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VIA E-MAIL AND U.S. MAIL

Charles Avrith, Esq.
Nagler & Associates
2300 S. Sepulveda Blvd.
Los Angeles, CA 90064-1911

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

Dear Chuck:

I write in response to your letter of May 6, 2015, which formally requested a meet and confer discovery conference pursuant to Local Rule 37-1 concerning your clients' Request to Enter Land Pursuant to Fed. R. Civ. P. 34(a)(2) (the "Request"). As we discussed via e-mail, we will have a telephonic meet and confer conference to discuss the issues raised in your letter today Friday, May 8, 2015 at 3 p.m.

As you are aware, Defendants responded to the Request on April 29, 2015 (the "Response"), stating a number of general and specific objections to the request and ultimately denying the Request due to those objections. Your May 6 letter takes issue with the objections raised in Defendants' Response. In advance of our conference, and to allow for a productive discussion on the issues raised by the Request, I respond here to the statements in your May 6 letter with respect to both the general and the specific objections raised in the Response.

I note, first, Defendants' objections to Plaintiffs' proposal to enter onto their property and test an unspecified number of classrooms in an unspecified manner and for an unspecified amount of time cannot be compared to limited testing conducted by Defendants on their own property by certified contractors when students are not present. As the owner of the property in question, the District has the right to conduct testing at Juan Cabrillo Elementary School and Malibu Middle and High School (the "Malibu Campus") at times and in locations that are convenient to the school schedule and the individuals occupying the Malibu Campus without securing prior approval from any third party. Plaintiffs, who are not the property owners, do not

have that right and, indeed, request for entry onto another party's property to conduct testing calls for "a greater inquiry into the necessity for inspection." *Belcher v. Bassett Furniture Indus., Inc.*, 588 F.2d 904, 908 (4th Cir. 1978).

Furthermore, the activities proposed in the Request are not, as you claim, "the same sort of testing that the District has already done on at least two occasions." The only testing that has been undertaken at the Malibu Campus has been far more limited, both in amount of time and in terms of the locations tested, than what the Request proposes.

I address below the issues raised in the May 6 letter with respect to Defendants' general and specific objections to the Request.

The Request is Not Reasonably Calculated to Lead to Admissible Evidence

Plaintiffs' request is not reasonably calculated to lead to admissible evidence because, as explained in the Response, where sufficient evidence exists to allege a TSCA violation, further attempts to locate additional TSCA violations are not necessary. *See New York Communities for Change v. New York City Dept. of Educ.*, 2012 WL 7807955, at *22 (E.D.N.Y. 2012). Plaintiffs have already alleged that they have located uses of PCBs in excess of the TSCA threshold. As Plaintiffs claim to already have sufficient evidence to prove the TSCA allegations contained in the First Amended Complaint, inspecting the Malibu Campus is not relevant to any party's claims or defenses. Fed. R. Civ. P. 26(b) and 34(a).

Evidence is only relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Fed. R. Evid. 401. Information derived from testing other locations at the schools will not make the existence of TSCA violations in the locations Plaintiffs have alleged more or less probable. The most that the activities proposed in the Request can hope to achieve is to uncover information that is in no way related to the particular TSCA violations that Plaintiffs have alleged in the First Amended Complaint. Because the discovery sought by the Request falls far outside the scope of evidence relevant to the claims raised by the First Amended Complaint, it is not reasonably calculated to lead to admissible evidence.

The Request Seeks the Ultimate Remedy in this Action

Plaintiffs' contention that they "do not seek sampling and testing of building materials of the School as a remedy" is disingenuous. Plaintiffs' requested relief includes, among other things, the prompt removal of "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." In order to achieve this remedy, sampling and testing of all building materials at the Malibu Campus would need to occur so that the PCB concentrations of that material could be verified.

Furthermore, as discussed at length in Defendants' oppositions to Plaintiffs' *ex parte* motion for expedited discovery and motion for preliminary injunctive relief, EPA is actively engaged in oversight of these issues at the Malibu Campus and has primary jurisdiction over this matter. *See Boyes v. Shell Oil Products Co.*, 199 F.3d 1260, 1265 (11th Cir. 2000).

The Request Should Be Stayed Pending Decision on the Motion to Dismiss

As discussed in the Response, stay of discovery is appropriate when a pending motion is potentially dispositive of an entire case or at least on the issue at which discovery is directed. *Pac. Lumber Co. v. Nat'l Union Fire Ins. Co.*, 220 F.R.D. 349, 352 (N.D. Cal. 2003) (*citing Panola Land Buyers Ass'n v. Shuman*, 762 F.2d 1550, 1560 (11th Cir. 1985); *Church of Scientology of S.F. v. Internal Revenue Service*, 991 F.2d 560, 563 (9th Cir. 1993)). Here, the pending motion to dismiss would be dispositive of the entire matter, including the requested discovery.

Furthermore, Defendants could easily make the required showing that discovery should be stayed pending resolution of the motion to dismiss. The discovery sought is burdensome—Plaintiffs' Request broadly seeks to inspect an unspecified number of rooms on the Malibu Campus, does not set any time limitations on the inspection, and does not explain which building materials will be sampled. As discussed above, this burdensome discovery is completely irrelevant to the allegations in the First Amended Complaint. Accordingly, Plaintiffs will have no difficulty demonstrating that such unnecessary and inconvenient discovery should be stayed until the Court renders a decision on Defendants' motion to dismiss.

The Request is Vague, Overbroad, and Lacks Reasonable Specificity

Under Fed. R. Civ. P. 34, a request must be specific enough to place a party on "reasonable notice of what is called for and what is not." *Parsons v. Jefferson-Pilot Corp.*, 141 F.R.D. 408, 412 (M.D.N.C. 1992). The overly broad nature of Plaintiffs' Request does not give Defendants reasonable notice of when testing will be conducted and completed, where on the Malibu Campus the testing will be undertaken and where it will not be, and how the testing will be undertaken for caulk and for other building materials.

Plaintiffs claim that they have specified the time, place, and manner for inspection. In reality, the Request proposes two weekends upon which testing and sampling may

occur, but states that testing activities may not be completed within the suggested timeframe. Plaintiffs have made no commitment to completing testing within any set timeframe, creating an immense scheduling burden for the District as it also tries to coordinate planned removal activities. The simple fact is that the Request goes far beyond any sampling of bulk materials that has ever taken place on the Malibu Campus before, and does not specify procedures or even a finite time limit on the sampling.

Similarly, Plaintiffs have offered no specific place for the inspection. Simply stating that testing will take place in "every regularly occupied room at the School in buildings built before 1980" is not sufficient to put Defendants on notice of where testing will occur. Neither the Request nor your May 6 letter explains what Plaintiffs consider to be a "regularly occupied" room, and neither state whether the testing will be limited to classrooms, or if other rooms (for example, supply closets, etc.) will be tested. The Request also fails to specify which building materials in the rooms will be tested or provide any sort of schedule for testing the rooms that would allow the District to put students and staff on notice of potential testing in their classrooms.

Certainly, given the nature of Plaintiffs' allegations, Plaintiffs understand that extensive disturbance of building materials that potentially contain contaminants while the school year is still in session and classrooms are still occupied by students and teachers is disruptive. The District must therefore know specifically which classrooms will be tested and when, so that it can take appropriate steps to ensure testing does not impact students and staff.

Further, while the Request discusses possible sampling methodology for caulk, it offers no such explanation for the "samples of other building materials." It does not explain what these building materials are, how it will be determined that they "appear to potentially contain PCBs," or how sampling will be conducted to determine whether the materials do, in fact, contain PCBs. It does not explain whether removal of "other building materials" will occur in all classrooms sampled or just some.

The Request also does not specify a time, place, or manner for conducting the "related acts" to the inspection. Fed. R. Civ. Proc. 34(b)(1)(A). While Defendants appreciate Plaintiffs' clarification in the May 6 letter as to the EPA methodology that will be used to test the samples, the additional information provided by Plaintiffs still fails to specify the manner in which testing of the samples will occur. Plaintiffs say that the sampling will be conducted by an experienced professional with success in PCB identification and remediation, but do not specify who that professional will be. Plaintiffs do not specify which laboratory will be used, or when results can be expected. Understanding where, when, and how these samples will be tested is certainly Defendants' concern as the results of any potential sampling could affect the

planned remediation that is scheduled at the Malibu Campus for the 2015 summer break.

With respect to inspection and waste generation, Defendants simply point out that there are disposal requirements under federal law that Plaintiffs would likely need to meet in connection with the extensive sampling they request. As the party collecting and handling the potential waste, Defendants do bear responsibility under the law for ensuring that it is properly disposed of. *See* 40 C.F.R. § 761.62. Additionally, EPA, as the lead agency, has requested to be provided with data collected on the Malibu Campus and there is no reason that Plaintiffs would be excepted from that request. Plaintiffs' failure to account for these issues in the Request was an oversight and highlights the vagueness of the request.

The Request is Cumulative and Duplicative

As Plaintiffs are aware, numerous samples of bulk material were removed from the District's property illegally, as the result of trespass on the Malibu Campus. Those samples were allegedly tested and some of the sampling results provide the basis for the allegations in the First Amended Complaint. These sampling events essentially amounted to unsanctioned discovery on Defendants' property. Given the illegal nature of these samples, Defendants do not know whether and to what extent Plaintiffs still retain unreleased sampling data that serves the same function as the discovery requested in Plaintiffs' Request.

It is my hope that the above has provided a clarification of Defendants' position that will guide our conversation on May 8. I look forward to speaking with you then.

Sincerely yours,

Mark E. Elliott