May 5, 2015

VIA HAND DELIVERY

Mark E. Elliott, Esq.
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Los Angeles, CA 90017-5406

Re: *America Unites, et al. v. Lyon, et al.*

Dear Mark:

This letter constitutes a formal request pursuant to Local Rule 37-1 for a meet and confer discovery conference concerning Plaintiffs' Request to Enter Land Pursuant to Fed. R. Civ. P. 34(a)(2) (the "Request"). Defendants' objections to the Request dated April 29, 2015, are improper for the reasons set forth below.

General Objections

1. Defendants object on the basis that the discovery is not reasonably calculated to lead to admissible evidence. In fact, this discovery is reasonably calculated to lead to admissible evidence which is central to Plaintiffs' claims. In this citizen suit, Plaintiffs seek to restrain violations of TSCA throughout Malibu Middle and High School and Juan Cabrillo Elementary School ("the School") due to the presence and continued use of caulk and other building materials containing PCBs at or above 50 ppm. The discovery sought is calculated to lead to evidence to prove the allegations in our complaint that violations of TSCA are widespread throughout the School, including in many rooms in which building materials have not been previously tested for PCBs.

   Numerous courts in cases alleging environmental contamination have approved discovery under Rule 34(a) to allow testing to determine the nature and extent of the contamination. *E.g. Martin v. Reynolds Metal Corp*. 297 F.2d 49, 57 (9th Cir. 1961) (permitting pre-litigation discovery for anticipated case alleging damage from pollution on cattle ranch, including testing samples of forage, feed, air, water and soil); *Cal. Sportfishing Protection Alliance v. Chico Scrap Metal, Inc*., 2014 U.S. Dist. LEXIS 61069 at *4-5, 2014 WL 1664936 2 (E.D. Cal. April 25, 2014) (testing of stormwater discharges for metals and PCBs); *United States v. Acquest Wehrle*, 2010 U.S. Dist. LEXIS 41263 at 1

(W.D.N.Y. Apri127, 2010) (permitting entry on land to conduct ecological and hydrological sampling and testing in Clean Water Act citizen suit); *Coldani v. Hamm*, 2008 U.S. 6 Dist. LEXIS 79608 at *3, 2008 WL 3992719 (E.D. Cal. Aug. 25, 2008) permitting testing of ranch's soil, sediment and groundwater for contamination); *Ark. Game & Fish Comm'n v. United States*, 74 Fed. Cl. 426, 434 (Fed. Cl. 2006) (allowing installation of instruments to measure water levels in case alleging damage to natural resources); *Teer v. Law Eng'g & Envtl. Services*, 176 F.R.D. 206, 207 (E.D.N.C. 1997) (allowing access to property to take soil and water samples, and other things necessary to determine the extent of pollution); *United States v. Moss-American*, 1977 U.S. Dist. LEXIS 14908 at *5-*7 (E.D. Wis. July 20, 1977) (entry onto land to take surface and core samples including samples from earthen floors of buildings).

The citation in the objections to *New York Communities for Change v. New York City Dept. of Educ.* 2012 WL 7807955 at *22, 2012 U.S. Dist. LEXIS 187437 at *34 (E.D.N.Y. Aug. 29, 2012), is misplaced. The discussion in that case concerned a motion to dismiss based on the lack of adequate notice under TSCA where not all sources of PCB contamination were identified in the notice. Plaintiffs agree that their notice, like the one in the *New York Communities* case, is sufficient to withstand a motion to dismiss even though it does not identify all the sources of PCB contamination. 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 notice to provide adequate notice or of the allegations in a complaint to state a claim, while discovery is intended to obtain evidence to prove those allegations. This discovery seeks to prove the allegations in Plaintiffs' Notice of Intent to Sue and their First Amended Complaint that illegal PCB contamination is widespread that the School in pre-1980 buildings.

2. Defendants object on the basis that the discovery request constitutes an impermissible remedy that contradicts the directive of the lead agency (EPA). This objection is baseless. Plaintiffs do not seek sampling and testing of building materials of the School as a remedy, but as discovery leading to admissible evidence to prove the allegations in their complaint of violations of TSCA and to support the remedy they seek, which is to restrain violations of TSCA. Plaintiffs' First Amended Complaint seeks the following remedy, which does not include testing:

> 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.

The fact that EPA in an August 2014 letter to Defendant Lyon stated that TSCA does not require testing caulk for PCBs, and that EPA did not recommend additional testing of caulk, has no bearing on whether testing under Rule 34(a) is appropriate. These statements by EPA were not an interpretation of TSCA as in any way prohibiting testing. In fact, the District tested caulk in 10 more rooms, all of which were found to violate TSCA, after the date of the letter. In addition, EPA confirmed in a more recent communication with Plaintiff America Unites on April 17, 2015, that "Nothing in the approval limits the District's ability to perform additional caulk sampling or removal. . . ". Ex. 11 to Supplemental Declaration of Jennifer DeNicola in Support of Motion for Preliminary Injunction. The discovery sought does not contravene any direction from EPA.

Moreover, the fact the TSCA has a citizen suit provision means that citizens may seek to enforce TSCA when EPA is not doing so. Plaintiffs' efforts to enforce TSCA supplement and do not contravene EPA's actions, as provided in the TSCA citizen suit provision.

3. Defendants object to the discovery on the basis that they have a pending motion to dismiss and therefore discovery should be stayed. Defendants have not made the requisite showing that discovery should be stayed for this reason. The Federal Rules do not provide for automatic stays when dispositive motions are filed. Defendants would need to move for a protective order under Fed. R. Civ. P. 26(c). Such a motion would require a strong showing of good cause and specific need to be granted. *See Skellerup Indus. v. City of Los Angeles*, 163 F.R.D. 598, 600-601 (C.D. Cal. 1995) *quoting Gray v. First Winthrop Corp*., 133 F.R.D. 39, 40 (N.D. Cal. 1990) ("If this court were to adopt defendants' reasoning, it would undercut the Federal Rules' liberal discovery provisions. . . . Had the Federal Rules contemplated that a motion to dismiss under Fed.R.Civ.Pro. 12(b)(6) would stay discovery, the Rules would contain a provision for that effect. In fact, such a notion is directly at odds with the need for expeditious resolution of litigation.") Defendants would not be able to make the required showing in this case, since the discovery sought would not be burdensome to Defendants and would greatly advance the expeditious resolution of this case.

4. Defendants state they object to the time and location specified for the entry onto land as unreasonable and unduly burdensome because it does not specify a reasonable time, place

and manner for the inspection. Plaintiffs have specified the time, place and manner for inspection and Defendants have not provided any support for their claim that the specifications in Plaintiffs' Request to Enter Land is deficient in this respect.

5. Defendants object that the request is overly broad, unduly burdensome and ambiguous to the extent that it does not describe with particularity each item or category of items to be inspected. In fact, Plaintiffs have specified that they will take 1 to 4 small caulk samples in each regularly occupied room in buildings constructed before 1980 at the Schools, as well some spot samples of other building materials, which based on the inspection by Plaintiffs' expert, are identified as possibly containing PCBs. Again, Defendants have not provided any support for their claim that Plaintiffs' descriptions of the items to be inspected is inadequate.

6. Defendants object to the request as seeking discovery that is unreasonably cumulative or duplicative. There is absolutely no explanation for why this claim is made. Since no other discovery has been conducted in this proceeding or is planned at this time, it is not possibly that this discovery could be unreasonably cumulative or duplicative.

Specific Objections

8. Defendants object to the locations proposed in Plaintiffs' request as overly broad, unduly burdensome and unreasonably vague because the request purportedly does not describe where at the School the investigation will be conducted. Plaintiffs have specified that they will take samples in every regularly occupied room at the School in buildings built before 1980. Defendants well know which buildings were built before 1980 and which rooms are regularly occupied. Their consultant Environ's various reports detail this information. Plaintiffs have also proposed to take a few samples of other building materials in or outside of those same rooms. While Plaintiffs do intend to take samples from many rooms, the discovery is not burdensome as it will be conducted in one or at most two weekends when schools is not in session.

9. Defendants again object to the locations proposed because they do not describe where the testing of the samples would occur. The testing will occur in an EPA-certified laboratory away from the School property, and thus should not be any concern of Defendants.

10. Defendants object to the proposed time because it will purportedly occur while students and teachers remain on campus after school. If any of the rooms sought to be sampled on Friday afternoon are occupied by students or teachers, Plaintiffs will postpone testing in those rooms until Saturday or Sunday so as not to disturb or burden those students or teachers. Plaintiffs note that the School District recently tested 10 rooms over a weekend without even informing anyone at the School, and apparently without any burden on anyone.

11. Defendants object to the time of the proposed discovery because it will occur prior to the end of the school year, and thus purportedly disrupt currently occupied classrooms and classes. The collection of small samples of building materials, which will be replaced with clean new materials, over a weekend when school is not in session has no potential to disrupt currently occupied classrooms and classes. Again, the School District recently tested 10 rooms over a weekend without even informing anyone at the School, and apparently without any burden on anyone or disruption to any classrooms or classes.

12. Defendants object to the time of the proposed discovery because it does not set finite dates and times for completion. This is not the case. Plaintiffs specified the time and dates that they will conduct their discovery, and the time and dates that they will return if discovery cannot be completed in the first weekend. Rule 34 requests often contain contingencies for returning for additional testing depending on the results of the first set of testing.

13. Defendants object to the manner of inspection as not describing with reasonable particularity each item or category of items to be inspected. Plaintiffs have described with reasonable particularity that they intend to take 1 to 4 caulk samples in each regularly occupied room in pre-1980 buildings, and a few samples of other building materials in or outside of those same rooms. The purpose of the reasonable particularity requirement is so that Defendants can know what documents or items to make available for inspection, and the court can have enough information about what is being requested to rule on any objections. *See e.g. Mailhoit v. Home Depot U.S.A., Inc.*, 285 F.R.D. 566, 570 (C.D. Cal. 2012), *quoting Regan-Touhy v. Walgreen Co.,* 526 F.3d 641, 649-650 (10th Cir. 2008) (“Though what qualifies as 'reasonabl[y] particular' surely depends at least in part on the circumstances of each case, a discovery request should be sufficiently definite and limited in scope that it can be said 'to apprise a person of ordinary intelligence what documents are required and [to enable] the court . . . to ascertain whether the requested documents have been

produced.'") (quoting Wright & Miller, 8A Federal Practice and Procedure § 2211, at 415); *Reinsdorf v. Skechers U.S.A., Inc.*, 296 F.R.D. 604, 616 (C.D. Cal. 2013) ("The test for reasonable particularity is whether the request places a party upon reasonable notice of what is called for and what is not.") (internal quotation marks and citations omitted).

Those purposes are certainly met here, where there is no burden on Defendants to make particular items available, and the court will know exactly what Plaintiffs are proposing to do.

14. Defendants object to the manner of inspection because it involves inspecting and disturbing building materials prior to the end of the school year, purportedly disrupting classes and classrooms that are currently occupied. Again, Plaintiffs activities on a weekend to remove and replace small pieces of caulk or other building materials can in no way disrupt classes and classrooms. The School District itself has conducted testing of materials, air and dust in a significant portion of the School's classrooms without disrupting classes or classrooms.

15. Defendants object to the manner of inspection because it does not specify the manner of sampling of non-caulk building materials or the types of non-caulk materials or which non-caulk materials. Just as with caulk sampling, Plaintiffs intend to take small samples of materials such as paint and joint compound for testing, and repair the areas sampled. The District itself has conducted similar sampling without disruption or damage to the School. There will be no burden or damage from this sampling, and no legitimate reason to object to this discovery.

16. Defendants object to the manner of inspection because it purportedly does not specify the manner in which the testing of the samples will occur. The samples will be sent to an EPA certified laboratory for analysis, no differently from the samples which the District has taken, and those independently taken, have been in the past. Defendants' suggestion that they do not know how the testing will occur is disingenuous.

17. Defendants object to the manner of inspection as insufficiently detailed regarding the specifics of the investigation. This objection merely repeats many of the objections above which falsely claim that the Plaintiffs' request is insufficiently specific. Defendants know exactly what Plaintiffs propose to do, and thus their request is sufficiently specific and detailed under applicable case law.

> Defendants express concern that Plaintiffs' investigation must be reviewed by EPA, including sampling methodologies, analytical parameters, materials handling requirements, QA/QC, split sampling and data-sharing measures, reporting standards and waste disposal requirements. In fact, the District itself did its initial sampling in November 2013 which found PCBs above legal limits, and which they acknowledge is sufficient to require removal in accordance with TSCA, without any such EPA review. Defendants' claim that the sampling could generate hazardous wastes and that Plaintiffs must obtain approvals for their disposal is ridiculous. Plaintiffs will be taking small samples which will be delivered to a laboratory and their disposal, if disposed, will be the responsibility of the EPA-certified laboratory. Defendants' claim that Plaintiffs must adhere to regulatory requirements in their investigation is equally specious, as EPA has no such regulatory requirements except as to disposal, which, as just noted, is not an issue here. Plaintiffs will employ a firm with expertise in PCB identification and testing which will comply will all EPA guidance as to the conduct of this investigation.

Please let me know your availability in the next ten days to schedule a meet and confer conference. Hopefully, we can reach agreement and not burden the Court with a motion to compel.

Very truly yours,

NAGLER & ASSOCIATES

Charles Avrith