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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

AMERICAN UNITES FOR KIDS, and PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, Plaintiffs, vs. SANDRA LYON, IN HER OFFICIAL CAPACITY AS SUPERINTENDENT OF THE SANTA MONICA MALIBU UNIFIED SCHOOL DISTRICT, JAN MAEZ, IN HER OFFICIAL CAPACITY AS ASSOCIATE SUPERINTENDENT AND CHIEF FINANCIAL OFFICER OF THE SANTA MONICA MALIBU UNIFIED SCHOOL DISTRICT, AND, LAURIE LIEBERMAN, DR. JOSE ESCARCE, CRAIG FOSTER, MARIA LEON-VAZQUEZ, RICHARD TAHVILDARAN-JESSWEIN, OSCAR DE LA TORRE, AND RALPH MECHUR, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE SANTA MONICA MALIBU UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION, Defendants.	No. 2:15-CV-02124-PA-AJW DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' *EX PARTE* MOTION FOR EXPEDITED DISCOVERY Dept. 15 Judge: Percy Anderson Complaint Filed: March 23, 2015

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I. INTRODUCTION

The Court should deny Plaintiffs' motion for expedited discovery. There is no "good cause" to grant Plaintiffs' expedited discovery requests, which are not necessary or pertinent to the legal and factual claims at the root of this lawsuit. Plaintiffs' request seeks, in fact, to circumvent the entire process of this lawsuit by seeking comprehensive source testing at the Juan Cabrillo Elementary School and Malibu Middle and High School campuses—one of their proposed remedies—without cause and without allowing adequate time for the Defendants to respond to the allegations in the First Amended Complaint ("Complaint") and to allow the Court to address the seminal questions of the remedies, if any, available to Plaintiffs under the Toxic Substances Control Act.

Plaintiffs have already alleged violations of the Toxic Substances Control Act ("TSCA") in their Complaint and allegedly possess sufficient data to prove those violations based upon the allegations of the Complaint. They do not need to take more samples to further enhance their case at this early stage in the litigation. Particularly in light of the United States Environmental Protection Agency's existing approval for Defendants to remove the PCB contamination previously identified. Allowing Plaintiffs' representatives to take additional samples would accomplish no purpose other than to disrupt the school environment for students and staff.

II. STATEMENT OF FACTS

The instant action is based upon alleged TSCA violations discussed in Plaintiffs ***second*** Notice of Intent to Sue, sent in January 2015; Plaintiffs first notified Defendants of their intent to sue under TSCA in August 2014, naming the United States Environmental Protection Agency ("EPA") along with Defendants in that notice. EPA is the lead regulatory agency with authority under TSCA, and has a robust policy regarding the presence of PCBs in

schools—a policy that it has applied not only to the Malibu schools, but also at schools around the country. As discussed below, Defendants have acted pursuant to EPA's direction, as required by law, in addressing polychlorinated biphenyl contamination in building materials at the Malibu schools. In turn, EPA has certified on multiple occasions that the Malibu school buildings do not pose a risk of adverse health effects to students and staff, and that all existing PCB materials remaining at the schools can be safely managed in place until they are removed in the future.

With the issuance of Plaintiffs' January 2015 Notice of Intent to Sue, EPA was removed as a named party, despite the fact that it is EPA's policies with which Plaintiffs take issue. Instead, Plaintiffs attack Defendants directly, alleging Defendants have violated TSCA because building materials at the school campuses contain polychlorinated biphenyls ("PCBs") in excess of the TSCA threshold of 50 ppm. They base these allegations on samples of bulk materials they say were collected at various locations on the two school campuses, including some that were illegally collected.

But it is uncontroverted that Defendants have followed EPA's policies and directives regarding the investigation and removal of PCBs at the Malibu schools to the letter. Defendants themselves have tested numerous bulk samples from the school campuses, many taken from the same rooms allegedly and illegally tested by Plaintiffs without permission to access the property and conduct sampling, and do not dispute that some exceedances of TSCA's PCB threshold have been found. However, Defendants have been working diligently under the supervision of the lead regulatory agency with authority under TSCA, EPA, to plan for and execute removal activities. EPA approved Defendants' plans on October 31, 2014. Where locations of PCB exceedances are known and verified, removal activities are already scheduled, with removal to begin once school lets out in summer 2015 so as not to disrupt

the school schedule. As part of the October 2014 approval, EPA also approved Defendants' plan to address any PCB exceedances that are discovered at the campuses in the future.

It is clear that Plaintiffs take issue with EPA's longstanding policies on PCBs in schools and the particular directives that have been issued in Malibu, but these are questions of *policy* that are appropriate for the federal legislature, not the courtroom. Despite this, Plaintiffs attempt to use this action to circumvent EPA's policies regarding the management of PCBs in building materials in schools without directly confronting the agency. On March 23, 2015, Plaintiffs filed their Complaint, alleging TSCA violations based on exceedances of the 50 ppm TSCA threshold at several locations on the school campuses. Complaint at ¶¶ 2, 126. On April 1, 2015, Plaintiffs filed a motion for preliminary injunction, asking that Defendants be compelled to remediate existing known and verified locations of PCBs in excess of 50 ppm on the school campuses—even though Defendants have already been approved by EPA to do this, and are preparing to commence remediation pursuant to EPA's October 2014 approval.

Now, Plaintiffs ask that this Court grant their request for expedited discovery in the form of comprehensive testing for PCBs in building materials in nearly every room on the two campuses—an inappropriate, overbroad, and burdensome request with no relation to either the allegations in the Complaint or the arguments in Plaintiffs' preliminary injunction motion. Rather, this expedited discovery request is an end run to the very remedy they seek. It's not discovery they seek, it's essentially a remedy.

III. LEGAL STANDARD AND ARGUMENT

A. There is No Legal Precedent that Supports an Application for Expedited Discovery on an *Ex Parte* Basis

In unprecedented fashion, Plaintiffs seek expedited discovery on an *ex parte* basis. Plaintiffs' *ex parte* Application should be denied outright because it is not supported by law, ignores this Court's Standing Order, and is cloaked in an urgency of Plaintiffs' own doing for purposes of obtaining a key and final remedy sought in their lawsuit.

Plaintiffs do not cite any legal authority that justifies the approval of a measure as extreme as an ex parte application. To the contrary, "[e]x parte motions are rarely justified." *Yokohama Tire Corp. v. Dealers Tire Supply, Inc.*, 202 F.R.D. 612, 613 (D. Ariz. 2001) (citing *Mission Power Energy Co. v. Continental Casualty Co.*, 883 F. Supp. 488, 490 (C.D. Cal. 1995)). That is because *ex parte* motions are "detrimental to the administration of justice." *Mission Power*, 883 F. Supp. at 489. Courts consistently adhere to and uphold this policy by routinely denying *ex parte* motions.

This Court has made it clear that *ex parte* motions are to be used sparingly, if at all. "Counsel are reminded *ex parte* applications are solely for extraordinary relief." *See* Standing Order at p. 6, Mar. 24, 2015. But Plaintiffs' application does not provide any basis upon which extraordinary relief should be granted. Neither Plaintiffs' moving papers nor the supporting declaration of their expert, Dr. Rosenfeld, give any reason why the discovery Plaintiffs seek must occur now, rather than at the usual time. The closest Plaintiffs come to expressing any sense of urgency is Dr. Rosenfeld's statement that "PCBs accumulate in the body." Rosenfeld Decl., ¶46. But this is far from quantifying any risk of real harm to students and staff at the schools from waiting until the typical time for discovery to take samples. In fact, Plaintiffs cannot quantify any such harm—because multiple rounds of

sampling at the schools have shown that there is not a risk of adverse health effects from PCBs to the individuals inside school buildings.

Plaintiffs' *ex parte* Application for extraordinary relief is nothing more than a guise to obtain one of Plaintiffs' ultimate remedies—comprehensive testing of all caulk and other building materials in the schools. *See* First Amended Complaint, p. 29. Plaintiffs are merely seeking to avoid the due process of this lawsuit. Plaintiffs cannot use their unprecedented and overbroad expedited discovery request to effectuate a remedy and bypass a hearing on the merits of the issues behind the remedy. Whether the remedy is appropriate or justified is a disputed matter that is too important, and too central, to this lawsuit to be decided on an *ex parte* basis.

B. There is No Good Cause to Grant Plaintiffs' Motion

Courts in the Ninth Circuit "use the 'good cause' standard to determine whether to permit discovery prior to a Rule 26(f) conference." *Apple Inc. v. Samsung Electronics Co., Ltd.*, 768 F.Supp.2d 1040, 1044 (N.D. Cal. 2011). The burden falls upon Plaintiffs to demonstrate to the Court good cause for departing from the usual discovery procedures. *Qwest Communications Int'l, Inc. v. WorldQuest Networks, Inc.*, 213 F.R.D. 418, 419 (D. Colo. 2003).

1. There are No Exigent Circumstances Requiring Expedited Discovery

Plaintiffs have not demonstrated any exigent circumstances requiring expedited discovery. As discussed above, neither Plaintiffs' moving papers or Dr. Rosenfeld's declaration in support of them explain why the sampling they request must be taken now, and not during the timeframe typically allotted for discovery. Plaintiffs and their expert only offer general statements about risks associated with PCBs, no demonstration of any actual harm that will result from a failure to grant expedited discovery. And Plaintiffs cannot demonstrate such harm. The fact is that EPA, the lead agency with jurisdiction, has certified that PCB exposures at the schools do not exceed EPA's health-

protective thresholds and do not pose a health risk. *See* Daugherty Decl. Indeed, safe levels have already been demonstrated through extensive air and wipe sampling conducted at Defendants' behest. *See* Daugherty Decl.

2. Plaintiffs' Expedited Discovery Request is Not Relevant to the Claims in its Complaint

Plaintiffs' Complaint alleges violations of TSCA. To state a claim under TSCA with respect to PCBs, Plaintiffs need only allege that PCBs are in use at the school campuses, other than in a totally enclosed manner, in excess of the TSCA threshold of 50 parts per million ("ppm"). *See* 15 U.S.C. § 2605; 40 C.F.R. § 761.20(a). Where such an allegation can be made, courts have held no further attempt to locate additional TSCA violations is necessary. *See New York Communities for Change v. New York City Dept. of Educ.*, 2012 WL 7807955, *22 (E.D.N.Y. 2012) (where plaintiffs alleged there were an "overwhelming number of leaks" of PCB ballasts in New York City schools, plaintiffs did not need to uncover additional PCB leaks to state a claim under TSCA). Plaintiffs do not need any additional discovery to support these allegations—their Complaint alleges that they have already located uses of PCBs in excess of the TSCA threshold at the school campuses. There is, therefore, no good cause, or indeed, any need at all, for any additional discovery—expedited or otherwise—to support Plaintiffs' claims under TSCA.

3. Plaintiffs' Expedited Discovery Request is Not Tailored to its Motion for Preliminary Injunction

Where, as here, a motion for preliminary injunction is sought, courts typically deny an expedited discovery request that "is not narrowly tailored to obtain information relevant to a preliminary injunction determination and instead goes to the merits of the plaintiff's claims in th[e] action." *American*

LegalNet, Inc. v. Davis, 673 F.Supp.2d 1063, 1069 (C.D. Cal. 2009); *see also Qwest Communications Int'l, Inc.*, 213 F.R.D. at 420-21.

Furthermore, the expedited discovery Plaintiffs seek is not at all relevant to the issues raised in Plaintiffs' motion for preliminary injunction. That motion seeks to require the remediation of rooms at the school campuses that have ***already*** been shown to contain PCBs in building materials in excess of 50 ppm. Those rooms have been identified through testing and verification of building material samples, as required pursuant to EPA's instruction. Plaintiffs have no need or cause to collect more samples at the school campuses in support of their preliminary injunction motion, which is limited to abatement of existing, verified locations of PCB exceedances under TSCA.

4. Plaintiffs Cannot Show the Need for Expedited Discovery Outweighs the Significant Burden to Defendants

Even if the expedited discovery sought by Plaintiffs was somehow relevant to their motion for preliminary injunction, there is still no good cause to allow for such broad and burdensome discovery in advance of the usual discovery process. Good cause may only be found where "the need for expedited discovery…outweighs the prejudice to the responding party." *Semitool, Inc. v. Tokyo Electron America, Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002). To determine whether good cause exists, courts consider the breadth of discovery requests, the purpose for requesting the expedited discovery, the burden on defendants to comply with the requests, and how far in advance of the typical discovery process the request was made. *See American LegalNet, Inc.*, 673 F.Supp.2d at 1067.

Beyond the fact that, as discussed above, there is no risk of harm to Plaintiffs if expedited discovery does not occur and expedited discovery is not necessary to support either Plaintiffs' allegations in the Complaint or its arguments in its preliminary injunction motion, the scope of the expedited

discovery request is unusually broad and burdensome and comes far in advance of the typical discovery process. The comprehensive source testing that Plaintiffs seek is not targeted—Plaintiffs want to myriad classrooms in each building at both school campuses. Such testing is impossible to conduct without extreme disruption to the learning environment at the schools. Source testing cannot be conducted while students and staff occupy rooms at the school campuses, meaning that classes will either need to be cancelled or relocated, at great expense, to allow for testing. There is also no need to conduct such testing now—the buildings are not unsafe and the building materials Plaintiffs seek to examine will not be altered or removed prior to the usual time to initiate discovery in this lawsuit. The prejudice suffered by Defendants far outweighs any cause Plaintiffs could have for requesting this overbroad and unnecessary discovery.

C. Plaintiffs' Rule 34 Arguments are Without Merit

While the cases cited by Plaintiffs in support of their contention that Rule 34(a) has been applied to permit environmental testing broadly illustrate that parties have at times been allowed to conduct environmental sampling as part of an inspection, none of the cases cited support the conclusion that such an order should be granted in this particular case. First, none of the cases cited involve TSCA. As discussed in the declaration of Doug Daugherty, this statute has been expressly construed by EPA to permit management in place of substances otherwise banned by the statute (e.g., asbestos, PCBs, lead paint). Accordingly, the question of the scope of discovery necessarily must consider deference to the lead agency authorized by Congress to enforce the statutes. Prior to granting discovery in for 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.

Second, none of the cases involve expedited or early discovery. Plaintiffs are quick to point out that the Rule 34 order in *Martin v. Reynolds Metal Corp*. was issued pre-litigation. 297 F.2d 49 (9th Cir. 1961). However, they ignore the crucial distinction that the decision in *Martin* was in response to a Rule 27 petition to perpetuate evidence that could reasonably and easily be lost. *Id*. The court emphasizes that "the showing required by Rule 27 must first be made *before* Rule 34 comes into play." *Id*. at 56 (emphasis added). Therefore, the Rule 34 order was only issued in that case because there was a need to perpetuate evidence. No such circumstances exist here nor do Plaintiffs offer any support for the conclusion that evidence is in jeopardy of loss. The caulk in question isn't going anywhere until Defendants undertake the current EPA-approved abatement program later this year.

Finally, none of the cases cited by Plaintiffs are remotely similar to a case where the governmental agency with statutorily-mandated primary jurisdiction has already evaluated the need for the inspection demanded and explicitly ruled that such inspection is unnecessary. The EPA, which was given express authority to enforce TSCA, has stated incontrovertibly, "**The Toxic Substances Control Act (TSCA) does not require schools or building owners to test caulk for PCBs.**" See Letter from Jared Blumenfeld, EPA Region IX, to Sandra Lyon (August 14, 2014), Daugherty Decl. (emphasis added). Not only does it find that such testing is not required, the EPA does not even recommend additional testing of caulk "unless dust or air samples persistently fail to meet EPA's health-based guidelines." *Id*. While inspection orders were granted in the cases Plaintiffs cite, they were not granted in opposition to a governmental agency's clear statement against conducting the inspections demanded. In fact, in the only case cited by Plaintiffs where a government agency was involved, *Teer v. Law Eng'g &*

Envtl. Services, the agency had actually directed the plaintiffs to investigate the alleged contamination, instead of finding that such investigation was unnecessary. *See* 176 F.R.D. 206, 207 (E.D.N.C. 1997). Here, Plaintiffs seek an order under Rule 34 to conduct inspections that fly directly in the face of the EPA's evaluations and recommendations.

D. Plaintiffs Cannot Use Discovery to Circumvent EPA Policy

In reality, Plaintiffs are using the shroud of discovery to conceal that they seek to circumvent well-established EPA policy and directives—not only at the Malibu schools but nationwide—without directly challenging EPA. This is not permissible. On the very issue of whether TSCA provides for further investigation of caulk, EPA is clear: "The Toxic Substances Control Act does not require schools or building owners to test caulk for PCBs." Letter from Jared Blumenfeld, EPA Region IX, to Sandra Lyon (August 14, 2014), Daugherty Decl.

TSCA grants EPA alone the authority to require remediation of PCBs. 15 U.S.C. § 2601(c). As the agency with primary jurisdiction, EPA has developed extensive regulations and policies with respect to PCBs, and oversees PCB remediation at sites across the country. *See United States v. General Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir. 1987) (an agency has primary jurisdiction if authority over the issue in question has been given pursuant to a regulation that "subjects an industry or activity to a comprehensive regulatory scheme that requires expertise or uniformity in administration."). EPA has even adopted a policy for PCBs in schools that sets uniform health levels for PCB exposures to children and others in school buildings, and has set best management practices to ensure children can safely attend school in buildings that contain PCB materials while long-term plans are made for renovation or demolition of those buildings. EPA, "Sensible Steps to Healthier School Environments" (July 2012), available at

http://yosemite.epa.gov/R10/ecocomm.nsf/childrenshealth/sensible-steps-webinars; EPA, Public Health Levels for PCBs in Indoor School Air (February 2, 2015), available at http://www.epa.gov/pcbsincaulk/maxconcentrations.htm. At the Malibu schools, EPA has specifically required and approved, in two letters issued in August 2014 and October 2014 respectively, plans to remove specific known and verified locations of PCBs above the TSCA threshold of 50 ppm within a set timeframe, and plans to manage in place PCB materials at the school, which EPA has certified do not pose any adverse health risk.

EPA's policy on management in place of PCBs is consistent with other substances, like asbestos and lead paint, that are also regulated under TSCA. *See* 15 U.S.C. §§ 2605(a), (c); 40 C.F.R. § 745.65; 40 C.F.R. § 763.80. Both asbestos and lead paint, though toxic, can be safely managed in place pursuant to federal regulations with periodic inspections to determine that unsafe exposures do not occur. 15 U.S.C. § 2685; 40 C.F.R. § 745.227; 40 C.F.R. § 763.93.

In the case of PCBs, EPA policy directs air and wipe sampling pursuant to EPA protocol to determine whether potential PCB exposures above EPA's health-protective levels are present. See EPA Fact Sheet – PCBs in Caulk, http://www.epa.gov/pcbsincaulk/pdf/caulk-fs.pdf. Only when air or wipe samples indicate unsafe exposure levels does EPA recommend testing of bulk materials that may contain PCBs; such testing is ***not*** required under TSCA. At Malibu, EPA's directives have been clear: "the District is meeting EPA national guidelines to protect public health from PCBs" and no additional testing of caulk is needed "unless dust or air samples persistently fail to meet EPA's health-based guidelines." Letter from Jared Blumenfeld, EPA Region IX, to Sandra Lyon (August 14, 2014), Daugherty Decl. Multiple rounds of air and wipe sampling at the Malibu schools have demonstrated that exposures

all fall below EPA's health levels; in many cases, PCB exposures even fell below detection thresholds. *See* Daugherty Decl.

As the federal agency with jurisdiction to enforce TSCA, EPA's interpretations of TSCA and its implementing regulations through its PCB policies are accorded significant deference. *See Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997) (an agency's interpretation of its own regulations through policy is accorded deference unless its interpretation is "plainly erroneous"). Plaintiffs cannot ask this court to override EPA's policies for health-based exposure levels and management in place of PCBs, policies that apply at schools nationwide, without any showing that these policies are flawed—and indeed, without even naming EPA as a party to this lawsuit—under the guise of seeking discovery they do not even need.

Plaintiffs say simply because Defendants, ***regulated*** parties, have undertaken activities Defendants committed to the regulating agency, EPA, they would do—verifying and removing specific locations where TSCA exceedances were already identified (albeit by illegal sampling)—Plaintiffs should be entitled to circumvent EPA policy and sample more building materials at the schools. EPA told Defendants they could conduct limited verification sampling of building materials at the Malibu schools. But EPA's October 31, 2014 letter never contemplated that Defendants, or anyone else, would engage in the type of widespread sampling of bulk materials that Plaintiffs propose. Instead, addressing the fact that historical testing had shown specific and discrete locations where building materials exceeded TSCA's PCB threshold, EPA's approval allows Defendants to verify those locations and then remove them. This is perfectly consistent with the requirements of TSCA, which mandate removal of PCB materials ***known*** to be in excess of the TSCA threshold, but which ***do not*** mandate widespread

sampling to search for PCB materials, as Plaintiffs advocate. Defendants have done just what EPA and TSCA prescribe, conducting limited verification sampling to abate exceedances of the TSCA threshold.

EPA's policy is that, under the circumstances present in the Malibu schools, additional sampling of building materials is not necessary. EPA has given that direction to Defendants. But when given the opportunity to name EPA as a defendant in this lawsuit—something Plaintiffs had initially considered and had indicated they would do—Plaintiffs elected not to. Defendants are simply doing what they are required to do by law: following the directives and national policies of the lead agency with authority to regulate them under TSCA. Plaintiffs cannot use this discovery request to force Defendants out of compliance with established EPA policies.

IV. CONCLUSION

For the reasons stated above, Defendants respectfully request that Plaintiffs' motion be denied.

Dated: April 2, 2015.

Respectfully Submitted,

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