building materials is exactly the sort of situation that TSCA's citizen suit provision was meant to address: situations where the government "cannot or will not command compliance" with the law. *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 62 (1987).

Finally, Defendants' claim that the discovery is not necessary because Plaintiffs do not need it to state a claim under TSCA, is misplaced. Plaintiffs agree that the allegations in their complaint are sufficient to withstand a motion to dismiss even without the discovery which is sought. However, this has no bearing on whether the discovery is "relevant to any party's claim or defense" as required by Fed. R. Civ. P. 26(b) and 34(a). A motion to dismiss is based on the sufficiency of the *allegations* in the complaint to state a claim, while discovery is intended to obtain evidence to prove those allegations.

II. THERE IS GOOD CAUSE FOR THE GRANTING OF EXPEDITED DISCOVERY

Defendants contend that there are no exigent circumstances requiring expedited discovery. This ignores two key points discussed in Plaintiffs' opening memorandum.

First, every day that students and teachers are exposed to illegal PCBs needlessly increases their risk of contracting one of the serious ailments that such exposure causes. 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 PCBs over 50 ppm "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. And, although Defendants refer to their "exceedances" of the PCB limits as if they were merely technical violations, Defendants' own testing has already found violations in excess of 11,000 times the legal limit. Defendants' contentions that the School is "safe," cannot be reconciled with these findings. Defendants are unnecessarily putting the students' and teachers' health and safety at risk.

Moreover, Plaintiffs need the sampling and testing to be done as soon as possible so that they can move for preliminary injunctive relief in time for the illegal and hazardous substance to be remediated over the summer before the beginning of the new school year. Otherwise, students and teachers will be required to study and learn in an illegal, contaminated environment for another year. If the remediation is not accomplished as soon as possible, parents will have to make the difficult choice of risking their children's health or removing them to other schools, which will entail considerable financial expense and take children away from their school and friends.

Defendants' claim that the discovery is not tailored to Plaintiffs' Motion for Preliminary Injunction misapprehends why Plaintiffs seek this discovery. Plaintiffs' pending Motion for Preliminary Injunction seeks prompt removal of PCBs already found by the District's own testing to violate TSCA. The discovery sought seeks to identify additional school rooms which violate TSCA. When those rooms are identified, assuming Defendants do not agree to prompt removal and remediation, Plaintiffs will amend their Motion for Preliminary Injunction to add those rooms, or

file a second Preliminary Injunction Motion, depending on the status of the first such motion at that time.

Finally, Defendants argue that expedited discovery would be a "significant burden" to them. The only alleged burden that Defendants identify is that "such testing is impossible to conduct without extreme disruption to the learning environment at the School." Defendants conveniently ignore that the sampling will be conducted over the weekend when there is no school.[3]

In fact, absolutely no actual prejudice to Defendants from the grant of expedited discovery has been shown. The discovery will cause no disruption or burden, and even assuming there is some burden, it certainly will not be greater if the discovery is conducted now as opposed to in the usual time sequence.

III. CONCLUSION

For the reasons set forth above and in Plaintiffs' opening memorandum, the Court should grant the requested relief.

Respectfully submitted,

Dated: April 3, 2015

NAGLER & ASSOCIATES

By: _____
Charles Avrith
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Dated: April 3, 2015

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[3] As noted above, Defendants recently conducted sampling of caulk on February 28, 2015, which was a Saturday. Defendants' own sampling does not appear to have caused any disruption of the learning environment.