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SANDRA LYON, ET AL.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AMERICA UNITES FOR KIDS, et al., Plaintiffs, vs. SANDRA LYON, et al., Defendants.	No. 2:15-CV-02124 **DISCOVERY MATTER** **JOINT STIPULATION REGARDING DEFENDANTS' MOTION TO COMPEL FURTHER RESPONSES IN DISCOVERY** Hearing Date: Jan. 11, 2016 Time: 10:00 am Place: 255 East Temple Street Dept. 690 Judge: Wistrich Complaint Filed: Mar. 23, 2015 Discovery Cutoff: Mar. 7, 2016 Pretrial Conf.: Apr. 15, 2016 Trial Date: May 17, 2016

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Pursuant to Rule 37 of the Federal Rules of Civil Procedure and Local Rule 37-2 of the Central District of California, Defendants ("SMMUSD" or "Defendants") and Plaintiffs America Unites for Kids ("AU") and Public Employees for Environmental Responsibility ("PEER") (collectively, "Plaintiffs"), respectfully submit this Joint Stipulation regarding Defendants' motion to compel further responses to the following discovery requests served by Defendants:[1]

- Interrogatories No. 3, 4, 5, 6, 8, and 9 of Defendants' First Set of Interrogatories to AU;
- Interrogatories No. 1, 2, 3, 4, 6, 7, and 8 of Defendants' First Set of Interrogatories to PEER;
- Requests No. 5, 11, 15, 17, and 19 of Defendants' First Set of Requests for Production of Documents ("Requests" or "RFPs") to AU; and
- Requests No. 6, 8, 17, 21, 22, 24, 26, 27, and 41, and 42 of Defendants' First Set of Requests for Production of Documents ("Requests" or "RFPs") to PEER.

In accordance with Local Rule 37-1, on November 23, 2015, Defendants served a meet and confer letter on counsel for America Unites which identified each issue and discovery request in dispute, and stated Defendants' position briefly with respect to each request. (A true and correct copy of this correspondence is attached as Exhibit B to the Declaration of Caroline L. Plant ("Decl. Plant"), which is being filed concurrently herewith). On November 25, 2015, in accordance with Local Rule 37-1, Defendants served a meet and confer letter on counsel for PEER which identified each issue and discovery request in dispute, and stated Defendants' position briefly with respect to each request. *See* Decl. Plant, Ex. C.

[1] Pursuant to Local Rules 37-2 and 7-7, a copy of the Scheduling Order (ECF No. 61) is attached as Exhibit A to the Declaration of Caroline Plant filed concurrently herewith.

On November 30, 2015, and again on December 3, 2015, counsel for the parties met and conferred telephonically in good faith to resolve this dispute, but were unable to do so. Decl. Plant ¶ 5.

I. DEFENDANTS' INTRODUCTORY STATEMENT

A. DISCOVERY REGARDING PLAINTIFFS' "INDEPENDENT TESTS."

Plaintiffs' complaint asserts one cause of action against Defendants, violation of the Toxic Substances Control Act (15 U.S.C. §§ 2601–2692) ("TSCA") based on the presence of PCBs in caulk and building materials at Malibu High School, Middle School, and Juan Cabrillo Elementary School ("Malibu Schools"). *See* Decl Plant, Ex. D; ¶ 2. This claim is premised in part on three sets of "Independent Tests" conducted by Plaintiffs. *See Id.*; ¶¶ 80, 103, 109. In discovery, Defendants seek the identity of the individuals who conducted this independent testing, as well as documents that identify those individuals. In response, Plaintiffs assert only the following inappropriate objections:

1. Relevancy. The identity of the individuals who conducted the independent sampling is relevant to both Plaintiffs' claim and Defendants' defenses. Specifically, this information is necessary so that Defendants can assess the reliability of the data upon which Plaintiffs rely, investigate the chain of custody for the samples, and obtain additional information regarding the sampling procedure used by these individuals. Plaintiffs are the sole party with access to this information and there is no burden on Plaintiffs in its production.

2. Vagueness, Ambiguity, Overbreadth, Oppressiveness, and Undue Burden. Plaintiffs assert these boilerplate objections without any showing that Defendants' requests are vague, ambiguous, overbroad, oppressive or unduly burdensome. Accordingly, these objections are without merit. *Bible v. Rio Props., Inc.*, 246 F.R.D. 614 , 619 (C.D. Cal. 2007).

3. Attorney-Client, Attorney Work Product, and Common Interest

Privileges. Similarly, Plaintiffs assert boilerplate objections and make no showing that any materials regarding Plaintiffs' "Independent Tests" are protected by any privilege. "The attorney-client privilege protects confidential communications between attorneys and clients, which are made for the purpose of giving legal advice." *United States v. Richey*, 632 F. 3d 559, 566 (9th Cir. 2011). The work product doctrine protects materials "prepared by a party or his representative in anticipation of litigation." *Richey* 632 F. 3d at 567. And the common interest doctrine is relevant only if the communication at issue is privileged in the first place. *Nidec Corp. v. Victor Co.*, 249 F.R.D. 575, 578 (N.D. Cal. 2007). Accordingly, this material cannot be withheld based on any privilege.

4. First Amendment. A valid objection on First Amendment grounds requires that Plaintiffs make a *prima facie* showing that disclosure of these materials requested would lead to "(1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights" under the First Amendment. *Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F. 2d 346, 350 (9th Cir. 1988). Plaintiffs have made no such showing here.

B. <u>COMMUNICATIONS REGARDING PCBS AT OTHER SCHOOLS.</u>

Plaintiffs assert the same unsupported objections to Defendants' requests for communications regarding PCBs at other schools as those discussed above. In their press releases and blog posts, Plaintiffs' frequently draw comparisons between the PCB remediation conducted at the Malibu Schools and that which has been conducted by other schools. Decl. Plant, Ex. E-G. This information may be used as part of Plaintiffs' claims against Defendants at trial and accordingly is entirely relevant. Further, Plaintiffs have made no showing that this request is overbroad, oppressive, vague, ambiguous, unduly burdensome, or protected by any privilege. Finally, Plaintiffs have not made any showing that disclosure of these materials

would lead to "harassment, membership withdrawal, or discouragement of new members," or that it would result in other consequences that could "chill" members' associational rights under the First Amendment. Accordingly, Plaintiffs must produce the requested materials.

C. DISCOVERY REGARDING PEER'S STANDING.

Finally, PEER objects to all discovery that seeks identification of those witnesses it will rely on to establish its standing on the ground that this information is protected by the attorney work product privilege. To have standing, a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citing *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 342 (1977)). An association only has standing to bring suit on behalf of members where: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Id.* An association's standing is subject to challenge in every phase of litigation and the burden of proving standing rests on PEER.

Further, the identity of witnesses is not protected as work product. The Federal Rules of Civil Procedure specifically require the exchange of witness information by the parties, including "the identity and location of persons who know of any discoverable matter." Fed. R. Civ. P. 26(b) (1). Defendants are entitled to take discovery regarding the injury allegedly suffered by PEER's members. It cannot take such discovery without the disclosure of the identities of the relevant witnesses.

PEER should be compelled to identify these witnesses and nonprivileged supporting materials upon which they intend to rely.

II. PLAINTIFFS' INTRODUCTORY STATEMENT

Plaintiffs, two non-profit organizations, filed this citizen's suit to restrain clear violations of the TSCA at the Malibu Schools, which are part of the Santa Monica-Malibu Unified School District (the "District"). Defendants are administrators and members of the District's Board of Education.

As set forth in Plaintiffs' First Amended Complaint ("FAC"), the Malibu Schools are contaminated with polychlorinated biphenyls ("PCBs"), a highly-toxic substance which causes cancers and numerous other serious diseases. (Plant Decl. Ex. D., at ¶¶ 41-49) TSCA and the regulations thereunder prohibit the use of materials containing PCBs at concentrations of 50 parts per million ("ppm") or greater. (*Id.* at ¶¶ 12-22) TSCA imposes 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).

The Court should deny Defendants' motion to compel for the following reasons.

A. The Identities Of Individuals Who Took The Independent Samples

Much of Defendants' motion is directed at interrogatory and document requests which seek the identities of the individuals who took the samples of caulk at the Malibu Schools that were the subject of three sets of "Independent Tests" that Plaintiff AU conducted prior to the filing of this action. These tests showed illegal levels of PCB contamination in 13 different rooms at the Malibu Schools. (Plant Decl. Ex. D., at ¶¶ 83, 103 and 109) On March 23, 2015 - - the day this action was filed - - the District publicly disclosed the results of its "verification" testing; those results confirmed the reliability of the "Independent Tests." The District's consultants took 24 samples from 10 rooms and in each case, illegal levels of caulk-

-up to 11,000 times the regulatory limit--were found. (*Id.* at ¶¶128-29) The District contends that it has remediated illegal caulk in 10 of the 13 rooms which the Independent Tests showed violated TSCA.

Defendants argue that they need to know the identities of the individuals who took the samples that were used in the Independent Tests so that they can assess the reliability of the data upon which Plaintiffs rely. Defendants' motion is without merit because the requested information is not relevant.

First, Plaintiffs are not relying on the Independent Tests of the caulk in the 10 rooms that Defendants claim to have remediated. Second, Plaintiffs do not need to know the identity of the persons taking the samples to assess the reliability of the Independent Tests of the caulk in the three rooms on which Plaintiffs continue to rely.[2] Defendants' own verification testing has demonstrated that the results of the Independent Tests are reliable. In any case, the EPA-certified laboratory reports that Plaintiffs have provided to Defendants has all the information that Defendants would need to assess the reliability of the data.

Moreover, requiring Plaintiffs to disclose the identities of the individuals who took the samples would place an undue burden on them and chill the exercise of their First Amendment rights. Defendants have already filed a false and malicious criminal complaint against the president of Plaintiff AU and her husband, alleging that they committed felony acts of trespassing and vandalism by collecting samples. (See Declaration of Jennifer DeNicola filed in this action (Dkt. 70-1), ¶¶2-3 and Exs. A and E thereto. The DeNicola declaration is attached as Exhibit A to the accompanying Declaration of Charles Avrith ("Avrith Decl."). Although the District Attorney has declined to file charges, Plaintiffs are rightfully concerned that

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[2] The three rooms are: (1) Room 722 (First Set of Independent Tests); (2) Room 205 (Second Set of Independent Tests; and JCES Office (Third Set of Independent Tests). (See Plant Decl. Ex. D, ¶¶82, 103 and 109)

if they disclose the names of the individuals in question, Defendants will file similar charges or otherwise take retaliatory action against the samplers.

B. Communications Regarding PCBs At Other Schools

Defendants are seeking communications "by and between" Plaintiffs, their members and third parties concerning PCBs at other schools. However, the issue in this case is whether the Malibu Schools violate TSCA, not what Plaintiffs, their members or third parties may have said about PCBs at other schools. Although what happened at other schools in terms of PCB contamination or remediation may prove to be relevant in this case, Defendants have not demonstrated the relevancy of what Plaintiffs, their members or third parties may have said about what happened with PCBs at other schools.

Furthermore, to the extent that Defendants are seeking communications between Plaintiffs AU and PEER concerning PCBs at other schools, their requests seeks documents protected by the attorney-client and common interest privileges. The request also violates the Plaintiffs' First Amendment rights of association.

C. Identities Of PEER's Trial Witnesses

Defendants' motion also seeks to compel the identities of PEER's trial witnesses. That information is privileged work product.

III. DISCOVERY TO AU REGARDING THE INDEPENDENT SAMPLING AT THE MALIBU SCHOOLS.

Defendants move to compel further responses to the following discovery requests which seek information regarding the identities of individuals who obtained the "Independent Tests." Defendants' Interrogatories 3, 4, 5, and 6 to AU seek the identities of all persons who obtained or collected the "Independent Tests" and other sample testing conducted by Plaintiffs. Interrogatories 8 and 9 seek the identities of the person or persons that authored or created the BC Labs and Eurofins Keys.

A. INTERROGATORIES TO AU REGARDING THE INDEPENDENT SAMPLING AT THE MALIBU SCHOOLS.

1. INTERROGATORY NO. 3.

a. INTERROGATORY NO. 3.

IDENTIFY all PERSONS who have taken SAMPLES at the MALIBU SCHOOLS.

b. RESPONSE TO INTERROGATORY NO. 3.

Plaintiff objects to this interrogatory on the ground that it seeks information that is not relevant to the party's claims or defenses or the subject matter of this action.

c. DEFENDANTS' CONTENTIONS REGARDING INTERROGATORY NO. 3.

Prior to initiation of this suit, Plaintiffs served Defendants with two Notices of Intent to File Suit under TSCA ("Notices"), the first dated August 19, 2014, and the second dated January 12, 2015. Decl. Plant, Exs. D, ¶ 32; H-I. Such Notices were sent because, under TSCA's citizen suit provision, a citizen plaintiff must give the alleged violator and EPA specific notice of the alleged violations of TSCA. 15 U.S.C.S. § 2619(b)(1). TSCA's 60-day notice period is mandatory to the establishment of jurisdiction and cannot be waived. *Id*. Both of these Notices relied upon independent sampling conducted by AU and PEER. *See* Decl. Plant, Ex. H; Ex. I.

Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying on such testing. References to "Independent Tests" and independent testing are specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl. Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-26, 128, 132.

Further, on April 1, 2015, Plaintiffs filed a motion for a preliminary injunction, again relying on the results of such independent testing, for its request that Defendants be enjoined from using such rooms where the testing was conducted.

Now, in response to discovery requests for information regarding this sampling, including the identities of persons who conducted such independent testing, Plaintiffs have taken the specious position that the identities of the individuals who conducted the testing are not relevant. Relevancy is not a valid objection to this Interrogatory. Under Rule 26(b)(1), parties may obtain discovery regarding:

> [A]ny nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within the scope of discovery does not need to be admissible in evidence. Fed. R. Civ. P. 26(b)(1).[3]

The identities of those individuals who have taken samples at the Malibu Schools is of great importance, is clearly relevant to Plaintiffs' claims, and is further relevant to Defendants' defenses. One of Defendants' defenses is that those areas from which samples were taken have been remediated, and accordingly, Plaintiffs' TSCA claim is moot. Defendants are entitled to take discovery, including depositions, of the individuals involved in Plaintiffs' independent testing to confirm the specific locations from which the samples were obtained and prepare this defense. Further, Defendants are entitled to this information so that they can examine the chain of custody for the samples, and assess the reliability of the

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[3] The Rule quoted here is the amended version of Rule 26(b)(1), which became effective December 1, 2015.

sampling data on which Plaintiffs' TSCA claim is founded. Plaintiffs cannot file an action based on this information and then shield it from discovery under the specious objection that it is not relevant.

Additionally, the issues at stake are significant, because Plaintiffs' claim is premised on the data it has collected through its own independent sampling, and Defendant could be held liable for millions of dollars of unnecessary remediation and renovation based on analysis of invalid or unreliable data. Furthermore, Plaintiffs are the sole source of this information and there is no burden on Plaintiffs in producing the requested information.

Finally, in addition to the independent testing which forms the basis of Plaintiffs' TSCA Notices and pleadings on file with this Court, Defendants know that additional sampling has been taken by AU or PEER or those acting in concert with Plaintiffs. Defendants have served subpoenas on every lab (known to it) which has processed Plaintiffs' samples. In responding to these subpoenas, these labs have produced to Defendants additional sampling data which has not been the basis of any judicial filing in this case. Defendants are entitled to the identities of these individuals so it can determine the locations and extent of these additional samples.

For all of the foregoing reasons, Plaintiffs should be required to identify those individuals who conducted sampling in connection to Plaintiffs "Independent Tests."

d. AU'S CONTENTIONS REGARDING INTERROGATORY NO. 3.

This interrogatory seeks the identity of individuals who took samples of building materials at the Malibu Schools. Defendants have not shown that the requested information is relevant. As discussed below, the information is not necessary for resolution of any of the issues in this case. Moreover, the burden of providing it outweighs any possible relevance.

Defendants contend that the identities of the individuals who took samples of

caulk at the Malibu Schools is relevant because Plaintiffs are purportedly relying on "Independent Tests" of caulk samples in 13 rooms that Plaintiff AU conducted prior to the filing of this action. However, as discussed above, Plaintiffs are not relying on the Independent Tests in 10 of the 13 rooms. There is no possible reason why Defendants would need to know the identities of the persons who took samples for tests on which Plaintiffs are not relying.

Defendants argue that the identities of the samplers for the tests Plaintiffs are not relying on is still relevant because the FAC refers to them. However, as Plaintiffs' counsel has explained to Defendants' counsel, the FAC included information about the independent testing primarily for informational purposes and to describe the chronology of events at the Malibu Schools. The FAC also recites that Defendants had verified the independent test results and found TSCA violations in every single one of 24 verification samples they took in 10 rooms. (Plant Decl. Ex. D., ¶¶ 127-29)

Defendants also contend that Plaintiffs' motion for preliminary injunction relied on the Independent Tests. Defendants are wrong. Plaintiffs' motion only sought an injunction with respect to the room where Defendants' own testing had shown illegal levels of PCBs. (See, e.g., Plaintiffs' Memorandum of Points and Authorities in Support of their Motion for a Preliminary Injunction, Dkt. 14, at p. 2, attached at Avrith Decl. Ex. 2) ("Plaintiffs now move for a preliminary injunction requiring Defendants to immediately cease use of the other 10 rooms that Defendants' own testing has shown to have illegal levels of PCBs in caulk ….") (emphasis added).

Defendants also contend that they need to confirm the specific locations from which the samples were obtained, so they can prepare their defenses that those areas from which the samples were taken have been remediated. This contention is equally without merit. Plaintiffs are not relying on the Independent Tests for any

purpose with respect to any of the 10 rooms that Defendants claim to have remediated. Thus, there is nothing for Defendants to confirm.

Even with respect to the three rooms for which Plaintiffs continue to rely on the Independent Tests, Defendants do not need to know the identities of the person who took the samples. Although Defendants conclusorily contend they need this information to assess the reliability of the testing data, they do not explain why that is the case. The test data is a product of a lab analysis of the samples. There is nothing that the sampler can do to affect the reliability of the data derived from the lab analysis.

In any case, there should be no question that the Independent Testing data is reliable. Defendants' own verification testing has proven the accuracy of the independent testing. Defendants do not state why the Independent Testing data from the three rooms in which the Defendants did not test should be any less reliable than the other 10 rooms where Defendants' verification testing has confirmed the accuracy of the independent data.

Defendants also assert that, in addition to the three sets of Independent Tests, they know from subpoenas served on laboratories that Plaintiffs have done additional sampling and testing "which has not been the basis of any judicial filing in this case." Defendants contend that the identities of the persons who took the samples are needed so that they can "determine the locations and extent of these additional samples."

However, at this point Defendants have not propounded any discovery requests related to this later sampling, the discovery requests at issue being limited by their terms to the three sets of independent tests. Also, Plaintiffs have not even attempted to use any such additional testing in the case. Moreover, Defendants do not explain why they need to know the "extent" of the sample. The "extent" of the sample is not relevant to determine a TSCA violation. Furthermore, Defendants do

not need to know the identities of the persons taking the samples to determine the "locations" of the samples. The location of the sampling is shown on the lab reports which Defendants already have. The exact location of the sampling is irrelevant. Defendants' obligation to remediate is not limited to the exact square inch where a sample was taken.

In any case, the issue in the case is not actually whether the independent tests are accurate, but whether or not there are TSCA violations in the rooms in question. Defendants could determine this fact, by analyzing their own verification samples, as they did with regard to ten rooms sampled in the Independent Tests. Thus, information which could lead to admissible evidence about whether or not there are TSCA violations in these rooms can be obtained without revealing the persons who took the independent samples.

Furthermore, the potential for harm to Plaintiffs or the samplers by disclosure of the requested information greatly outweighs any possible benefit of disclosure. As discussed above, Defendants have already filed a malicious criminal complaint for trespassing and vandalism against individuals who allegedly took samples. Although the District Attorney declined to file any charges, Plaintiffs are legitimately concerned that Defendants will use the requested information to initiate similar charges against the samplers or otherwise retaliate against them.

Forced disclosure of the identities of those who took samples would greatly inhibit Plaintiffs' ability to fulfill their mission of advocating for remediation of environmental hazards. *See, e.g., United States v. Garde*, 673 F.Supp. 604, 607 (D.D.C. 1987)

> "[I]f the government is successful in compelling [the organization's lawyer] to reveal the information given to her, especially the identity of those she represents, GAP will lose the confidence of some of its whistleblower informants and its efforts to gather and

> present safety allegations will suffer. This is the harm that GAP claims, and it is cognizable under the [First Amendment] right to association."

Plaintiffs have made a "prima facie showing of arguable first amendment infringement." *Perry v. Schwazanegger*, 591 F.3d 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of the identities of the samplers would severely discourage Plaintiffs' ability to gather evidence of environmental violations because Plaintiffs would be unable to protect the samplers' confidentiality, and thus lose the confidence of their informants, thereby severely hampering Plaintiffs' organizational missions. It could also result in harassment of individuals who took the samples. Defendants have already filed a false criminal complaint against the President of America Unites, Ms. Denicola, and her husband, seeking to subject them to felony charges punishable by fines and imprisonment, for allegedly taking caulk samples. It is difficult to imagine a more "chilling" action against those who advocate for PCB testing and remediation at the Malibu Schools.

Once a prima facie case of First Amendment infringement is made, "the evidentiary burden will then shift to the government…[to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest…[and] the 'least restrictive means' of obtaining the desired information." *Perry*, 591 F.3d at 1161 (quoting *brock v. Local 375, Plumbers Int'l Union of Am.*, 960 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)).

> "Importantly, the party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation—a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1). The request must also be

carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable." *Perry*, 591 F.3d at 1161.

Here, Defendants cannot even show that this discovery meets the relevance requirements of Rule 26, much less the more demanding standard of relevance when First Amendment interests are implicated. As discussed above, there are other means of acquiring the desired information, namely, by examining the laboratory reports and the information provided in accordance with Defendants' subpoenas to the laboratories, or by conducting verification testing, without requiring Plaintiff to disclose the information about the identity of the samplers.

2. INTERROGATORY NO. 4.

a. INTERROGATORY NO. 4.

IDENTIFY all PERSONS who obtained or collected the "First Set of Independent Tests," referred to at paragraph 80 of the FAC, at the MALIBU SCHOOLS.

b. RESPONSE TO INTERROGATORY NO. 4.

Plaintiff objects to this interrogatory on the ground that it seeks information that is not relevant to the party's claims or defenses or the subject matter of this action.

c. DEFENDANTS' CONTENTIONS REGARDING INTERROGATORY NO. 4.

Prior to initiation of this suit, Plaintiffs served Defendants with two Notices of Intent to File Suit under TSCA ("Notices"), the first dated August 19, 2014, and the second dated January 12, 2015. Decl. Plant, Exs. D, ¶ 32; H-I. Such Notices were sent because, under TSCA's citizen suit provision, a citizen plaintiff must give the alleged violator and EPA specific notice of the alleged violations of TSCA. 15 U.S.C.S. § 2619(b)(1). TSCA's 60-day notice period is mandatory to the

establishment of jurisdiction and cannot be waived. *Id*. Both of these Notices relied upon independent sampling conducted by AU and PEER. *See* Decl. Plant, Ex. H; Ex. I.

Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying on such testing. References to "Independent Tests" and independent testing are specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl. Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-26, 128, 132.

Further, on April 1, 2015, Plaintiffs filed a motion for a preliminary injunction, again relying on the results of such independent testing, for its request that Defendants be enjoined from using such rooms where the testing was conducted.

Now, in response to discovery requests for information regarding this sampling, including the identities of persons who conducted such independent testing, Plaintiffs have taken the specious position that the identities of the individuals who conducted the testing are not relevant. Relevancy is not a valid objection to this Interrogatory. Under Rule 26(b)(1), parties may obtain discovery regarding:

> [A]ny nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within the scope of discovery does not need to be admissible in evidence. Fed. R. Civ. P. 26(b)(1).

The identities of those individuals who have taken samples at the Malibu Schools is of great importance, is clearly relevant to Plaintiffs' claims, and is further

relevant to Defendants' defenses. One of Defendants' defenses is that those areas from which samples were taken have been remediated, and accordingly, Plaintiffs' TSCA claim is moot. Defendants are entitled to take discovery, including depositions, of the individuals involved in Plaintiffs' independent testing to confirm the specific locations from which the samples were obtained and prepare this defense. Further, Defendants are entitled to this information so that they can examine the chain of custody for the samples, and assess the reliability of the sampling data on which Plaintiffs' TSCA claim is founded. Plaintiffs cannot file an action based on this information and then shield it from discovery under the specious objection that it is not relevant.

Additionally, the issues at stake are significant, because Plaintiffs' claim is premised on the data it has collected through its own independent sampling, and Defendant could be held liable for millions of dollars of unnecessary remediation and renovation based on analysis of invalid or unreliable data. Furthermore, Plaintiffs are the sole source of this information and there is no burden on Plaintiffs in producing the requested information.

Finally, in addition to the independent testing which forms the basis of Plaintiffs' TSCA Notices and pleadings on file with this Court, Defendants know that additional sampling has been taken by AU or PEER or those acting in concert with Plaintiffs. Defendants have served subpoenas on every lab (known to it) which has processed Plaintiffs' samples. In responding to these subpoenas, these labs have produced to Defendants additional sampling data which has not been the basis of any judicial filing in this case. Defendants are entitled to the identities of these individuals so it can determine the locations and extent of these additional samples.

For all of the foregoing reasons, Plaintiffs should be required to identify those individuals who conducted sampling in connection to Plaintiffs' "Independent Tests."

d. AU'S CONTENTIONS REGARDING INTERROGATORY NO. 4.

This interrogatory seeks the identity of individuals who took the samples used in the First Set of Independent Tests. Defendants have not shown that the requested information is relevant. As discussed below, the information is not necessary for resolution of any of the issues in this case. Moreover, the burden of providing it outweighs any possible relevance.

Defendants contend that the identities of the individuals who took the samples is relevant because Plaintiffs are purportedly relying on the First Set of Independent Tests that Plaintiff AU conducted prior to the filing of this action. However, as discussed above, Plaintiffs are not relying on the results of the First Set of Independent Tests in two of the three rooms tested.[4] There is no possible reason why Defendants would need to know the identities of the persons who took samples for tests on which Plaintiffs are not relying.

Defendants argue that the identities of the samplers for the tests Plaintiffs are not relying on is still relevant because the FAC refers to them. However, as Plaintiffs' counsel has explained to Defendants' counsel, the FAC included information about the independent testing primarily for informational purposes and to describe the chronology of events at the Malibu Schools. The FAC also recites that Defendants had verified the independent test results and found TSCA violations in every single one of 24 verification samples they took in 10 rooms. (Plant Decl. Ex. D., ¶¶ 127-29)

Defendants also contend that Plaintiffs' motion for preliminary injunction relied on the Independent Tests. Defendants are wrong. Plaintiffs' motion only sought an injunction with respect to the room where Defendants' own testing had shown illegal levels of PCBs. (See, e.g., Plaintiffs' Memorandum of Points and Authorities in Support of their Motion for a Preliminary Injunction, Dkt. 14, at p. 2,

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[4] Plaintiffs are relying on the Independent Test in Room 722.

attached at Avrith Decl. Ex. 2) ("Plaintiffs now move for a preliminary injunction requiring Defendants to immediately cease use of the other 10 rooms that Defendants' own testing has shown to have illegal levels of PCBs in caulk ….") (emphasis added).

Defendants also contend that they need to confirm the specific locations from which the samples were obtained, so they can prepare their defenses that those areas from which the samples were taken have been remediated. This contention is equally without merit. Plaintiffs are not relying on the Independent Tests for any purpose with respect to any of the rooms that Defendants claim to have remediated. Thus, there is nothing for Defendants to confirm.

Even with respect to the one room (Room 722) for which Plaintiffs continue to rely on the First Set of Independent Tests, Defendants do not need to know the identities of the person who took the samples. Although Defendants conclusorily contend they need this information to assess the reliability of the testing data, they do not explain why that is the case. The test data is a product of a lab analysis of the samples. There is nothing that the sampler can do to affect the reliability of the data derived from the lab analysis.

In any case, there should be no question that the Independent Testing data is reliable. Defendants' own verification testing has proven the accuracy of the independent testing. Defendants do not state why the Independent Testing data from the three rooms in which the Defendants did not test should be any less reliable than the other 10 rooms where Defendants' verification testing has confirmed the accuracy of the independent data.

Moreover, the issue in the case is not actually whether the independent tests are accurate, but whether or not there are TSCA violations in the rooms in question. Defendants could determine this fact, by analyzing their own verification samples, as they did with regard to ten rooms sampled in the Independent Tests. Thus,

information which could lead to admissible evidence about whether or not there are TSCA violations in these rooms can be obtained without revealing the persons who took the independent samples.

Furthermore, the potential for harm to Plaintiffs or the samplers by disclosure of the requested information greatly outweighs any possible benefit of disclosure. As discussed above, Defendants have already filed a malicious criminal complaint for trespassing and vandalism against individuals who allegedly took samples. Although the District Attorney declined to file any charges, Plaintiffs are legitimately concerned that Defendants will use the requested information to initiate similar charges against the samplers or otherwise retaliate against them.

Forced disclosure of the identities of those who took samples would greatly inhibit Plaintiffs' ability to fulfill their mission of advocating for remediation of environmental hazards. *See, e.g., United States v. Garde*, 673 F.Supp. 604, 607 (D.D.C. 1987)

> "[I]f the government is successful in compelling [the organization's lawyer] to reveal the information given to her, especially the identity of those she represents, GAP will lose the confidence of some of its whistleblower informants and its efforts to gather and present safety allegations will suffer. This is the harm that GAP claims, and it is cognizable under the [First Amendment] right to association."

Plaintiffs have made a "prima facie showing of arguable first amendment infringement." *Perry v. Schwazanegger*, 591 F.3d 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of the identities of the samplers would severely discourage Plaintiffs' ability to gather evidence of environmental violations because Plaintiffs would be unable to protect the samplers' confidentiality, and thus lose the

confidence of their informants, thereby severely hampering Plaintiffs' organizational missions. It could also result in harassment of individuals who took the samples. Defendants have already filed a false criminal complaint against the President of America Unites, Ms. Denicola, and her husband, seeking to subject them to felony charges punishable by fines and imprisonment, for allegedly taking caulk samples. It is difficult to imagine a more "chilling" action against those who advocate for PCB testing and remediation at the Malibu Schools.

Once a prima facie case of First Amendment infringement is made, "the evidentiary burden will then shift to the government…[to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest…[and] the 'least restrictive means' of obtaining the desired information." *Perry*, 591 F.3d at 1161 (quoting *brock v. Local 375, Plumbers Int'l Union of Am.*, 960 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)).

> "Importantly, the party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation—a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1). The request must also be carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable." *Perry*, 591 F.3d at 1161.

Here, Defendants cannot even show that this discovery meets the relevance requirements of Rule 26, much less the more demanding standard of relevance when First Amendment interests are implicated. As discussed above, there are other means of acquiring the desired information, namely, by examining the laboratory reports and the information provided in accordance with Defendants' subpoenas to

the laboratories, or by conducting verification testing, without requiring Plaintiff to disclose the information about the identity of the samplers.

3. INTERROGATORY NO. 5.

a. INTERROGATORY NO. 5.

IDENTIFY all PERSONS who obtained or collected the "Second Set of Independent Tests," referred to at paragraph 103 of the FAC.

b. RESPONSE TO INTERROGATORY NO. 5.

Plaintiff objects to this interrogatory on the ground that it seeks information that is not relevant to the party's claims or defenses or the subject matter of this action.

c. DEFENDANTS' CONTENTIONS REGARDING INTERROGATORY NO. 5.

Prior to initiation of this suit, Plaintiffs served Defendants with two Notices of Intent to File Suit under TSCA ("Notices"), the first dated August 19, 2014, and the second dated January 12, 2015. Decl. Plant, Exs. D, ¶ 32; H-I. Such Notices were sent because, under TSCA's citizen suit provision, a citizen plaintiff must give the alleged violator and EPA specific notice of the alleged violations of TSCA. 15 U.S.C.S. § 2619(b)(1). TSCA's 60-day notice period is mandatory to the establishment of jurisdiction and cannot be waived. *Id*. Both of these Notices relied upon independent sampling conducted by AU and PEER. *See* Decl. Plant, Ex. H; Ex. I.

Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying on such testing. References to "Independent Tests" and independent testing are specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl. Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-26, 128, 132.

Further, on April 1, 2015, Plaintiffs filed a motion for a preliminary injunction, again relying on the results of such independent testing, for its request that Defendants be enjoined from using such rooms where the testing was conducted.

Now, in response to discovery requests for information regarding this sampling, including the identities of persons who conducted such independent testing, Plaintiffs have taken the specious position that the identities of the individuals who conducted the testing are not relevant. Relevancy is not a valid objection to this Interrogatory. Under Rule 26(b)(1), parties may obtain discovery regarding:

> [A]ny nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within the scope of discovery does not need to be admissible in evidence. Fed. R. Civ. P. 26(b)(1).

The identities of those individuals who have taken samples at the Malibu Schools is of great importance, is clearly relevant to Plaintiffs' claims, and is further relevant to Defendants' defenses. One of Defendants' defenses is that those areas from which samples were taken have been remediated, and accordingly, Plaintiffs' TSCA claim is moot. Defendants are entitled to take discovery, including depositions, of the individuals involved in Plaintiffs' independent testing to confirm the specific locations from which the samples were obtained and prepare this defense. Further, Defendants are entitled to this information so that they can examine the chain of custody for the samples, and assess the reliability of the sampling data on which Plaintiffs' TSCA claim is founded. Plaintiffs cannot file an

action based on this information and then shield it from discovery under the specious objection that it is not relevant.

Additionally, the issues at stake are significant, because Plaintiffs' claim is premised on the data it has collected through its own independent sampling, and Defendant could be held liable for millions of dollars of unnecessary remediation and renovation based on analysis of invalid or unreliable data. Furthermore, Plaintiffs are the sole source of this information and there is no burden on Plaintiffs in producing the requested information.

Finally, in addition to the independent testing which forms the basis of Plaintiffs' TSCA Notices and pleadings on file with this Court, Defendants know that additional sampling has been taken by AU or PEER or those acting in concert with Plaintiffs. Defendants have served subpoenas on every lab (known to it) which has processed Plaintiffs' samples. In responding to these subpoenas, these labs have produced to Defendants additional sampling data which has not been the basis of any judicial filing in this case. Defendants are entitled to the identities of these individuals so it can determine the locations and extent of these additional samples.

For all of the foregoing reasons, Plaintiffs should be required to identify those individuals who conducted sampling in connection to Plaintiffs' "Independent Tests."

d. AU'S CONTENTIONS REGARDING INTERROGATORY NO.5.

This interrogatory seeks the identity of individuals who took the samples used in the Second Set of Independent Tests. Defendants have not shown that the requested information is relevant. As discussed below, the information is not necessary for resolution of any of the issues in this case. Moreover, the burden of providing it outweighs any possible relevance.

Defendants contend that the identities of the individuals who took the samples is relevant because Plaintiffs are purportedly relying on the Second Set of

Independent Tests. However, as discussed above, Plaintiffs are not relying on the results of the Second Set of Independent Tests in three of the four rooms tested.[5] There is no possible reason why Defendants would need to know the identities of the persons who took samples for tests on which Plaintiffs are not relying.

Defendants argue that the identities of the samplers for the tests Plaintiffs are not relying on is still relevant because the FAC refers to them. However, as Plaintiffs' counsel has explained to Defendants' counsel, the FAC included information about the independent testing primarily for informational purposes and to describe the chronology of events at the Malibu Schools. The FAC also recites that Defendants had verified the independent test results and found TSCA violations in every single one of 24 verification samples they took in 10 rooms. (Plant Decl. Ex. D., ¶¶ 127-29)

Defendants also contend that Plaintiffs' motion for preliminary injunction relied on the Independent Tests. Defendants are wrong. Plaintiffs' motion only sought an injunction with respect to the room where Defendants' own testing had shown illegal levels of PCBs. (See, e.g., Plaintiffs' Memorandum of Points and Authorities in Support of their Motion for a Preliminary Injunction, Dkt. 14, at p. 2, attached at Avrith Decl. Ex. 2) ("Plaintiffs now move for a preliminary injunction requiring Defendants to immediately cease use of the other 10 rooms that Defendants' own testing has shown to have illegal levels of PCBs in caulk ….") (emphasis added).

Defendants also contend that they need to confirm the specific locations from which the samples were obtained, so they can prepare their defenses that those areas from which the samples were taken have been remediated. This contention is equally without merit. Plaintiffs are not relying on the Independent Tests for any

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[5] Plaintiffs are relying on the Independent Test in Room 205.

purpose with respect to any of the rooms that Defendants claim to have remediated. Thus, there is nothing for Defendants to confirm.

Even with respect to the one room (Room 205) for which Plaintiffs continue to rely on the Second Set of Independent Tests, Defendants do not need to know the identities of the person who took the samples. Although Defendants conclusorily contend they need this information to assess the reliability of the testing data, they do not explain why that is the case. The test data is a product of a lab analysis of the samples. There is nothing that the sampler can do to affect the reliability of the data derived from the lab analysis.

In any case, there should be no question that the Independent Testing data is reliable. Defendants' own verification testing has proven the accuracy of the independent testing. Defendants do not state why the Independent Testing data from the three rooms in which the Defendants did not test should be any less reliable than the other 10 rooms where Defendants' verification testing has confirmed the accuracy of the independent data.

Moreover, the issue in the case is not actually whether the independent tests are accurate, but whether or not there are TSCA violations in the rooms in question. Defendants could determine this fact, by analyzing their own verification samples, as they did with regard to ten rooms sampled in the Independent Tests. Thus, information which could lead to admissible evidence about whether or not there are TSCA violations in these rooms can be obtained without revealing the persons who took the independent samples.

Furthermore, the potential for harm to Plaintiffs or the samplers by disclosure of the requested information greatly outweighs any possible benefit of disclosure. As discussed above, Defendants have already filed a malicious criminal complaint for trespassing and vandalism against individuals who allegedly took samples. Although the District Attorney declined to file any charges, Plaintiffs are

legitimately concerned that Defendants will use the requested information to initiate similar charges against the samplers or otherwise retaliate against them.

Forced disclosure of the identities of those who took samples would greatly inhibit Plaintiffs' ability to fulfill their mission of advocating for remediation of environmental hazards. *See, e.g., United States v. Garde*, 673 F.Supp. 604, 607 (D.D.C. 1987)

> "[I]f the government is successful in compelling [the organization's lawyer] to reveal the information given to her, especially the identity of those she represents, GAP will lose the confidence of some of its whistleblower informants and its efforts to gather and present safety allegations will suffer. This is the harm that GAP claims, and it is cognizable under the [First Amendment] right to association."

Plaintiffs have made a "prima facie showing of arguable first amendment infringement." *Perry v. Schwazanegger*, 591 F.3d 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of the identities of the samplers would severely discourage Plaintiffs' ability to gather evidence of environmental violations because Plaintiffs would be unable to protect the samplers' confidentiality, and thus lose the confidence of their informants, thereby severely hampering Plaintiffs' organizational missions. It could also result in harassment of individuals who took the samples. Defendants have already filed a false criminal complaint against the President of America Unites, Ms. Denicola, and her husband, seeking to subject them to felony charges punishable by fines and imprisonment, for allegedly taking caulk samples. It is difficult to imagine a more "chilling" action against those who advocate for PCB testing and remediation at the Malibu Schools.

Once a prima facie case of First Amendment infringement is made, "the

evidentiary burden will then shift to the government…[to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest…[and] the 'least restrictive means' of obtaining the desired information." *Perry*, 591 F.3d at 1161 (quoting *brock v. Local 375, Plumbers Int'l Union of Am.*, 960 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)).

> "Importantly, the party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation—a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1). The request must also be carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable." *Perry*, 591 F.3d at 1161.

Here, Defendants cannot even show that this discovery meets the relevance requirements of Rule 26, much less the more demanding standard of relevance when First Amendment interests are implicated. As discussed above, there are other means of acquiring the desired information, namely, by examining the laboratory reports and the information provided in accordance with Defendants' subpoenas to the laboratories, or by conducting verification testing, without requiring Plaintiff to disclose the information about the identity of the samplers.

4. <u>INTERROGATORY NO. 6.</u>

a. <u>INTERROGATORY NO. 6.</u>

IDENTIFY all PERSONS who obtained or collected the "Third Set of Independent Tests," referred to at paragraph 109 of the FAC.

b. <u>RESPONSE TO INTERROGATORY NO. 6.</u>

Plaintiffs objects to this interrogatory on the ground that it seeks information

that is not relevant to the party's claims or defenses or the subject matter of this action.

c. DEFENDANTS' CONTENTIONS REGARDING INTERROGATORY NO. 6.

Prior to initiation of this suit, Plaintiffs served Defendants with two Notices of Intent to File Suit under TSCA ("Notices"), the first dated August 19, 2014, and the second dated January 12, 2015. Decl. Plant, Exs. D, ¶ 32; H-I. Such Notices were sent because, under TSCA's citizen suit provision, a citizen plaintiff must give the alleged violator and EPA specific notice of the alleged violations of TSCA. 15 U.S.C.S. § 2619(b)(1). TSCA's 60-day notice period is mandatory to the establishment of jurisdiction and cannot be waived. *Id*. Both of these Notices relied upon independent sampling conducted by AU and PEER. *See* Decl. Plant, Ex. H; Ex. I.

Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying on such testing. References to "Independent Tests" and independent testing are specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl. Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-26, 128, 132.

Further, on April 1, 2015, Plaintiffs filed a motion for a preliminary injunction, again relying on the results of such independent testing, for its request that Defendants be enjoined from using such rooms where the testing was conducted.

Now, in response to discovery requests for information regarding this sampling, including the identities of persons who conducted such independent testing, Plaintiffs have taken the specious position that the identities of the individuals who conducted the testing are not relevant. Relevancy is not a valid

objection to this Interrogatory. Under Rule 26(b)(1), parties may obtain discovery regarding:

> [A]ny nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within the scope of discovery does not need to be admissible in evidence. Fed. R. Civ. P. 26(b)(1).

The identities of those individuals who have taken samples at the Malibu Schools is of great importance, is clearly relevant to Plaintiffs' claims, and is further relevant to Defendants' defenses. One of Defendants' defenses is that those areas from which samples were taken have been remediated, and accordingly, Plaintiffs' TSCA claim is moot. Defendants are entitled to take discovery, including depositions, of the individuals involved in Plaintiffs' independent testing to confirm the specific locations from which the samples were obtained and prepare this defense. Further, Defendants are entitled to this information so that they can examine the chain of custody for the samples, and assess the reliability of the sampling data on which Plaintiffs' TSCA claim is founded. Plaintiffs cannot file an action based on this information and then shield it from discovery under the specious objection that it is not relevant.

Additionally, the issues at stake are significant, because Plaintiffs' claim is premised on the data it has collected through its own independent sampling, and Defendant could be held liable for millions of dollars of unnecessary remediation and renovation based on analysis of invalid or unreliable data. Furthermore, Plaintiffs are the sole source of this information and there is no burden on Plaintiffs in producing the requested information.

Finally, in addition to the independent testing which forms the basis of Plaintiffs' TSCA Notices and pleadings on file with this Court, Defendants know that additional sampling has been taken by AU or PEER or those acting in concert with Plaintiffs. Defendants have served subpoenas on every lab (known to it) which has processed Plaintiffs' samples. In responding to these subpoenas, these labs have produced to Defendants additional sampling data which has not been the basis of any judicial filing in this case. Defendants are entitled to the identities of these individuals so it can determine the locations and extent of these additional samples.

For all of the foregoing reasons, Plaintiffs should be required to identify those individuals who conducted sampling in connection with Plaintiffs' "Independent Tests."

d. AU'S CONTENTIONS REGARDING INTERROGATORY NO. 6.

This interrogatory seeks the identity of individuals who took samples used in the Third Set of Independent Tests. Defendants have not shown that the requested information is relevant. As discussed below, the information is not necessary for resolution of any of the issues in this case. Moreover, the burden of providing it outweighs any possible relevance.

Defendants contend that the identities of the individuals who took the samples is relevant because Plaintiffs are purportedly relying on the Third Set of Independent Tests that Plaintiff AU conducted prior to the filing of this action. However, as discussed above, Plaintiffs are not relying on the Third Set of Independent Tests in five of the six rooms tested.[6] There is no possible reason why Defendants would need to know the identities of the persons who took samples for tests on which Plaintiffs are not relying.

Defendants argue that the identities of the samplers for the tests Plaintiffs are not relying on is still relevant because the FAC refers to them. However, as

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[6] Plaintiffs are relying on the Independent Test in the JCES office.

Plaintiffs' counsel has explained to Defendants' counsel, the FAC included information about the independent testing primarily for informational purposes and to describe the chronology of events at the Malibu Schools. The FAC also recites that Defendants had verified the independent test results and found TSCA violations in every single one of 24 verification samples they took in 10 rooms. (Plant Decl. Ex. D., ¶¶ 127-29)

Defendants also contend that Plaintiffs' motion for preliminary injunction relied on the Independent Tests. Defendants are wrong. Plaintiffs' motion only sought an injunction with respect to the room where Defendants' own testing had shown illegal levels of PCBs. (See, e.g., Plaintiffs' Memorandum of Points and Authorities in Support of their Motion for a Preliminary Injunction, Dkt. 14, at p. 2, attached at Avrith Decl. Ex. 2) ("Plaintiffs now move for a preliminary injunction requiring Defendants to immediately cease use of the other 10 rooms that Defendants' own testing has shown to have illegal levels of PCBs in caulk ….") (emphasis added).

Defendants also contend that they need to confirm the specific locations from which the samples were obtained, so they can prepare their defenses that those areas from which the samples were taken have been remediated. This contention is equally without merit. Plaintiffs are not relying on the Independent Tests for any purpose with respect to any of the rooms that Defendants claim to have remediated. Thus, there is nothing for Defendants to confirm.

Even with respect to the one room (JCES office) for which Plaintiffs continue to rely on the Third Set of Independent Tests, Defendants do not need to know the identities of the person who took the samples. Although Defendants conclusorily contend they need this information to assess the reliability of the testing data, they do not explain why that is the case. The test data is a product of a lab analysis of the

samples. There is nothing that the sampler can do to affect the reliability of the data derived from the lab analysis.

In any case, there should be no question that the Independent Testing data is reliable. Defendants' own verification testing has proven the accuracy of the independent testing. Defendants do not state why the Independent Testing data from the three rooms in which the Defendants did not test should be any less reliable than the other 10 rooms where Defendants' verification testing has confirmed the accuracy of the independent data.

Moreover, the issue in the case is not actually whether the independent tests are accurate, but whether or not there are TSCA violations in the rooms in question. Defendants could determine this fact, by analyzing their own verification samples, as they did with regard to ten rooms sampled in the Independent Tests. Thus, information which could lead to admissible evidence about whether or not there are TSCA violations in these rooms can be obtained without revealing the persons who took the independent samples.

Furthermore, the potential for harm to Plaintiffs or the samplers by disclosure of the requested information greatly outweighs any possible benefit of disclosure. As discussed above, Defendants have already filed a malicious criminal complaint for trespassing and vandalism against individuals who allegedly took samples. Although the District Attorney declined to file any charges, Plaintiffs are legitimately concerned that Defendants will use the requested information to initiate similar charges against the samplers or otherwise retaliate against them.

Forced disclosure of the identities of those who took samples would greatly inhibit Plaintiffs' ability to fulfill their mission of advocating for remediation of environmental hazards. *See, e.g., United States v. Garde*, 673 F.Supp. 604, 607 (D.D.C. 1987)

> "[I]f the government is successful in compelling [the organization's lawyer] to reveal the information given to her, especially the identity of those she represents, GAP will lose the confidence of some of its whistleblower informants and its efforts to gather and present safety allegations will suffer. This is the harm that GAP claims, and it is cognizable under the [First Amendment] right to association."

Plaintiffs have made a "prima facie showing of arguable first amendment infringement." *Perry v. Schwazanegger*, 591 F.3d 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of the identities of the samplers would severely discourage Plaintiffs' ability to gather evidence of environmental violations because Plaintiffs would be unable to protect the samplers' confidentiality, and thus lose the confidence of their informants, thereby severely hampering Plaintiffs' organizational missions. It could also result in harassment of individuals who took the samples. Defendants have already filed a false criminal complaint against the President of America Unites, Ms. Denicola, and her husband, seeking to subject them to felony charges punishable by fines and imprisonment, for allegedly taking caulk samples. It is difficult to imagine a more "chilling" action against those who advocate for PCB testing and remediation at the Malibu Schools.

Once a prima facie case of First Amendment infringement is made, "the evidentiary burden will then shift to the government…[to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest…[and] the 'least restrictive means' of obtaining the desired information." *Perry*, 591 F.3d at 1161 (quoting *brock v. Local 375, Plumbers Int'l Union of Am.*, 960 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)).

> "Importantly, the party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation—a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1). The request must also be carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable." *Perry*, 591 F.3d at 1161.

Here, Defendants cannot even show that this discovery meets the relevance requirements of Rule 26, much less the more demanding standard of relevance when First Amendment interests are implicated. As discussed above, there are other means of acquiring the desired information, namely, by examining the laboratory reports and the information provided in accordance with Defendants' subpoenas to the laboratories, or by conducting verification testing, without requiring Plaintiff to disclose the information about the identity of the samplers.

5. INTERROGATORY NO. 8.

a. INTERROGATORY NO. 8.

IDENTIFY the PERSON or PERSONS that authored or created the BC LABS KEY.

b. RESPONSE TO INTERROGATORY NO. 8.

Plaintiffs objects to this interrogatory on the ground that it seeks information that is not relevant to the party's claims or defenses or the subject matter of this action.

c. DEFENDANTS' CONTENTIONS REGARDING INTERROGATORY NO. 8.

The "BC Labs Key" refers to the "Key to BC Laboratories, Inc [*sic*] Report." This key, which was created by Plaintiffs, purportedly shows the locations from

which independent sampling was taken. A true and correct copy of the "BC Labs Key" is attached to the Declaration of Caroline L. Plant as Exhibit J.

Relevancy is not a valid objection to this Interrogatory. Under Rule 26(b)(1), parties may obtain discovery regarding:

> [A]ny nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within the scope of discovery does not need to be admissible in evidence. Fed. R. Civ. P. 26(b)(1).

The identity of the author of this key is certainly relevant, because the author possesses discoverable information that will assist Defendants in identifying the specific locations where independent testing occurred and establish a chain of custody. One of Defendants' defenses is that the samples, which form the basis of Plaintiffs' TSCA lawsuit, have been remediated, and accordingly, Plaintiffs' claims are moot. Defendants are entitled to take discovery, including depositions, of the individuals to confirm the specific locations from which the samples were obtained. Further, Defendants are entitled to this information so that they can examine the chain of custody for the samples, and assess the reliability of the sampling data on which Plaintiffs' TSCA claim is founded.

Additionally, the issues at stake are significant, because Plaintiffs' claim is premised on the data it has collected through its own independent sampling, and Defendant could be held liable for millions of dollars of unnecessary remediation and renovation based on analysis of invalid or unreliable data. Furthermore, Plaintiffs are the sole source of this information and there is no burden on Plaintiffs in producing the requested information.

For all of the foregoing reasons, Plaintiffs should be required to identify those individuals who authored the BC Labs Key.

d. AU'S CONTENTIONS REGARDING INTERROGATORY NO. 8

This interrogatory seeks the identity of the individuals who created the "BC Labs key," which shows the locations from which independent sampling was taken. Defendants have not shown that the requested information is relevant. As discussed below, the information is not necessary for resolution of any of the issues in this case. Moreover, the burden of providing it outweighs any possible relevance.

Defendants contend that the identities of the individuals who created the key is relevant because the "author possesses discoverable information that will assist Defendants in identifying the specific locations where independent testing occurred and establish a chain of custody." However, as discussed above, Plaintiffs are not relying on the Independent Tests in 10 of the 13 rooms. There is no possible reason why Defendants would need to know this information for tests on which Plaintiffs are not relying.

Moreover, with respect to the Independent Tests on which Plaintiffs continue to rely, the location of the sampling is shown on the lab reports which Defendants already have. The exact location of the sampling is irrelevant. Defendants' obligation to remediate is not limited to the exact square inch where a sample was taken. The lab reports also contain whatever chain of custody information Defendants need.

Furthermore, the potential for harm to Plaintiffs or the persons creating the key by disclosure of the requested information greatly outweighs any possible benefit of disclosure. As discussed above, Defendants have already filed a malicious criminal complaint for trespassing and vandalism against individuals who allegedly took samples. Although the District Attorney declined to file any charges, Plaintiffs are legitimately concerned that Defendants will use the requested

information to initiate similar charges against the samplers or otherwise retaliate against them.

Forced disclosure of the identities of those who created the key would greatly inhibit Plaintiffs' ability to fulfill their mission of advocating for remediation of environmental hazards. *See, e.g., United States v. Garde*, 673 F.Supp. 604, 607 (D.D.C. 1987)

> "[I]f the government is successful in compelling [the organization's lawyer] to reveal the information given to her, especially the identity of those she represents, GAP will lose the confidence of some of its whistleblower informants and its efforts to gather and present safety allegations will suffer. This is the harm that GAP claims, and it is cognizable under the [First Amendment] right to association."

Plaintiffs have made a "prima facie showing of arguable first amendment infringement." *Perry v. Schwazanegger*, 591 F.3d 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of the identities of the samplers would severely discourage Plaintiffs' ability to gather evidence of environmental violations because Plaintiffs would be unable to protect the samplers' confidentiality, and thus lose the confidence of their informants, thereby severely hampering Plaintiffs' organizational missions. It could also result in harassment of individuals who took the samples. Defendants have already filed a false criminal complaint against the President of America Unites, Ms. Denicola, and her husband, seeking to subject them to felony charges punishable by fines and imprisonment, for allegedly taking caulk samples. It is difficult to imagine a more "chilling" action against those who advocate for PCB testing and remediation at the Malibu Schools.

Once a prima facie case of First Amendment infringement is made, "the

evidentiary burden will then shift to the government…[to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest…[and] the 'least restrictive means' of obtaining the desired information." *Perry*, 591 F.3d at 1161 (quoting *brock v. Local 375, Plumbers Int'l Union of Am.*, 960 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)).

> "Importantly, the party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation—a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1). The request must also be carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable." *Perry*, 591 F.3d at 1161.

Here, Defendants cannot even show that this discovery meets the relevance requirements of Rule 26, much less the more demanding standard of relevance when First Amendment interests are implicated. As discussed above, there are other means of acquiring the desired information, namely, by examining the laboratory reports and the information provided in accordance with Defendants' subpoenas to the laboratories, or by conducting verification testing, without requiring Plaintiff to disclose the information about the identity of the persons creating the key.

6. <u>INTERROGATORY NO. 9.</u>

a. <u>INTERROGATORY NO. 9.</u>

IDENTIFY the PERSON or PERSONS that authored or created the EUROFINS KEY.

b. <u>RESPONSE TO INTERROGATORY NO. 9.</u>

Plaintiffs objects to this interrogatory on the ground that it seeks information that is not relevant to the party's claims or defenses or the subject matter of this

action.

c. DEFENDANTS' CONTENTIONS REGARDING INTERROGATORY NO. 9.

The "EUROFINS KEY" refers to the key to Work Order 14-08-1493. This key, which was created by Plaintiffs, purportedly shows the locations from which sampling was taken. A true and correct copy of the "Eurofins Key" is attached to the Declaration of Caroline L. Plant as Exhibit K.

Relevancy is not a valid objection to this Interrogatory. Under Rule 26(b)(1), parties may obtain discovery regarding:

> [A]ny nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within the scope of discovery does not need to be admissible in evidence. Fed. R. Civ. P. 26(b)(1).

The identity of the author of this key is certainly relevant, because the author possesses discoverable information that will assist Defendants in identifying the specific locations where independent testing occurred and establish a chain of custody. One of Defendants' defenses is that the samples, which form the basis of Plaintiffs' TSCA lawsuit, have been remediated, and accordingly, Plaintiffs' claims are moot. Defendants are entitled to take discovery, including depositions, of the individuals to confirm the specific locations from which the samples were obtained. Further, Defendants are entitled to this information so that they can examine the chain of custody for the samples, and assess the reliability of the sampling data on which Plaintiffs' TSCA claim is founded.

Additionally, the issues at stake are significant, because Plaintiffs' claim is premised on the data it has collected through its own independent sampling, and

Defendant could be held liable for millions of dollars of unnecessary remediation and renovation based on analysis of invalid or unreliable data. Furthermore, Plaintiffs are the sole source of this information and there is no burden on Plaintiffs in producing the requested information.

For all of the foregoing reasons, Plaintiffs should be required to identify those individuals who authored the Eurofins Key.

d. AU'S CONTENTIONS REGARDING INTERROGATORY NO. 9.

This interrogatory seeks the identity of the individuals who created the "Eurofins key," which shows the locations from which independent sampling was taken. Defendants have not shown that the requested information is relevant. As discussed below, the information is not necessary for resolution of any of the issues in this case. Moreover, the burden of providing it outweighs any possible relevance.

Defendants contend that the identities of the individuals who created the key is relevant because the "author possesses discoverable information that will assist Defendants in identifying the specific locations where independent testing occurred and establish a chain of custody." However, as discussed above, Plaintiffs are not relying on the Independent Tests in 10 of the 13 rooms. There is no possible reason why Defendants would need to know this information for tests on which Plaintiffs are not relying.

Moreover, with respect to the Independent Tests on which Plaintiffs continue to rely, the location of the sampling is shown on the lab reports which Defendants already have. The exact location of the sampling is irrelevant. Defendants' obligation to remediate is not limited to the exact square inch where a sample was taken. The lab reports also contain whatever chain of custody information Defendants need.

Furthermore, the potential for harm to Plaintiffs or the persons creating the key by disclosure of the requested information greatly outweighs any possible

benefit of disclosure. As discussed above, Defendants have already filed a malicious criminal complaint for trespassing and vandalism against individuals who allegedly took samples. Although the District Attorney declined to file any charges, Plaintiffs are legitimately concerned that Defendants will use the requested information to initiate similar charges against the samplers or otherwise retaliate against them.

Forced disclosure of the identities of those who created the key would greatly inhibit Plaintiffs' ability to fulfill their mission of advocating for remediation of environmental hazards. *See, e.g., United States v. Garde*, 673 F.Supp. 604, 607 (D.D.C. 1987)

> "[I]f the government is successful in compelling [the organization's lawyer] to reveal the information given to her, especially the identity of those she represents, GAP will lose the confidence of some of its whistleblower informants and its efforts to gather and present safety allegations will suffer. This is the harm that GAP claims, and it is cognizable under the [First Amendment] right to association."

Plaintiffs have made a "prima facie showing of arguable first amendment infringement." *Perry v. Schwazanegger*, 591 F.3d 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of the identities of the samplers would severely discourage Plaintiffs' ability to gather evidence of environmental violations because Plaintiffs would be unable to protect the samplers' confidentiality, and thus lose the confidence of their informants, thereby severely hampering Plaintiffs' organizational missions. It could also result in harassment of individuals who took the samples. Defendants have already filed a false criminal complaint against the President of America Unites, Ms. Denicola, and her husband, seeking to subject

them to felony charges punishable by fines and imprisonment, for allegedly taking caulk samples. It is difficult to imagine a more "chilling" action against those who advocate for PCB testing and remediation at the Malibu Schools.

Once a prima facie case of First Amendment infringement is made, "the evidentiary burden will then shift to the government…[to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest…[and] the 'least restrictive means' of obtaining the desired information." *Perry*, 591 F.3d at 1161 (quoting *brock v. Local 375, Plumbers Int'l Union of Am.*, 960 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)).

> "Importantly, the party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation—a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1). The request must also be carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable." *Perry*, 591 F.3d at 1161.

Here, Defendants cannot even show that this discovery meets the relevance requirements of Rule 26, much less the more demanding standard of relevance when First Amendment interests are implicated. As discussed above, there are other means of acquiring the desired information, namely, by examining the laboratory reports and the information provided in accordance with Defendants' subpoenas to the laboratories, or by conducting verification testing, without requiring Plaintiff to disclose the information about the identity of the persons creating the key.

B. <u>REQUESTS FOR PRODUCTION TO AU REGARDING THE INDEPENDENT SAMPLING AT THE MALIBU SCHOOLS</u>

Defendants' Requests for Production 5, 15, 17, and 19 to AU seek the

identities of all persons who obtained or collected the "Independent Tests" and other information regarding sample testing conducted by Plaintiffs.

1. REQUEST FOR PRODUCTION NO. 5.

a. REQUEST FOR PRODUCTION NO. 5

All DOCUMENTS that IDENTIFY the PERSON or PERSONS who obtained or collected the "First Set of Independent Tests," referred to at paragraph 80 of the FAC, at the MALIBU SCHOOLS.

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 5.

Plaintiff objects to this Request on the ground that it seeks information that is not relevant to the parties' claims or defenses or the subject matter of the instant action. Plaintiff further objects to this Request on the ground that it is vague and ambiguous and overbroad. Plaintiff further objects to this Request to the extent that it seeks privileged attorney-client communications, work product, common-interest communications or other privileged information. Plaintiff further objects to this Request on the ground that it violates the First Amendment rights of association of Plaintiff and its members and supporters.

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 5.

i. Relevancy Is Not a Valid Objection to RFP No.5.

Prior to initiation of this suit, Plaintiffs served Defendants with two Notices of Intent to File Suit under TSCA ("Notices"), the first dated August 19, 2014, and the second dated January 12, 2015. Decl. Plant, Exs. D, ¶ 32; H-I. Such Notices were sent because, under TSCA's citizen suit provision, a citizen plaintiff must give the alleged violator and EPA specific notice of the alleged violations of TSCA. 15 U.S.C.S. § 2619(b)(1). TSCA's 60-day notice period is mandatory to the establishment of jurisdiction and cannot be waived. *Id*. Both of these Notices relied upon independent sampling conducted by AU and PEER. *See* Decl. Plant, Ex. H; Ex. I.

Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying on such testing. References to "Independent Tests" and independent testing are specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl. Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-26, 128, 132.

Further, on April 1, 2015, Plaintiffs filed a motion for a preliminary injunction, again relying on the results of such independent testing, for its request that Defendants be enjoined from using such rooms where the testing was conducted.

Now, in response to discovery requests for information regarding this sampling, including the identities of persons who conducted such independent testing, Plaintiffs have taken the specious position that the identities of the individuals who conducted the testing are not relevant. Relevancy is not a valid objection to this Interrogatory. Under Rule 26(b)(1), parties may obtain discovery regarding:

> [A]ny nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within the scope of discovery does not need to be admissible in evidence. Fed. R. Civ. P. 26(b)(1).

The identities of those individuals who have taken samples at the Malibu Schools is of great importance, is clearly relevant to Plaintiffs' claims, and is further relevant to Defendants' defenses. One of Defendants' defenses is that those areas from which samples were taken have been remediated, and accordingly, Plaintiffs' TSCA claim is moot. Defendants are entitled to take discovery, including

depositions, of the individuals involved in Plaintiffs' independent testing to confirm the specific locations from which the samples were obtained and prepare this defense. Further, Defendants are entitled to this information so that they can examine the chain of custody for the samples, and assess the reliability of the sampling data on which Plaintiffs' TSCA claim is founded. Plaintiffs cannot file an action based on this information and then shield it from discovery under the specious objection that it is not relevant.

Additionally, the issues at stake are significant, because Plaintiffs' claim is premised on the data it has collected through its own independent sampling, and Defendant could be held liable for millions of dollars of unnecessary remediation and renovation based on analysis of invalid or unreliable data. Furthermore, Plaintiffs are the sole source of this information and there is no burden on Plaintiffs in producing the requested information.

Finally, in addition to the independent testing which forms the basis of Plaintiffs' TSCA Notices and pleadings on file with this Court, Defendants know that additional sampling has been taken by AU or PEER or those acting in concert with Plaintiffs. Defendants have served subpoenas on every lab (known to it) which has processed Plaintiffs' samples. In responding to these subpoenas, these labs have produced to Defendants additional sampling data which has not been the basis of any judicial filing in this case. Defendants are entitled to the identities of these individuals so it can determine the locations and extent of these additional samples.

For all of the foregoing reasons, Plaintiffs should be required to identify those individuals who conducted sampling in connection to Plaintiffs' "Independent Tests."

ii. Vagueness, Ambiguity, and Overbreadth Are Not Valid Objections.

Plaintiff's objection that that this Request is vague, ambiguous and overbroad is unfounded. "The party who resists discovery has the burden to show discovery

should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." *Bible v. Rio Props., Inc.*, 246 F. R. D. 614 (C.D. Cal. 2007) (*citing Blankenship v. Hearst Corp.*, 519 F. 2d 418, 429 (9th Cir. 1975) and *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 655-56 (C.D. Cal. 2005)). There is no merit to "general or boilerplate objections such as 'overly broad' [or] 'vague and ambiguous.'" *Bible*, 246 F. R. D. at 619; *A. Farber & Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal. 2006).

Plaintiff has not met its burden of demonstrating that discovery of the information sought in this Request should not be allowed, because it has not supported or explained its objections on the basis of the requests being vague, ambiguous, or overbroad. Defendants have requested documents identifying those individuals who obtained or collected samples in the "Independent Tests" referred to in Plaintiffs' very own FAC. Plaintiff need only produce those documents that identify samplers or others in the chain of custody for these tests. Without further explanation, Plaintiff's objection is without merit, and Plaintiff should produce documents in response to this Request.

iii. Attorney-Client, Attorney Work Product, and Common-Interest Communication Privileges Are Not Valid Objections.

(a) Attorney-Client Privilege.

"The attorney-client privilege protects confidential communications between attorneys and clients, which are made for the purpose of giving legal advice." *United States v. Richey*, 632 F. 3d 559, 566 (9th Cir. 2011). The party asserting this privilege bears the burden of showing that there is an attorney-client relationship and the privileged nature of the communication. *Id.*; *United States v. Bauer*, 132 F. 3d 504, 507 (9th Cir. 1997). There is an attorney-client privilege where: "(1) [ ] legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in

confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) unless the protection be waved." *Id.* (quoting *United States v. Graf*, 610 F. 3d 1148, 1156 (9th Cir. 2010)). The privilege is waived when privileged communications are disclosed. *Weil v. Inv. Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). While the privilege may extend to those communications with third parties assisting the attorney in legal advice, it does not extend where the advice sought is not legal advice. *Id.*

Documents identifying those involved in Plaintiffs' "Independent Tests" are not protected by the attorney-client privilege to the extent that they include correspondences and records from the environmental testing entities engaged in the testing process. The entities involved in the testing process were not engaged in this process for the purpose of aiding Plaintiffs or their counsel in litigation; rather, the sole role of these entities was to provide testing services. Furthermore, Plaintiffs have failed to indicate in their responses which communications they believe to be protected by the attorney-client privilege. *Richey*, 632 F. 3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(b) Attorney Work Product.

The work product doctrine prohibits discovery of documents and other materials "prepared by a party or his representative in anticipation of litigation." *United States v. Richey* 632 F. 3d 559, 567 (9th Cir. 2011) (*quoting Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F. 2d 1486, 1494 (9th Cir. 1989)); Fed. R. Civ. P. 26(b)(3). The work product doctrine is a qualified immunity rather than a privilege, and a showing of good cause for the information desired is sufficient to overcome the qualified immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D. Cal. 2006); *Admiral Ins. Co. v. United States Dist. Court*, 881 F. 2d 1486, 1494 (9th

Cir. 1989). "The party claiming work product immunity has the burden of proving the applicability of the doctrine." *A. Farbers & Ptnrs., Inc.*, 234 F.R.D. at 192.

Plaintiffs cannot claim work product immunity because they have made no showing that this protection applies to any of the information or documents sought in Defendants' Requests. For example, Plaintiffs have not demonstrated how documents identifying those who obtained or collected samples in Plaintiffs' independent testing bears any relation to Plaintiffs' efforts in preparation for trial. Furthermore, Defendants have good cause to request information sought, because the data from the "Independent Tests" will surely be used against Defendants in this litigation, and Defendants must be afforded the opportunity to confront the validity and reliability of the data. This necessarily entails a complete knowledge of the chain of custody, which can only be discovered through documents identifying those involved in the testing process. Plaintiffs have not met the burden of demonstrating the applicability of the work product doctrine, so their objection on this basis is not appropriate. Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(c) Common Interest Doctrine.

In general, the attorney-client privilege is waived when communications between an attorney and client are disclosed to a third party. *Weil v. Inv/ Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). There is a rare exception to this waiver rule where individuals with a common interest in a legal matter may "communicate among themselves and with the separate attorneys on matters of common legal interest, for the purpose of preparing a joint strategy, and the attorney-client privilege will protect these communications to the same extent as it would communications between each client and his own attorney." *Nidec Corp. v. Victor Co.*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) (*quoting* 1 PAUL R. RICE,

ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:35, at 192 (1999 ed.); *United States v. Gonzales*, 669 F. 3d 974, 978 (9th Cir. 2012). This common interest doctrine is not a privilege, but an exception to the rule on waiver where communications are disclosed to third parties. *See Griffith v. Davis*, 161 F.R.D. 687, 692 (C.D. Cal. 1995). For this reason, the common interest doctrine comes into play only if the communication at issue is privileged in the first place. *Nidec Corp*, 249 F.R.D. at 578.

As the common interest doctrine applies only to those materials protected by the attorney-client privilege with regard to America Unites and PEER, the parties with a common legal interest in this case, not all communications between America Unites and PEER are protected. Defendants request that Plaintiff produce documents in response to this request to the extent that Plaintiff possesses responsive materials that are not protected as either Plaintiffs' attorney-client communications.

iv. First Amendment Privilege Is Not a Valid Objection.

Plaintiff objects to this Request on the ground that it violates the First Amendment rights of association of Plaintiff and its members. A party objecting on the basis of a First Amendment privilege must satisfy a two-part test. The objecting party must first make a "prima facie showing of arguable first amendment infringement." *Perry v. Schwarzenegger*, 591 F. 3d 1126, 1140 (9th Cir. 2010) (*quoting Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F. 2d 346, 349-50 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is enforced, there will be "(1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Brock*, 860 F. 2d at 350.

Here, Plaintiff has made no such showing that disclosure of the documents requested would lead to "harassment, membership withdrawal, or discouragement

of new members," or that it would result in other consequences that could "chill" members' associational rights. The Request for documents identifying those who obtained or collected the "Independent Tests" calls for chain of custody documents and documents prepared for Plaintiffs by environmental testing companies. The Request propounded by Defendants is not seeking personal information, does nothing to harass members of Plaintiff organizations, and would not have a deterrent effect on membership. Moreover, the documents requested by Defendants are necessary so that Defendants can defend themselves in this litigation and fairness justifies their production. Defendants will not be afforded a fair discovery if they are precluded from accessing information regarding the independent testing data acquired by Plaintiffs, which will surely be used against Defendants in trial.

Additionally, there would be no "chilling" effect if Plaintiffs responded to Defendants' requests for this information, because AU is publicly vocal about its activities and its membership, listing members of its Advisory Board and Leadership Team on its website. *See* Decl. Plant, Exs. L.M. In particular, Plaintiff frequently publicizes its activities with regard to the subject matter of this very case on its website. *See* Decl. Plant, Ex. E; Ex. F; Ex. G. The information sought in the above Request relates **only** to those individuals who obtained or collected data for the "Independent Tests" that form the basis for this lawsuit, and to communications regarding PCBs, the subject matter of this lawsuit.

The documents and information requested are necessary and relevant to Defendants' preparation for trial, and the names and email addresses of those members who would like their membership in AU to remain private could be redacted so as to balance any associational issues with the Court's strong interest in ensuring Defendants' ability to fairly defend their case. Plaintiffs' entire case is premised on data from the "Independent Tests" referenced in Plaintiffs' FAC, and it

is imperative that Defendants are granted full access to information and communications regarding these tests and their chains of custody.

d. AU'S CONTENTIONS REGARDING RFP NO. 5.

This request seeks documents concerning the identities of the individuals who took samples used in the First Set of Independent Tests. Defendants have not shown that the requested information is relevant. As discussed below, the information is not necessary for resolution of any of the issues in this case. Moreover, the burden of providing it outweighs any possible relevance.

Defendants contend that the identities of the individuals who took samples of caulk at the Malibu Schools is relevant because Plaintiffs are purportedly relying on the First Set of Independent Tests. However, as discussed above, Plaintiffs are not relying on the First Set of Independent Tests in two of the three rooms tested. There is no possible reason why Defendants would need to know the identities of the persons who took samples for tests on which Plaintiffs are not relying.

Defendants argue that the identities of the samplers for the tests Plaintiffs are not relying on is still relevant because the FAC refers to them. However, as Plaintiffs' counsel has explained to Defendants' counsel, the FAC included information about the independent testing primarily for informational purposes and to describe the chronology of events at the Malibu Schools. The FAC also recites that Defendants had verified the independent test results and found TSCA violations in every single one of 24 verification samples they took in 10 rooms. (Plant Decl. Ex. D., ¶¶ 127-29)

Defendants also contend that Plaintiffs' motion for preliminary injunction relied on the Independent Tests. Defendants are wrong. Plaintiffs' motion only sought an injunction with respect to the room where Defendants' own testing had shown illegal levels of PCBs. (See, e.g., Plaintiffs' Memorandum of Points and Authorities in Support of their Motion for a Preliminary Injunction, Dkt. 14, at p. 2,

attached at Avrith Decl. Ex. 2) ("Plaintiffs now move for a preliminary injunction requiring Defendants to immediately cease use of the other 10 rooms that Defendants' own testing has shown to have illegal levels of PCBs in caulk ….") (emphasis added).

Defendants also contend that they need to confirm the specific locations from which the samples were obtained, so they can prepare their defenses that those areas from which the samples were taken have been remediated. This contention is equally without merit. Plaintiffs are not relying on the Independent Tests for any purpose with respect to any of the rooms that Defendants claim to have remediated. Thus, there is nothing for Defendants to confirm.

Even with respect to the one room (Room 722) for which Plaintiffs continue to rely on the First Set of Independent Tests, Defendants do not need to know the identities of the person who took the samples. Although Defendants conclusorily contend they need this information to assess the reliability of the testing data, they do not explain why that is the case. The test data is a product of a lab analysis of the samples. There is nothing that the sampler can do to affect the reliability of the data derived from the lab analysis.

In any case, there should be no question that the Independent Testing data is reliable. Defendants' own verification testing has proven the accuracy of the independent testing. Defendants do not state why the Independent Testing data from the three rooms in which the Defendants did not test should be any less reliable than the other 10 rooms where Defendants' verification testing has confirmed the accuracy of the independent data.

Moreover, the issue in the case is not actually whether the independent tests are accurate, but whether or not there are TSCA violations in the rooms in question. Defendants could determine this fact, by analyzing their own verification samples, as they did with regard to ten rooms sampled in the Independent Tests. Thus,

information which could lead to admissible evidence about whether or not there are TSCA violations in these rooms can be obtained without revealing the persons who took the independent samples.

Furthermore, the potential for harm to Plaintiffs or the samplers by disclosure of the requested information greatly outweighs any possible benefit of disclosure. As discussed above, Defendants have already filed a malicious criminal complaint for trespassing and vandalism against individuals who allegedly took samples. Although the District Attorney declined to file any charges, Plaintiffs are legitimately concerned that Defendants will use the requested information to initiate similar charges against the samplers or otherwise retaliate against them.

Forced disclosure of the identities of those who took samples would greatly inhibit Plaintiffs' ability to fulfill their mission of advocating for remediation of environmental hazards. *See, e.g., United States v. Garde*, 673 F.Supp. 604, 607 (D.D.C. 1987). Plaintiffs have made a "prima facie showing of arguable first amendment infringement." *Perry v. Schwazanegger*, 591 F.3d 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of the identities of the samplers would severely discourage Plaintiffs' ability to gather evidence of environmental violations because Plaintiffs would be unable to protect the samplers' confidentiality, and thus lose the confidence of their informants, thereby severely hampering Plaintiffs' organizational missions. It could also result in harassment of individuals who took the samples. Defendants have already filed a false criminal complaint against the President of America Unites, Ms. Denicola, and her husband, seeking to subject them to felony charges punishable by fines and imprisonment, for allegedly taking caulk samples. It is difficult to imagine a more "chilling" action against those who advocate for PCB testing and remediation at the Malibu Schools.

Once a prima facie case of First Amendment infringement is made, "the

evidentiary burden will then shift to the government…[to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest…[and] the 'least restrictive means' of obtaining the desired information." *Perry*, 591 F.3d at 1161 (quoting *brock v. Local 375, Plumbers Int'l Union of Am.*, 960 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)).

Here, Defendants cannot even show that this discovery meets the relevance requirements of Rule 26, much less the more demanding standard of relevance when First Amendment interests are implicated. As discussed above, there are other means of acquiring the desired information, namely, by examining the laboratory reports and the information provided in accordance with Defendants' subpoenas to the laboratories, or by conducting verification testing, without requiring Plaintiff to disclose the information about the identity of the samplers.

Finally, documents concerning the identities of samplers which constitute attorney-client communications or attorney work product are privileged. To the extent that any such documents are relevant, Plaintiffs will list them on a privilege log.

2. REQUEST FOR PRODUCTION NO. 15.

a. REQUEST FOR PRODUCTION NO. 15.

All DOCUMENTS that IDENTIFY the PERSON or PERSONS who obtained or collected the "Second Set of Independent Tests," referred to at paragraph 103 of the FAC.

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 15.

Plaintiff objects to this Request on the ground that it seeks information that is not relevant to the parties' claims or defenses or the subject matter of the instant action. Plaintiff further objects to this Request on the ground that it is vague and ambiguous and overbroad. Plaintiff further objects to this Request to the extent that

it seeks privileged attorney-client communications, work product, common-interest communications or other privileged information. Plaintiff further objects to this Request on the ground that it violates the First Amendment rights of association of Plaintiff and its members and supporters.

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 15.

i. Relevancy Is Not a Valid Objection to RFP No. 15.

Prior to initiation of this suit, Plaintiffs served Defendants with two Notices of Intent to File Suit under TSCA ("Notices"), the first dated August 19, 2014, and the second dated January 12, 2015. Decl. Plant, Exs. D, ¶ 32; H-I. Such Notices were sent because, under TSCA's citizen suit provision, a citizen plaintiff must give the alleged violator and EPA specific notice of the alleged violations of TSCA. 15 U.S.C.S. § 2619(b)(1). TSCA's 60-day notice period is mandatory to the establishment of jurisdiction and cannot be waived. *Id*. Both of these Notices relied upon independent sampling conducted by AU and PEER. *See* Decl. Plant, Ex. H; Ex. I.

Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying on such testing. References to "Independent Tests" and independent testing are specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl. Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-26, 128, 132.

Further, on April 1, 2015, Plaintiffs filed a motion for a preliminary injunction, again relying on the results of such independent testing, for its request that Defendants be enjoined from using such rooms where the testing was conducted.

Now, in response to discovery requests for information regarding this sampling, including the identities of persons who conducted such independent

testing, Plaintiffs have taken the specious position that the identities of the individuals who conducted the testing are not relevant. Relevancy is not a valid objection to this Interrogatory. Under Rule 26(b)(1), parties may obtain discovery regarding:

> [A]ny nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within the scope of discovery does not need to be admissible in evidence. Fed. R. Civ. P. 26(b)(1).

The identities of those individuals who have taken samples at the Malibu Schools is of great importance, is clearly relevant to Plaintiffs' claims, and is further relevant to Defendants' defenses. One of Defendants' defenses is that those areas from which samples were taken have been remediated, and accordingly, Plaintiffs' TSCA claim is moot. Defendants are entitled to take discovery, including depositions, of the individuals involved in Plaintiffs' independent testing to confirm the specific locations from which the samples were obtained and prepare this defense. Further, Defendants are entitled to this information so that they can examine the chain of custody for the samples, and assess the reliability of the sampling data on which Plaintiffs' TSCA claim is founded. Plaintiffs cannot file an action based on this information and then shield it from discovery under the specious objection that it is not relevant.

Additionally, the issues at stake are significant, because Plaintiffs' claim is premised on the data it has collected through its own independent sampling, and Defendant could be held liable for millions of dollars of unnecessary remediation and renovation based on analysis of invalid or unreliable data. Furthermore,

Plaintiffs are the sole source of this information and there is no burden on Plaintiffs in producing the requested information.

Finally, in addition to the independent testing which forms the basis of Plaintiffs' TSCA Notices and pleadings on file with this Court, Defendants know that additional sampling has been taken by AU or PEER or those acting in concert with Plaintiffs. Defendants have served subpoenas on every lab (known to it) which has processed Plaintiffs' samples. In responding to these subpoenas, these labs have produced to Defendants additional sampling data which has not been the basis of any judicial filing in this case. Defendants are entitled to the identities of these individuals so it can determine the locations and extent of these additional samples.

For all of the foregoing reasons, Plaintiffs should be required to identify those individuals who conducted sampling in connection to Plaintiffs' "Independent Tests."

ii. Vagueness, Ambiguity, and Overbreadth Are Not Valid Objections to RFP No. 15.

Plaintiff's objection that Requests for Production No. 15 is vague, ambiguous and overbroad is unfounded. "The party who resists discovery has the burden to show discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." *Bible v. Rio Props., Inc.*, 246 F. R. D. 614 (C.D. Cal. 2007) (*citing Blankenship v. Hearst Corp.*, 519 F. 2d 418, 429 (9th Cir. 1975) and *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 655-56 (C.D. Cal. 2005)). There is no merit to "general or boilerplate objections such as 'overly broad' [or] 'vague and ambiguous.'" *Bible*, 246 F. R. D. at 619; *A. Farber & Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal. 2006).

AU has not met its burden of demonstrating that discovery of the information sought in this Request should not be allowed, because it has not supported or explained its objections on the basis of the requests being vague, ambiguous, or

overbroad. Defendants have requested documents identifying those individuals who obtained or collected samples in the "Independent Tests" referred to in Plaintiffs' very own FAC. Plaintiff need only look for documents that identify samplers or others in the chain of custody for these tests. Without further explanation, Plaintiff's objection is without merit, and Plaintiff should produce documents in response to this Request.

iii. Attorney-Client, Attorney Work Product, and Common-Interest Communication Privileges Are Not Valid Objections to RFP No. 15.

(a) Attorney-Client Privilege.

"The attorney-client privilege protects confidential communications between attorneys and clients, which are made for the purpose of giving legal advice." *United States v. Richey*, 632 F. 3d 559, 566 (9th Cir. 2011). The party asserting this privilege bears the burden of showing that there is an attorney-client relationship and the privileged nature of the communication. *Id.*; *United States v. Bauer*, 132 F. 3d 504, 507 (9th Cir. 1997). There is an attorney-client privilege where: "(1) [ ] legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) unless the protection be waved." *Id.* (quoting *United States v. Graf*, 610 F. 3d 1148, 1156 (9th Cir. 2010)). The privilege is waived when privileged communications are disclosed. *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). While the privilege may extend to those communications with third parties assisting the attorney in legal advice, it does not extend where the advice sought is not legal advice. *Id.*

Documents identifying those involved in Plaintiffs' "Independent Tests" are not protected by the attorney-client privilege to the extent that they include

correspondences and records from the environmental testing entities engaged in the testing process. The entities involved in the testing process were not engaged in this process for the purpose of aiding Plaintiffs or their counsel in litigation; rather, the sole role of these entities was to provide testing services. Furthermore, Plaintiffs have failed to indicate in their responses which communications they believe to be protected by the attorney-client privilege. *Richey*, 632 F. 3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(b) Attorney Work Product.

The work product doctrine prohibits discovery of documents and other materials "prepared by a party or his representative in anticipation of litigation." *United States v. Richey* 632 F. 3d 559, 567 (9th Cir. 2011) (*quoting Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F. 2d 1486, 1494 (9th Cir. 1989); Fed. R. Civ. P. 26(b)(3). The work product doctrine is a qualified immunity rather than a privilege, and a showing of good cause for the information desired is sufficient to overcome the qualified immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D. Cal. 2006); *Admiral Ins. Co. v. United States Dist. Court*, 881 F. 2d 1486, 1494 (9th Cir. 1989). "The party claiming work product immunity has the burden of proving the applicability of the doctrine." *A. Farbers & Ptnrs., Inc.*, 234 F.R.D. at 192.

Plaintiffs cannot claim work product immunity because they have made no showing that this protection applies to any of the information sought in Defendants' Requests. For example, Plaintiffs have not demonstrated how documents identifying those who obtained or collected samples in Plaintiffs' independent testing bears any relation to Plaintiffs' efforts in preparation for trial. Furthermore, Defendants have good cause to request information sought, because the data from the "Independent Tests" will surely be used against Defendants in this litigation, and Defendants must be afforded the opportunity to confront the validity and reliability

of the data. This necessarily entails a complete knowledge of the chain of custody, which can only be discovered through documents identifying those involved in the testing process. Plaintiffs have not met the burden of demonstrating the applicability of the work product doctrine, so their objection on this basis is not appropriate. Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(c) Common Interest Doctrine.

In general, the attorney-client privilege is waived when communications between an attorney and client are disclosed to a third party. *Weil v. Inv/ Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). There is a rare exception to this waiver rule where individuals with a common interest in a legal matter may "communicate among themselves and with the separate attorneys on matters of common legal interest, for the purpose of preparing a joint strategy, and the attorney-client privilege will protect these communications to the same extent as it would communications between each client and his own attorney." *Nidec Corp. v. Victor Co.*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) (*quoting* 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:35, at 192 (1999 ed.); *United States v. Gonzales*, 669 F. 3d 974, 978 (9th Cir. 2012). This common interest doctrine is not a privilege, but an exception to the rule on waiver where communications are disclosed to third parties. *See Griffith*, 161 F.R.D. at 692. For this reason, the common interest doctrine comes into play only if the communication at issue is privileged in the first place. *Nidec Corp*, 249 F.R.D. at 578.

As the common interest doctrine applies only to those materials protected by the attorney-client privilege with regard to America Unites and PEER, the parties with a common legal interest in this case, not all communications between America Unites and PEER are protected. Defendants request that Plaintiff produce

documents in response to this request to the extent that Plaintiff possesses responsive materials that are not protected as either Plaintiffs' attorney-client communications.

iv. First Amendment Privilege Is Not a Valid Objection to RFP No. 15.

Plaintiff objects to RFP No. 15 on the ground that this Request violates the First Amendment rights of association of Plaintiff and its members. A party objecting on the basis of a First Amendment privilege must satisfy a two-part test. The objecting party must first make a "prima facie showing of arguable first amendment infringement." *Perry v. Schwarzenegger*, 591 F. 3d 1126, 1140 (9th Cir. 2010) (*quoting Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F. 2d 346, 349-50 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is enforced, there will be "(1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Brock*, 860 F. 2d at 350.

Here, Plaintiff has made no such showing that disclosure of the documents requested would lead to "harassment, membership withdrawal, or discouragement of new members," or that it would result in other consequences that could "chill" members' associational rights. The Request for documents identifying those who obtained or collected the "Independent Tests" calls for chain of custody documents and documents prepared for Plaintiffs by environmental testing companies. The Request propounded by Defendants is not seeking personal information, does nothing to harass members of Plaintiff organizations, and would not have a deterrent effect on membership. Moreover, the documents requested by Defendants are necessary so that Defendants can defend themselves in this litigation and fairness justifies their production. Defendants will not be afforded a fair discovery if they

are precluded from accessing information regarding the independent testing data acquired by Plaintiffs, which will surely be used against Defendants in trial.

Additionally, there would be no "chilling" effect if Plaintiffs responded to Defendants' RFP, because AU is publicly vocal about its activities and its membership, listing members of its Advisory Board and Leadership Team on its website. *See* Decl. Plant, Ex. L, M. In particular, Plaintiff frequently publicizes its activities with regard to the subject matter of this very case on its website. *See* Decl. Plant, Ex. E; Ex. F; Ex. G. The information sought in the above Request relates **only** to those individuals who obtained or collected data for the "Independent Tests" that form the basis for this lawsuit, and to communications regarding PCBs, the subject matter of this lawsuit.

The documents and information requested are necessary and relevant to Defendants' preparation for trial, and the names and email addresses of those members who would like their membership in America Unites to remain private could be redacted so as to balance any associational issues with the Court's strong interest in ensuring Defendants' ability to fairly defend their case. Plaintiffs' entire case is premised on data from the "Independent Tests" referenced in Plaintiffs' FAC, and it is imperative that Defendants are granted full access to information and communications regarding these tests and their chains of custody.

d. AU'S CONTENTIONS REGARDING RFP NO. 15.

This request seeks documents concerning the samples used in the Second Set of Independent Tests. Defendants have not shown that the requested information is relevant. As discussed below, the information is not necessary for resolution of any of the issues in this case. Moreover, the burden of providing it outweighs any possible relevance.

Defendants contend that the identities of the individuals who took samples of caulk at the Malibu Schools is relevant because Plaintiffs are purportedly relying on

the Second Set of Independent Tests. However, as discussed above, Plaintiffs are not relying on the Second Set of Independent Tests in three of the four rooms tested. There is no possible reason why Defendants would need to know the identities of the persons who took samples for tests on which Plaintiffs are not relying.

Defendants argue that the identities of the samplers for the tests Plaintiffs are not relying on is still relevant because the FAC refers to them. However, as Plaintiffs' counsel has explained to Defendants' counsel, the FAC included information about the independent testing primarily for informational purposes and to describe the chronology of events at the Malibu Schools. The FAC also recites that Defendants had verified the independent test results and found TSCA violations in every single one of 24 verification samples they took in 10 rooms. (Plant Decl. Ex. D., ¶¶ 127-29)

Defendants also contend that Plaintiffs' motion for preliminary injunction relied on the Independent Tests. Defendants are wrong. Plaintiffs' motion only sought an injunction with respect to the room where Defendants' own testing had shown illegal levels of PCBs. (See, e.g., Plaintiffs' Memorandum of Points and Authorities in Support of their Motion for a Preliminary Injunction, Dkt. 14, at p. 2, attached at Avrith Decl. Ex. 2) ("Plaintiffs now move for a preliminary injunction requiring Defendants to immediately cease use of the other 10 rooms that Defendants' own testing has shown to have illegal levels of PCBs in caulk ….") (emphasis added).

Defendants also contend that they need to confirm the specific locations from which the samples were obtained, so they can prepare their defenses that those areas from which the samples were taken have been remediated. This contention is equally without merit. Plaintiffs are not relying on the Independent Tests for any purpose with respect to any of the rooms that Defendants claim to have remediated. Thus, there is nothing for Defendants to confirm.

Even with respect to the one room (Room 205) for which Plaintiffs continue to rely on the Second Set of Independent Tests, Defendants do not need to know the identities of the person who took the samples. Although Defendants conclusorily contend they need this information to assess the reliability of the testing data, they do not explain why that is the case. The test data is a product of a lab analysis of the samples. There is nothing that the sampler can do to affect the reliability of the data derived from the lab analysis.

In any case, there should be no question that the Independent Testing data is reliable. Defendants' own verification testing has proven the accuracy of the independent testing. Defendants do not state why the Independent Testing data from the three rooms in which the Defendants did not test should be any less reliable than the other 10 rooms where Defendants' verification testing has confirmed the accuracy of the independent data.

Moreover, the issue in the case is not actually whether the independent tests are accurate, but whether or not there are TSCA violations in the rooms in question. Defendants could determine this fact, by analyzing their own verification samples, as they did with regard to ten rooms sampled in the Independent Tests. Thus, information which could lead to admissible evidence about whether or not there are TSCA violations in these rooms can be obtained without revealing the persons who took the independent samples.

Furthermore, the potential for harm to Plaintiffs or the samplers by disclosure of the requested information greatly outweighs any possible benefit of disclosure. As discussed above, Defendants have already filed a malicious criminal complaint for trespassing and vandalism against individuals who allegedly took samples. Although the District Attorney declined to file any charges, Plaintiffs are legitimately concerned that Defendants will use the requested information to initiate similar charges against the samplers or otherwise retaliate against them.

Forced disclosure of the identities of those who took samples would greatly inhibit Plaintiffs' ability to fulfill their mission of advocating for remediation of environmental hazards. *See, e.g., United States v. Garde*, 673 F.Supp. 604, 607 (D.D.C. 1987). Plaintiffs have made a "prima facie showing of arguable first amendment infringement." *Perry v. Schwazanegger*, 591 F.3d 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of the identities of the samplers would severely discourage Plaintiffs' ability to gather evidence of environmental violations because Plaintiffs would be unable to protect the samplers' confidentiality, and thus lose the confidence of their informants, thereby severely hampering Plaintiffs' organizational missions. It could also result in harassment of individuals who took the samples. Defendants have already filed a false criminal complaint against the President of America Unites, Ms. Denicola, and her husband, seeking to subject them to felony charges punishable by fines and imprisonment, for allegedly taking caulk samples. It is difficult to imagine a more "chilling" action against those who advocate for PCB testing and remediation at the Malibu Schools.

Once a prima facie case of First Amendment infringement is made, "the evidentiary burden will then shift to the government…[to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest…[and] the 'least restrictive means' of obtaining the desired information." *Perry*, 591 F.3d at 1161 (quoting *brock v. Local 375, Plumbers Int'l Union of Am.*, 960 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)).

Here, Defendants cannot even show that this discovery meets the relevance requirements of Rule 26, much less the more demanding standard of relevance when First Amendment interests are implicated. As discussed above, there are other means of acquiring the desired information, namely, by examining the laboratory

reports and the information provided in accordance with Defendants' subpoenas to the laboratories, or by conducting verification testing, without requiring Plaintiff to disclose the information about the identity of the samplers.

Finally, documents concerning the identities of samplers which constitute attorney-client communications or attorney work product are privileged. To the extent that any such documents are relevant, Plaintiffs will list them on a privilege log.

3. REQUEST FOR PRODUCTION NO. 17.

a. REQUEST FOR PRODUCTION NO. 17.

All DOCUMENTS that IDENTIFY the PERSON or PERSONS who obtained OR COLLECTED THE PIECE OF CAULK REFERRED TO AT PARAGRAPH 104 OF THE FAC.

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 17.

Plaintiff objects to this Request on the ground that it seeks information that is not relevant to the parties' claims or defenses or the subject matter of the instant action. Plaintiff further objects to this Request on the ground that it is vague and ambiguous and overbroad. Plaintiff further objects to this Request to the extent that it seeks privileged attorney-client communications, work product, common-interest communications or other privileged information. Plaintiff further objects to this Request on the ground that it violates the First Amendment rights of association of Plaintiff and its members and supporters.

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 17.

i. Relevancy Is Not a Valid Objection to RFP No. 17.

Prior to initiation of this suit, Plaintiffs served Defendants with two Notices of Intent to File Suit under TSCA ("Notices"), the first dated August 19, 2014, and the second dated January 12, 2015. Decl. Plant, Exs. D, ¶ 32; H-I. Such Notices were sent because, under TSCA's citizen suit provision, a citizen plaintiff must give

the alleged violator and EPA specific notice of the alleged violations of TSCA. 15 U.S.C.S. § 2619(b)(1). TSCA's 60-day notice period is mandatory to the establishment of jurisdiction and cannot be waived. *Id*. Both of these Notices relied upon independent sampling conducted by AU and PEER. *See* Decl. Plant, Ex. H; Ex. I.

Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying on such testing. References to "Independent Tests" and independent testing are specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl. Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-26, 128, 132.

Further, on April 1, 2015, Plaintiffs filed a motion for a preliminary injunction, again relying on the results of such independent testing, for its request that Defendants be enjoined from using such rooms where the testing was conducted.

Now, in response to discovery requests for information regarding this sampling, including the identities of persons who conducted such independent testing, Plaintiffs have taken the specious position that the identities of the individuals who conducted the testing are not relevant. Relevancy is not a valid objection to this Interrogatory. Under Rule 26(b)(1), parties may obtain discovery regarding:

> [A]ny nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within the scope of discovery does not need to be admissible in evidence. Fed. R. Civ. P. 26(b)(1).

The identities of those individuals who have taken samples at the Malibu Schools is of great importance, is clearly relevant to Plaintiffs' claims, and is further relevant to Defendants' defenses. One of Defendants' defenses is that those areas from which samples were taken have been remediated, and accordingly, Plaintiffs' TSCA claim is moot. Defendants are entitled to take discovery, including depositions, of the individuals involved in Plaintiffs' independent testing to confirm the specific locations from which the samples were obtained and prepare this defense. Further, Defendants are entitled to this information so that they can examine the chain of custody for the samples, and assess the reliability of the sampling data on which Plaintiffs' TSCA claim is founded. Plaintiffs cannot file an action based on this information and then shield it from discovery under the specious objection that it is not relevant.

Additionally, the issues at stake are significant, because Plaintiffs' claim is premised on the data it has collected through its own independent sampling, and Defendant could be held liable for millions of dollars of unnecessary remediation and renovation based on analysis of invalid or unreliable data. Furthermore, Plaintiffs are the sole source of this information and there is no burden on Plaintiffs in producing the requested information.

Finally, in addition to the independent testing which forms the basis of Plaintiffs' TSCA Notices and pleadings on file with this Court, Defendants know that additional sampling has been taken by AU or PEER or those acting in concert with Plaintiffs. Defendants have served subpoenas on every lab (known to it) which has processed Plaintiffs' samples. In responding to these subpoenas, these labs have produced to Defendants additional sampling data which has not been the basis of any judicial filing in this case. Defendants are entitled to the identities of these individuals so it can determine the locations and extent of these additional samples.

For all of the foregoing reasons, Plaintiffs should be required to identify those individuals who conducted sampling in connection to Plaintiffs' "Independent Tests."

ii. Vagueness, Ambiguity, and Overbreadth Are Not Valid Objections to RFP No. 17.

Plaintiff's objection that Requests for Production No. 17 is vague, ambiguous and overbroad is unfounded. "The party who resists discovery has the burden to show discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." *Bible v. Rio Props., Inc.*, 246 F. R. D. 614 (C.D. Cal. 2007) (*citing Blankenship v. Hearst Corp.*, 519 F. 2d 418, 429 (9th Cir. 1975) and *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 655-56 (C.D. Cal. 2005)). There is no merit to "general or boilerplate objections such as 'overly broad' [or] 'vague and ambiguous.'" *Bible*, 246 F. R. D. at 619; *A. Farber & Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal. 2006).

AU has not met its burden of demonstrating that discovery of the information sought in this Request should not be allowed, because it has not supported or explained its objections on the basis of the requests being vague, ambiguous, or overbroad. Defendants have requested documents identifying those individuals who obtained or collected samples in the independent sampling referred to in Plaintiffs' very own FAC. Plaintiff need only look for documents that identify samplers or others in the chain of custody for these tests. Without further explanation, Plaintiff's objection is without merit, and Plaintiff should produce documents in response to this Request.

iii. Attorney-Client, Attorney Work Product, and Common-Interest Communication Privileges Are Not Valid Objections to RFP No. 17.

(a) Attorney-Client Privilege.

"The attorney-client privilege protects confidential communications between

attorneys and clients, which are made for the purpose of giving legal advice." *United States v. Richey*, 632 F. 3d 559, 566 (9th Cir. 2011). The party asserting this privilege bears the burden of showing that there is an attorney-client relationship and the privileged nature of the communication. *Id.*; *United States v. Bauer*, 132 F. 3d 504, 507 (9th Cir. 1997). There is an attorney-client privilege where: "(1) [ ] legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) unless the protection be waved." *Id.* (quoting *United States v. Graf*, 610 F. 3d 1148, 1156 (9th Cir. 2010)). The privilege is waived when privileged communications are disclosed. *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). While the privilege may extend to those communications with third parties assisting the attorney in legal advice, it does not extend where the advice sought is not legal advice. *Id.*

Documents identifying those involved in Plaintiffs' "Independent Tests" are not protected by the attorney-client privilege to the extent that they include correspondences and records from the environmental testing entities engaged in the testing process. The entities involved in the testing process were not engaged in this process for the purpose of aiding Plaintiffs or their counsel in litigation; rather, the sole role of these entities was to provide testing services. Furthermore, Plaintiffs have failed to indicate in their responses which communications they believe to be protected by the attorney-client privilege. *Richey*, 632 F. 3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(b) Attorney Work Product.

The work product doctrine prohibits discovery of documents and other

materials "prepared by a party or his representative in anticipation of litigation." *United States v. Richey* 632 F. 3d 559, 567 (9th Cir. 2011) (*quoting Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F. 2d 1486, 1494 (9th Cir. 1989); Fed. R. Civ. P. 26(b)(3). The work product doctrine is a qualified immunity rather than a privilege, and a showing of good cause for the information desired is sufficient to overcome the qualified immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D. Cal. 2006); *Admiral Ins. Co. v. United States Dist. Court.*, 881 F. 2d 1486, 1494 (9th Cir. 1989). "The party claiming work product immunity has the burden of proving the applicability of the doctrine." *A. Farbers & Ptnrs., Inc.*, 234 F.R.D. at 192.

Plaintiffs cannot claim work product immunity because they have made no showing that this protection applies to any of the information sought in Defendants' Requests. For example, Plaintiffs have not demonstrated how documents identifying those who obtained or collected samples in Plaintiffs' independent testing bears any relation to Plaintiffs' efforts in preparation for trial. Furthermore, Defendants have good cause to request information sought, because the data from the "Independent Tests" will surely be used against Defendants in this litigation, and Defendants must be afforded the opportunity to confront the validity and reliability of the data. This necessarily entails a complete knowledge of the chain of custody, which can only be discovered through documents identifying those involved in the testing process. Plaintiffs have not met the burden of demonstrating the applicability of the work product doctrine, so their objection on this basis is not appropriate. Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(c) Common Interest Doctrine.

In general, the attorney-client privilege is waived when communications between an attorney and client are disclosed to a third party. *Weil v. Inv/ Indicators,*

Research & Mgmt., Inc., 647 F. 2d 18, 24 (9th Cir. 1981). There is a rare exception to this waiver rule where individuals with a common interest in a legal matter may "communicate among themselves and with the separate attorneys on matters of common legal interest, for the purpose of preparing a joint strategy, and the attorney-client privilege will protect these communications to the same extent as it would communications between each client and his own attorney." *Nidec Corp. v. Victor Co.*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) (*quoting* 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:35, at 192 (1999 ed.); *United States v. Gonzales*, 669 F. 3d 974, 978 (9th Cir. 2012). This common interest doctrine is not a privilege, but an exception to the rule on waiver where communications are disclosed to third parties. *See Griffith*, 161 F.R.D. at 692. For this reason, the common interest doctrine comes into play only if the communication at issue is privileged in the first place. *Nidec Corp*, 249 F.R.D. at 578.

As the common interest doctrine applies only to those materials protected by the attorney-client privilege with regard to America Unites and PEER, the parties with a common legal interest in this case, not all communications between America Unites and PEER are protected. Defendants request that Plaintiff produce documents in response to this request to the extent that Plaintiff possesses responsive materials that are not protected as either Plaintiffs' attorney-client communications.

iv. First Amendment Privilege Is Not a Valid Objection to RFP No. 17.

Plaintiff objects to RFP No. 17 on the ground that this Request violates the First Amendment rights of association of Plaintiff and its members. A party objecting on the basis of a First Amendment privilege must satisfy a two-part test. The objecting party must first make a "prima facie showing of arguable first amendment infringement." *Perry v. Schwarzenegger*, 591 F. 3d 1126, 1140 (9th

Cir. 2010) (*quoting Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F. 2d 346, 349-50 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is enforced, there will be "(1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Brock*, 860 F. 2d at 350.

Here, Plaintiff has made no such showing that disclosure of the documents requested would lead to "harassment, membership withdrawal, or discouragement of new members," or that it would result in other consequences that could "chill" members' associational rights. The Request for documents identifying those who obtained or collected the "Independent Tests" calls for chain of custody documents and documents prepared for Plaintiffs by environmental testing companies. The Request propounded by Defendants is not seeking personal information, does nothing to harass members of Plaintiff organizations, and would not have a deterrent effect on membership. Moreover, the documents requested by Defendants are necessary so that Defendants can defend themselves in this litigation and fairness justifies their production. Defendants will not be afforded a fair discovery if they are precluded from accessing information regarding the independent testing data acquired by Plaintiffs, which will surely be used against Defendants in trial.

Additionally, there would be no "chilling" effect if Plaintiffs responded to Defendants' RFP, because AU is publicly vocal about its activities and its membership, listing members of its Advisory Board and Leadership Team on its website. *See* Decl. Plant, Exs. L, M. In particular, Plaintiff frequently publicizes its activities with regard to the subject matter of this very case on its website. *See* Decl. Plant, Ex. E; Ex. F; Ex. G. The information sought in the above Request relates **only** to those individuals who obtained or collected data for the "Independent Tests" that form the basis for this lawsuit, and to communications regarding PCBs, the

subject matter of this lawsuit.

The documents and information requested are necessary and relevant to Defendants' preparation for trial, and the names and email addresses of those members who would like their membership in America Unites to remain private could be redacted so as to balance any associational issues with the Court's strong interest in ensuring Defendants' ability to fairly defend their case. Plaintiffs' entire case is premised on data from the "Independent Tests" referenced in Plaintiffs' FAC, and it is imperative that Defendants are granted full access to information and communications regarding these tests and their chains of custody.

d. AU'S CONTENTIONS REGARDING RFP NO. 17.

This request seeks the identity of the individuals who obtained or collected the piece of caulk referred to at paragraph 104 of the FAC. Defendants have not shown that the requested information is relevant. As discussed below, the information is not necessary for resolution of any of the issues in this case. Moreover, the burden of providing it outweighs any possible relevance.

Defendants contend that the identities of the individuals who obtained or collected the piece of caulk is relevant because Plaintiffs are purportedly relying on the "Independent Tests" of caulk samples in 13 rooms that Plaintiff AU conducted prior to the filing of this action. However, the piece of caulk in question was not tied to any particular room and Plaintiffs are not relying on the testing of it. There is no possible reason why Defendants would need to know the identities of the persons who took samples for tests on which Plaintiffs are not relying.

Furthermore, the potential for harm to Plaintiffs or the samplers by disclosure of the requested information greatly outweighs any possible benefit of disclosure. As discussed above, Defendants have already filed a malicious criminal complaint for trespassing and vandalism against individuals who allegedly took samples. Although the District Attorney declined to file any charges, Plaintiffs are

legitimately concerned that Defendants will use the requested information to initiate similar charges against the samplers or otherwise retaliate against them.

Forced disclosure of the identities of those who took samples would greatly inhibit Plaintiffs' ability to fulfill their mission of advocating for remediation of environmental hazards. *See, e.g., United States v. Garde*, 673 F.Supp. 604, 607 (D.D.C. 1987). Plaintiffs have made a "prima facie showing of arguable first amendment infringement." *Perry v. Schwazanegger*, 591 F.3d 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of the identities of the samplers would severely discourage Plaintiffs' ability to gather evidence of environmental violations because Plaintiffs would be unable to protect the samplers' confidentiality, and thus lose the confidence of their informants, thereby severely hampering Plaintiffs' organizational missions. It could also result in harassment of individuals who took the samples. Defendants have already filed a false criminal complaint against the President of America Unites, Ms. Denicola, and her husband, seeking to subject them to felony charges punishable by fines and imprisonment, for allegedly taking caulk samples. It is difficult to imagine a more "chilling" action against those who advocate for PCB testing and remediation at the Malibu Schools.

Once a prima facie case of First Amendment infringement is made, "the evidentiary burden will then shift to the government…[to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest…[and] the 'least restrictive means' of obtaining the desired information." *Perry*, 591 F.3d at 1161 (quoting *brock v. Local 375, Plumbers Int'l Union of Am.*, 960 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)).

Here, Defendants cannot even show that this discovery meets the relevance requirements of Rule 26, much less the more demanding standard of relevance when

First Amendment interests are implicated. As discussed above, there are other means of acquiring the desired information, namely, by examining the laboratory reports and the information provided in accordance with Defendants' subpoenas to the laboratories, or by conducting verification testing, without requiring Plaintiff to disclose the information about the identity of the samplers.

Finally, documents concerning the identities of samplers which constitute attorney-client communications or attorney work product are privileged. To the extent that any such documents are relevant, Plaintiffs will list them on a privilege log.

4. REQUEST FOR PRODUCTION NO. 19.

a. REQUEST FOR PRODUCTION NO. 19.

All DOCUMENTS that IDENTIFY the PERSON or PERSONS who obtained or collected the "Third Set of Independent Tests," referred to at paragraph 109 of the FAC.

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 19.

Plaintiff objects to this Request on the ground that it seeks information that is not relevant to the parties' claims or defenses or the subject matter of the instant action. Plaintiff further objects to this Request on the ground that it is vague and ambiguous and overbroad. Plaintiff further objects to this Request to the extent that it seeks privileged attorney-client communications, work product, common-interest communications or other privileged information. Plaintiff further objects to this Request on the ground that it violates the First Amendment rights of association of Plaintiff and its members and supporters.

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 19.

i. Relevancy Is Not a Valid Objection to RFP No. 19.

Prior to initiation of this suit, Plaintiffs served Defendants with two Notices of Intent to File Suit under TSCA ("Notices"), the first dated August 19, 2014, and

the second dated January 12, 2015. Decl. Plant, Exs. D, ¶ 32; H-I. Such Notices were sent because, under TSCA's citizen suit provision, a citizen plaintiff must give the alleged violator and EPA specific notice of the alleged violations of TSCA. 15 U.S.C.S. § 2619(b)(1). TSCA's 60-day notice period is mandatory to the establishment of jurisdiction and cannot be waived. *Id*. Both of these Notices relied upon independent sampling conducted by AU and PEER. See Decl. Plant, Ex. H; Ex. I.

Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying on such testing. References to "Independent Tests" and independent testing are specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl. Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-26, 128, 132.

Further, on April 1, 2015, Plaintiffs filed a motion for a preliminary injunction, again relying on the results of such independent testing, for its request that Defendants be enjoined from using such rooms where the testing was conducted.

Now, in response to discovery requests for information regarding this sampling, including the identities of persons who conducted such independent testing, Plaintiffs have taken the specious position that the identities of the individuals who conducted the testing are not relevant. Relevancy is not a valid objection to this Interrogatory. Under Rule 26(b)(1), parties may obtain discovery regarding:

> [A]ny nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within the scope of discovery does not need to be admissible in evidence. Fed. R. Civ. P. 26(b)(1).

The identities of those individuals who have taken samples at the Malibu Schools is of great importance, is clearly relevant to Plaintiffs' claims, and is further relevant to Defendants' defenses. One of Defendants' defenses is that those areas from which samples were taken have been remediated, and accordingly, Plaintiffs' TSCA claim is moot. Defendants are entitled to take discovery, including depositions, of the individuals involved in Plaintiffs' independent testing to confirm the specific locations from which the samples were obtained and prepare this defense. Further, Defendants are entitled to this information so that they can examine the chain of custody for the samples, and assess the reliability of the sampling data on which Plaintiffs' TSCA claim is founded. Plaintiffs cannot file an action based on this information and then shield it from discovery under the specious objection that it is not relevant.

Additionally, the issues at stake are significant, because Plaintiffs' claim is premised on the data it has collected through its own independent sampling, and Defendant could be held liable for millions of dollars of unnecessary remediation and renovation based on analysis of invalid or unreliable data. Furthermore, Plaintiffs are the sole source of this information and there is no burden on Plaintiffs in producing the requested information.

Finally, in addition to the independent testing which forms the basis of Plaintiffs' TSCA Notices and pleadings on file with this Court, Defendants know that additional sampling has been taken by AU or PEER or those acting in concert with Plaintiffs. Defendants have served subpoenas on every lab (known to it) which has processed Plaintiffs' samples. In responding to these subpoenas, these labs have produced to Defendants additional sampling data which has not been the basis of any judicial filing in this case. Defendants are entitled to the identities of these

individuals so it can determine the locations and extent of these additional samples.

For all of the foregoing reasons, Plaintiffs should be required to identify those individuals who conducted sampling in connection to Plaintiffs' "Independent Tests."

ii. Vagueness, Ambiguity, and Overbreadth Are Not Valid Objections to RFP No. 19.

Plaintiff's objection that Requests for Production No. 19 is vague, ambiguous and overbroad is unfounded. "The party who resists discovery has the burden to show discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." *Bible v. Rio Props., Inc.*, 246 F. R. D. 614 (C.D. Cal. 2007) (*citing Blankenship v. Hearst Corp.*, 519 F. 2d 418, 429 (9th Cir. 1975) and *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 655-56 (C.D. Cal. 2005)). There is no merit to "general or boilerplate objections such as 'overly broad' [or] 'vague and ambiguous.'" *Bible*, 246 F. R. D. at 619; *A. Farber & Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal. 2006).

AU has not met its burden of demonstrating that discovery of the information sought in this Request should not be allowed, because it has not supported or explained its objections on the basis of the requests being vague, ambiguous, or overbroad. Defendants have requested documents identifying those individuals who obtained or collected samples in the "Independent Tests" referred to in Plaintiffs' very own FAC. Plaintiff need only look for documents that identify samplers or others in the chain of custody for these tests. Without further explanation, Plaintiff's objection is without merit, and Plaintiff should produce documents in response to this Request.

iii. Attorney-Client, Attorney Work Product, and Common-Interest Communication Privileges Are Not Valid Objections to RFP No. 19.

(a) Attorney-Client Privilege.

"The attorney-client privilege protects confidential communications between attorneys and clients, which are made for the purpose of giving legal advice." *United States v. Richey*, 632 F. 3d 559, 566 (9th Cir. 2011). The party asserting this privilege bears the burden of showing that there is an attorney-client relationship and the privileged nature of the communication. *Id.*; *United States v. Bauer*, 132 F. 3d 504, 507 (9th Cir. 1997). There is an attorney-client privilege where: "(1) [ ] legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) unless the protection be waved." *Id.* (quoting *United States v. Graf*, 610 F. 3d 1148, 1156 (9th Cir. 2010)). The privilege is waived when privileged communications are disclosed. *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). While the privilege may extend to those communications with third parties assisting the attorney in legal advice, it does not extend where the advice sought is not legal advice. *Id.*

Documents identifying those involved in Plaintiffs' "Independent Tests" are not protected by the attorney-client privilege to the extent that they include correspondences and records from the environmental testing entities engaged in the testing process. The entities involved in the testing process were not engaged in this process for the purpose of aiding Plaintiffs or their counsel in litigation; rather, the sole role of these entities was to provide testing services. Furthermore, Plaintiffs have failed to indicate in their responses which communications they believe to be protected by the attorney-client privilege. *Richey*, 632 F. 3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(b) Attorney Work Product.

The work product doctrine prohibits discovery of documents and other materials "prepared by a party or his representative in anticipation of litigation." *United States v. Richey* 632 F. 3d 559, 567 (9th Cir. 2011) (*quoting Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F. 2d 1486, 1494 (9th Cir. 1989); Fed. R. Civ. P. 26(b)(3). The work product doctrine is a qualified immunity rather than a privilege, and a showing of good cause for the information desired is sufficient to overcome the qualified immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D. Cal. 2006); *Admiral Ins. Co. v. United States Dist. Court.*, 881 F. 2d 1486, 1494 (9th Cir. 1989). "The party claiming work product immunity has the burden of proving the applicability of the doctrine." *A. Farbers & Ptnrs., Inc.*, 234 F.R.D. at 192.

Plaintiffs cannot claim work product immunity because they have made no showing that this protection applies to any of the information sought in Defendants' Requests. For example, Plaintiffs have not demonstrated how documents identifying those who obtained or collected samples in Plaintiffs' independent testing bears any relation to Plaintiffs' efforts in preparation for trial. Furthermore, Defendants have good cause to request information sought, because the data from the "Independent Tests" will surely be used against Defendants in this litigation, and Defendants must be afforded the opportunity to confront the validity and reliability of the data. This necessarily entails a complete knowledge of the chain of custody, which can only be discovered through documents identifying those involved in the testing process. Plaintiffs have not met the burden of demonstrating the applicability of the work product doctrine, so their objection on this basis is not appropriate. Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(c) Common Interest Doctrine.

In general, the attorney-client privilege is waived when communications between an attorney and client are disclosed to a third party. *Weil v. Inv/ Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). There is a rare exception to this waiver rule where individuals with a common interest in a legal matter may "communicate among themselves and with the separate attorneys on matters of common legal interest, for the purpose of preparing a joint strategy, and the attorney-client privilege will protect these communications to the same extent as it would communications between each client and his own attorney." *Nidec Corp. v. Victor Co.*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) (*quoting* 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:35, at 192 (1999 ed.); *United States v. Gonzales*, 669 F. 3d 974, 978 (9th Cir. 2012). This common interest doctrine is not a privilege, but an exception to the rule on waiver where communications are disclosed to third parties. *See Griffith v. Davis*, 161 F.R.D. at 692. For this reason, the common interest doctrine comes into play only if the communication at issue is privileged in the first place. *Nidec Corp*, 249 F.R.D. at 578.

As the common interest doctrine applies only to those materials protected by the attorney-client privilege with regard to America Unites and PEER, the parties with a common legal interest in this case, not all communications between America Unites and PEER are protected. Defendants request that Plaintiff produce documents in response to this request to the extent that Plaintiff possesses responsive materials that are not protected as either Plaintiffs' attorney-client communications.

iv. First Amendment Privilege Is Not a Valid Objection to RFP No. 19.

Plaintiff objects to RFP No. 19 on the ground that this Request violates the First Amendment rights of association of Plaintiff and its members. A party

objecting on the basis of a First Amendment privilege must satisfy a two-part test. The objecting party must first make a "prima facie showing of arguable first amendment infringement." *Perry v. Schwarzenegger*, 591 F. 3d 1126, 1140 (9th Cir. 2010) (*quoting Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F. 2d 346, 349-50 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is enforced, there will be "(1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Brock*, 860 F. 2d at 350.

Here, Plaintiff has made no such showing that disclosure of the documents requested would lead to "harassment, membership withdrawal, or discouragement of new members," or that it would result in other consequences that could "chill" members' associational rights. The Request for documents identifying those who obtained or collected the "Independent Tests" calls for chain of custody documents and documents prepared for Plaintiffs by environmental testing companies. The Request propounded by Defendants is not seeking personal information, does nothing to harass members of Plaintiff organizations, and would not have a deterrent effect on membership. Moreover, the documents requested by Defendants are necessary so that Defendants can defend themselves in this litigation and fairness justifies their production. Defendants will not be afforded a fair discovery if they are precluded from accessing information regarding the independent testing data acquired by Plaintiffs, which will surely be used against Defendants in trial.

Additionally, there would be no "chilling" effect if Plaintiffs responded to Defendants' RFP, because AU is publicly vocal about its activities and its membership, listing members of its Advisory Board and Leadership Team on its website. *See* Decl. Plant, Exs. L, M. In particular, Plaintiff frequently publicizes its activities with regard to the subject matter of this very case on its website. *See* Decl.

Plant, Ex. E; Ex. F; Ex. G. The information sought in the above Request relates **only** to those individuals who obtained or collected data for the "Independent Tests" that form the basis for this lawsuit, and to communications regarding PCBs, the subject matter of this lawsuit.

The documents and information requested are necessary and relevant to Defendants' preparation for trial, and the names and email addresses of those members who would like their membership in America Unites to remain private could be redacted so as to balance any associational issues with the Court's strong interest in ensuring Defendants' ability to fairly defend their case. Plaintiffs' entire case is premised on data from the "Independent Tests" referenced in Plaintiffs' FAC, and it is imperative that Defendants are granted full access to information and communications regarding these tests and their chains of custody.

d. AU'S CONTENTIONS REGARDING RFP NO. 19.

This request seeks documents concerning the identity of the individuals who took samples used in the Third Set of Independent Tests. Defendants have not shown that the requested information is relevant. As discussed below, the information is not necessary for resolution of any of the issues in this case. Moreover, the burden of providing it outweighs any possible relevance.

Defendants contend that the identities of the individuals who took samples of caulk at the Malibu Schools is relevant because Plaintiffs are purportedly relying on the Third Set of Independent Tests. However, as discussed above, Plaintiffs are not relying on the Third Set of Independent Tests in five of the six rooms tested. There is no possible reason why Defendants would need to know the identities of the persons who took samples for tests on which Plaintiffs are not relying.

Defendants argue that the identities of the samplers for the tests Plaintiffs are not relying on is still relevant because the FAC refers to them. However, as Plaintiffs' counsel has explained to Defendants' counsel, the FAC included

information about the independent testing primarily for informational purposes and to describe the chronology of events at the Malibu Schools. The FAC also recites that Defendants had verified the independent test results and found TSCA violations in every single one of 24 verification samples they took in 10 rooms. (Plant Decl. Ex. D., ¶¶ 127-29)

Defendants also contend that Plaintiffs' motion for preliminary injunction relied on the Independent Tests. Defendants are wrong. Plaintiffs' motion only sought an injunction with respect to the room where Defendants' own testing had shown illegal levels of PCBs. (See, e.g., Plaintiffs' Memorandum of Points and Authorities in Support of their Motion for a Preliminary Injunction, Dkt. 14, at p. 2, attached at Avrith Decl. Ex. 2) ("Plaintiffs now move for a preliminary injunction requiring Defendants to immediately cease use of the other 10 rooms that Defendants' own testing has shown to have illegal levels of PCBs in caulk ….") (emphasis added).

Defendants also contend that they need to confirm the specific locations from which the samples were obtained, so they can prepare their defenses that those areas from which the samples were taken have been remediated. This contention is equally without merit. Plaintiffs are not relying on the Independent Tests for any purpose with respect to any of the rooms that Defendants claim to have remediated. Thus, there is nothing for Defendants to confirm.

Even with respect to the one room (JCES office) for which Plaintiffs continue to rely on the Third Set of Independent Tests, Defendants do not need to know the identities of the person who took the samples. Although Defendants conclusorily contend they need this information to assess the reliability of the testing data, they do not explain why that is the case. The test data is a product of a lab analysis of the samples. There is nothing that the sampler can do to affect the reliability of the data derived from the lab analysis.

In any case, there should be no question that the Independent Testing data is reliable. Defendants' own verification testing has proven the accuracy of the independent testing. Defendants do not state why the Independent Testing data from the three rooms in which the Defendants did not test should be any less reliable than the other 10 rooms where Defendants' verification testing has confirmed the accuracy of the independent data.

Moreover, the issue in the case is not actually whether the independent tests are accurate, but whether or not there are TSCA violations in the rooms in question. Defendants could determine this fact, by analyzing their own verification samples, as they did with regard to ten rooms sampled in the Independent Tests. Thus, information which could lead to admissible evidence about whether or not there are TSCA violations in these rooms can be obtained without revealing the persons who took the independent samples.

Furthermore, the potential for harm to Plaintiffs or the samplers by disclosure of the requested information greatly outweighs any possible benefit of disclosure. As discussed above, Defendants have already filed a malicious criminal complaint for trespassing and vandalism against individuals who allegedly took samples. Although the District Attorney declined to file any charges, Plaintiffs are legitimately concerned that Defendants will use the requested information to initiate similar charges against the samplers or otherwise retaliate against them.

Forced disclosure of the identities of those who took samples would greatly inhibit Plaintiffs' ability to fulfill their mission of advocating for remediation of environmental hazards. *See, e.g., United States v. Garde*, 673 F.Supp. 604, 607 (D.D.C. 1987). Plaintiffs have made a "prima facie showing of arguable first amendment infringement." *Perry v. Schwazanegger*, 591 F.3d 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of the identities of the samplers would severely

discourage Plaintiffs' ability to gather evidence of environmental violations because Plaintiffs would be unable to protect the samplers' confidentiality, and thus lose the confidence of their informants, thereby severely hampering Plaintiffs' organizational missions. It could also result in harassment of individuals who took the samples. Defendants have already filed a false criminal complaint against the President of America Unites, Ms. Denicola, and her husband, seeking to subject them to felony charges punishable by fines and imprisonment, for allegedly taking caulk samples. It is difficult to imagine a more "chilling" action against those who advocate for PCB testing and remediation at the Malibu Schools.

Once a prima facie case of First Amendment infringement is made, "the evidentiary burden will then shift to the government…[to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest…[and] the 'least restrictive means' of obtaining the desired information." *Perry*, 591 F.3d at 1161 (quoting *brock v. Local 375, Plumbers Int'l Union of Am.*, 960 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)).

Here, Defendants cannot even show that this discovery meets the relevance requirements of Rule 26, much less the more demanding standard of relevance when First Amendment interests are implicated. As discussed above, there are other means of acquiring the desired information, namely, by examining the laboratory reports and the information provided in accordance with Defendants' subpoenas to the laboratories, or by conducting verification testing, without requiring Plaintiff to disclose the information about the identity of the samplers.

Finally, documents concerning the identities of samplers which constitute attorney-client communications or attorney work product are privileged. To the extent that any such documents are relevant, Plaintiffs will list them on a privilege log.

C. INTERROGATORIES TO PEER REGARDING INDEPENDENT SAMPLING.

Defendants' Interrogatories 1, 2, 3, and 4 to PEER seek the identities of all persons who obtained or collected the "Independent Tests" and other sample testing conducted by Plaintiffs. Interrogatories 6 and 7 seek the identities of the person or persons that authored or created the BC Labs and Eurofins Keys.

1. INTERROGATORY NO. 1

a. INTERROGATORY NO. 1.

IDENTIFY all PERSONS who have taken SAMPLES at the MALIBU SCHOOLS.

b. RESPONSE TO INTERROGATORY NO. 1.

Plaintiff objects to this interrogatory on the ground that it seeks information that is not relevant to the party's claims or defenses or the subject matter of this action.

c. DEFENDANTS' CONTENTIONS REGARDING INTERROGATORY NO. 1.

Prior to initiation of this suit, Plaintiffs served Defendants with two Notices of Intent to File Suit under TSCA ("Notices"), the first dated August 19, 2014, and the second dated January 12, 2015. Decl. Plant, Exs. D, ¶ 32; H-I. Such Notices were sent because, under TSCA's citizen suit provision, a citizen plaintiff must give the alleged violator and EPA specific notice of the alleged violations of TSCA. 15 U.S.C.S. § 2619(b)(1). TSCA's 60-day notice period is mandatory to the establishment of jurisdiction and cannot be waived. *Id*. Both of these Notices relied upon independent sampling conducted by AU and PEER. *See* Decl. Plant, Ex. H; Ex. I.

Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying

on such testing. References to "Independent Tests" and independent testing are specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl. Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-26, 128, 132.

Further, on April 1, 2015, Plaintiffs filed a motion for a preliminary injunction, again relying on the results of such independent testing, for its request that Defendants be enjoined from using such rooms where the testing was conducted.

Now, in response to discovery requests for information regarding this sampling, including the identities of persons who conducted such independent testing, Plaintiffs have taken the specious position that the identities of the individuals who conducted the testing are not relevant. Relevancy is not a valid objection to this Interrogatory. Under Rule 26(b)(1), parties may obtain discovery regarding:

> [A]ny nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within the scope of discovery does not need to be admissible in evidence. Fed. R. Civ. P. 26(b)(1).

The identities of those individuals who have taken samples at the Malibu Schools is of great importance, is clearly relevant to Plaintiffs' claims, and is further relevant to Defendants' defenses. One of Defendants' defenses is that those areas from which samples were taken have been remediated, and accordingly, Plaintiffs' TSCA claim is moot. Defendants are entitled to take discovery, including depositions, of the individuals involved in Plaintiffs' independent testing to confirm the specific locations from which the samples were obtained and prepare this

defense. Further, Defendants are entitled to this information so that they can examine the chain of custody for the samples, and assess the reliability of the sampling data on which Plaintiffs' TSCA claim is founded. Plaintiffs cannot file an action based on this information and then shield it from discovery under the specious objection that it is not relevant.

Additionally, the issues at stake are significant, because Plaintiffs' claim is premised on the data it has collected through its own independent sampling, and Defendant could be held liable for millions of dollars of unnecessary remediation and renovation based on analysis of invalid or unreliable data. Furthermore, Plaintiffs are the sole source of this information and there is no burden on Plaintiffs in producing the requested information.

Finally, in addition to the independent testing which forms the basis of Plaintiffs' TSCA Notices and pleadings on file with this Court, Defendants know that additional sampling has been taken by AU or PEER or those acting in concert with Plaintiffs. Defendants have served subpoenas on every lab (known to it) which has processed Plaintiffs' samples. In responding to these subpoenas, these labs have produced to Defendants additional sampling data which has not been the basis of any judicial filing in this case. Defendants are entitled to the identities of these individuals so it can determine the locations and extent of these additional samples.

For all of the foregoing reasons, Plaintiffs should be required to identify those individuals who conducted sampling in connection to Plaintiffs' independent sampling.

d. PEER'S CONTENTIONS REGARDING INTERROGATORY NO. 1.

This interrogatory seeks the identity of individuals who took samples at the Malibu Schools. Defendants have not shown that the requested information is relevant. As discussed below, the information is not necessary for resolution of any

of the issues in this case. Moreover, the burden of providing it outweighs any possible relevance.

As discussed above, Defendants contend that the identities of the individuals who took samples of caulk at the Malibu Schools is relevant because Plaintiffs are purportedly relying on "Independent Tests" of caulk samples in 13 rooms that Plaintiffs conducted prior to the filing of this action. However, as also discussed above, Plaintiffs are not relying on the Independent Tests in 10 of the 13 rooms. There is no possible reason why Defendants would need to know the identities of the persons who took samples for tests on which Plaintiffs are not relying.

Defendants argue that the identities of the samplers for the tests Plaintiffs are not relying on is still relevant because the FAC refers to them. However, as Plaintiffs' counsel has explained to Defendants' counsel, the FAC included information about the independent testing primarily for informational purposes and to describe the chronology of events at the Malibu Schools. The FAC also recites that Defendants had verified the independent test results and found TSCA violations in every single one of 24 verification samples they took in 10 rooms. (¶¶ 127-29)

Defendants also contend that Plaintiffs' motion for preliminary injunction relied on the Independent Tests. Defendants are wrong. Plaintiffs' motion only sought an injunction with respect to the room where Defendants' own testing had shown illegal levels of PCBs. See, e.g., Plaintiffs' Memorandum of Points and Authorities in Support of their Motion for a Preliminary Injunction, Dkt. 14, at p. 2 ("Plaintiffs now move for a preliminary injunction requiring Defendants to immediately cease use of the other 10 rooms that Defendants' own testing has shown to have illegal levels of PCBs in caulk ….") (emphasis added).

Defendants also contend that they need "to confirm the specific locations from which the samples were obtained," so they can prepare their defenses that those areas from which the samples were taken have been remediated." This

contention is equally without merit. Plaintiffs are not relying on the Independent Tests for any purpose with respect to any of the 10 rooms that Defendants claim to have remediated. Thus, there is nothing for Defendants to confirm.

Even with respect to the three rooms for which Plaintiffs continue to rely on the Independent Tests, Defendants do not need to know the identities of the person who took the samples. Although Defendants conclusorily contend they need this information to assess the reliability of the testing data, they do not explain why that is the case. Defendants' reports of its own testing do not state the name of the individuals who took the samples. The test data is a product of a lab analysis of the samples. There is nothing that the sampler can do to affect the reliability of the data derived from a sample.

In any case, there should be no question that the Independent Testing data is reliable. Defendants' own verification testing has proven the accuracy of the independent testing. Defendants do not state why the Independent Testing data from the three rooms not verified by Defendants should be any less reliable than the other 10 rooms where Defendants' verification testing has confirmed the accuracy of the independent data.

Defendants also assert that, in addition to the three sets of Independent Tests, they know from subpoenas served on laboratories that Plaintiffs have done additional sampling and testing "which has not been the basis of any judicial filing in this case." Defendants contend that the identities of the persons who took the samples so that they can "determine the locations and extent of these additional samples."

However, at this point Plaintiffs have not even attempted to use any such additional testing in the case. Moreover, Defendants do not explain why they need to know the "extent" of the sample. The "extent" of the sample is not relevant to determine a TSCA violation. Moreover, Defendants do not need to know the

identities of the persons taking the samples to determine the "locations" of the samples. The location of the sampling is shown on the lab reports which Defendants already have. The "exact" location of the sampling is irrelevant. Defendants' obligation to remediate is not limited to the exact square inch where a sample was taken.

Moreover, the issue in the case is not actually whether the independent tests are accurate, but whether or not there are TSCA violations in the rooms in question. Defendants could determine this fact, by analyzing their own verification samples, as they did with regard to the Independent Tests. Thus, information which could lead to admissible evidence about whether or not there are TSCA violations in this room can be obtained without revealing the persons who took the independent samples.

Furthermore, the potential for harm to Plaintiffs or the samplers by disclosure of the requested information greatly outweighs any possible benefit of disclosure. Defendants have already filed a malicious criminal complaint for trespassing and vandalism against individuals who allegedly took samples. Although the District Attorney declined to file any charges, Plaintiffs are legitimately concerned that Defendants will use the requested information to initiate similar charges against the samplers or otherwise retaliate against them.

Forced disclosure of the identities of those who took samples would greatly inhibit Plaintiffs' ability to fulfill their mission of advocating for remediation of environmental hazards. See, e.g., *United States v. Garde*, 673 F.Supp. 604, 607 (D.D.C. 1987)

> "if the government is successful in compelling [the organization's lawyer] to reveal the information given to her, especially the identity of those she represents, GAP will lose the confidence of some of its whistleblower informants and its efforts to gather and present safety

> allegations will suffer. This is the harm that GAP claims, and it is cognizable under the [First Amendment] right to association."

Plaintiff has made a "prima facie showing of arguable first amendment infringement." *Perry v. Schwazanegger*, 591 F.3d 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of the identities of the samplers would severely discourage Plaintiff's ability to gather evidence of environmental violations because Plaintiff would be unable to protect the samplers' confidentiality, thereby severely hampering Plaintiff's organizational mission. It could also result in harassment of individuals who took the samples. Defendants have already filed a false criminal complaint against the President of America Unites, Ms. DeNicola, and her husband, seeking to subject them to felony charges punishable by fines and imprisonment, for allegedly taking caulk samples. It is difficult to imagine a more "chilling" action against those who advocate for PCB testing and remediation at the Malibu Schools.

Once a prima facie case of First Amendment infringement is made, "the evidentiary burden will then shift to the government…[to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest…[and] the 'least restrictive means' of obtaining the desired information." Perry, 591 F.3d at 1161 (quoting *Brock v. Local 375, Plumbers Int'l Union of Am.*, 960 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)).

> "Importantly, the party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation—a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1). The request must also be carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable."

Perry, 591 F.3d at 1161.

Here, Defendants cannot even show that this discovery meets the relevance requirements of Rule 26, much less the more demanding standard of relevance when First Amendment interests are implicated. As discussed above, there are other means of acquiring the desired information, namely, by examining the laboratory reports and the information provided in accordance with Defendants' subpoenas to the laboratories, or by conducting verification testing, without requiring Plaintiff to disclose its communications with its members, supporters and others who have contacted Plaintiffs concerning PCBs at the Malibu Schools or other information which may reveal who took the samples.

2. INTERROGATORY NO. 2.

a. INTERROGATORY NO. 2.

IDENTIFY all PERSONS who obtained or collected the "First Set of Independent Tests," referred to at paragraph 80 of the FAC, at the MALIBU SCHOOLS.

b. RESPONSE TO INTERROGATORY NO. 2.

Plaintiff objects to this interrogatory on the ground that it seeks information that is not relevant to the party's claims or defenses or the subject matter of this action.

c. DEFENDANTS' CONTENTIONS REGARDING INTERROGATORY NO. 2.

Prior to initiation of this suit, Plaintiffs served Defendants with two Notices of Intent to File Suit under TSCA ("Notices"), the first dated August 19, 2014, and the second dated January 12, 2015. Decl. Plant, Exs. D, ¶ 32; H-I. Such Notices were sent because, under TSCA's citizen suit provision, a citizen plaintiff must give the alleged violator and EPA specific notice of the alleged violations of TSCA. 15 U.S.C.S. § 2619(b)(1). TSCA's 60-day notice period is mandatory to the

establishment of jurisdiction and cannot be waived. *Id*. Both of these Notices relied upon independent sampling conducted by AU and PEER. *See* Decl. Plant, Ex. H; Ex. I.

Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying on such testing. References to "Independent Tests" and independent testing are specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl. Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-26, 128, 132.

Further, on April 1, 2015, Plaintiffs filed a motion for a preliminary injunction, again relying on the results of such independent testing, for its request that Defendants be enjoined from using such rooms where the testing was conducted.

Now, in response to discovery requests for information regarding this sampling, including the identities of persons who conducted such independent testing, Plaintiffs have taken the specious position that the identities of the individuals who conducted the testing are not relevant. Relevancy is not a valid objection to this Interrogatory. Under Rule 26(b)(1), parties may obtain discovery regarding:

> [A]ny nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within the scope of discovery does not need to be admissible in evidence. Fed. R. Civ. P. 26(b)(1).

The identities of those individuals who have taken samples at the Malibu Schools is of great importance, is clearly relevant to Plaintiffs' claims, and is further

relevant to Defendants' defenses. One of Defendants' defenses is that those areas from which samples were taken have been remediated, and accordingly, Plaintiffs' TSCA claim is moot. Defendants are entitled to take discovery, including depositions, of the individuals involved in Plaintiffs' independent testing to confirm the specific locations from which the samples were obtained and prepare this defense. Further, Defendants are entitled to this information so that they can examine the chain of custody for the samples, and assess the reliability of the sampling data on which Plaintiffs' TSCA claim is founded. Plaintiffs cannot file an action based on this information and then shield it from discovery under the specious objection that it is not relevant.

Additionally, the issues at stake are significant, because Plaintiffs' claim is premised on the data it has collected through its own independent sampling, and Defendant could be held liable for millions of dollars of unnecessary remediation and renovation based on analysis of invalid or unreliable data. Furthermore, Plaintiffs are the sole source of this information and there is no burden on Plaintiffs in producing the requested information.

Finally, in addition to the independent testing which forms the basis of Plaintiffs' TSCA Notices and pleadings on file with this Court, Defendants know that additional sampling has been taken by AU or PEER or those acting in concert with Plaintiffs. Defendants have served subpoenas on every lab (known to it) which has processed Plaintiffs' samples. In responding to these subpoenas, these labs have produced to Defendants additional sampling data which has not been the basis of any judicial filing in this case. Defendants are entitled to the identities of these individuals so it can determine the locations and extent of these additional samples.

For all of the foregoing reasons, Plaintiffs should be required to identify those individuals who conducted sampling in connection to Plaintiffs' "Independent Tests."

d. PEER'S CONTENTIONS REGARDING INTERROGATORY NO. 2.

This interrogatory seeks the identity of individuals who took samples for the First Set of Independent Tests at the Malibu Schools. Defendants have not shown that the requested information is relevant. As discussed below, the information is not necessary for resolution of any of the issues in this case. Moreover, the burden of providing it outweighs any possible relevance.

Information regarding the "First Set of Independent Tests" is not relevant to the matters at issue in this lawsuit because Defendants have verified through their own testing that two out of the three rooms in the "First Set of Independent Tests" were in violation of TSCA, the matter which Plaintiffs are seeking to prove in this lawsuit. Although Defendants argue that Plaintiffs relied on this independent testing in their Amended Complaint, in fact Plaintiffs' Amended Complaint included information about the independent testing primarily for informational purposes and to describe the chronology of events at the Malibu School. Plaintiffs also recited that Defendants had verified the independent test results and found TSCA violations in every single one of 24 verification samples they took in ten rooms, FAC ¶¶ 127-129, confirming the appropriateness of the methodology and accuracy of the analysis of the independent testing generally, and making it unnecessary to rely on the independent testing to prove Plaintiffs' case at the least with regard to the verified rooms and the buildings in which they are located. There is no possible reason why Defendants would need to know the identities of the persons who took samples for tests on which Plaintiffs are not relying. From the First Set of Independent Tests, Plaintiffs would possibly introduce evidence only with regard to the test results regarding MHS Room 722, a physical education faculty office in which Defendants did not conduct verification testing or remediation.

Defendants also claim that Plaintiffs relied on the independent testing in their Preliminary Injunction motion. However, that Motion only addressed the ten rooms in which the District had verified TSCA violations, and did not rely at all on the independent testing. See, e.g., Plaintiffs' Memorandum of Points and Authorities in Support of their Motion for a Preliminary Injunction, Dkt. 14, at p. 2 ("Plaintiffs now move for a preliminary injunction requiring Defendants to immediately cease use of the other 10 rooms that Defendants' own testing has shown to have illegal levels of PCBs in caulk ….") (emphasis added).

Defendants also contend that they need "to confirm the specific locations from which the samples were obtained," so they can prepare their defenses that those areas from which the samples were taken have been remediated." This contention is equally without merit. Plaintiffs are not relying on the Independent Tests for any purpose with respect to any of the 10 rooms that Defendants claim to have remediated. Thus, there is nothing for Defendants to confirm.

Even with respect to the one room for which Plaintiffs continue to rely on the First Set of Independent Tests, Defendants do not need to know the identities of the person who took the samples. With regard to Room 722, Plaintiffs have produced the laboratory reports, and a "key" supplying additional information on the location of samples. Although Defendants conclusorily contend they need the identity of the samplers to assess the reliability of the testing data, they do not explain why that is the case. Defendants' reports of its own testing do not state the name of the individuals who took the samples. The test data is a product of a lab analysis of the samples. There is nothing that the sampler can do to affect the reliability of the data derived from a sample.

In any case, there should be no question that the Independent Testing data is reliable. Defendants' own verification testing has proven the accuracy of the independent testing. Defendants do not state why the Independent Testing data

from the three rooms not verified by Defendants should be any less reliable than the other 10 rooms where Defendants' verification testing has confirmed the accuracy of the independent data.

Moreover, the issue in the case is not actually whether the independent tests are accurate, but whether or not there are TSCA violations in the rooms in question. Defendants could determine this fact, by analyzing their own verification samples, as they did with regard to the other Independent Tests. Thus, information which could lead to admissible evidence about whether or not there are TSCA violations in this room can be obtained without revealing the persons who took the independent samples.

Defendants also assert that, in addition to the three sets of Independent Tests, they know from subpoenas served on laboratories that Plaintiffs have done additional sampling and testing "which has not been the basis of any judicial filing in this case." Defendants contend that the identities of the persons who took the samples so that they can "determine the locations and extent of these additional samples."

However, this interrogatory only relates to the First Set of Independent Tests and therefore the identity of the samples for different tests would not be responsive. In addition, at this point Plaintiffs have not even attempted to use any such additional testing in the case. Moreover, Defendants do not explain why they need to know the "extent" of the sample. The "extent" of the sample is not relevant to determine a TSCA violation. Moreover, Defendants do not need to know the identities of the persons taking the samples to determine the "locations" of the samples. The location of the sampling is shown on the lab reports which Defendants already have. The "exact" location of the sampling is irrelevant. Defendants' obligation to remediate is not limited to the exact square inch where a sample was taken.

Furthermore, the potential for harm to Plaintiffs or the samplers by disclosure of the requested information greatly outweighs any possible benefit of disclosure. Defendants have already filed a malicious criminal complaint for trespassing and vandalism against individuals who allegedly took samples. Although the District Attorney declined to file any charges, Plaintiffs are legitimately concerned that Defendants will use the requested information to initiate similar charges against the samplers or otherwise retaliate against them.

Forced disclosure of the identities of those who took samples would greatly inhibit Plaintiff's ability to fulfill their mission of advocating for remediation of environmental hazards. See, e.g., *United States v. Garde*, 673 F.Supp. 604, 607 (D.D.C. 1987)

> "if the government is successful in compelling [the organization's lawyer] to reveal the information given to her, especially the identity of those she represents, GAP will lose the confidence of some of its whistleblower informants and its efforts to gather and present safety allegations will suffer. This is the harm that GAP claims, and it is cognizable under the [First Amendment] right to association."

Plaintiff has made a "prima facie showing of arguable first amendment infringement." *Perry v. Schwazanegger*, 591 F.3d 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of the identities of the samplers would severely discourage Plaintiff's ability to gather evidence of environmental violations because Plaintiff would be unable to protect the samplers' confidentiality, thereby severely hampering Plaintiff's organizational mission. It could also result in harassment of individuals who took the samples. Defendants have already filed a false criminal complaint against the President of America Unites, Ms. DeNicola, and her husband, seeking to subject them to felony charges punishable by fines and imprisonment, for

allegedly taking caulk samples. It is difficult to imagine a more "chilling" action against those who advocate for PCB testing and remediation at the Malibu Schools. See Declarations of Paula Dinerstein and Jennifer DeNicola appended hereto.

Once a prima facie case of First Amendment infringement is made, "the evidentiary burden will then shift to the government…[to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest…[and] the 'least restrictive means' of obtaining the desired information." *Perry*, 591 F.3d at 1161 (quoting *Brock v. Local 375, Plumbers Int'l Union of Am.*, 960 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)).

> "Importantly, the party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation—a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1). The request must also be carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable."

Perry, 591 F.3d at 1161.

Here, Defendants cannot even show that this discovery meets the relevance requirements of Rule 26, much less the more demanding standard of relevance when First Amendment interests are implicated. As discussed above, there are other means of acquiring the desired information, namely, by examining the laboratory reports and the information provided in accordance with Defendants' subpoenas to the laboratories, or by conducting verification testing, without requiring Plaintiff to disclose its communications with its members, supporters and others who have contacted Plaintiffs concerning PCBs at the Malibu Schools or other information which may reveal who took the samples.

3. INTERROGATORY NO. 3.

a. INTERROGATORY NO. 3.

IDENTIFY all PERSONS who obtained or collected the "Second Set of Independent Tests," referred to at paragraph 103 of the FAC.

b. RESPONSE TO INTERROGATORY NO. 3.

Plaintiff objects to this interrogatory on the ground that it seeks information that is not relevant to the party's claims or defenses or the subject matter of this action.

c. DEFENDANTS' CONTENTIONS REGARDING INTERROGATORY NO. 3.

Prior to initiation of this suit, Plaintiffs served Defendants with two Notices of Intent to File Suit under TSCA ("Notices"), the first dated August 19, 2014, and the second dated January 12, 2015. Decl. Plant, Exs. D, ¶ 32; H-I. Such Notices were sent because, under TSCA's citizen suit provision, a citizen plaintiff must give the alleged violator and EPA specific notice of the alleged violations of TSCA. 15 U.S.C.S. § 2619(b)(1). TSCA's 60-day notice period is mandatory to the establishment of jurisdiction and cannot be waived. *Id*. Both of these Notices relied upon independent sampling conducted by AU and PEER. *See* Decl. Plant, Ex. H; Ex. I.

Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying on such testing. References to "Independent Tests" and independent testing are specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl. Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-26, 128, 132.

Further, on April 1, 2015, Plaintiffs filed a motion for a preliminary injunction, again relying on the results of such independent testing, for its request

that Defendants be enjoined from using such rooms where the testing was conducted.

Now, in response to discovery requests for information regarding this sampling, including the identities of persons who conducted such independent testing, Plaintiffs have taken the specious position that the identities of the individuals who conducted the testing are not relevant. Relevancy is not a valid objection to this Interrogatory. Under Rule 26(b)(1), parties may obtain discovery regarding:

> [A]ny nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within the scope of discovery does not need to be admissible in evidence. Fed. R. Civ. P. 26(b)(1).

The identities of those individuals who have taken samples at the Malibu Schools is of great importance, is clearly relevant to Plaintiffs' claims, and is further relevant to Defendants' defenses. One of Defendants' defenses is that those areas from which samples were taken have been remediated, and accordingly, Plaintiffs' TSCA claim is moot. Defendants are entitled to take discovery, including depositions, of the individuals involved in Plaintiffs' independent testing to confirm the specific locations from which the samples were obtained and prepare this defense. Further, Defendants are entitled to this information so that they can examine the chain of custody for the samples, and assess the reliability of the sampling data on which Plaintiffs' TSCA claim is founded. Plaintiffs cannot file an action based on this information and then shield it from discovery under the specious objection that it is not relevant.

Additionally, the issues at stake are significant, because Plaintiffs' claim is premised on the data it has collected through its own independent sampling, and Defendant could be held liable for millions of dollars of unnecessary remediation and renovation based on analysis of invalid or unreliable data. Furthermore, Plaintiffs are the sole source of this information and there is no burden on Plaintiffs in producing the requested information.

Finally, in addition to the independent testing which forms the basis of Plaintiffs' TSCA Notices and pleadings on file with this Court, Defendants know that additional sampling has been taken by AU or PEER or those acting in concert with Plaintiffs. Defendants have served subpoenas on every lab (known to it) which has processed Plaintiffs' samples. In responding to these subpoenas, these labs have produced to Defendants additional sampling data which has not been the basis of any judicial filing in this case. Defendants are entitled to the identities of these individuals so it can determine the locations and extent of these additional samples.

For all of the foregoing reasons, Plaintiffs should be required to identify those individuals who conducted sampling in connection to Plaintiffs' "Independent Tests."

d. PEER'S CONTENTIONS REGARDING INTERROGATORY NO. 3.

This interrogatory seeks the identity of individuals who took samples for the Second Set of Independent Tests at the Malibu Schools. Defendants have not shown that the requested information is relevant. As discussed below, the information is not necessary for resolution of any of the issues in this case. Moreover, the burden of providing it outweighs any possible relevance.

Information regarding the "Second Set of Independent Tests" is not relevant to the matters at issue in this lawsuit because Defendants have verified through their own testing that three out of the four rooms in the "Second Set of Independent Tests" were in violation of TSCA, the matter which Plaintiffs are seeking to prove

in this lawsuit. Although Defendants argue that Plaintiffs relied on this independent testing in their Amended Complaint, in fact Plaintiffs' Amended Complaint included information about the independent testing primarily for informational purposes and to describe the chronology of events at the Malibu School. Plaintiffs also recited that Defendants had verified the independent test results and found TSCA violations in every single one of 24 verification samples they took in ten rooms, FAC ¶¶ 127-129, confirming the appropriateness of the methodology and accuracy of the analysis of the independent testing generally, and making it unnecessary to rely on the independent testing to prove Plaintiffs' case at the least with regard to the verified rooms and the buildings in which they are located. There is no possible reason why Defendants would need to know the identities of the persons who took samples for tests on which Plaintiffs are not relying. From the Second Set of Independent Tests, Plaintiffs would possibly introduce evidence only with regard to the test results regarding MHS Room 205, a French language classroom in which Defendants did not conduct verification testing or remediation.

Defendants also claim that Plaintiffs relied on the independent testing in their Preliminary Injunction motion. However, that Motion only addressed the ten rooms in which the District had verified TSCA violations, and did not rely at all on the independent testing. See, e.g., Plaintiffs' Memorandum of Points and Authorities in Support of their Motion for a Preliminary Injunction, Dkt. 14, at p. 2 ("Plaintiffs now move for a preliminary injunction requiring Defendants to immediately cease use of the other 10 rooms that Defendants' own testing has shown to have illegal levels of PCBs in caulk ….") (emphasis added).

Defendants also contend that they need "to confirm the specific locations from which the samples were obtained," so they can prepare their defenses that those areas from which the samples were taken have been remediated." This

contention is equally without merit. Plaintiffs are not relying on the Independent Tests for any purpose with respect to any of the 10 rooms that Defendants claim to have remediated. Thus, there is nothing for Defendants to confirm.

Even with respect to the one room for which Plaintiffs continue to rely on the Second Set of Independent Tests, Defendants do not need to know the identities of the person who took the samples. With regard to Room 205, Plaintiffs have produced the laboratory reports, and a "key" supplying additional information on the location of samples. Although Defendants conclusorily contend they need the identity of the samplers to assess the reliability of the testing data, they do not explain why that is the case. Defendants' reports of its own testing do not state the name of the individuals who took the samples. The test data is a product of a lab analysis of the samples. There is nothing that the sampler can do to affect the reliability of the data derived from a sample.

In any case, there should be no question that the Independent Testing data is reliable. Defendants' own verification testing has proven the accuracy of the independent testing. Defendants do not state why the Independent Testing data from the three rooms not verified by Defendants should be any less reliable than the other 10 rooms where Defendants' verification testing has confirmed the accuracy of the independent data.

Moreover, the issue in the case is not actually whether the independent tests are accurate, but whether or not there are TSCA violations in the rooms in question. Defendants could determine this fact, by analyzing their own verification samples, as they did with regard to the other Independent Tests. Thus, information which could lead to admissible evidence about whether or not there are TSCA violations in this room can be obtained without revealing the persons who took the independent samples.

Defendants also assert that, in addition to the three sets of Independent Tests, they know from subpoenas served on laboratories that Plaintiffs have done additional sampling and testing "which has not been the basis of any judicial filing in this case." Defendants contend that the identities of the persons who took the samples so that they can "determine the locations and extent of these additional samples."

However, this interrogatory only relates to the Second Set of Independent Tests and therefore the identity of the samples for different tests would not be responsive. In addition, at this point Plaintiffs have not even attempted to use any such additional testing in the case. Moreover, Defendants do not explain why they need to know the "extent" of the sample. The "extent" of the sample is not relevant to determine a TSCA violation. Moreover, Defendants do not need to know the identities of the persons taking the samples to determine the "locations" of the samples. The location of the sampling is shown on the lab reports which Defendants already have. The "exact" location of the sampling is irrelevant. Defendants' obligation to remediate is not limited to the exact square inch where a sample was taken.

Furthermore, the potential for harm to Plaintiffs or the samplers by disclosure of the requested information greatly outweighs any possible benefit of disclosure. Defendants have already filed a malicious criminal complaint for trespassing and vandalism against individuals who allegedly took samples. Although the District Attorney declined to file any charges, Plaintiffs are legitimately concerned that Defendants will use the requested information to initiate similar charges against the samplers or otherwise retaliate against them.

Forced disclosure of the identities of those who took samples would greatly inhibit Plaintiff's ability to fulfill their mission of advocating for remediation of

environmental hazards. See, e.g., *United States v. Garde*, 673 F.Supp. 604, 607 (D.D.C. 1987)

> "if the government is successful in compelling [the organization's lawyer] to reveal the information given to her, especially the identity of those she represents, GAP will lose the confidence of some of its whistleblower informants and its efforts to gather and present safety allegations will suffer. This is the harm that GAP claims, and it is cognizable under the [First Amendment] right to association."

Plaintiff has made a "prima facie showing of arguable first amendment infringement." *Perry v. Schwazanegger*, 591 F.3d 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of the identities of the samplers would severely discourage Plaintiff's ability to gather evidence of environmental violations because Plaintiff would be unable to protect the samplers' confidentiality, thereby severely hampering Plaintiff's organizational mission. It could also result in harassment of individuals who took the samples. Defendants have already filed a false criminal complaint against the President of America Unites, Ms. DeNicola, and her husband, seeking to subject them to felony charges punishable by fines and imprisonment, for allegedly taking caulk samples. It is difficult to imagine a more "chilling" action against those who advocate for PCB testing and remediation at the Malibu Schools. See Declarations of Paula Dinerstein and Jennifer DeNicola appended hereto.

Once a prima facie case of First Amendment infringement is made, "the evidentiary burden will then shift to the government…[to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest…[and] the 'least restrictive means' of obtaining the desired information." Perry, 591 F.3d at 1161 (quoting *Brock v. Local 375, Plumbers Int'l Union of Am.*, 960 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v.*

Trader's State Bank, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)).

> "Importantly, the party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation—a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1). The request must also be carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable."

Perry, 591 F.3d at 1161.

Here, Defendants cannot even show that this discovery meets the relevance requirements of Rule 26, much less the more demanding standard of relevance when First Amendment interests are implicated. As discussed above, there are other means of acquiring the desired information, namely, by examining the laboratory reports and the information provided in accordance with Defendants' subpoenas to the laboratories, or by conducting verification testing, without requiring Plaintiff to disclose its communications with its members, supporters and others who have contacted Plaintiffs concerning PCBs at the Malibu Schools or other information which may reveal who took the samples.

4. INTERROGATORY NO. 4.

a. INTERROGATORY NO. 4.

IDENTIFY all PERSONS who obtained or collected the "Third Set of Independent Tests," referred to at paragraph 109 of the FAC.

b. RESPONSE TO INTERROGATORY NO. 4.

Plaintiff objects to this interrogatory on the ground that it seeks information that is not relevant to the party's claims or defenses or the subject matter of this action.

c. DEFENDANTS' CONTENTIONS REGARDING INTERROGATORY NO. 4.

Prior to initiation of this suit, Plaintiffs served Defendants with two Notices of Intent to File Suit under TSCA ("Notices"), the first dated August 19, 2014, and the second dated January 12, 2015. Decl. Plant, Exs. D, ¶ 32; H-I. Such Notices were sent because, under TSCA's citizen suit provision, a citizen plaintiff must give the alleged violator and EPA specific notice of the alleged violations of TSCA. 15 U.S.C.S. § 2619(b)(1). TSCA's 60-day notice period is mandatory to the establishment of jurisdiction and cannot be waived. *Id*. Both of these Notices relied upon independent sampling conducted by AU and PEER. *See* Decl. Plant, Ex. H; Ex. I.

Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying on such testing. References to "Independent Tests" and independent testing are specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl. Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-26, 128, 132.

Further, on April 1, 2015, Plaintiffs filed a motion for a preliminary injunction, again relying on the results of such independent testing, for its request that Defendants be enjoined from using such rooms where the testing was conducted.

Now, in response to discovery requests for information regarding this sampling, including the identities of persons who conducted such independent testing, Plaintiffs have taken the specious position that the identities of the individuals who conducted the testing are not relevant. Relevancy is not a valid objection to this Interrogatory. Under Rule 26(b)(1), parties may obtain discovery regarding:

> [A]ny nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within the scope of discovery does not need to be admissible in evidence. Fed. R. Civ. P. 26(b)(1).

The identities of those individuals who have taken samples at the Malibu Schools is of great importance, is clearly relevant to Plaintiffs' claims, and is further relevant to Defendants' defenses. One of Defendants' defenses is that those areas from which samples were taken have been remediated, and accordingly, Plaintiffs' TSCA claim is moot. Defendants are entitled to take discovery, including depositions, of the individuals involved in Plaintiffs' independent testing to confirm the specific locations from which the samples were obtained and prepare this defense. Further, Defendants are entitled to this information so that they can examine the chain of custody for the samples, and assess the reliability of the sampling data on which Plaintiffs' TSCA claim is founded. Plaintiffs cannot file an action based on this information and then shield it from discovery under the specious objection that it is not relevant.

Additionally, the issues at stake are significant, because Plaintiffs' claim is premised on the data it has collected through its own independent sampling, and Defendant could be held liable for millions of dollars of unnecessary remediation and renovation based on analysis of invalid or unreliable data. Furthermore, Plaintiffs are the sole source of this information and there is no burden on Plaintiffs in producing the requested information.

Finally, in addition to the independent testing which forms the basis of Plaintiffs' TSCA Notices and pleadings on file with this Court, Defendants know that additional sampling has been taken by AU or PEER or those acting in concert

with Plaintiffs. Defendants have served subpoenas on every lab (known to it) which has processed Plaintiffs' samples. In responding to these subpoenas, these labs have produced to Defendants additional sampling data which has not been the basis of any judicial filing in this case. Defendants are entitled to the identities of these individuals so it can determine the locations and extent of these additional samples.

For all of the foregoing reasons, Plaintiffs should be required to identify those individuals who conducted sampling in connection to Plaintiffs' "Independent Tests."

d. PEER'S CONTENTIONS REGARDING INTERROGATORY NO. 4.

This interrogatory seeks the identity of individuals who took samples for the Third Set of Independent Tests at the Malibu Schools. Defendants have not shown that the requested information is relevant. As discussed below, the information is not necessary for resolution of any of the issues in this case. Moreover, the burden of providing it outweighs any possible relevance. Information regarding the "Third Set of Independent Tests" is not relevant to the matters at issue in this lawsuit because Defendants have verified through their own testing that four out of the five rooms in the "Third Set of Independent Tests" were in violation of TSCA, the matter which Plaintiffs are seeking to prove in this lawsuit.

Although Defendants argue that Plaintiffs relied on this independent testing in their Amended Complaint, in fact Plaintiffs' Amended Complaint included information about the independent testing primarily for informational purposes and to describe the chronology of events at the Malibu School. Plaintiffs also recited that Defendants had verified the independent test results and found TSCA violations in every single one of 24 verification samples they took in ten rooms, FAC ¶¶ 127-129, confirming the appropriateness of the methodology and accuracy of the analysis of the independent testing generally, and making it unnecessary to rely on the independent testing to prove Plaintiffs' case at the least with regard to the

verified rooms and the buildings in which they are located. There is no possible reason why Defendants would need to know the identities of the persons who took samples for tests on which Plaintiffs are not relying. From the Third Set of Independent Tests, Plaintiffs would possibly introduce evidence only with regard to the test results regarding a JCES office next to the teacher's lounge, which includes the principal's office, in which Defendants did not conduct verification testing or remediation.

Defendants also claim that Plaintiffs relied on the independent testing in their Preliminary Injunction motion. However, that Motion only addressed the ten rooms in which the District had verified TSCA violations, and did not rely at all on the independent testing. See, e.g., Plaintiffs' Memorandum of Points and Authorities in Support of their Motion for a Preliminary Injunction, Dkt. 14, at p. 2 ("Plaintiffs now move for a preliminary injunction requiring Defendants to immediately cease use of the other 10 rooms that Defendants' own testing has shown to have illegal levels of PCBs in caulk ….") (emphasis added).

Defendants also contend that they need "to confirm the specific locations from which the samples were obtained," so they can prepare their defenses that those areas from which the samples were taken have been remediated." This contention is equally without merit. Plaintiffs are not relying on the Independent Tests for any purpose with respect to any of the 10 rooms that Defendants claim to have remediated. Thus, there is nothing for Defendants to confirm.

Even with respect to the one room for which Plaintiffs continue to rely on the Third Set of Independent Tests, Defendants do not need to know the identities of the person who took the samples. With regard to the JCES Office, Plaintiffs have produced the laboratory reports. Although Defendants conclusorily contend they need the identity of the samplers to assess the reliability of the testing data, they do not explain why that is the case. Defendants' reports of its own testing do not state

the name of the individuals who took the samples. The test data is a product of a lab analysis of the samples. There is nothing that the sampler can do to affect the reliability of the data derived from a sample.

In any case, there should be no question that the Independent Testing data is reliable. Defendants' own verification testing has proven the accuracy of the independent testing. Defendants do not state why the Independent Testing data from the three rooms not verified by Defendants should be any less reliable than the other 10 rooms where Defendants' verification testing has confirmed the accuracy of the independent data.

Moreover, the issue in the case is not actually whether the independent tests are accurate, but whether or not there are TSCA violations in the rooms in question. Defendants could determine this fact, by analyzing their own verification samples, as they did with regard to the other Independent Tests. Thus, information which could lead to admissible evidence about whether or not there are TSCA violations in this room can be obtained without revealing the persons who took the independent samples.

Defendants also assert that, in addition to the three sets of Independent Tests, they know from subpoenas served on laboratories that Plaintiffs have done additional sampling and testing "which has not been the basis of any judicial filing in this case." Defendants contend that the identities of the persons who took the samples so that they can "determine the locations and extent of these additional samples."

However, this interrogatory only relates to the Third Set of Independent Tests and therefore the identity of the samples for different tests would not be responsive. In addition, at this point Plaintiffs have not even attempted to use any such additional testing in the case. Moreover, Defendants do not explain why they need to know the "extent" of the sample. The "extent" of the sample is not relevant to

determine a TSCA violation. Moreover, Defendants do not need to know the identities of the persons taking the samples to determine the "locations" of the samples. The location of the sampling is shown on the lab reports which Defendants already have. The "exact" location of the sampling is irrelevant. Defendants' obligation to remediate is not limited to the exact square inch where a sample was taken.

Furthermore, the potential for harm to Plaintiffs or the samplers by disclosure of the requested information greatly outweighs any possible benefit of disclosure. Defendants have already filed a malicious criminal complaint for trespassing and vandalism against individuals who allegedly took samples. Although the District Attorney declined to file any charges, Plaintiffs are legitimately concerned that Defendants will use the requested information to initiate similar charges against the samplers or otherwise retaliate against them.

Forced disclosure of the identities of those who took samples would greatly inhibit Plaintiff's ability to fulfill their mission of advocating for remediation of environmental hazards. See, e.g., United States v. Garde, 673 F.Supp. 604, 607 (D.D.C. 1987)

> "if the government is successful in compelling [the organization's lawyer] to reveal the information given to her, especially the identity of those she represents, GAP will lose the confidence of some of its whistleblower informants and its efforts to gather and present safety allegations will suffer. This is the harm that GAP claims, and it is cognizable under the [First Amendment] right to association."

Plaintiff has made a "prima facie showing of arguable first amendment infringement." *Perry v. Schwazanegger*, 591 F.3d 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of the identities of the samplers would severely

discourage Plaintiff's ability to gather evidence of environmental violations because Plaintiff would be unable to protect the samplers' confidentiality, thereby severely hampering Plaintiff's organizational mission. It could also result in harassment of individuals who took the samples. Defendants have already filed a false criminal complaint against the President of America Unites, Ms. DeNicola, and her husband, seeking to subject them to felony charges punishable by fines and imprisonment, for allegedly taking caulk samples. It is difficult to imagine a more "chilling" action against those who advocate for PCB testing and remediation at the Malibu Schools. See Declarations of Paula Dinerstein and Jennifer DeNicola appended hereto.

Once a prima facie case of First Amendment infringement is made, "the evidentiary burden will then shift to the government…[to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest…[and] the 'least restrictive means' of obtaining the desired information." Perry, 591 F.3d at 1161 (quoting *Brock v. Local 375, Plumbers Int'l Union of Am.*, 960 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)).

> "Importantly, the party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation—a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1). The request must also be carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable."

Perry, 591 F.3d at 1161.

Here, Defendants cannot even show that this discovery meets the relevance requirements of Rule 26, much less the more demanding standard of relevance when First Amendment interests are implicated. As discussed above, there are other means of acquiring the desired information, namely, by examining the laboratory

reports and the information provided in accordance with Defendants' subpoenas to the laboratories, or by conducting verification testing, without requiring Plaintiff to disclose its communications with its members, supporters and others who have contacted Plaintiffs concerning PCBs at the Malibu Schools or other information which may reveal who took the samples.

5. INTERROGATORY NO. 6.

a. INTERROGATORY NO. 6.

IDENTIFY the PERSON or PERSONS that authored or created the BC LABS KEY.

b. RESPONSE TO INTERROGATORY NO. 6.

Plaintiff objects to this interrogatory on the ground that it seeks information that is not relevant to the party's claims or defenses or the subject matter of this action.

c. DEFENDANTS' CONTENTIONS REGARDING INTERROGATORY NO. 6.

The "BC Labs Key" refers to the "Key to BC Laboratories, Inc [*sic*] Report." This key, which was created by Plaintiffs, purportedly shows the locations from which independent sampling was taken. A true and correct copy of the "BC Labs Key" is attached to the Declaration of Caroline L. Plant as Exhibit J.

Relevancy is not a valid objection to this Interrogatory. Under Rule 26(b)(1), parties may obtain discovery regarding:

> [A]ny nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within the scope of discovery does not need to be admissible in evidence. Fed. R. Civ. P. 26(b)(1).

The identity of the author of this key is certainly relevant, because the author possesses discoverable information that will assist Defendants in identifying the specific locations where independent testing occurred and establish a chain of custody. One of Defendants' defenses is that the samples, which form the basis of Plaintiffs' TSCA lawsuit, have been remediated, and accordingly, Plaintiffs' claims are moot. Defendants are entitled to take discovery, including depositions, of the individuals to confirm the specific locations from which the samples were obtained. Further, Defendants are entitled to this information so that they can examine the chain of custody for the samples, and assess the reliability of the sampling data on which Plaintiffs' TSCA claim is founded.

Additionally, the issues at stake are significant, because Plaintiffs' claim is premised on the data it has collected through its own independent sampling, and Defendant could be held liable for millions of dollars of unnecessary remediation and renovation based on analysis of invalid or unreliable data. Furthermore, Plaintiffs are the sole source of this information and there is no burden on Plaintiffs in producing the requested information.

For all of the foregoing reasons, Plaintiffs should be required to identify those individuals who authored the BC Labs Key.

d. PEER'S CONTENTIONS REGARDING INTERROGATORY NO. 6.

This interrogatory seeks the identity of the individuals who created the "BC Labs key," which shows the locations from which independent sampling was taken. Defendants have not shown that the requested information is relevant. As discussed below, the information is not necessary for resolution of any of the issues in this case. Moreover, the burden of providing it outweighs any possible relevance.

Defendants contend that the identities of the individuals who created the key is relevant because the "author possesses discoverable information that will assist Defendants in identifying the specific locations where independent testing occurred

and establish a chain of custody." However, as discussed above, Plaintiffs are not relying on the Independent Tests in 10 of the 13 rooms. There is no possible reason why Defendants would need to know this information for tests on which Plaintiffs are not relying.

Moreover, with respect to the Independent Tests on which Plaintiffs continue to rely, the location of the sampling is shown on the lab reports which Defendants already have. The exact location of the sampling is irrelevant. Defendants' obligation to remediate is not limited to the exact square inch where a sample was taken. The lab reports also contain whatever chain of custody information Defendants need.

Furthermore, the potential for harm to Plaintiffs or the persons creating the key by disclosure of the requested information greatly outweighs any possible benefit of disclosure. As discussed above, Defendants have already filed a malicious criminal complaint for trespassing and vandalism against individuals who allegedly took samples. Although the District Attorney declined to file any charges, Plaintiffs are legitimately concerned that Defendants will use the requested information to initiate similar charges against the samplers or otherwise retaliate against them.

Forced disclosure of the identities of those who created the key would greatly inhibit Plaintiffs' ability to fulfill their mission of advocating for remediation of environmental hazards. See, e.g., *United States v. Garde*, 673 F.Supp. 604, 607 (D.D.C. 1987)

> "[I]f the government is successful in compelling [the organization's lawyer] to reveal the information given to her, especially the identity of those she represents, GAP will lose the confidence of some of its whistleblower informants and its efforts to gather and present safety allegations will suffer. This is the harm that GAP

> claims, and it is cognizable under the [First Amendment] right to association."

Plaintiffs have made a "prima facie showing of arguable first amendment infringement." *Perry v. Schwazanegger*, 591 F.3d 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of the identities of the persons who created the key (and therefore either were the samplers or obtained the information about the locations from the samplers) would severely discourage Plaintiffs' ability to gather evidence of environmental violations because Plaintiffs would be unable to protect the samplers' confidentiality, and thus lose the confidence of their informants, thereby severely hampering Plaintiffs' organizational missions. It could also result in harassment of individuals who took the samples. Defendants have already filed a false criminal complaint against the President of America Unites, Ms. DeNicola, and her husband, seeking to subject them to felony charges punishable by fines and imprisonment, for allegedly taking caulk samples. It is difficult to imagine a more "chilling" action against those who advocate for PCB testing and remediation at the Malibu Schools.

Once a prima facie case of First Amendment infringement is made, "the evidentiary burden will then shift to the government…[to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest…[and] the 'least restrictive means' of obtaining the desired information." Perry, 591 F.3d at 1161 (quoting *Brock v. Local 375, Plumbers Int'l Union of Am.*, 960 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)).

> "Importantly, the party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation—a more demanding standard of relevance than that under

Federal Rule of Civil Procedure 26(b)(1). The request must also be carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable." *Perry*, 591 F.3d at 1161.

Here, Defendants cannot even show that this discovery meets the relevance requirements of Rule 26, much less the more demanding standard of relevance when First Amendment interests are implicated. As discussed above, there are other means of acquiring the desired information, namely, by examining the laboratory reports and the information provided in accordance with Defendants' subpoenas to the laboratories, or by conducting verification testing, without requiring Plaintiff to disclose the information about the identity of the persons creating the key.

6. INTERROGATORY NO. 7.

a. INTERROGATORY NO. 7.

IDENTIFY the PERSON or PERSONS that authored or created the EUROFINS KEY.

b. RESPONSE TO INTERROGATORY NO. 7.

Plaintiff objects to this interrogatory on the ground that it seeks information that is not relevant to the party's claims or defenses or the subject matter of this action.

c. DEFENDANTS' CONTENTIONS REGARDING INTERROGATORY NO. 7.

The "EUROFINS KEY" refers to the key to Work Order 14-08-1493. This key, which was created by Plaintiffs, purportedly shows the locations from which sampling was taken. A true and correct copy of the "Eurofins Key" is attached to the Declaration of Caroline L. Plant as Exhibit K.

Relevancy is not a valid objection to this Interrogatory. Under Rule 26(b)(1), parties may obtain discovery regarding:

> [A]ny nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within the scope of discovery does not need to be admissible in evidence. Fed. R. Civ. P. 26(b)(1).

The identity of the author of this key is certainly relevant, because the author possesses discoverable information that will assist Defendants in identifying the specific locations where independent testing occurred and establish a chain of custody. One of Defendants' defenses is that the samples, which form the basis of Plaintiffs' TSCA lawsuit, have been remediated, and accordingly, Plaintiffs' claims are moot. Defendants are entitled to take discovery, including depositions, of the individuals to confirm the specific locations from which the samples were obtained. Further, Defendants are entitled to this information so that they can examine the chain of custody for the samples, and assess the reliability of the sampling data on which Plaintiffs' TSCA claim is founded.

Additionally, the issues at stake are significant, because Plaintiffs' claim is premised on the data it has collected through its own independent sampling, and Defendant could be held liable for millions of dollars of unnecessary remediation and renovation based on analysis of invalid or unreliable data. Furthermore, Plaintiffs are the sole source of this information and there is no burden on Plaintiffs in producing the requested information.

For all of the foregoing reasons, Plaintiffs should be required to identify those individuals who authored the Eurofins Key.

d. PEER'S CONTENTIONS REGARDING INTERROGATORY NO. 7.

This interrogatory seeks the identity of the individuals who created the "Eurofins key," which shows the locations from which independent sampling was

taken. Defendants have not shown that the requested information is relevant. As discussed below, the information is not necessary for resolution of any of the issues in this case. Moreover, the burden of providing it outweighs any possible relevance.

Defendants contend that the identities of the individuals who created the key is relevant because the "author possesses discoverable information that will assist Defendants in identifying the specific locations where independent testing occurred and establish a chain of custody." However, as discussed above, Plaintiffs are not relying on the Independent Tests in 10 of the 13 rooms. There is no possible reason why Defendants would need to know this information for tests on which Plaintiffs are not relying.

Moreover, with respect to the Independent Tests on which Plaintiffs continue to rely, the location of the sampling is shown on the lab reports which Defendants already have. The exact location of the sampling is irrelevant. Defendants' obligation to remediate is not limited to the exact square inch where a sample was taken. The lab reports also contain whatever chain of custody information Defendants need.

Furthermore, the potential for harm to Plaintiffs or the persons creating the key by disclosure of the requested information greatly outweighs any possible benefit of disclosure. As discussed above, Defendants have already filed a malicious criminal complaint for trespassing and vandalism against individuals who allegedly took samples. Although the District Attorney declined to file any charges, Plaintiffs are legitimately concerned that Defendants will use the requested information to initiate similar charges against the samplers or otherwise retaliate against them.

Forced disclosure of the identities of those who created the key (and therefore either were the samplers or obtained information from the samplers) would greatly inhibit Plaintiffs' ability to fulfill their mission of advocating for remediation of

environmental hazards. See, e.g., *United States v. Garde*, 673 F.Supp. 604, 607 (D.D.C. 1987)

> "[I]f the government is successful in compelling [the organization's lawyer] to reveal the information given to her, especially the identity of those she represents, GAP will lose the confidence of some of its whistleblower informants and its efforts to gather and present safety allegations will suffer. This is the harm that GAP claims, and it is cognizable under the [First Amendment] right to association."

Plaintiffs have made a "prima facie showing of arguable first amendment infringement." *Perry v. Schwazanegger*, 591 F.3d 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of the identities of the samplers would severely discourage Plaintiffs' ability to gather evidence of environmental violations because Plaintiffs would be unable to protect the samplers' confidentiality, and thus lose the confidence of their informants, thereby severely hampering Plaintiffs' organizational missions. It could also result in harassment of individuals who took the samples. Defendants have already filed a false criminal complaint against the President of America Unites, Ms. DeNicola, and her husband, seeking to subject them to felony charges punishable by fines and imprisonment, for allegedly taking caulk samples. It is difficult to imagine a more "chilling" action against those who advocate for PCB testing and remediation at the Malibu Schools.

Once a prima facie case of First Amendment infringement is made, "the evidentiary burden will then shift to the government…[to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest…[and] the 'least restrictive means' of obtaining the desired information." *Perry*, 591 F.3d at 1161 (quoting *Brock v. Local 375, Plumbers Int'l*

Union of Am., 960 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)).

> "Importantly, the party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation—a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1). The request must also be carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable." *Perry*, 591 F.3d at 1161.

Here, Defendants cannot even show that this discovery meets the relevance requirements of Rule 26, much less the more demanding standard of relevance when First Amendment interests are implicated. As discussed above, there are other means of acquiring the desired information, namely, by examining the laboratory reports and the information provided in accordance with Defendants' subpoenas to the laboratories, or by conducting verification testing, without requiring Plaintiff to disclose the information about the identity of the persons creating the key.

D. REQUESTS FOR PRODUCTION TO PEER REGARDING INDEPENDENT SAMPLING

Requests for Production No. 6, 8, 21, 22, 24, 26, and 27 seek information regarding the "Independent Tests" referred to in Plaintiffs' FAC.

1. REQUEST FOR PRODUCTION NO. 6.

a. REQUEST FOR PRODUCTION NO. 6.

All DOCUMENTS that IDENTIFY the PERSON or PERSONS who obtained or collected the "First Set of Independent Tests," referred to at paragraph 80 of the FAC, at the MALIBU SCHOOLS.

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 6.

Plaintiff objects to this Request on the ground that it seeks information that is not relevant to the parties' claims or defenses or the subject matter of the instant action. Plaintiff further objects to this Request on the ground that it is vague and ambiguous and overbroad. Plaintiff further objects to this Request to the extent that it seeks privileged attorney-client communications, work product, common-interest communications or other privileged information. Plaintiff further objects to this Request on the ground that it violates the First Amendment rights of association of plaintiff and its members and supporters.

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 6.

i. Relevancy Is Not a Valid Objection to RFP No.6.

Prior to initiation of this suit, Plaintiffs served Defendants with two Notices of Intent to File Suit under TSCA ("Notices"), the first dated August 19, 2014, and the second dated January 12, 2015. Decl. Plant, Exs. D; ¶ 32, H-I. Such Notices were sent because, under TSCA's citizen suit provision, a citizen plaintiff must give the alleged violator and EPA specific notice of the alleged violations of TSCA. 15 U.S.C.S. § 2619(b)(1). TSCA's 60-day notice period is mandatory to the establishment of jurisdiction and cannot be waived. *Id*. Both of these Notices relied upon independent sampling conducted by AU and PEER. *See* Decl. Plant, Ex. H; Ex. I.

Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying on such testing. References to "Independent Tests" and independent testing are specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl. Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-26, 128, 132.

Further, on April 1, 2015, Plaintiffs filed a motion for a preliminary injunction, again relying on the results of such independent testing, for its request that Defendants be enjoined from using such rooms where the testing was conducted.

Now, in response to discovery requests for information regarding this sampling, including the identities of persons who conducted such independent testing, Plaintiffs have taken the specious position that the identities of the individuals who conducted the testing are not relevant. Relevancy is not a valid objection to this Interrogatory. Under Rule 26(b)(1), parties may obtain discovery regarding:

> [A]ny nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within the scope of discovery does not need to be admissible in evidence. Fed. R. Civ. P. 26(b)(1).

The identities of those individuals who have taken samples at the Malibu Schools is of great importance, is clearly relevant to Plaintiffs' claims, and is further relevant to Defendants' defenses. One of Defendants' defenses is that those areas from which samples were taken have been remediated, and accordingly, Plaintiffs' TSCA claim is moot. Defendants are entitled to take discovery, including depositions, of the individuals involved in Plaintiffs' independent testing to confirm the specific locations from which the samples were obtained and prepare this defense. Further, Defendants are entitled to this information so that they can examine the chain of custody for the samples, and assess the reliability of the sampling data on which Plaintiffs' TSCA claim is founded. Plaintiffs cannot file an

action based on this information and then shield it from discovery under the specious objection that it is not relevant.

Additionally, the issues at stake are significant, because Plaintiffs' claim is premised on the data it has collected through its own independent sampling, and Defendant could be held liable for millions of dollars of unnecessary remediation and renovation based on analysis of invalid or unreliable data. Furthermore, Plaintiffs are the sole source of this information and there is no burden on Plaintiffs in producing the requested information.

Finally, in addition to the independent testing which forms the basis of Plaintiffs' TSCA Notices and pleadings on file with this Court, Defendants know that additional sampling has been taken by AU or PEER or those acting in concert with Plaintiffs. Defendants have served subpoenas on every lab (known to it) which has processed Plaintiffs' samples. In responding to these subpoenas, these labs have produced to Defendants additional sampling data which has not been the basis of any judicial filing in this case. Defendants are entitled to the identities of these individuals so it can determine the locations and extent of these additional samples.

For all of the foregoing reasons, Plaintiffs should be required to identify those individuals who conducted sampling in connection to Plaintiffs' "Independent Tests."

ii. Vagueness, Ambiguity, and Overbreadth Are Not Valid Objections.

Plaintiff's objection that that this Request is vague, ambiguous and overbroad is unfounded. "The party who resists discovery has the burden to show discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." *Bible v. Rio Props., Inc.*, 246 F. R. D. 614 (C.D. Cal. 2007) (*citing Blankenship v. Hearst Corp.*, 519 F. 2d 418, 429 (9th Cir. 1975) and *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 655-56 (C.D. Cal. 2005)). There is no merit to "general or boilerplate objections such as 'overly broad' [or] 'vague and

ambiguous.'" *Bible*, 246 F. R. D. at 619; *A. Farber & Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal. 2006).

Plaintiff PEER has not met its burden of demonstrating that discovery of the information sought in this Request should not be allowed, because it has not supported or explained its objections on the basis of the requests being vague, ambiguous, or overbroad. Defendants have requested documents identifying those individuals who obtained or collected samples in the "Independent Tests" referred to in Plaintiffs' very own FAC. Plaintiff need only produce those documents that identify samplers or others in the chain of custody for these tests. Without further explanation, Plaintiff's objection is without merit, and Plaintiff should produce documents in response to this Request.

iii. Attorney-Client, Attorney Work Product, and Common-Interest Communication Privileges Are Not Valid Objections.

(a) Attorney-Client Privilege.

"The attorney-client privilege protects confidential communications between attorneys and clients, which are made for the purpose of giving legal advice." *United States v. Richey*, 632 F. 3d 559, 566 (9th Cir. 2011). The party asserting this privilege bears the burden of showing that there is an attorney-client relationship and the privileged nature of the communication. *Id.*; *United States v. Bauer*, 132 F. 3d 504, 507 (9th Cir. 1997). There is an attorney-client privilege where: "(1) [ ] legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) unless the protection be waved." *Id.* (quoting *United States v. Graf*, 610 F. 3d 1148, 1156 (9th Cir. 2010)). The privilege is waived when privileged communications are disclosed. *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). While

the privilege may extend to those communications with third parties assisting the attorney in legal advice, it does not extend where the advice sought is not legal advice. *Id.*

Documents identifying those involved in Plaintiffs' "Independent Tests" are not protected by the attorney-client privilege to the extent that they include correspondences and records from the environmental testing entities engaged in the testing process. The entities involved in the testing process were not engaged in this process for the purpose of aiding Plaintiffs or their counsel in litigation; rather, the sole role of these entities was to provide testing services. Furthermore, Plaintiffs have failed to indicate in their responses which communications they believe to be protected by the attorney-client privilege. *Richey*, 632 F. 3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(b) Attorney Work Product.

The work product doctrine prohibits discovery of documents and other materials "prepared by a party or his representative in anticipation of litigation." *United States v. Richey* 632 F. 3d 559, 567 (9th Cir. 2011) (*quoting Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F. 2d 1486, 1494 (9th Cir. 1989)); Fed. R. Civ. P. 26(b)(3). The work product doctrine is a qualified immunity rather than a privilege, and a showing of good cause for the information desired is sufficient to overcome the qualified immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D. Cal. 2006); *Admiral Ins. Co. v. United States Dist. Court*, 881 F. 2d 1486, 1494 (9th Cir. 1989). "The party claiming work product immunity has the burden of proving the applicability of the doctrine." *A. Farbers & Ptnrs., Inc.*, 234 F.R.D. at 192.

Plaintiffs cannot claim work product immunity because they have made no showing that this protection applies to any of the information or documents sought in Defendants' Requests. For example, Plaintiffs have not demonstrated how

documents identifying those who obtained or collected samples in Plaintiffs' independent testing bears any relation to Plaintiffs' efforts in preparation for trial. Furthermore, Defendants have good cause to request information sought, because the data from the "Independent Tests" will surely be used against Defendants in this litigation, and Defendants must be afforded the opportunity to confront the validity and reliability of the data. This necessarily entails a complete knowledge of the chain of custody, which can only be discovered through documents identifying those involved in the testing process. Plaintiffs have not met the burden of demonstrating the applicability of the work product doctrine, so their objection on this basis is not appropriate. Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(c) Common Interest Doctrine.

In general, the attorney-client privilege is waived when communications between an attorney and client are disclosed to a third party. *Weil v. Inv/ Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). There is a rare exception to this waiver rule where individuals with a common interest in a legal matter may "communicate among themselves and with the separate attorneys on matters of common legal interest, for the purpose of preparing a joint strategy, and the attorney-client privilege will protect these communications to the same extent as it would communications between each client and his own attorney." *Nidec Corp. v. Victor Co.*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) (*quoting* 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:35, at 192 (1999 ed.); *United States v. Gonzales*, 669 F. 3d 974, 978 (9th Cir. 2012). This common interest doctrine is not a privilege, but an exception to the rule on waiver where communications are disclosed to third parties. *See Griffith v. Davis*, 161 F.R.D. at 692. For this reason, the common interest doctrine comes into play only if the

communication at issue is privileged in the first place. *Nidec Corp*, 249 F.R.D. at 578.

As the common interest doctrine applies only to those materials protected by the attorney-client privilege with regard to America Unites and PEER, the parties with a common legal interest in this case, not all communications between America Unites and PEER are protected. Defendants request that Plaintiff produce documents in response to this request to the extent that Plaintiff possesses responsive materials that are not protected as either Plaintiffs' attorney-client communications.

iv. First Amendment Privilege Is Not a Valid Objection.

Plaintiff objects to this Request on the ground that it violates the First Amendment rights of association of Plaintiff and its members. A party objecting on the basis of a First Amendment privilege must satisfy a two-part test. The objecting party must first make a "prima facie showing of arguable first amendment infringement." *Perry v. Schwarzenegger*, 591 F. 3d 1126, 1140 (9th Cir. 2010) (*quoting Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F. 2d 346, 349-50 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is enforced, there will be "(1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Brock*, 860 F. 2d at 350.

Here, Plaintiff has made no such showing that disclosure of the documents requested would lead to "harassment, membership withdrawal, or discouragement of new members," or that it would result in other consequences that could "chill" members' associational rights. The Request for documents identifying those who obtained or collected the "Independent Tests" calls for chain of custody documents and documents prepared for Plaintiffs by environmental testing companies. The Request propounded by Defendants is not seeking personal information, does

nothing to harass members of Plaintiff organizations, and would not have a deterrent effect on membership. Moreover, the documents requested by Defendants are necessary so that Defendants can defend themselves in this litigation and fairness justifies their production. Defendants will not be afforded a fair discovery if they are precluded from accessing information regarding the independent testing data acquired by Plaintiffs, which will surely be used against Defendants in trial.

Additionally, there would be no "chilling" effect if Plaintiffs responded to Defendants' requests for this information, because PEER is publicly vocal about its activities and its membership, listing members of its Board and DC Staff on its website. *See* Decl. Plant, Exs. N,O. In particular, Plaintiff frequently publicizes its activities with regard to the subject matter of this very case on its website. The information sought in the above Request relates **only** to those individuals who obtained or collected data for the "Independent Tests" that form the basis for this lawsuit, and to communications regarding PCBs, the subject matter of this lawsuit.

The documents and information requested are necessary and relevant to Defendants' preparation for trial, and the names and email addresses of those members who would like their membership in PEER to remain private could be redacted so as to balance any associational issues with the Court's strong interest in ensuring Defendants' ability to fairly defend their case. Plaintiffs' entire case is premised on data from the "Independent Tests" referenced in Plaintiffs' FAC, and it is imperative that Defendants are granted full access to information and communications regarding these tests and their chains of custody.

d. PEER'S CONTENTIONS REGARDING REQUEST FOR PRODUCTION NO. 6

This request for production seeks documents which identify the individuals who took samples for the First Set of Independent Tests at the Malibu Schools. Defendants have not shown that the requested information is relevant. As discussed

below, the information is not necessary for resolution of any of the issues in this case. Moreover, the burden of providing it outweighs any possible relevance.

Information regarding the "First Set of Independent Tests" is not relevant to the matters at issue in this lawsuit because Defendants have verified through their own testing that two out of the three rooms in the "First Set of Independent Tests" were in violation of TSCA, the matter which Plaintiffs are seeking to prove in this lawsuit. Although Defendants argue that Plaintiffs relied on this independent testing in their Amended Complaint, in fact Plaintiffs' Amended Complaint included information about the independent testing primarily for informational purposes and to describe the chronology of events at the Malibu School. Plaintiffs also recited that Defendants had verified the independent test results and found TSCA violations in every single one of 24 verification samples they took in ten rooms, FAC ¶¶ 127-129, confirming the appropriateness of the methodology and accuracy of the analysis of the independent testing generally, and making it unnecessary to rely on the independent testing to prove Plaintiffs' case at the least with regard to the verified rooms and the buildings in which they are located. There is no possible reason why Defendants would need to know the identities of the persons who took samples for tests on which Plaintiffs are not relying. From the First Set of Independent Tests, Plaintiffs would possibly introduce evidence only with regard to the test results regarding MHS Room 722, a physical education faculty office in which Defendants did not conduct verification testing or remediation.

Defendants also claim that Plaintiffs relied on the independent testing in their Preliminary Injunction motion. However, that Motion only addressed the ten rooms in which the District had verified TSCA violations, and did not rely at all on the independent testing. See, e.g., Plaintiffs' Memorandum of Points and Authorities in Support of their Motion for a Preliminary Injunction, Dkt. 14, at p. 2 ("Plaintiffs

now move for a preliminary injunction requiring Defendants to immediately cease use of the other 10 rooms that Defendants' own testing has shown to have illegal levels of PCBs in caulk ….") (emphasis added).

Defendants also contend that they need "to confirm the specific locations from which the samples were obtained," so they can prepare their defenses that those areas from which the samples were taken have been remediated." This contention is equally without merit. Plaintiffs are not relying on the Independent Tests for any purpose with respect to any of the 10 rooms that Defendants claim to have remediated. Thus, there is nothing for Defendants to confirm.

Even with respect to the one room for which Plaintiffs continue to rely on the First Set of Independent Tests, Defendants do not need to know the identities of the person who took the samples. With regard to Room 722, Plaintiffs have produced the laboratory reports, and a "key" supplying additional information on the location of samples. Although Defendants conclusorily contend they need the identity of the samplers to assess the reliability of the testing data, they do not explain why that is the case. Defendants' reports of its own testing do not state the name of the individuals who took the samples. The test data is a product of a lab analysis of the samples. There is nothing that the sampler can do to affect the reliability of the data derived from a sample.

In any case, there should be no question that the Independent Testing data is reliable. Defendants' own verification testing has proven the accuracy of the independent testing. Defendants do not state why the Independent Testing data from the three rooms not verified by Defendants should be any less reliable than the other 10 rooms where Defendants' verification testing has confirmed the accuracy of the independent data.

Moreover, the issue in the case is not actually whether the independent tests are accurate, but whether or not there are TSCA violations in the rooms in question.

Defendants could determine this fact, by analyzing their own verification samples, as they did with regard to the other Independent Tests. Thus, information which could lead to admissible evidence about whether or not there are TSCA violations in this room can be obtained without revealing the persons who took the independent samples.

Defendants also assert that, in addition to the three sets of Independent Tests, they know from subpoenas served on laboratories that Plaintiffs have done additional sampling and testing "which has not been the basis of any judicial filing in this case." Defendants contend that the identities of the persons who took the samples so that they can "determine the locations and extent of these additional samples."

However, this document request only relates to the First Set of Independent Tests and therefore the identity of the samples for different tests would not be responsive. In addition, at this point Plaintiffs have not even attempted to use any such additional testing in the case. Moreover, Defendants do not explain why they need to know the "extent" of the sample. The "extent" of the sample is not relevant to determine a TSCA violation. Moreover, Defendants do not need to know the identities of the persons taking the samples to determine the "locations" of the samples. The location of the sampling is shown on the lab reports which Defendants already have. The "exact" location of the sampling is irrelevant. Defendants' obligation to remediate is not limited to the exact square inch where a sample was taken.

Furthermore, the potential for harm to Plaintiffs or the samplers by disclosure of the requested information greatly outweighs any possible benefit of disclosure. Defendants have already filed a malicious criminal complaint for trespassing and vandalism against individuals who allegedly took samples. Although the District Attorney declined to file any charges, Plaintiffs are legitimately concerned that

Defendants will use the requested information to initiate similar charges against the samplers or otherwise retaliate against them.

Forced disclosure of the identities of those who took samples would greatly inhibit Plaintiff's ability to fulfill their mission of advocating for remediation of environmental hazards. See, e.g., *United States v. Garde*, 673 F.Supp. 604, 607 (D.D.C. 1987)

> "if the government is successful in compelling [the organization's lawyer] to reveal the information given to her, especially the identity of those she represents, GAP will lose the confidence of some of its whistleblower informants and its efforts to gather and present safety allegations will suffer. This is the harm that GAP claims, and it is cognizable under the [First Amendment] right to association."

Plaintiff has made a "prima facie showing of arguable first amendment infringement." *Perry v. Schwazanegger*, 591 F.3d 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of the identities of the samplers would severely discourage Plaintiff's ability to gather evidence of environmental violations because Plaintiff would be unable to protect the samplers' confidentiality, thereby severely hampering Plaintiff's organizational mission. It could also result in harassment of individuals who took the samples. Defendants have already filed a false criminal complaint against the President of America Unites, Ms. DeNicola, and her husband, seeking to subject them to felony charges punishable by fines and imprisonment, for allegedly taking caulk samples. It is difficult to imagine a more "chilling" action against those who advocate for PCB testing and remediation at the Malibu Schools. See Declarations of Paula Dinerstein and Jennifer DeNicola appended hereto.

Once a prima facie case of First Amendment infringement is made, "the evidentiary burden will then shift to the government…[to] demonstrate that the

information sought through the [discovery] is rationally related to a compelling governmental interest…[and] the 'least restrictive means' of obtaining the desired information." *Perry*, 591 F.3d at 1161 (quoting *Brock v. Local 375, Plumbers Int'l Union of Am.*, 960 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)).

> "Importantly, the party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation—a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1). The request must also be carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable."

Perry, 591 F.3d at 1161.

Here, Defendants cannot even show that this discovery meets the relevance requirements of Rule 26, much less the more demanding standard of relevance when First Amendment interests are implicated. As discussed above, there are other means of acquiring the desired information, namely, by examining the laboratory reports and the information provided in accordance with Defendants' subpoenas to the laboratories, or by conducting verification testing, without requiring Plaintiff to disclose its communications with its members, supporters and others who have contacted Plaintiffs concerning PCBs at the Malibu Schools or other information which may reveal who took the samples.

2. REQUEST FOR PRODUCTION NO. 8.

a. REQUEST FOR PRODUCTION NO. 8.

All COMMUNICATIONS by and between PEER and AMERICA UNITES regarding the "First Set of Independent Tests," referred to at paragraph 80 of the FAC.

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 8.

Plaintiff objects to this Request on the ground that it seeks information that is not relevant to the parties' claims or defenses or the subject matter of the instant action. Plaintiff further objects to this Request on the ground that it is vague and ambiguous and overbroad. Plaintiff further objects to this Request to the extent that it seeks privileged attorney-client communications, work product, common-interest communications or other privileged information. Plaintiff further objects to this Request on the ground that it violates the First Amendment rights of association of Plaintiff and its members and supporters.

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 8.

i. Relevancy Is Not a Valid Objection to RFP No. 8.

Prior to initiation of this suit, Plaintiffs served Defendants with two Notices of Intent to File Suit under TSCA ("Notices"), the first dated August 19, 2014, and the second dated January 12, 2015. Decl. Plant, Exs. D, ¶ 32; H-I. Such Notices were sent because, under TSCA's citizen suit provision, a citizen plaintiff must give the alleged violator and EPA specific notice of the alleged violations of TSCA. 15 U.S.C.S. § 2619(b)(1). TSCA's 60-day notice period is mandatory to the establishment of jurisdiction and cannot be waived. *Id*. Both of these Notices relied upon independent sampling conducted by AU and PEER. See Decl. Plant, Ex. H; Ex. I.

Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying on such testing. References to "Independent Tests" and independent testing are specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl. Plant, Ex. B; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-26, 128, 132.

Further, on April 1, 2015, Plaintiffs filed a motion for a preliminary injunction, again relying on the results of such independent testing, for its request that Defendants be enjoined from using such rooms where the testing was conducted.

Now, in response to discovery requests for further information regarding this sampling, Plaintiffs have taken the specious position that the identities of the individuals who conducted the testing are not relevant. Relevancy is not a valid objection to this Interrogatory. Under Rule 26(b)(1), parties may obtain discovery regarding:

> [A]ny nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within the scope of discovery does not need to be admissible in evidence. Fed. R. Civ. P. 26(b)(1).

The identities of those individuals who have taken samples at the Malibu Schools is of great importance, is clearly relevant to Plaintiffs' claims, and is further relevant to Defendants' defenses. One of Defendants' defenses is that those areas from which samples were taken have been remediated, and accordingly, Plaintiffs' TSCA claim is moot. Defendants are entitled to take discovery, including depositions, of the individuals involved in Plaintiffs' independent testing to confirm the specific locations from which the samples were obtained and prepare this defense. Further, Defendants are entitled to this information so that they can examine the chain of custody for the samples, and assess the reliability of the sampling data on which Plaintiffs' TSCA claim is founded. Plaintiffs cannot file an action based on this information and then shield it from discovery under the specious objection that it is not relevant.

Additionally, the issues at stake are significant, because Plaintiffs' claim is premised on the data it has collected through its own independent sampling, and Defendant could be held liable for millions of dollars of unnecessary remediation and renovation based on analysis of invalid or unreliable data. Furthermore, Plaintiffs are the sole source of this information and there is no burden on Plaintiffs in producing the requested information.

Finally, non-privileged communications between Plaintiffs related to the "Independent Testing" are relevant and should be produced. Communications regarding the independent sampling will provide additional information regarding the location from which sampling was taken, will identity witnesses, and will provide additional information relevant to Defendants defenses in this matter. Further, Plaintiffs have provided no valid grounds on which these communications should withheld. Any communications which Plaintiffs deem to be privileged can be withheld or redacted as appropriate.

For all of the foregoing reasons, Plaintiffs should be required to identify those individuals who conducted sampling in connection to Plaintiffs' "Independent Tests."

ii. Vagueness, Ambiguity, and Overbreadth Are Not Valid Objections to RFP No. 8.

Plaintiff's objection that Requests for Production No. 8 is vague, ambiguous and overbroad is unfounded. "The party who resists discovery has the burden to show discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." *Bible v. Rio Props., Inc.*, 246 F. R. D. 614 (C.D. Cal. 2007) (*citing Blankenship v. Hearst Corp.*, 519 F. 2d 418, 429 (9th Cir. 1975) and *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 655-56 (C.D. Cal. 2005)). There is no merit to "general or boilerplate objections such as 'overly

broad' [or] 'vague and ambiguous.'" *Bible*, 246 F. R. D. at 619; *A. Farber & Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal. 2006).

Plaintiff PEER has not met its burden of demonstrating that discovery of the information sought in this Request should not be allowed, because it has not supported or explained its objections on the basis of the requests being vague, ambiguous, or overbroad. Defendants have requested communications identifying those individuals who obtained or collected samples in the "Independent Tests" referred to in Plaintiffs' very own FAC. Plaintiff need only look for communications and documents that identify samplers or others in the chain of custody for these tests. Without further explanation, Plaintiff's objection is without merit, and Plaintiff should produce documents in response to this Request.

iii. Attorney-Client, Attorney Work Product, and Common-Interest Communication Privileges Are Not Valid Objections to RFP No. 8.

(a) Attorney-Client Privilege.

"The attorney-client privilege protects confidential communications between attorneys and clients, which are made for the purpose of giving legal advice." *United States v. Richey*, 632 F. 3d 559, 566 (9th Cir. 2011). The party asserting this privilege bears the burden of showing that there is an attorney-client relationship and the privileged nature of the communication. *Id.*; *United States v. Bauer*, 132 F. 3d 504, 507 (9th Cir. 1997). There is an attorney-client privilege where: "(1) [ ] legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) unless the protection be waved." *Id.* (quoting *United States v. Graf*, 610 F. 3d 1148, 1156 (9th Cir. 2010)). The privilege is waived when privileged communications are disclosed. *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). While

the privilege may extend to those communications with third parties assisting the attorney in legal advice, it does not extend where the advice sought is not legal advice. *Id.*

Communications regarding Plaintiffs' "Independent Tests" are not protected by the attorney-client privilege to the extent that they include communications regarding the data, methodology, or chain of custody of these tests and correspondences including information from the environmental testing entities engaged in the testing process. Defendants' request is not asking for communications between Plaintiffs and their counsel. Plaintiffs have failed to indicate in their responses which communications they believe to be protected by the attorney-client privilege. *Richey*, 632 F. 3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(b) Attorney Work Product.

The work product doctrine prohibits discovery of documents and other materials "prepared by a party or his representative in anticipation of litigation." *United States v. Richey* 632 F. 3d 559, 567 (9th Cir. 2011) (*quoting Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F. 2d 1486, 1494 (9th Cir. 1989)); Fed. R. Civ. P. 26(b)(3). The work product doctrine is a qualified immunity rather than a privilege, and a showing of good cause for the information desired is sufficient to overcome the qualified immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D. Cal. 2006); *Admiral Ins. Co. v. United States Dist. Court*, 881 F. 2d 1486, 1494 (9th Cir. 1989). "The party claiming work product immunity has the burden of proving the applicability of the doctrine." *A. Farbers & Ptnrs., Inc.*, 234 F.R.D. at 192.

Plaintiffs cannot claim work product immunity because they have made no showing that this protection applies to any of the information or documents sought in Defendants' Requests. For example, Plaintiffs have not demonstrated how

correspondences between the Plaintiffs regarding the "Independent Tests" referred to in the FAC bears any relation to Plaintiffs' efforts in preparation for trial. Furthermore, Defendants have good cause to request the information sought, because the data from the "Independent Tests" will surely be used against Defendants in this litigation, and Defendants must be afforded the opportunity to confront the validity and reliability of the data. This necessarily entails a complete knowledge of the chain of custody, which can only be discovered through documents identifying those involved in the testing process. Plaintiffs have not met the burden of demonstrating the applicability of the work product doctrine, so their objection on this basis is not appropriate. Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(c) Common Interest Doctrine.

In general, the attorney-client privilege is waived when communications between an attorney and client are disclosed to a third party. *Weil v. Inv/ Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). There is a rare exception to this waiver rule where individuals with a common interest in a legal matter may "communicate among themselves and with the separate attorneys on matters of common legal interest, for the purpose of preparing a joint strategy, and the attorney-client privilege will protect these communications to the same extent as it would communications between each client and his own attorney." *Nidec Corp. v. Victor Co.*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) (*quoting* 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:35, at 192 (1999 ed.); *United States v. Gonzales*, 669 F. 3d 974, 978 (9th Cir. 2012). This common interest doctrine is not a privilege, but an exception to the rule on waiver where communications are disclosed to third parties. *See Griffith v. Davis*, 161 F.R.D. at 692. For this reason, the common interest doctrine comes into play only if the

communication at issue is privileged in the first place. *Nidec Corp*, 249 F.R.D. at 578.

As the common interest doctrine applies only to those materials protected by the attorney-client privilege with regard to America Unites and PEER, the parties with a common legal interest in this case, not all communications between America Unites and PEER are protected. Defendants request that Plaintiff produce documents in response to this request to the extent that Plaintiff possesses responsive materials that are not protected as either Plaintiffs' attorney-client communications.

iv. First Amendment Privilege Is Not a Valid Objection.

Plaintiff objects to this Request on the ground that it violates the First Amendment rights of association of Plaintiff and its members. A party objecting on the basis of a First Amendment privilege must satisfy a two-part test. The objecting party must first make a "prima facie showing of arguable first amendment infringement." *Perry v. Schwarzenegger*, 591 F. 3d 1126, 1140 (9th Cir. 2010) (*quoting Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F. 2d 346, 349-50 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is enforced, there will be "(1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Brock*, 860 F. 2d at 350.

Here, Plaintiff has made no such showing that disclosure of the communications requested would lead to "harassment, membership withdrawal, or discouragement of new members," or that it would result in other consequences that could "chill" members' associational rights. The Request for communications regarding the "Independent Tests" calls for communications regarding the chain of custody documents and documents prepared for Plaintiffs by environmental testing companies. The Request propounded by Defendants is not seeking personal

information, does nothing to harass members of Plaintiff organizations, and would not have a deterrent effect on membership. Moreover, the materials requested by Defendants are necessary so that Defendants can defend themselves in this litigation, and fairness justifies their production. Defendants will not be afforded a fair discovery if they are precluded from accessing information regarding the independent testing data acquired by Plaintiffs, which will surely be used against Defendants in trial.

Additionally, there would be no "chilling" effect if Plaintiffs responded to Defendants' requests for this information, because PEER is publicly vocal about its activities and its membership, listing members of its Board and DC Staff on its website. *See* Decl. Plant, Ex. N,O. In particular, Plaintiff frequently publicizes its activities with regard to the subject matter of this very case on its website. The information sought in the above Request relates **only** to those individuals who obtained or collected data for the "Independent Tests" that form the basis for this lawsuit, and to communications regarding PCBs, the subject matter of this lawsuit.

The documents and information requested are necessary and relevant to Defendants' preparation for trial, and the names and email addresses of those members who would like their membership in PEER to remain private could be redacted so as to balance any associational issues with the Court's strong interest in ensuring Defendants' ability to fairly defend their case. Plaintiffs' entire case is premised on data from the "Independent Tests" referenced in Plaintiffs' FAC, and it is imperative that Defendants are granted full access to information and communications regarding these tests and their chains of custody.

d. PEER'S CONTENTIONS REGARDING RFP NO. 8.

Relevance

Information regarding the "First Set of Independent Tests" is not relevant to the matters at issue in this lawsuit because Defendants have verified through their

own testing that two out of the three rooms in the "First Set of Independent Tests" were in violation of TSCA, the matter which Plaintiffs are seeking to prove in this lawsuit. Although Defendants argue that Plaintiffs relied on this independent testing in their Amended Complaint, in fact Plaintiffs' Amended Complaint included information about the independent testing primarily for informational purposes and to describe the chronology of events at the Malibu School. Plaintiffs also recited that Defendants had verified the independent test results and found TSCA violations in every single one of 24 verification samples they took in ten rooms, FAC ¶¶ 127-129, confirming the appropriateness of the methodology and accuracy of the analysis of the independent testing generally, and making it unnecessary to rely on the independent testing to prove Plaintiffs' case at the least with regard to the verified rooms and the buildings in which they are located. From the First Set of Independent Tests, Plaintiffs would possibly introduce evidence only with regard to the test results regarding MHS Room 722, a physical education faculty office in which Defendants did not conduct verification testing or remediation.

Defendants also claim that Plaintiffs relied on the independent testing in their Preliminary Injunction motion. However, that Motion only addressed the ten rooms in which the District had verified TSCA violations, and did not rely at all on the independent testing. Dkt. 14 at p. 18.

With regard to Room 722, Plaintiffs have produced the laboratory reports, and a "key" supplying additional information on the location of samples. Defendants have supplied no valid reason that they need more than this, or how the request for communications between PEER and America Unites about the First Set of Independent Tests is reasonably calculated to lead to the discovery of admissible evidence. Defendants' claim that they need more information on the exact location of the sampling to prepare their defense of mootness because that area had been

remediated is not applicable here because Defendants have not claimed to have remediated this room.

As for using these communications to attempt to identify the samplers, this is an effort to harass those individuals, as explained above and below. If Defendants wish to challenge the reliability of the independent tests for the one room in the First Set of Independent Tests which it did not verify with its own testing, it may rely on the chain of custody and other information in the laboratory report and on the information it receives from its subpoenas to the laboratories. Since the issue in the case is not actually whether the independent tests are accurate, but whether or not there are TSCA violations in the room, Defendants could determine this fact, as they did with regard to the other independent tests, by analyzing their own verification samples. Thus, any information which could lead to admissible evidence about whether or not there are TSCA violations in this room can be obtained without revealing the persons who took the independent samples and subjecting them to possible harassment and attempts at criminal prosecution.

Vagueness, Ambiguity, and Overbreadth

This request is vague, ambiguous and overbroad because it pertains to all communications "by and between" PEER and America Unites regarding the First Set of Independent Tests. There is no limitation as to subject matter of communications other than the topic of the independent tests, or of who is involved in the communications. In addition, it is not clear what is meant by "by and between PEER and America Unites," i.e. whether the requests encompass all communications by either PEER or America Unites to anyone about these tests. Defendants claim that "Plaintiff need only look for communications and documents that identify samplers or others in the chain of custody for those tests." However, by its terms, the request is far broader, vaguer and more ambiguous than that.

Attorney-Client, Attorney Work Product and Common Interest Communication Privileges

Defendants state that they are not asking for communications between Plaintiffs and their counsel. However, all communications between America Unites and PEER regarding the independent tests would involve PEER counsel, as no one else at PEER communicated with America Unites about these matters. PEER and America Unites are jointly pursuing this case, and therefore communications with either PEER or America Unites counsel (America Unites counsel is also PEER counsel) would be privileged pursuant to the attorney-client privilege and common interest doctrine. Therefore, all the communications sought in this request would be privileged.

If this request is seeking communications by PEER to anyone regarding the First Set of Independent Tests, PEER considers that all persons who contact PEER are seeking legal advice or assistance, and therefore their communications are attorney-client privileged. (See PEER webpage, Ex. 1 to Dinerstein Declaration.) PEER has already provided all non-privileged communications responsive to this request in its possession in its discovery production – i.e. communications with the general public, the media, and government officials.

First Amendment Privilege

PEER is a whistleblower organization which promises confidentiality to all those who contact it concerning environmental issues and government wrongdoing. Confidentiality is promised with regard to the content of the communication and not only the identity of the person. (See PEER webpage, Ex. 1 to Dinerstein Declaration.) This promise of confidentiality applies to all of those who have contacted PEER about the PCBs in the Malibu Schools, whether or not they are associated with America Unites. If PEER were to disclose communications with

those persons in discovery, it would greatly inhibit PEER's ability to function as an organization where people may raise issues in confidence.[7]

In a case involving another whistleblower organization, the Government Accountability Project (GAP), in which a subpoena seeking information about its informants was quashed, the court stated:

> "if the government is successful in compelling [the organization's lawyer] to reveal the information given to her, especially the identity of those she represents, GAP will lose the confidence of some of its whistleblower informants and its efforts to gather and present safety allegations will suffer. This is the harm that GAP claims, and it is cognizable under the right to association."

United States v. Garde, 673 F. Supp. 604, 607 (D.D.C. 1987).

The same would hold for PEER, which has thus made a "prima facie showing of arguable first amendment infringement." *Perry v. Schwarzenegger*, 591 F.3d 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of communications between members of the public and PEER is likely to result in discouraging such communications because PEER is unable to protect their confidentiality, thereby severely hampering PEER's organizational mission. It could also result in

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[7] Defendants claim that PEER is "publicly vocal about its activities and its membership, listing members of its Board and DC Staff on its website." Although PEER may be publicly vocal about its activities, and does list the members of its Board and staff on its website, revealing the identity of PEER's employees and Board is an entirely different matter from revealing the identities of or the content of communications with those who contact PEER in confidence. PEER does not reveal its membership list to anyone. While certain members may choose to reveal their membership in PEER or their communications with PEER, PEER has promised them confidentiality and would never reveal their identities or the contents of their communications without their permission. No such permission has been given here.

harassment of individuals who are parties to these communications. Defendants have already filed a false criminal complaint against the President of America Unites, Ms. DeNicola, and her husband, seeking to subject them to felony charges punishable by fines and imprisonment, for allegedly taking caulk samples. It is difficult to imagine a more "chilling" action against those who advocate for PCB testing and remediation at the Malibu Schools.

It is more than understandable that persons who communicate with PEER on this subject would not want their communications disclosed. In fact, given the marginal, if any, relevance to this litigation of the communications sought here, one cannot help but suspect that this discovery is being sought for the purpose of harassing people who have communicated with PEER about PCBs at the Malibu Schools. It should also be noted that teachers and other staff who are employees of Defendants, on whose behalf PEER advocates, are even more vulnerable to harassment and retaliation than parents at the school such as Mr. and Ms. DeNicola, since they depend on the Defendants for their employment and all of the conditions of that employment.

Defendants suggest that "names and email addresses of those members who would like their membership in PEER to remain private could be redacted …". However, while persons who communicate with PEER certainly have First Amendment protection against revealing the fact of their membership and their personal contact information, *NAACP v. State of Alabama*, 357 U.S. 449 (1958), the First Amendment also protects the confidentiality of the fact that they have communicated with PEER, whether or not they are members of PEER, and protects the content of their communications. The Ninth Circuit in Perry ordered protection of communications, not the identities of members, emphasizing that:

> "The First Amendment privilege, however, has never been limited to the disclosure of identities of rank-and-file members. … The existence of a prima facie case turns not on the type of information sought, but

> on whether disclosure of the information will have a deterrent effect on the exercise of protected activities."

591 F.3d at 1162 (citations omitted).

In addition, given the relatively small size of the community at the Malibu Schools, it is likely that the identity of those communicating could be deduced from the content of the communication even if names are redacted.

Once a prima facie case of First Amendment infringement is made, "the evidentiary burden will then shift to the government . . . [to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest . . . [and] the 'least restrictive means' of obtaining the desired information." *Perry*, 591 F.3d at 1161 (quoting *Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)).

> "Importantly, the party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation -- a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1). The request must also be carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable." *Perry*, 591 F.3d at 1161.

Here, Defendants cannot even show that this discovery meets the relevance requirements of Rule 26, much less the more demanding standard of relevance when First Amendment interests are implicated. Moreover, there are other means of acquiring the desired information – whether or not there are TSCA violations in the locations of the First Set of Independent Tests – namely, by examining the laboratory reports and the information provided in accordance with Defendants' subpoenas to the laboratories, or by conducting verification testing, without

requiring PEER to disclose its communications with its members, supporters and others who have contacted PEER concerning PCBs at the Malibu Schools.

Again, PEER has already provided all non-privileged communications responsive to this request in its possession in its discovery production – i.e. communications with the general public, the media, and government officials.

3. REQUEST FOR PRODUCTION NO. 21.

a. REQUEST FOR PRODUCTION NO. 21.

All DOCUMENTS that IDENTIFY the PERSON or PERSONS who obtained or collected the "Second Set of Independent Tests," referred to at paragraph 103 of The FAC.

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 21.

Plaintiff objects to this Request on the ground that it seeks information that is not relevant to the parties' claims or defenses or the subject matter of the instant action. Plaintiff further objects to this Request on the ground that it is vague and ambiguous and overbroad. Plaintiff further objects to this Request to the extent that it seeks privileged attorney-client communications, work product, common-interest communications or other privileged information. Plaintiff further objects to this Request on the ground that it violates the First Amendment rights of association of Plaintiff and its members and supporters.

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 21.

i. Relevancy Is Not a Valid Objection to RFP No. 21.

Prior to initiation of this suit, Plaintiffs served Defendants with two Notices of Intent to File Suit under TSCA ("Notices"), the first dated August 19, 2014, and the second dated January 12, 2015. Decl. Plant, Exs. D, ¶ 32; H-I. Such Notices were sent because, under TSCA's citizen suit provision, a citizen plaintiff must give the alleged violator and EPA specific notice of the alleged violations of TSCA. 15 U.S.C.S. § 2619(b)(1). TSCA's 60-day notice period is mandatory to the

establishment of jurisdiction and cannot be waived. *Id*. Both of these Notices relied upon independent sampling conducted by AU and PEER. *See* Decl. Plant, Ex. H; Ex. I.

Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying on such testing. References to "Independent Tests" and independent testing are specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl. Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-26, 128, 132.

Further, on April 1, 2015, Plaintiffs filed a motion for a preliminary injunction, again relying on the results of such independent testing, for its request that Defendants be enjoined from using such rooms where the testing was conducted.

Now, in response to discovery requests for information regarding this sampling, including the identities of persons who conducted such independent testing, Plaintiffs have taken the specious position that the identities of the individuals who conducted the testing are not relevant. Relevancy is not a valid objection to this Interrogatory. Under Rule 26(b)(1), parties may obtain discovery regarding:

> [A]ny nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within the scope of discovery does not need to be admissible in evidence. Fed. R. Civ. P. 26(b)(1).

The identities of those individuals who have taken samples at the Malibu Schools is of great importance, is clearly relevant to Plaintiffs' claims, and is further

relevant to Defendants' defenses. One of Defendants' defenses is that those areas from which samples were taken have been remediated, and accordingly, Plaintiffs' TSCA claim is moot. Defendants are entitled to take discovery, including depositions, of the individuals involved in Plaintiffs' independent testing to confirm the specific locations from which the samples were obtained and prepare this defense. Further, Defendants are entitled to this information so that they can examine the chain of custody for the samples, and assess the reliability of the sampling data on which Plaintiffs' TSCA claim is founded. Plaintiffs cannot file an action based on this information and then shield it from discovery under the specious objection that it is not relevant.

Additionally, the issues at stake are significant, because Plaintiffs' claim is premised on the data it has collected through its own independent sampling, and Defendant could be held liable for millions of dollars of unnecessary remediation and renovation based on analysis of invalid or unreliable data. Furthermore, Plaintiffs are the sole source of this information and there is no burden on Plaintiffs in producing the requested information.

Finally, in addition to the independent testing which forms the basis of Plaintiffs' TSCA Notices and pleadings on file with this Court, Defendants know that additional sampling has been taken by AU or PEER or those acting in concert with Plaintiffs. Defendants have served subpoenas on every lab (known to it) which has processed Plaintiffs' samples. In responding to these subpoenas, these labs have produced to Defendants additional sampling data which has not been the basis of any judicial filing in this case. Defendants are entitled to the identities of these individuals so it can determine the locations and extent of these additional samples.

For all of the foregoing reasons, Plaintiffs should be required to identify those individuals who conducted sampling in connection to Plaintiffs' "Independent Tests."

ii. Vagueness, Ambiguity, and Overbreadth Are Not Valid Objections to RFP No. 21.

Plaintiff's objection that Requests for Production No. 21 is vague, ambiguous and overbroad is unfounded. "The party who resists discovery has the burden to show discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." *Bible v. Rio Props., Inc.*, 246 F. R. D. 614 (C.D. Cal. 2007) (*citing Blankenship v. Hearst Corp.*, 519 F. 2d 418, 429 (9th Cir. 1975) and *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 655-56 (C.D. Cal. 2005)). There is no merit to "general or boilerplate objections such as 'overly broad' [or] 'vague and ambiguous.'" *Bible*, 246 F. R. D. at 619; *A. Farber & Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal. 2006).

Plaintiff PEER has not met its burden of demonstrating that discovery of the information sought in this Request should not be allowed, because it has not supported or explained its objections on the basis of the requests being vague, ambiguous, or overbroad. Defendants have requested documents identifying those individuals who obtained or collected samples in the "Independent Tests" referred to in Plaintiffs' very own FAC. Plaintiff need only look for documents that identify samplers or others in the chain of custody for these tests. Without further explanation, Plaintiff's objection is without merit, and Plaintiff should produce documents in response to this Request.

iii. Attorney-Client, Attorney Work Product, and Common-Interest Communication Privileges Are Not Valid Objections to RFP No. 21.

(a) Attorney-Client Privilege.

"The attorney-client privilege protects confidential communications between attorneys and clients, which are made for the purpose of giving legal advice." *United States v. Richey*, 632 F. 3d 559, 566 (9th Cir. 2011). The party asserting this privilege bears the burden of showing that there is an attorney-client relationship

and the privileged nature of the communication. *Id.*; *United States v. Bauer*, 132 F. 3d 504, 507 (9th Cir. 1997). There is an attorney-client privilege where: "(1) [ ] legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) unless the protection be waved." *Id.* (quoting *United States v. Graf*, 610 F. 3d 1148, 1156 (9th Cir. 2010)). The privilege is waived when privileged communications are disclosed. *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). While the privilege may extend to those communications with third parties assisting the attorney in legal advice, it does not extend where the advice sought is not legal advice. *Id.*

Documents identifying those involved in Plaintiffs' "Independent Tests" are not protected by the attorney-client privilege to the extent that they include correspondences and records from the environmental testing entities engaged in the testing process. The entities involved in the testing process were not engaged in this process for the purpose of aiding Plaintiffs or their counsel in litigation; rather, the sole role of these entities was to provide testing services. Furthermore, Plaintiffs have failed to indicate in their responses which communications they believe to be protected by the attorney-client privilege. *Richey*, 632 F. 3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(b) Attorney Work Product.

The work product doctrine prohibits discovery of documents and other materials "prepared by a party or his representative in anticipation of litigation." *United States v. Richey* 632 F. 3d 559, 567 (9th Cir. 2011) (*quoting Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F. 2d 1486, 1494 (9th Cir. 1989)); Fed. R. Civ. P. 26(b)(3).

The work product doctrine is a qualified immunity rather than a privilege, and a showing of good cause for the information desired is sufficient to overcome the qualified immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D. Cal. 2006); *Admiral Ins. Co. v. United States Dist. Court*, 881 F. 2d 1486, 1494 (9th Cir. 1989). "The party claiming work product immunity has the burden of proving the applicability of the doctrine." *A. Farbers & Ptnrs., Inc.*, 234 F.R.D. at 192.

Plaintiffs cannot claim work product immunity because they have made no showing that this protection applies to any of the information or documents sought in Defendants' Requests. For example, Plaintiffs have not demonstrated how documents identifying those who obtained or collected samples in Plaintiffs' independent testing bears any relation to Plaintiffs' efforts in preparation for trial. Furthermore, Defendants have good cause to request information sought, because the data from the "Independent Tests" will surely be used against Defendants in this litigation, and Defendants must be afforded the opportunity to confront the validity and reliability of the data. This necessarily entails a complete knowledge of the chain of custody, which can only be discovered through documents identifying those involved in the testing process. Plaintiffs have not met the burden of demonstrating the applicability of the work product doctrine, so their objection on this basis is not appropriate. Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(c) Common Interest Doctrine.

In general, the attorney-client privilege is waived when communications between an attorney and client are disclosed to a third party. *Weil v. Inv/ Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). There is a rare exception to this waiver rule where individuals with a common interest in a legal matter may "communicate among themselves and with the separate attorneys on matters of

common legal interest, for the purpose of preparing a joint strategy, and the attorney-client privilege will protect these communications to the same extent as it would communications between each client and his own attorney." *Nidec Corp. v. Victor Co.*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) (*quoting* 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:35, at 192 (1999 ed.); *United States v. Gonzales*, 669 F. 3d 974, 978 (9th Cir. 2012). This common interest doctrine is not a privilege, but an exception to the rule on waiver where communications are disclosed to third parties. *See Griffith v. Davis*, 161 F.R.D. at 692. For this reason, the common interest doctrine comes into play only if the communication at issue is privileged in the first place. *Nidec Corp*, 249 F.R.D. at 578.

As the common interest doctrine applies only to those materials protected by the attorney-client privilege with regard to America Unites and PEER, the parties with a common legal interest in this case, not all communications between America Unites and PEER are protected. Defendants request that Plaintiff produce documents in response to this request to the extent that Plaintiff possesses responsive materials that are not protected as either Plaintiffs' attorney-client communications.

iv. First Amendment Privilege Is Not a Valid Objection.

Plaintiff objects to this Request on the ground that it violates the First Amendment rights of association of Plaintiff and its members. A party objecting on the basis of a First Amendment privilege must satisfy a two-part test. The objecting party must first make a "prima facie showing of arguable first amendment infringement." *Perry v. Schwarzenegger*, 591 F. 3d 1126, 1140 (9th Cir. 2010) (*quoting Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F. 2d 346, 349-50 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is enforced, there will be "(1) harassment, membership withdrawal, or discouragement

of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Brock*, 860 F. 2d at 350.

Here, Plaintiff has made no such showing that disclosure of the documents requested would lead to "harassment, membership withdrawal, or discouragement of new members," or that it would result in other consequences that could "chill" members' associational rights. The Request for documents identifying those who obtained or collected the "Independent Tests" calls for chain of custody documents and documents prepared for Plaintiffs by environmental testing companies. The Request propounded by Defendants is not seeking personal information, does nothing to harass members of Plaintiff organizations, and would not have a deterrent effect on membership. Moreover, the documents requested by Defendants are necessary so that Defendants can defend themselves in this litigation and fairness justifies their production. Defendants will not be afforded a fair discovery if they are precluded from accessing information regarding the independent testing data acquired by Plaintiffs, which will surely be used against Defendants in trial.

Additionally, there would be no "chilling" effect if Plaintiffs responded to Defendants' requests for this information, because PEER is publicly vocal about its activities and its membership, listing members of its Board and DC Staff on its website. *See* Decl. Plant, Ex. N,O. In particular, Plaintiff frequently publicizes its activities with regard to the subject matter of this very case on its website. The information sought in the above Request relates **only** to those individuals who obtained or collected data for the "Independent Tests" that form the basis for this lawsuit, and to communications regarding PCBs, the subject matter of this lawsuit.

The documents and information requested are necessary and relevant to Defendants' preparation for trial, and the names and email addresses of those members who would like their membership in PEER to remain private could be redacted so as to balance any associational issues with the Court's strong interest in

ensuring Defendants' ability to fairly defend their case. Plaintiffs' entire case is premised on data from the "Independent Tests" referenced in Plaintiffs' FAC, and it is imperative that Defendants are granted full access to information and communications regarding these tests and their chains of custody.

d. PEER'S CONTENTIONS REGARDING RFP NO. 21.

This request for production seeks documents identifying the individuals who obtained or collected the Second Set of Independent Tests. Defendants have not shown that the requested information is relevant. As discussed below, the information is not necessary for resolution of any of the issues in this case. Moreover, the burden of providing it outweighs any possible relevance.

Information regarding the "Second Set of Independent Tests" is not relevant to the matters at issue in this lawsuit because Defendants have verified through their own testing that three out of the four rooms in the "Second Set of Independent Tests" were in violation of TSCA, the matter which Plaintiffs are seeking to prove in this lawsuit. Although Defendants argue that Plaintiffs relied on this independent testing in their Amended Complaint, in fact Plaintiffs' Amended Complaint included information about the independent testing primarily for informational purposes and to describe the chronology of events at the Malibu School. Plaintiffs also recited that Defendants had verified the independent test results and found TSCA violations in every single one of 24 verification samples they took in ten rooms, FAC ¶¶ 127-129, confirming the appropriateness of the methodology and accuracy of the analysis of the independent testing generally, and making it unnecessary to rely on the independent testing to prove Plaintiffs' case at the least with regard to the verified rooms and the buildings in which they are located. There is no possible reason why Defendants would need to know the identities of the persons who took samples for tests on which Plaintiffs are not relying. From the Second Set of Independent Tests, Plaintiffs would possibly

introduce evidence only with regard to the test results regarding MHS Room 205, a French language classroom in which Defendants did not conduct verification testing or remediation.

Defendants also claim that Plaintiffs relied on the independent testing in their Preliminary Injunction motion. However, that Motion only addressed the ten rooms in which the District had verified TSCA violations, and did not rely at all on the independent testing. See, e.g., Plaintiffs' Memorandum of Points and Authorities in Support of their Motion for a Preliminary Injunction, Dkt. 14, at p. 2 ("Plaintiffs now move for a preliminary injunction requiring Defendants to immediately cease use of the other 10 rooms that Defendants' own testing has shown to have illegal levels of PCBs in caulk ….") (emphasis added).

Defendants also contend that they need "to confirm the specific locations from which the samples were obtained," so they can prepare their defenses that those areas from which the samples were taken have been remediated." This contention is equally without merit. Plaintiffs are not relying on the Independent Tests for any purpose with respect to any of the 10 rooms that Defendants claim to have remediated. Thus, there is nothing for Defendants to confirm.

Even with respect to the one room for which Plaintiffs continue to rely on the Second Set of Independent Tests, Defendants do not need to know the identities of the person who took the samples. With regard to Room 205, Plaintiffs have produced the laboratory reports, and a "key" supplying additional information on the location of samples. Although Defendants conclusorily contend they need the identity of the samplers to assess the reliability of the testing data, they do not explain why that is the case. Defendants' reports of its own testing do not state the name of the individuals who took the samples. The test data is a product of a lab analysis of the samples. There is nothing that the sampler can do to affect the reliability of the data derived from a sample.

In any case, there should be no question that the Independent Testing data is reliable. Defendants' own verification testing has proven the accuracy of the independent testing. Defendants do not state why the Independent Testing data from the three rooms not verified by Defendants should be any less reliable than the other 10 rooms where Defendants' verification testing has confirmed the accuracy of the independent data.

Moreover, the issue in the case is not actually whether the independent tests are accurate, but whether or not there are TSCA violations in the rooms in question. Defendants could determine this fact, by analyzing their own verification samples, as they did with regard to the other Independent Tests. Thus, information which could lead to admissible evidence about whether or not there are TSCA violations in this room can be obtained without revealing the persons who took the independent samples.

Defendants also assert that, in addition to the three sets of Independent Tests, they know from subpoenas served on laboratories that Plaintiffs have done additional sampling and testing "which has not been the basis of any judicial filing in this case." Defendants contend that the identities of the persons who took the samples so that they can "determine the locations and extent of these additional samples."

However, this document request only relates to the Second Set of Independent Tests and therefore the identity of the samplers for different tests would not be responsive. In addition, at this point Plaintiffs have not even attempted to use any such additional testing in the case. Moreover, Defendants do not explain why they need to know the "extent" of the sample. The "extent" of the sample is not relevant to determine a TSCA violation. Moreover, Defendants do not need to know the identities of the persons taking the samples to determine the "locations" of the samples. The location of the sampling is shown on the lab reports which

Defendants already have. The "exact" location of the sampling is irrelevant. Defendants' obligation to remediate is not limited to the exact square inch where a sample was taken.

Furthermore, the potential for harm to Plaintiffs or the samplers by disclosure of the requested information greatly outweighs any possible benefit of disclosure. Defendants have already filed a malicious criminal complaint for trespassing and vandalism against individuals who allegedly took samples. Although the District Attorney declined to file any charges, Plaintiffs are legitimately concerned that Defendants will use the requested information to initiate similar charges against the samplers or otherwise retaliate against them.

Forced disclosure of the identities of those who took samples would greatly inhibit Plaintiff's ability to fulfill their mission of advocating for remediation of environmental hazards. See, e.g., *United States v. Garde*, 673 F.Supp. 604, 607 (D.D.C. 1987)

> "if the government is successful in compelling [the organization's lawyer] to reveal the information given to her, especially the identity of those she represents, GAP will lose the confidence of some of its whistleblower informants and its efforts to gather and present safety allegations will suffer. This is the harm that GAP claims, and it is cognizable under the [First Amendment] right to association."

Plaintiff has made a "prima facie showing of arguable first amendment infringement." *Perry v. Schwazanegger*, 591 F.3d 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of the identities of the samplers would severely discourage Plaintiff's ability to gather evidence of environmental violations because Plaintiff would be unable to protect the samplers' confidentiality, thereby severely hampering Plaintiff's organizational mission. It could also result in harassment of

individuals who took the samples. Defendants have already filed a false criminal complaint against the President of America Unites, Ms. DeNicola, and her husband, seeking to subject them to felony charges punishable by fines and imprisonment, for allegedly taking caulk samples. It is difficult to imagine a more "chilling" action against those who advocate for PCB testing and remediation at the Malibu Schools. See Declarations of Paula Dinerstein and Jennifer DeNicola appended hereto.

Once a prima facie case of First Amendment infringement is made, "the evidentiary burden will then shift to the government…[to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest…[and] the 'least restrictive means' of obtaining the desired information." *Perry*, 591 F.3d at 1161 (quoting *Brock v. Local 375, Plumbers Int'l Union of Am.*, 960 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)).

> "Importantly, the party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation—a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1). The request must also be carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable."

Perry, 591 F.3d at 1161.

Here, Defendants cannot even show that this discovery meets the relevance requirements of Rule 26, much less the more demanding standard of relevance when First Amendment interests are implicated. As discussed above, there are other means of acquiring the desired information, namely, by examining the laboratory reports and the information provided in accordance with Defendants' subpoenas to the laboratories, or by conducting verification testing, without requiring Plaintiff to disclose its communications with its members, supporters and others who have

contacted Plaintiffs concerning PCBs at the Malibu Schools or other information which may reveal who took the samples.

4. REQUEST FOR PRODUCTION NO. 22.

a. REQUEST FOR PRODUCTION NO. 22.

All COMMUNICATIONS by and between PEER and AMERICA UNITES, regarding the "Second Set of Independent Tests," referred to at paragraph 103 of the FAC.

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 22.

Plaintiff objects to this Request on the ground that it seeks information that is not relevant to the parties' claims or defenses or the subject matter of the instant action. Plaintiff further objects to this Request on the ground that it is vague and ambiguous and overbroad. Plaintiff further objects to this Request to the extent that it seeks privileged attorney-client communications, work product, common-interest communications or other privileged information. Plaintiff further objects to this Request on the ground that it violates the First Amendment rights of association of Plaintiff and its members and supporters.

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 22.

i. Relevancy Is Not a Valid Objection to RFP No. 22.

Prior to initiation of this suit, Plaintiffs served Defendants with two Notices of Intent to File Suit under TSCA ("Notices"), the first dated August 19, 2014, and the second dated January 12, 2015. Decl. Plant, Exs. D, ¶ 32; H-I. Such Notices were sent because, under TSCA's citizen suit provision, a citizen plaintiff must give the alleged violator and EPA specific notice of the alleged violations of TSCA. 15 U.S.C.S. § 2619(b)(1). TSCA's 60-day notice period is mandatory to the establishment of jurisdiction and cannot be waived. *Id*. Both of these Notices relied upon independent sampling conducted by AU and PEER. *See* Decl. Plant, Ex. H; Ex. I.

Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying on such testing. References to "Independent Tests" and independent testing are specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl. Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-26, 128, 132.

Further, on April 1, 2015, Plaintiffs filed a motion for a preliminary injunction, again relying on the results of such independent testing, for its request that Defendants be enjoined from using such rooms where the testing was conducted.

Now, in response to discovery requests for information regarding this sampling, including the identities of persons who conducted such independent testing, Plaintiffs have taken the specious position that the identities of the individuals who conducted the testing are not relevant. Relevancy is not a valid objection to this Interrogatory. Under Rule 26(b)(1), parties may obtain discovery regarding:

> [A]ny nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within the scope of discovery does not need to be admissible in evidence. Fed. R. Civ. P. 26(b)(1).

The identities of those individuals who have taken samples at the Malibu Schools is of great importance, is clearly relevant to Plaintiffs' claims, and is further relevant to Defendants' defenses. One of Defendants' defenses is that those areas from which samples were taken have been remediated, and accordingly, Plaintiffs' TSCA claim is moot. Defendants are entitled to take discovery, including

depositions, of the individuals involved in Plaintiffs' independent testing to confirm the specific locations from which the samples were obtained and prepare this defense. Further, Defendants are entitled to this information so that they can examine the chain of custody for the samples, and assess the reliability of the sampling data on which Plaintiffs' TSCA claim is founded. Plaintiffs cannot file an action based on this information and then shield it from discovery under the specious objection that it is not relevant.

Additionally, the issues at stake are significant, because Plaintiffs' claim is premised on the data it has collected through its own independent sampling, and Defendant could be held liable for millions of dollars of unnecessary remediation and renovation based on analysis of invalid or unreliable data. Furthermore, Plaintiffs are the sole source of this information and there is no burden on Plaintiffs in producing the requested information.

Finally, non-privileged communications between Plaintiffs related to the "Independent Testing" are relevant and should be produced. Communications regarding the independent sampling will provide additional information regarding the location from which sampling was taken, will identity witnesses, and will provide additional information relevant to Defendants defenses in this matter. Further, Plaintiffs have provided no valid grounds on which these communications should withheld. Any communications which Plaintiffs deem to be privileged can be withheld or redacted as appropriate.

For all of the foregoing reasons, Plaintiffs should be required to identify those individuals who conducted sampling in connection to Plaintiffs' "Independent Tests."

ii. Vagueness, Ambiguity, and Overbreadth Are Not Valid Objections to RFP No. 22.

Plaintiff's objection that Requests for Production No. 22 is vague, ambiguous and overbroad is unfounded. "The party who resists discovery has the burden to show discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." *Bible v. Rio Props., Inc.*, 246 F. R. D. 614 (C.D. Cal. 2007) (*citing Blankenship v. Hearst Corp.*, 519 F. 2d 418, 429 (9th Cir. 1975) and *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 655-56 (C.D. Cal. 2005)). There is no merit to "general or boilerplate objections such as 'overly broad' [or] 'vague and ambiguous.'" *Bible*, 246 F. R. D. at 619; *A. Farber & Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal. 2006).

Plaintiff PEER has not met its burden of demonstrating that discovery of the information sought in this Request should not be allowed, because it has not supported or explained its objections on the basis of the requests being vague, ambiguous, or overbroad. Defendants have requested communications identifying those individuals who obtained or collected samples in the "Independent Tests" referred to in Plaintiffs' very own FAC. Plaintiff need only look for communications and documents that identify samplers or others in the chain of custody for these tests. Without further explanation, Plaintiff's objection is without merit, and Plaintiff should produce documents in response to this Request.

iii. Attorney-Client, Attorney Work Product, and Common-Interest Communication Privileges Are Not Valid Objections to RFP No. 22.

(a) Attorney-Client Privilege.

"The attorney-client privilege protects confidential communications between attorneys and clients, which are made for the purpose of giving legal advice." *United States v. Richey*, 632 F. 3d 559, 566 (9th Cir. 2011). The party asserting this privilege bears the burden of showing that there is an attorney-client relationship

and the privileged nature of the communication. *Id.*; *United States v. Bauer*, 132 F. 3d 504, 507 (9th Cir. 1997). There is an attorney-client privilege where: "(1) [ ] legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) unless the protection be waved." *Id.* (quoting *United States v. Graf*, 610 F. 3d 1148, 1156 (9th Cir. 2010)). The privilege is waived when privileged communications are disclosed. *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). While the privilege may extend to those communications with third parties assisting the attorney in legal advice, it does not extend where the advice sought is not legal advice. *Id.*

Communications regarding Plaintiffs' "Independent Tests" are not protected by the attorney-client privilege to the extent that they include communications regarding the data, methodology, or chain of custody of these tests and correspondences including information from the environmental testing entities engaged in the testing process. Defendants' request is not asking for communications between Plaintiffs and their counsel. Plaintiffs have failed to indicate in their responses which communications they believe to be protected by the attorney-client privilege. *Richey*, 632 F. 3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(b) Attorney Work Product.

The work product doctrine prohibits discovery of documents and other materials "prepared by a party or his representative in anticipation of litigation." *United States v. Richey* 632 F. 3d 559, 567 (9th Cir. 2011) (*quoting Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F. 2d 1486, 1494 (9th Cir. 1989)); Fed. R. Civ. P. 26(b)(3).

The work product doctrine is a qualified immunity rather than a privilege, and a showing of good cause for the information desired is sufficient to overcome the qualified immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D. Cal. 2006); *Admiral Ins. Co. v. United States Dist. Court*, 881 F. 2d 1486, 1494 (9th Cir. 1989). "The party claiming work product immunity has the burden of proving the applicability of the doctrine." *A. Farbers & Ptnrs., Inc.*, 234 F.R.D. at 192.

Plaintiffs cannot claim work product immunity because they have made no showing that this protection applies to any of the information or documents sought in Defendants' Requests. For example, Plaintiffs have not demonstrated how correspondences between the Plaintiffs regarding the "Independent Tests" referred to in the FAC bears any relation to Plaintiffs' efforts in preparation for trial. Furthermore, Defendants have good cause to request the information sought, because the data from the "Independent Tests" will surely be used against Defendants in this litigation, and Defendants must be afforded the opportunity to confront the validity and reliability of the data. This necessarily entails a complete knowledge of the chain of custody, which can only be discovered through documents identifying those involved in the testing process. Plaintiffs have not met the burden of demonstrating the applicability of the work product doctrine, so their objection on this basis is not appropriate. Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(c) Common Interest Doctrine.

In general, the attorney-client privilege is waived when communications between an attorney and client are disclosed to a third party. *Weil v. Inv/ Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). There is a rare exception to this waiver rule where individuals with a common interest in a legal matter may "communicate among themselves and with the separate attorneys on matters of

common legal interest, for the purpose of preparing a joint strategy, and the attorney-client privilege will protect these communications to the same extent as it would communications between each client and his own attorney." *Nidec Corp. v. Victor Co.*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) (*quoting* 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:35, at 192 (1999 ed.); *United States v. Gonzales*, 669 F. 3d 974, 978 (9th Cir. 2012). This common interest doctrine is not a privilege, but an exception to the rule on waiver where communications are disclosed to third parties. *See Griffith*, 161 F.R.D. at 692. For this reason, the common interest doctrine comes into play only if the communication at issue is privileged in the first place. *Nidec Corp*, 249 F.R.D. at 578.

As the common interest doctrine applies only to those materials protected by the attorney-client privilege with regard to America Unites and PEER, the parties with a common legal interest in this case, not all communications between America Unites and PEER are protected. Defendants request that Plaintiff produce documents in response to this request to the extent that Plaintiff possesses responsive materials that are not protected as either Plaintiffs' attorney-client communications.

iv. First Amendment Privilege Is Not a Valid Objection.

Plaintiff objects to this Request on the ground that it violates the First Amendment rights of association of Plaintiff and its members. A party objecting on the basis of a First Amendment privilege must satisfy a two-part test. The objecting party must first make a "prima facie showing of arguable first amendment infringement." *Perry v. Schwarzenegger*, 591 F. 3d 1126, 1140 (9th Cir. 2010) (*quoting Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F. 2d 346, 349-50 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is enforced, there will be "(1) harassment, membership withdrawal, or discouragement

of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Brock*, 860 F. 2d at 350.

Here, Plaintiff has made no such showing that disclosure of the communications requested would lead to "harassment, membership withdrawal, or discouragement of new members," or that it would result in other consequences that could "chill" members' associational rights. The Request for communications regarding the "Independent Tests" calls for communications regarding the chain of custody documents and documents prepared for Plaintiffs by environmental testing companies. The Request propounded by Defendants is not seeking personal information, does nothing to harass members of Plaintiff organizations, and would not have a deterrent effect on membership. Moreover, the materials requested by Defendants are necessary so that Defendants can defend themselves in this litigation, and fairness justifies their production. Defendants will not be afforded a fair discovery if they are precluded from accessing information regarding the independent testing data acquired by Plaintiffs, which will surely be used against Defendants in trial.

Additionally, there would be no "chilling" effect if Plaintiffs responded to Defendants' requests for this information, because PEER is publicly vocal about its activities and its membership, listing members of its Board and DC Staff on its website. *See* Decl. Plant, Exs. N,O. In particular, Plaintiff frequently publicizes its activities with regard to the subject matter of this very case on its website. The information sought in the above Request relates **only** to those individuals who obtained or collected data for the "Independent Tests" that form the basis for this lawsuit, and to communications regarding PCBs, the subject matter of this lawsuit.

The documents and information requested are necessary and relevant to Defendants' preparation for trial, and the names and email addresses of those members who would like their membership in PEER to remain private could be

redacted so as to balance any associational issues with the Court's strong interest in ensuring Defendants' ability to fairly defend their case. Plaintiffs' entire case is premised on data from the "Independent Tests" referenced in Plaintiffs' FAC, and it is imperative that Defendants are granted full access to information and communications regarding these tests and their chains of custody.

d. PEER'S CONTENTIONS REGARDING RFP NO. 22.

Relevance

Information regarding the "Second Set of Independent Tests" is not relevant to the matters at issue in this lawsuit because Defendants have verified through their own testing that three out of the four rooms in the "Second Set of Independent Tests" were in violation of TSCA, the matter which Plaintiffs are seeking to prove in this lawsuit. Although Defendants argue that Plaintiffs relied on this independent testing in their Amended Complaint, in fact Plaintiffs' Amended Complaint included information about the independent testing primarily for informational purposes and to describe the chronology of events at the Malibu School. Plaintiffs also recited that Defendants had verified the independent test results and found TSCA violations in every single one of 24 verification samples they took in ten rooms, FAC ¶¶ 127-129, confirming the appropriateness of the methodology and accuracy of the analysis of the independent testing generally, and making it unnecessary to rely on the independent testing to prove Plaintiffs' case at the least with regard to the verified rooms and the buildings in which they are located. From the Second Set of Independent Tests, Plaintiffs would possibly introduce evidence only with regard to the test results regarding MHS Room 205, a French language classroom in which Defendants did not conduct verification testing or remediation.

Defendants also claim that Plaintiffs relied on the independent testing in their Preliminary Injunction motion. However, that Motion only addressed the ten rooms

in which the District had verified TSCA violations, and did not rely at all on the independent testing. Dkt. 14 at p. 18.

With regard to Room 205, Plaintiffs have produced the laboratory reports, and a "key" supplying additional information on the location of samples. Defendants have supplied no valid reason that they need more than this, or how the request for communications between PEER and America Unites about the Second Set of Independent Tests is reasonably calculated to lead to the discovery of admissible evidence. Defendants' claim that they need more information on the exact location of the sampling to prepare their defense of mootness because that area had been remediated is not applicable here because Defendants have not claimed to have remediated this room.

As for using these communications to attempt to identify the samplers, this is an effort to harass those individuals, as explained above and below. If Defendants wish to challenge the reliability of the independent tests for the one room in the Second Set of Independent Tests which it did not verify with its own testing, it may rely on the chain of custody and other information in the laboratory report and on the information it receives from its subpoenas to the laboratories. Since the issue in the case is not actually whether the independent tests are accurate, but whether or not there are TSCA violations in the room, Defendants could determine this fact, as they did with regard to the other independent tests, by analyzing their own verification samples. Thus, any information which could lead to admissible evidence about whether or not there are TSCA violations in this room can be obtained without revealing the persons who took the independent samples and subjecting them to possible harassment and attempts at criminal prosecution.

Vagueness, Ambiguity, and Overbreadth

This request is vague, ambiguous and overbroad because it pertains to all communications "by and between" PEER and America Unites regarding the Second

Set of Independent Tests. There is no limitation as to subject matter of communications other than the topic of the independent tests, or of who is involved in the communications. In addition, it is not clear what is meant by "by and between PEER and America Unites," i.e. whether the requests encompass all communications by either PEER or America Unites to anyone about these tests. Defendants claim that "Plaintiff need only look for communications and documents that identify samplers or others in the chain of custody for those tests." However, by its terms, the request is far broader, vaguer and more ambiguous than that.

Attorney-Client, Attorney Work Product and Common Interest Communication Privileges

Defendants state that they are not asking for communications between Plaintiffs and their counsel. However, all communications between America Unites and PEER regarding the independent tests would involve PEER counsel, as no one else at PEER communicated with America Unites about these matters. PEER and America Unites are jointly pursuing this case, and therefore communications with either PEER or America Unites counsel (America Unites counsel is also PEER counsel) would be privileged pursuant to the attorney-client privilege and common interest doctrine. Therefore, all the communications sought in this request would be privileged.

If this request is seeking communications by PEER to anyone regarding the Second Set of Independent Tests, PEER considers that all persons who contact PEER are seeking legal advice or assistance, and therefore their communications are attorney-client privileged. (See PEER webpage, Ex. 1 to Dinerstein Declaration). PEER has already provided all non-privileged communications responsive to this request in its possession in its discovery production – i.e. communications with the general public, the media, and government officials.

First Amendment Privilege

PEER is a whistleblower organization which promises confidentiality to all those who contact it concerning environmental issues and government wrongdoing. Confidentiality is promised with regard to the content of the communication and not only the identity of the person. (See PEER webpage, Ex. 1 to Dinerstein Declaration). This promise of confidentiality applies to all of those who have contacted PEER about the PCBs in the Malibu Schools, whether or not they are associated with America Unites. If PEER were to disclose communications with those persons in discovery, it would greatly inhibit PEER's ability to function as an organization where people may raise issues in confidence.[8]

In a case involving another whistleblower organization, the Government Accountability Project (GAP), in which a subpoena seeking information about its informants was quashed, the court stated:

> "if the government is successful in compelling [the organization's lawyer] to reveal the information given to her, especially the identity of those she represents, GAP will lose the confidence of some of its whistleblower informants and its efforts to gather and present safety allegations will suffer. This is the harm that GAP claims, and it is cognizable under the right to association."

United States v. Garde, 673 F. Supp. 604, 607 (D.D.C. 1987).

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[8] Defendants claim that PEER is "publicly vocal about its activities and its membership, listing members of its Board and DC Staff on its website." Although PEER may be publicly vocal about its activities, and does list the members of its Board and staff on its website, revealing the identity of PEER's employees and Board is an entirely different matter from revealing the identities of or the content of communications with those who contact PEER in confidence. PEER does not reveal its membership list to anyone. While certain members may choose to reveal their membership in PEER or their communications with PEER, PEER has promised them confidentiality and would never reveal their identities or the contents of their communications without their permission. No such permission has been given here.

The same would hold for PEER, which has thus made a "prima facie showing of arguable first amendment infringement." *Perry v. Schwarzenegger*, 591 F.3d 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of communications between members of the public and PEER is likely to result in discouraging such communications because PEER is unable to protect their confidentiality, thereby severely hampering PEER's organizational mission. It could also result in harassment of individuals who are parties to these communications. Defendants have already filed a false criminal complaint against the President of America Unites, Ms. DeNicola, and her husband, seeking to subject them to felony charges punishable by fines and imprisonment, for allegedly taking caulk samples. It is difficult to imagine a more "chilling" action against those who advocate for PCB testing and remediation at the Malibu Schools.

It is more than understandable that persons who communicate with PEER on this subject would not want their communications disclosed. In fact, given the marginal, if any, relevance to this litigation of the communications sought here, one cannot help but suspect that this discovery is being sought for the purpose of harassing people who have communicated with PEER about PCBs at the Malibu Schools. It should also be noted that teachers and other staff who are employees of Defendants, on whose behalf PEER advocates, are even more vulnerable to harassment and retaliation than parents at the school such as Mr. and Ms. DeNicola, since they depend on the Defendants for their employment and all of the conditions of that employment.

Defendants suggest that "names and email addresses of those members who would like their membership in PEER to remain private could be redacted …". However, while persons who communicate with PEER certainly have First Amendment protection against revealing the fact of their membership in PEER and their personal contact information, NAACP v. State of Alabama, 357 U.S. 449

(1958), the First Amendment also protects the confidentiality of the fact that they have communicated with PEER, whether or not they are members, and the confidentiality of the content of their communications. The Ninth Circuit in Perry ordered protection for communications, not the identities of members, emphasizing that:

> "The First Amendment privilege, however, has never been limited to the disclosure of identities of rank-and-file members. … The existence of a prima facie case turns not on the type of information sought, but on whether disclosure of the information will have a deterrent effect on the exercise of protected activities."

591 F.3d at 1162 (citations omitted).

In addition, given the relatively small size of the community at the Malibu Schools, it is likely that the identity of those communicating could be deduced from the content of the communication even if names are redacted.

Once a prima facie case of First Amendment infringement is made, "the evidentiary burden will then shift to the government . . . [to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest . . . [and] the 'least restrictive means' of obtaining the desired information." *Perry*, 591 F.3d at 1161 (quoting *Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). "Importantly, the party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation -- a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1). The request must also be carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable." *Perry*, 591 F.3d at 1161.

Here, Defendants cannot even show that this discovery meets the relevance requirements of Rule 26, much less the more demanding standard of relevance when First Amendment interests are implicated. Moreover, there are other means of acquiring the desired information – whether or not there are TSCA violations in the locations of the Second Set of Independent Tests – namely, by examining the laboratory reports and the information provided in accordance with Defendants' subpoenas to the laboratories, or by doing verification testing, without requiring PEER to disclose its communications with its members, supporters and others who have contacted PEER concerning PCBs at the Malibu Schools.

Again, PEER has already provided all non-privileged communications responsive to this request in its possession in its discovery production – i.e. communications with the general public, the media, and government officials.

5. REQUEST FOR PRODUCTION NO. 24.

a. REQUEST FOR PRODUCTION NO. 24

All DOCUMENTS that IDENTIFY the PERSON or PERSONS who obtained or collected the piece of caulk referred to at paragraph 104 of the FAC.

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 24.

Plaintiff objects to this Request on the ground that it seeks information that is not relevant to the parties' claims or defenses or the subject matter of the instant action. Plaintiff further objects to this Request on the ground that it is vague and ambiguous and overbroad. Plaintiff further objects to this Request to the extent that it seeks privileged attorney-client communications, work product, common-interest communications or other privileged information. Plaintiff further objects to this Request on the ground that it violates the First Amendment rights of association of Plaintiff and its members and supporters.

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 24.

i. Relevancy Is Not a Valid Objection to RFP No. 24.

Prior to initiation of this suit, Plaintiffs served Defendants with two Notices of Intent to File Suit under TSCA ("Notices"), the first dated August 19, 2014, and the second dated January 12, 2015. Decl. Plant, Exs. D, ¶ 32; H-I. Such Notices were sent because, under TSCA's citizen suit provision, a citizen plaintiff must give the alleged violator and EPA specific notice of the alleged violations of TSCA. 15 U.S.C.S. § 2619(b)(1). TSCA's 60-day notice period is mandatory to the establishment of jurisdiction and cannot be waived. *Id*. Both of these Notices relied upon independent sampling conducted by AU and PEER. *See* Decl. Plant, Ex. H; Ex. I.

Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying on such testing. References to "Independent Tests" and independent testing are specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl. Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-26, 128, 132.

Further, on April 1, 2015, Plaintiffs filed a motion for a preliminary injunction, again relying on the results of such independent testing, for its request that Defendants be enjoined from using such rooms where the testing was conducted.

Now, in response to discovery requests for information regarding this sampling, including the identities of persons who conducted such independent testing, Plaintiffs have taken the specious position that the identities of the individuals who conducted the testing are not relevant. Relevancy is not a valid objection to this Interrogatory. Under Rule 26(b)(1), parties may obtain discovery regarding:

> [A]ny nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within the scope of discovery does not need to be admissible in evidence. Fed. R. Civ. P. 26(b)(1).

The identities of those individuals who have taken samples at the Malibu Schools is of great importance, is clearly relevant to Plaintiffs' claims, and is further relevant to Defendants' defenses. One of Defendants' defenses is that those areas from which samples were taken have been remediated, and accordingly, Plaintiffs' TSCA claim is moot. Defendants are entitled to take discovery, including depositions, of the individuals involved in Plaintiffs' independent testing to confirm the specific locations from which the samples were obtained and prepare this defense. Further, Defendants are entitled to this information so that they can examine the chain of custody for the samples, and assess the reliability of the sampling data on which Plaintiffs' TSCA claim is founded. Plaintiffs cannot file an action based on this information and then shield it from discovery under the specious objection that it is not relevant.

Additionally, the issues at stake are significant, because Plaintiffs' claim is premised on the data it has collected through its own independent sampling, and Defendant could be held liable for millions of dollars of unnecessary remediation and renovation based on analysis of invalid or unreliable data. Furthermore, Plaintiffs are the sole source of this information and there is no burden on Plaintiffs in producing the requested information.

Finally, in addition to the independent testing which forms the basis of Plaintiffs' TSCA Notices and pleadings on file with this Court, Defendants know that additional sampling has been taken by AU or PEER or those acting in concert

with Plaintiffs. Defendants have served subpoenas on every lab (known to it) which has processed Plaintiffs' samples. In responding to these subpoenas, these labs have produced to Defendants additional sampling data which has not been the basis of any judicial filing in this case. Defendants are entitled to the identities of these individuals so it can determine the locations and extent of these additional samples.

For all of the foregoing reasons, Plaintiffs should be required to identify those individuals who conducted sampling in connection to Plaintiffs' "Independent Tests."

ii. Vagueness, Ambiguity, and Overbreadth Are Not Valid Objections to RFP No. 24.

Plaintiff's objection that Requests for Production No. 24 is vague, ambiguous and overbroad is unfounded. "The party who resists discovery has the burden to show discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." *Bible v. Rio Props., Inc.*, 246 F. R. D. 614 (C.D. Cal. 2007) (*citing Blankenship v. Hearst Corp.*, 519 F. 2d 418, 429 (9th Cir. 1975) and *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 655-56 (C.D. Cal. 2005)). There is no merit to "general or boilerplate objections such as 'overly broad' [or] 'vague and ambiguous.'" *Bible*, 246 F. R. D. at 619; *A. Farber & Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal. 2006).

Plaintiff PEER has not met its burden of demonstrating that discovery of the information sought in this Request should not be allowed, because it has not supported or explained its objections on the basis of the requests being vague, ambiguous, or overbroad. Defendants have requested documents identifying those individuals who obtained or collected samples in the "Independent Tests" referred to in Plaintiffs' very own FAC. Plaintiff need only look for documents that identify samplers or others in the chain of custody for these tests. Without further

explanation, Plaintiff's objection is without merit, and Plaintiff should produce documents in response to this Request.

iii. Attorney-Client, Attorney Work Product, and Common-Interest Communication Privileges Are Not Valid Objections to RFP No. 24.

(a) Attorney-Client Privilege.

"The attorney-client privilege protects confidential communications between attorneys and clients, which are made for the purpose of giving legal advice." *United States v. Richey*, 632 F. 3d 559, 566 (9th Cir. 2011). The party asserting this privilege bears the burden of showing that there is an attorney-client relationship and the privileged nature of the communication. *Id.*; *United States v. Bauer*, 132 F. 3d 504, 507 (9th Cir. 1997). There is an attorney-client privilege where: "(1) [ ] legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) unless the protection be waved." *Id.* (quoting *United States v. Graf*, 610 F. 3d 1148, 1156 (9th Cir. 2010)). The privilege is waived when privileged communications are disclosed. *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). While the privilege may extend to those communications with third parties assisting the attorney in legal advice, it does not extend where the advice sought is not legal advice. *Id.*

Documents identifying those involved in Plaintiffs' "Independent Tests" are not protected by the attorney-client privilege to the extent that they include correspondences and records from the environmental testing entities engaged in the testing process. The entities involved in the testing process were not engaged in this process for the purpose of aiding Plaintiffs or their counsel in litigation; rather, the sole role of these entities was to provide testing services. Furthermore, Plaintiffs

have failed to indicate in their responses which communications they believe to be protected by the attorney-client privilege. *Richey*, 632 F. 3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(b) Attorney Work Product.

The work product doctrine prohibits discovery of documents and other materials "prepared by a party or his representative in anticipation of litigation." *United States v. Richey* 632 F. 3d 559, 567 (9th Cir. 2011) (*quoting Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F. 2d 1486, 1494 (9th Cir. 1989)); Fed. R. Civ. P. 26(b)(3). The work product doctrine is a qualified immunity rather than a privilege, and a showing of good cause for the information desired is sufficient to overcome the qualified immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D. Cal. 2006); *Admiral Ins. Co. v. United States Dist. Court.*, 881 F. 2d 1486, 1494 (9th Cir. 1989). "The party claiming work product immunity has the burden of proving the applicability of the doctrine." *A. Farbers & Ptnrs., Inc.*, 234 F.R.D. at 192.

Plaintiffs cannot claim work product immunity because they have made no showing that this protection applies to any of the information or documents sought in Defendants' Requests. For example, Plaintiffs have not demonstrated how documents identifying those who obtained or collected samples in Plaintiffs' independent testing bears any relation to Plaintiffs' efforts in preparation for trial. Furthermore, Defendants have good cause to request information sought, because the data from the "Independent Tests" will surely be used against Defendants in this litigation, and Defendants must be afforded the opportunity to confront the validity and reliability of the data. This necessarily entails a complete knowledge of the chain of custody, which can only be discovered through documents identifying those involved in the testing process. Plaintiffs have not met the burden of

demonstrating the applicability of the work product doctrine, so their objection on this basis is not appropriate. Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(c) Common Interest Doctrine.

In general, the attorney-client privilege is waived when communications between an attorney and client are disclosed to a third party. *Weil v. Inv/ Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). There is a rare exception to this waiver rule where individuals with a common interest in a legal matter may "communicate among themselves and with the separate attorneys on matters of common legal interest, for the purpose of preparing a joint strategy, and the attorney-client privilege will protect these communications to the same extent as it would communications between each client and his own attorney." *Nidec Corp. v. Victor Co.*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) (*quoting* 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:35, at 192 (1999 ed.); *United States v. Gonzales*, 669 F. 3d 974, 978 (9th Cir. 2012). This common interest doctrine is not a privilege, but an exception to the rule on waiver where communications are disclosed to third parties. *See Griffith*, 161 F.R.D. at 692. For this reason, the common interest doctrine comes into play only if the communication at issue is privileged in the first place. *Nidec Corp*, 249 F.R.D. at 578.

As the common interest doctrine applies only to those materials protected by the attorney-client privilege with regard to America Unites and PEER, the parties with a common legal interest in this case, not all communications between America Unites and PEER are protected. Defendants request that Plaintiff produce documents in response to this request to the extent that Plaintiff possesses

responsive materials that are not protected as either Plaintiffs' attorney-client communications.

iv. First Amendment Privilege Is Not a Valid Objection.

Plaintiff objects to this Request on the ground that it violates the First Amendment rights of association of Plaintiff and its members. A party objecting on the basis of a First Amendment privilege must satisfy a two-part test. The objecting party must first make a "prima facie showing of arguable first amendment infringement." *Perry v. Schwarzenegger*, 591 F. 3d 1126, 1140 (9th Cir. 2010) (*quoting Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F. 2d 346, 349-50 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is enforced, there will be "(1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Brock*, 860 F. 2d at 350.

Here, Plaintiff has made no such showing that disclosure of the documents requested would lead to "harassment, membership withdrawal, or discouragement of new members," or that it would result in other consequences that could "chill" members' associational rights. The Request for documents identifying those who obtained or collected the "Independent Tests" calls for chain of custody documents and documents prepared for Plaintiffs by environmental testing companies. The Request propounded by Defendants is not seeking personal information, does nothing to harass members of Plaintiff organizations, and would not have a deterrent effect on membership. Moreover, the documents requested by Defendants are necessary so that Defendants can defend themselves in this litigation and fairness justifies their production. Defendants will not be afforded a fair discovery if they are precluded from accessing information regarding the independent testing data acquired by Plaintiffs, which will surely be used against Defendants in trial.

Additionally, there would be no "chilling" effect if Plaintiffs responded to Defendants' requests for this information, because PEER is publicly vocal about its activities and its membership, listing members of its Board and DC Staff on its website. *See* Decl. Plant, Exs. N,O. In particular, Plaintiff frequently publicizes its activities with regard to the subject matter of this very case on its website. The information sought in the above Request relates **only** to those individuals who obtained or collected data for the "Independent Tests" that form the basis for this lawsuit, and to communications regarding PCBs, the subject matter of this lawsuit.

The documents and information requested are necessary and relevant to Defendants' preparation for trial, and the names and email addresses of those members who would like their membership in PEER to remain private could be redacted so as to balance any associational issues with the Court's strong interest in ensuring Defendants' ability to fairly defend their case. Plaintiffs' entire case is premised on data from the "Independent Tests" referenced in Plaintiffs' FAC, and it is imperative that Defendants are granted full access to information and communications regarding these tests and their chains of custody.

d. PEER'S CONTENTIONS REGARDING RFP NO. 24.

This request for production seeks documents that identify the individuals who obtained or collected the piece of caulk referred to in paragraph 104 of the FAC. Defendants have not shown that the requested information is relevant. As discussed below, the information is not necessary for resolution of any of the issues in this case. Moreover, the burden of providing it outweighs any possible relevance.

Defendants contend that the identities of the individuals who obtained or collected the piece of caulk which fell out of a trash bag on the MHS campus is relevant because Plaintiffs are purportedly relying on the "Independent Tests" of caulk samples in 13 rooms that Plaintiff AU conducted prior to the filing of this action. However, the piece of caulk in question was not tied to any particular room

and Plaintiffs are not relying on the testing of it. There is no possible reason why Defendants would need to know the identities of the persons who took samples for tests on which Plaintiffs are not relying.

Furthermore, the potential for harm to Plaintiffs or the samplers by disclosure of the requested information greatly outweighs any possible benefit of disclosure. As discussed above, Defendants have already filed a malicious criminal complaint for trespassing and vandalism against individuals who allegedly took samples. Although the District Attorney declined to file any charges, Plaintiffs are legitimately concerned that Defendants will use the requested information to initiate similar charges against the samplers or otherwise retaliate against them.

Forced disclosure of the identities of those who took samples would greatly inhibit Plaintiffs' ability to fulfill their mission of advocating for remediation of environmental hazards. See, e.g., *United States v. Garde*, 673 F.Supp. 604, 607 (D.D.C. 1987). Plaintiffs have made a "prima facie showing of arguable first amendment infringement." *Perry v. Schwazanegger*, 591 F.3d 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of the identities of the samplers would severely discourage Plaintiffs' ability to gather evidence of environmental violations because Plaintiffs would be unable to protect the samplers' confidentiality, and thus lose the confidence of their informants, thereby severely hampering Plaintiffs' organizational missions. It could also result in harassment of individuals who took the samples. Defendants have already filed a false criminal complaint against the President of America Unites, Ms. DeNicola, and her husband, seeking to subject them to felony charges punishable by fines and imprisonment, for allegedly taking caulk samples. It is difficult to imagine a more "chilling" action against those who advocate for PCB testing and remediation at the Malibu Schools.

Once a prima facie case of First Amendment infringement is made, "the

evidentiary burden will then shift to the government…[to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest…[and] the 'least restrictive means' of obtaining the desired information." *Perry*, 591 F.3d at 1161 (quoting *Brock v. Local 375, Plumbers Int'l Union of Am.*, 960 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)).

Here, Defendants cannot even show that this discovery meets the relevance requirements of Rule 26, much less the more demanding standard of relevance when First Amendment interests are implicated. As discussed above, there are other means of acquiring the desired information, namely, by examining the laboratory reports and the information provided in accordance with Defendants' subpoenas to the laboratories, or by conducting verification testing, without requiring Plaintiff to disclose the information about the identity of the samplers.

Finally, documents concerning the identities of samplers which constitute attorney-client communications or attorney work product are privileged. To the extent that any such documents are relevant, Plaintiffs will list them on a privilege log.

6. REQUEST FOR PRODUCTION NO. 26.

a. REQUEST FOR PRODUCTION NO. 26.

All DOCUMENTS that IDENTIFY the PERSON or PERSONS who obtained or collected the "Third Set of Independent Tests," referred to at paragraph 109 of the FAC.

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 26.

Plaintiff objects to this Request on the ground that it seeks information that is not relevant to the parties' claims or defenses or the subject matter of the instant action. Plaintiff further objects to this Request on the ground that it is vague and ambiguous and overbroad. Plaintiff further objects to this Request to the extent that

it seeks privileged attorney-client communications, work product, common-interest communications or other privileged information. Plaintiff further objects to this Request on the ground that it violates the First Amendment rights of association of Plaintiff and its members and supporters.

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 26.

i. Relevancy Is Not a Valid Objection to RFP No. 26.

Prior to initiation of this suit, Plaintiffs served Defendants with two Notices of Intent to File Suit under TSCA ("Notices"), the first dated August 19, 2014, and the second dated January 12, 2015. Decl. Plant, Exs. D, ¶ 32; H-I. Such Notices were sent because, under TSCA's citizen suit provision, a citizen plaintiff must give the alleged violator and EPA specific notice of the alleged violations of TSCA. 15 U.S.C.S. § 2619(b)(1). TSCA's 60-day notice period is mandatory to the establishment of jurisdiction and cannot be waived. *Id*. Both of these Notices relied upon independent sampling conducted by AU and PEER. *See* Decl. Plant, Ex. H; Ex. I.

Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying on such testing. References to "Independent Tests" and independent testing are specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl. Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-26, 128, 132.

Further, on April 1, 2015, Plaintiffs filed a motion for a preliminary injunction, again relying on the results of such independent testing, for its request that Defendants be enjoined from using such rooms where the testing was conducted.

Now, in response to discovery requests for information regarding this sampling, including the identities of persons who conducted such independent

testing, Plaintiffs have taken the specious position that the identities of the individuals who conducted the testing are not relevant. Relevancy is not a valid objection to this Interrogatory. Under Rule 26(b)(1), parties may obtain discovery regarding:

> [A]ny nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within the scope of discovery does not need to be admissible in evidence. Fed. R. Civ. P. 26(b)(1).

The identities of those individuals who have taken samples at the Malibu Schools is of great importance, is clearly relevant to Plaintiffs' claims, and is further relevant to Defendants' defenses. One of Defendants' defenses is that those areas from which samples were taken have been remediated, and accordingly, Plaintiffs' TSCA claim is moot. Defendants are entitled to take discovery, including depositions, of the individuals involved in Plaintiffs' independent testing to confirm the specific locations from which the samples were obtained and prepare this defense. Further, Defendants are entitled to this information so that they can examine the chain of custody for the samples, and assess the reliability of the sampling data on which Plaintiffs' TSCA claim is founded. Plaintiffs cannot file an action based on this information and then shield it from discovery under the specious objection that it is not relevant.

Additionally, the issues at stake are significant, because Plaintiff's claim is premised on the data it has collected through its own independent sampling, and Defendant could be held liable for millions of dollars of unnecessary remediation and renovation based on analysis of invalid or unreliable data. Furthermore,

Plaintiffs are the sole source of this information and there is no burden on Plaintiffs in producing the requested information.

Finally, in addition to the independent testing which forms the basis of Plaintiffs' TSCA Notices and pleadings on file with this Court, Defendants know that additional sampling has been taken by AU or PEER or those acting in concert with Plaintiffs. Defendants have served subpoenas on every lab (known to it) which has processed Plaintiffs' samples. In responding to these subpoenas, these labs have produced to Defendants additional sampling data which has not been the basis of any judicial filing in this case. Defendants are entitled to the identities of these individuals so it can determine the locations and extent of these additional samples.

For all of the foregoing reasons, Plaintiffs should be required to identify those individuals who conducted sampling in connection to Plaintiffs' "Independent Tests."

ii. Vagueness, Ambiguity, and Overbreadth Are Not Valid Objections to RFP No. 26.

Plaintiff's objection that Requests for Production No. 26 is vague, ambiguous and overbroad is unfounded. "The party who resists discovery has the burden to show discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." *Bible v. Rio Props., Inc.*, 246 F. R. D. 614 (C.D. Cal. 2007) (*citing Blankenship v. Hearst Corp.*, 519 F. 2d 418, 429 (9th Cir. 1975) and *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 655-56 (C.D. Cal. 2005)). There is no merit to "general or boilerplate objections such as 'overly broad' [or] 'vague and ambiguous.'" *Bible*, 246 F. R. D. at 619; *A. Farber & Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal. 2006).

Plaintiff PEER has not met its burden of demonstrating that discovery of the information sought in this Request should not be allowed, because it has not supported or explained its objections on the basis of the requests being vague,

ambiguous, or overbroad. Defendants have requested documents identifying those individuals who obtained or collected samples in the "Independent Tests" referred to in Plaintiffs' very own FAC. Plaintiff need only look for documents that identify samplers or others in the chain of custody for these tests. Without further explanation, Plaintiff's objection is without merit, and Plaintiff should produce documents in response to this Request.

iii. Attorney-Client, Attorney Work Product, and Common-Interest Communication Privileges Are Not Valid Objections to RFP No. 26.

(a) Attorney-Client Privilege.

"The attorney-client privilege protects confidential communications between attorneys and clients, which are made for the purpose of giving legal advice." *United States v. Richey*, 632 F. 3d 559, 566 (9th Cir. 2011). The party asserting this privilege bears the burden of showing that there is an attorney-client relationship and the privileged nature of the communication. *Id.*; *United States v. Bauer*, 132 F. 3d 504, 507 (9th Cir. 1997). There is an attorney-client privilege where: "(1) [ ] legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) unless the protection be waved." *Id.* (quoting *United States v. Graf*, 610 F. 3d 1148, 1156 (9th Cir. 2010)). The privilege is waived when privileged communications are disclosed. *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). While the privilege may extend to those communications with third parties assisting the attorney in legal advice, it does not extend where the advice sought is not legal advice. *Id.*

Documents identifying those involved in Plaintiffs' "Independent Tests" are not protected by the attorney-client privilege to the extent that they include

correspondences and records from the environmental testing entities engaged in the testing process. The entities involved in the testing process were not engaged in this process for the purpose of aiding Plaintiffs or their counsel in litigation; rather, the sole role of these entities was to provide testing services. Furthermore, Plaintiffs have failed to indicate in their responses which communications they believe to be protected by the attorney-client privilege. *Richey*, 632 F. 3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(b) Attorney Work Product.

The work product doctrine prohibits discovery of documents and other materials "prepared by a party or his representative in anticipation of litigation." *United States v. Richey* 632 F. 3d 559, 567 (9th Cir. 2011) (*quoting Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F. 2d 1486, 1494 (9th Cir. 1989)); Fed. R. Civ. P. 26(b)(3). The work product doctrine is a qualified immunity rather than a privilege, and a showing of good cause for the information desired is sufficient to overcome the qualified immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D. Cal. 2006); *Admiral Ins. Co. v. United States Dist. Court*, 881 F. 2d 1486, 1494 (9th Cir. 1989). "The party claiming work product immunity has the burden of proving the applicability of the doctrine." *A. Farbers & Ptnrs., Inc.*, 234 F.R.D. at 192.

Plaintiffs cannot claim work product immunity because they have made no showing that this protection applies to any of the information or documents sought in Defendants' Requests. For example, Plaintiffs have not demonstrated how documents identifying those who obtained or collected samples in Plaintiffs' independent testing bears any relation to Plaintiffs' efforts in preparation for trial. Furthermore, Defendants have good cause to request information sought, because the data from the "Independent Tests" will surely be used against Defendants in this litigation, and Defendants must be afforded the opportunity to confront the validity

and reliability of the data. This necessarily entails a complete knowledge of the chain of custody, which can only be discovered through documents identifying those involved in the testing process. Plaintiffs have not met the burden of demonstrating the applicability of the work product doctrine, so their objection on this basis is not appropriate. Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(c) Common Interest Doctrine.

In general, the attorney-client privilege is waived when communications between an attorney and client are disclosed to a third party. *Weil v. Inv/ Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). There is a rare exception to this waiver rule where individuals with a common interest in a legal matter may "communicate among themselves and with the separate attorneys on matters of common legal interest, for the purpose of preparing a joint strategy, and the attorney-client privilege will protect these communications to the same extent as it would communications between each client and his own attorney." *Nidec Corp. v. Victor Co.*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) (*quoting* 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:35, at 192 (1999 ed.); *United States v. Gonzales*, 669 F. 3d 974, 978 (9th Cir. 2012). This common interest doctrine is not a privilege, but an exception to the rule on waiver where communications are disclosed to third parties. *See Griffith*, 161 F.R.D. 687, 692. For this reason, the common interest doctrine comes into play only if the communication at issue is privileged in the first place. *Nidec Corp*, 249 F.R.D. at 578.

As the common interest doctrine applies only to those materials protected by the attorney-client privilege with regard to America Unites and PEER, the parties with a common legal interest in this case, not all communications between America

Unites and PEER are protected. Defendants request that Plaintiff produce documents in response to this request to the extent that Plaintiff possesses responsive materials that are not protected as either Plaintiffs' attorney-client communications.

iv. First Amendment Privilege Is Not a Valid Objection.

Plaintiff objects to this Request on the ground that it violates the First Amendment rights of association of Plaintiff and its members. A party objecting on the basis of a First Amendment privilege must satisfy a two-part test. The objecting party must first make a "prima facie showing of arguable first amendment infringement." *Perry v. Schwarzenegger*, 591 F. 3d 1126, 1140 (9th Cir. 2010) (*quoting Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F. 2d 346, 349-50 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is enforced, there will be "(1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Brock*, 860 F. 2d at 350.

Here, Plaintiff has made no such showing that disclosure of the documents requested would lead to "harassment, membership withdrawal, or discouragement of new members," or that it would result in other consequences that could "chill" members' associational rights. The Request for documents identifying those who obtained or collected the "Independent Tests" calls for chain of custody documents and documents prepared for Plaintiffs by environmental testing companies. The Request propounded by Defendants is not seeking personal information, does nothing to harass members of Plaintiff organizations, and would not have a deterrent effect on membership. Moreover, the documents requested by Defendants are necessary so that Defendants can defend themselves in this litigation and fairness justifies their production. Defendants will not be afforded a fair discovery if they

are precluded from accessing information regarding the independent testing data acquired by Plaintiffs, which will surely be used against Defendants in trial.

Additionally, there would be no "chilling" effect if Plaintiffs responded to Defendants' requests for this information, because PEER is publicly vocal about its activities and its membership, listing members of its Board and DC Staff on its website. *See* Decl. Plant, Exs. N,O. In particular, Plaintiff frequently publicizes its activities with regard to the subject matter of this very case on its website. The information sought in the above Request relates **only** to those individuals who obtained or collected data for the "Independent Tests" that form the basis for this lawsuit, and to communications regarding PCBs, the subject matter of this lawsuit.

The documents and information requested are necessary and relevant to Defendants' preparation for trial, and the names and email addresses of those members who would like their membership in PEER to remain private could be redacted so as to balance any associational issues with the Court's strong interest in ensuring Defendants' ability to fairly defend their case. Plaintiffs' entire case is premised on data from the "Independent Tests" referenced in Plaintiffs' FAC, and it is imperative that Defendants are granted full access to information and communications regarding these tests and their chains of custody.

d. PEER'S CONTENTIONS REGARDING RFP NO. 26.

This request for production seeks documents identifying the individuals who obtained or collected the Third Set of Independent Tests. Defendants have not shown that the requested information is relevant. As discussed below, the information is not necessary for resolution of any of the issues in this case. Moreover, the burden of providing it outweighs any possible relevance.

Information regarding the "Third Set of Independent Tests" is not relevant to the matters at issue in this lawsuit because Defendants have verified through their own testing that four out of the five rooms in the "Third Set of Independent Tests"

were in violation of TSCA, the matter which Plaintiffs are seeking to prove in this lawsuit. Although Defendants argue that Plaintiffs relied on this independent testing in their Amended Complaint, in fact Plaintiffs' Amended Complaint included information about the independent testing primarily for informational purposes and to describe the chronology of events at the Malibu School. Plaintiffs also recited that Defendants had verified the independent test results and found TSCA violations in every single one of 24 verification samples they took in ten rooms, FAC ¶¶ 127-129, confirming the appropriateness of the methodology and accuracy of the analysis of the independent testing generally, and making it unnecessary to rely on the independent testing to prove Plaintiffs' case at the least with regard to the verified rooms and the buildings in which they are located. There is no possible reason why Defendants would need to know the identities of the persons who took samples for tests on which Plaintiffs are not relying. From the Third Set of Independent Tests, Plaintiffs would possibly introduce evidence only with regard to the test results regarding a JCES office next to the teacher's lounge, which includes the principal's office, in which Defendants did not conduct verification testing or remediation.

Defendants also claim that Plaintiffs relied on the independent testing in their Preliminary Injunction motion. However, that Motion only addressed the ten rooms in which the District had verified TSCA violations, and did not rely at all on the independent testing. See, e.g., Plaintiffs' Memorandum of Points and Authorities in Support of their Motion for a Preliminary Injunction, Dkt. 14, at p. 2 ("Plaintiffs now move for a preliminary injunction requiring Defendants to immediately cease use of the other 10 rooms that Defendants' own testing has shown to have illegal levels of PCBs in caulk ….") (emphasis added).

Defendants also contend that they need "to confirm the specific locations from which the samples were obtained," so they can prepare their defenses that

those areas from which the samples were taken have been remediated." This contention is equally without merit. Plaintiffs are not relying on the Independent Tests for any purpose with respect to any of the 10 rooms that Defendants claim to have remediated. Thus, there is nothing for Defendants to confirm.

Even with respect to the one room for which Plaintiffs continue to rely on the Third Set of Independent Tests, Defendants do not need to know the identities of the person who took the samples. With regard to the JCES Office, Plaintiffs have produced the laboratory reports. Although Defendants conclusorily contend they need the identity of the samplers to assess the reliability of the testing data, they do not explain why that is the case. Defendants' reports of its own testing do not state the name of the individuals who took the samples. The test data is a product of a lab analysis of the samples. There is nothing that the sampler can do to affect the reliability of the data derived from a sample.

In any case, there should be no question that the Independent Testing data is reliable. Defendants' own verification testing has proven the accuracy of the independent testing. Defendants do not state why the Independent Testing data from the three rooms not verified by Defendants should be any less reliable than the other 10 rooms where Defendants' verification testing has confirmed the accuracy of the independent data.

Moreover, the issue in the case is not actually whether the independent tests are accurate, but whether or not there are TSCA violations in the rooms in question. Defendants could determine this fact, by analyzing their own verification samples, as they did with regard to the other Independent Tests. Thus, information which could lead to admissible evidence about whether or not there are TSCA violations in this room can be obtained without revealing the persons who took the independent samples.

Defendants also assert that, in addition to the three sets of Independent Tests, they know from subpoenas served on laboratories that Plaintiffs have done additional sampling and testing "which has not been the basis of any judicial filing in this case." Defendants contend that the identities of the persons who took the samples so that they can "determine the locations and extent of these additional samples."

However, this document request only relates to the Third Set of Independent Tests and therefore the identity of the samplers for different tests would not be responsive. In addition, at this point Plaintiffs have not even attempted to use any such additional testing in the case. Moreover, Defendants do not explain why they need to know the "extent" of the sample. The "extent" of the sample is not relevant to determine a TSCA violation. Moreover, Defendants do not need to know the identities of the persons taking the samples to determine the "locations" of the samples. The location of the sampling is shown on the lab reports which Defendants already have. The "exact" location of the sampling is irrelevant. Defendants' obligation to remediate is not limited to the exact square inch where a sample was taken.

Furthermore, the potential for harm to Plaintiffs or the samplers by disclosure of the requested information greatly outweighs any possible benefit of disclosure. Defendants have already filed a malicious criminal complaint for trespassing and vandalism against individuals who allegedly took samples. Although the District Attorney declined to file any charges, Plaintiffs are legitimately concerned that Defendants will use the requested information to initiate similar charges against the samplers or otherwise retaliate against them.

Forced disclosure of the identities of those who took samples would greatly inhibit Plaintiff's ability to fulfill their mission of advocating for remediation of

environmental hazards. See, e.g., *United States v. Garde*, 673 F.Supp. 604, 607 (D.D.C. 1987)

> "if the government is successful in compelling [the organization's lawyer] to reveal the information given to her, especially the identity of those she represents, GAP will lose the confidence of some of its whistleblower informants and its efforts to gather and present safety allegations will suffer. This is the harm that GAP claims, and it is cognizable under the [First Amendment] right to association."

Plaintiff has made a "prima facie showing of arguable first amendment infringement." *Perry v. Schwazanegger*, 591 F.3d 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of the identities of the samplers would severely discourage Plaintiff's ability to gather evidence of environmental violations because Plaintiff would be unable to protect the samplers' confidentiality, thereby severely hampering Plaintiff's organizational mission. It could also result in harassment of individuals who took the samples. Defendants have already filed a false criminal complaint against the President of America Unites, Ms. DeNicola, and her husband, seeking to subject them to felony charges punishable by fines and imprisonment, for allegedly taking caulk samples. It is difficult to imagine a more "chilling" action against those who advocate for PCB testing and remediation at the Malibu Schools. See Declarations of Paula Dinerstein and Jennifer DeNicola appended hereto.

Once a prima facie case of First Amendment infringement is made, "the evidentiary burden will then shift to the government…[to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest…[and] the 'least restrictive means' of obtaining the desired information." *Perry*, 591 F.3d at 1161 (quoting *Brock v. Local 375, Plumbers Int'l Union of Am.*, 960 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v.*

Trader's State Bank, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)).

> "Importantly, the party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation—a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1). The request must also be carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable."

Perry, 591 F.3d at 1161.

Here, Defendants cannot even show that this discovery meets the relevance requirements of Rule 26, much less the more demanding standard of relevance when First Amendment interests are implicated. As discussed above, there are other means of acquiring the desired information, namely, by examining the laboratory reports and the information provided in accordance with Defendants' subpoenas to the laboratories, or by conducting verification testing, without requiring Plaintiff to disclose its communications with its members, supporters and others who have contacted Plaintiffs concerning PCBs at the Malibu Schools or other information which may reveal who took the samples.

7. REQUEST FOR PRODUCTION NO. 27.

a. REQUEST FOR PRODUCTION NO. 27

All COMMUNICATIONS by and between PEER and AMERICA UNITES regarding the "Third Set of Independent Tests," referred to at paragraph 109 of the FAC.

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 27.

Plaintiff objects to this Request on the ground that it seeks information that is not relevant to the parties' claims or defenses or the subject matter of the instant action. Plaintiff further objects to this Request on the ground that it is vague and ambiguous and overbroad. Plaintiff further objects to this Request to the extent that

it seeks privileged attorney-client communications, work product, common-interest communications or other privileged information. Plaintiff further objects to this Request on the ground that it violates the First Amendment rights of association of Plaintiff and its members and supporters.

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 27.

i. Relevancy Is Not a Valid Objection to RFP No. 27.

Prior to initiation of this suit, Plaintiffs served Defendants with two Notices of Intent to File Suit under TSCA ("Notices"), the first dated August 19, 2014, and the second dated January 12, 2015. Decl. Plant, Exs. D, ¶ 32; H-I. Such Notices were sent because, under TSCA's citizen suit provision, a citizen plaintiff must give the alleged violator and EPA specific notice of the alleged violations of TSCA. 15 U.S.C.S. § 2619(b)(1). TSCA's 60-day notice period is mandatory to the establishment of jurisdiction and cannot be waived. *Id*. Both of these Notices relied upon independent sampling conducted by AU and PEER. *See* Decl. Plant, Ex. H; Ex. I.

Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying on such testing. References to "Independent Tests" and independent testing are specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl. Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-26, 128, 132.

Further, on April 1, 2015, Plaintiffs filed a motion for a preliminary injunction, again relying on the results of such independent testing, for its request that Defendants be enjoined from using such rooms where the testing was conducted.

Now, in response to discovery requests for information regarding this sampling, including the identities of persons who conducted such independent

testing, Plaintiffs have taken the specious position that the identities of the individuals who conducted the testing are not relevant. Relevancy is not a valid objection to this Interrogatory. Under Rule 26(b)(1), parties may obtain discovery regarding:

> [A]ny nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within the scope of discovery does not need to be admissible in evidence. Fed. R. Civ. P. 26(b)(1).

The identities of those individuals who have taken samples at the Malibu Schools is of great importance, is clearly relevant to Plaintiffs' claims, and is further relevant to Defendants' defenses. One of Defendants' defenses is that those areas from which samples were taken have been remediated, and accordingly, Plaintiffs' TSCA claim is moot. Defendants are entitled to take discovery, including depositions, of the individuals involved in Plaintiffs' independent testing to confirm the specific locations from which the samples were obtained and prepare this defense. Further, Defendants are entitled to this information so that they can examine the chain of custody for the samples, and assess the reliability of the sampling data on which Plaintiffs' TSCA claim is founded. Plaintiffs cannot file an action based on this information and then shield it from discovery under the specious objection that it is not relevant.

Additionally, the issues at stake are significant, because Plaintiffs' claim is premised on the data it has collected through its own independent sampling, and Defendant could be held liable for millions of dollars of unnecessary remediation and renovation based on analysis of invalid or unreliable data. Furthermore,

Plaintiffs are the sole source of this information and there is no burden on Plaintiffs in producing the requested information.

Finally, non-privileged communications between Plaintiffs related to the "Independent Testing" are relevant and should be produced. Communications regarding the independent sampling will provide additional information regarding the location from which sampling was taken, will identity witnesses, and will provide additional information relevant to Defendants defenses in this matter. Further, Plaintiffs have provided no valid grounds on which these communications should withheld. Any communications which Plaintiffs deem to be privileged can be withheld or redacted as appropriate.

For all of the foregoing reasons, Plaintiffs should be required to identify those individuals who conducted sampling in connection to Plaintiffs' "Independent Tests."

ii. Vagueness, Ambiguity, and Overbreadth Are Not Valid Objections to RFP No. 27.

Plaintiff's objection that Requests for Production No. 27 is vague, ambiguous and overbroad is unfounded. "The party who resists discovery has the burden to show discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." *Bible v. Rio Props., Inc.*, 246 F. R. D. 614 (C.D. Cal. 2007) (*citing Blankenship v. Hearst Corp.*, 519 F. 2d 418, 429 (9th Cir. 1975) and *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 655-56 (C.D. Cal. 2005)). There is no merit to "general or boilerplate objections such as 'overly broad' [or] 'vague and ambiguous.'" *Bible*, 246 F. R. D. at 619; *A. Farber & Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal. 2006).

Plaintiff PEER has not met its burden of demonstrating that discovery of the information sought in this Request should not be allowed, because it has not supported or explained its objections on the basis of the requests being vague,

ambiguous, or overbroad. Defendants have requested communications identifying those individuals who obtained or collected samples in the "Independent Tests" referred to in Plaintiffs' very own FAC. Plaintiff need only look for communications that identify samplers or others in the chain of custody for these tests. Without further explanation, Plaintiff's objection is without merit, and Plaintiff should produce documents in response to this Request.

iii. Attorney-Client, Attorney Work Product, and Common-Interest Communication Privileges Are Not Valid Objections to RFP No. 27.

(a) Attorney-Client Privilege.

"The attorney-client privilege protects confidential communications between attorneys and clients, which are made for the purpose of giving legal advice." *United States v. Richey*, 632 F. 3d 559, 566 (9th Cir. 2011). The party asserting this privilege bears the burden of showing that there is an attorney-client relationship and the privileged nature of the communication. *Id.*; *United States v. Bauer*, 132 F. 3d 504, 507 (9th Cir. 1997). There is an attorney-client privilege where: "(1) [ ] legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) unless the protection be waved." *Id.* (quoting *United States v. Graf*, 610 F. 3d 1148, 1156 (9th Cir. 2010)). The privilege is waived when privileged communications are disclosed. *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). While the privilege may extend to those communications with third parties assisting the attorney in legal advice, it does not extend where the advice sought is not legal advice. *Id.*

Communications regarding Plaintiffs' "Independent Tests" are not protected by the attorney-client privilege to the extent that they include communications

regarding the data, methodology, or chain of custody of these tests and correspondences including information from the environmental testing entities engaged in the testing process. Defendants' request is not asking for communications between Plaintiffs and their counsel. Plaintiffs have failed to indicate in their responses which communications they believe to be protected by the attorney-client privilege. *Richey*, 632 F. 3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(b) Attorney Work Product.

The work product doctrine prohibits discovery of documents and other materials "prepared by a party or his representative in anticipation of litigation." *United States v. Richey* 632 F. 3d 559, 567 (9th Cir. 2011) (*quoting Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F. 2d 1486, 1494 (9th Cir. 1989)); Fed. R. Civ. P. 26(b)(3). The work product doctrine is a qualified immunity rather than a privilege, and a showing of good cause for the information desired is sufficient to overcome the qualified immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D. Cal. 2006); *Admiral Ins. Co. v. United States Dist. Court.*, 881 F. 2d 1486, 1494 (9th Cir. 1989). "The party claiming work product immunity has the burden of proving the applicability of the doctrine." *A. Farbers & Ptnrs., Inc.*, 234 F.R.D. at 192.

Plaintiffs cannot claim work product immunity because they have made no showing that this protection applies to any of the information or documents sought in Defendants' Requests. For example, Plaintiffs have not demonstrated how correspondences between the Plaintiffs regarding the "Independent Tests" referred to in the FAC bears any relation to Plaintiffs' efforts in preparation for trial. Furthermore, Defendants have good cause to request the information sought, because the data from the "Independent Tests" will surely be used against

Defendants in this litigation, and Defendants must be afforded the opportunity to confront the validity and reliability of the data. This necessarily entails a complete knowledge of the chain of custody, which can only be discovered through documents identifying those involved in the testing process. Plaintiffs have not met the burden of demonstrating the applicability of the work product doctrine, so their objection on this basis is not appropriate. Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(c) Common Interest Doctrine.

In general, the attorney-client privilege is waived when communications between an attorney and client are disclosed to a third party. *Weil v. Inv/ Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). There is a rare exception to this waiver rule where individuals with a common interest in a legal matter may "communicate among themselves and with the separate attorneys on matters of common legal interest, for the purpose of preparing a joint strategy, and the attorney-client privilege will protect these communications to the same extent as it would communications between each client and his own attorney." *Nidec Corp. v. Victor Co.*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) (*quoting* 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:35, at 192 (1999 ed.); *United States v. Gonzales*, 669 F. 3d 974, 978 (9th Cir. 2012). This common interest doctrine is not a privilege, but an exception to the rule on waiver where communications are disclosed to third parties. *See Griffith*, 161 F.R.D. at 692. For this reason, the common interest doctrine comes into play only if the communication at issue is privileged in the first place. *Nidec Corp*, 249 F.R.D. at 578.

As the common interest doctrine applies only to those materials protected by the attorney-client privilege with regard to America Unites and PEER, the parties

with a common legal interest in this case, not all communications between America Unites and PEER are protected. Defendants request that Plaintiff produce documents in response to this request to the extent that Plaintiff possesses responsive materials that are not protected as either Plaintiffs' attorney-client communications.

iv. First Amendment Privilege Is Not a Valid Objection.

Plaintiff objects to this Request on the ground that it violates the First Amendment rights of association of Plaintiff and its members. A party objecting on the basis of a First Amendment privilege must satisfy a two-part test. The objecting party must first make a "prima facie showing of arguable first amendment infringement." *Perry v. Schwarzenegger*, 591 F. 3d 1126, 1140 (9th Cir. 2010) (*quoting Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F. 2d 346, 349-50 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is enforced, there will be "(1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Brock*, 860 F. 2d at 350.

Here, Plaintiff has made no such showing that disclosure of the communications requested would lead to "harassment, membership withdrawal, or discouragement of new members," or that it would result in other consequences that could "chill" members' associational rights. The Request for communications regarding the "Independent Tests" calls for communications regarding the chain of custody documents and documents prepared for Plaintiffs by environmental testing companies. The Request propounded by Defendants is not seeking personal information, does nothing to harass members of Plaintiff organizations, and would not have a deterrent effect on membership. Moreover, the materials requested by Defendants are necessary so that Defendants can defend themselves in this litigation, and fairness justifies their production. Defendants will not be afforded a

fair discovery if they are precluded from accessing information regarding the independent testing data acquired by Plaintiffs, which will surely be used against Defendants in trial.

Additionally, there would be no "chilling" effect if Plaintiffs responded to Defendants' requests for this information, because PEER is publicly vocal about its activities and its membership, listing members of its Board and DC Staff on its website. *See* Decl. Plant, Exs. N,O. In particular, Plaintiff frequently publicizes its activities with regard to the subject matter of this very case on its website. The information sought in the above Request relates **only** to those individuals who obtained or collected data for the "Independent Tests" that form the basis for this lawsuit, and to communications regarding PCBs, the subject matter of this lawsuit.

The documents and information requested are necessary and relevant to Defendants' preparation for trial, and the names and email addresses of those members who would like their membership in PEER to remain private could be redacted so as to balance any associational issues with the Court's strong interest in ensuring Defendants' ability to fairly defend their case. Plaintiffs' entire case is premised on data from the "Independent Tests" referenced in Plaintiffs' FAC, and it is imperative that Defendants are granted full access to information and communications regarding these tests and their chains of custody.

d. PEER'S CONTENTIONS REGARDING RFP NO. 27.

Relevance

Information regarding the "Third Set of Independent Tests" is not relevant to the matters at issue in this lawsuit because Defendants have verified through their own testing that four out of the five rooms in the "Third Set of Independent Tests" were in violation of TSCA, the matter which Plaintiffs are seeking to prove in this lawsuit. Although Defendants argue that Plaintiffs relied on this independent testing in their Amended Complaint, in fact Plaintiffs' Amended Complaint

included information about the independent testing primarily for informational purposes and to describe the chronology of events at the Malibu School. Plaintiffs also recited that Defendants had verified the independent test results and found TSCA violations in every single one of 24 verification samples they took in ten rooms, FAC ¶¶ 127-129, confirming the appropriateness of the methodology and accuracy of the analysis of the independent testing generally, and making it unnecessary to rely on the independent testing to prove Plaintiffs' case at the least with regard to the verified rooms and the buildings in which they are located. From the Third Set of Independent Tests, Plaintiffs would possibly introduce evidence only with regard to the test results regarding the JCES office next to the teacher's lounge, which includes the principal's office, in which Defendants did not conduct verification testing or remediation.

Defendants also claim that Plaintiffs relied on the independent testing in their Preliminary Injunction motion. However, that Motion only addressed the ten rooms in which the District had verified TSCA violations, and did not rely at all on the independent testing. Dkt. 14 at p. 18.

With regard to the JCES office, Plaintiffs have produced the laboratory report for the testing of that room, and Defendants have supplied no valid reason that they need more than this, or how the request for communications between PEER and America Unites about the Third Set of Independent Tests is reasonably calculated to lead to the discovery of admissible evidence. Defendants' claim that they need more information on the exact location of the sampling to prepare their defense of mootness because that area had been remediated is not applicable here because Defendants have not claimed to have remediated this room.

As for using these communications to attempt to identify the samplers, this is an effort to harass those individuals, as explained above and below. If Defendants wish to challenge the reliability of the independent tests for the one room in the

Third Set of Independent Tests which it did not verify with its own testing, it may rely on the chain of custody and other information in the laboratory report and on the information it receives from its subpoenas to the laboratories. Since the issue in the case is not actually whether the independent tests are accurate, but whether or not there are TSCA violations in the room, Defendants could determine this fact, as they did with regard to the other independent tests, by analyzing their own verification samples. Thus, any information which could lead to admissible evidence about whether or not there are TSCA violations in this room can be obtained without revealing the persons who took the independent samples and subjecting them to possible harassment and attempts at criminal prosecution.

Vagueness, Ambiguity, and Overbreadth

This request is vague, ambiguous and overbroad because it pertains to all communications "by and between" PEER and America Unites regarding the Second Set of Independent Tests. There is no limitation as to subject matter of communications other than the topic of the independent tests, or of who is involved in the communications. In addition, it is not clear what is meant by "by and between PEER and America Unites," i.e. whether the requests encompass all communications by either PEER or America Unites to anyone about these tests. Defendants claim that "Plaintiff need only look for communications and documents that identify samplers or others in the chain of custody for those tests." However, by its terms, the request is far broader, vaguer and more ambiguous than that.

Attorney-Client, Attorney Work Product and Common Interest Communication Privileges

Defendants state that they are not asking for communications between Plaintiffs and their counsel. However, all communications between America Unites and PEER regarding the independent tests would involve PEER counsel, as no one else at PEER communicated with America Unites about these matters. PEER and

America Unites are jointly pursuing this case, and therefore communications with either PEER or America Unites counsel (America Unites counsel is also PEER counsel) would be privileged pursuant to the attorney-client privilege and common interest doctrine. Therefore, all the communications sought in this request would be privileged.

If this request is seeking communications by PEER to anyone regarding the Second Set of Independent Tests, PEER considers that all persons who contact PEER are seeking legal advice or assistance, and therefore their communications are attorney-client privileged. (See PEER webpage, Ex. 1 to Dinerstein Declaration) PEER has already provided all non-privileged communications responsive to this request in its possession in its discovery production – i.e. communications with the general public, the media, and government officials.

First Amendment Privilege

PEER is a whistleblower organization which promises confidentiality to all those who contact it concerning environmental issues and government wrongdoing. Confidentiality is promised with regard to the content of the communication and not only the identity of the person. (See PEER webpage, Ex. 1 to Dinerstein Declaration) This promise of confidentiality applies to all of those who have contacted PEER about the PCBs in the Malibu Schools, whether or not they are associated with America Unites. If PEER were to disclose communications with those persons in discovery, it would greatly inhibit PEER's ability to function as an organization where people may raise issues in confidence.[9]

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[9] Defendants claim that PEER is "publicly vocal about its activities and its membership, listing members of its Board and DC Staff on its website." Although PEER may be publicly vocal about its activities, and does list the members of its Board and staff on its website, revealing the identity of PEER's employees and Board is an entirely different matter from revealing the identities of or the content of communications with those who contact PEER in confidence. PEER does not

In a case involving another whistleblower organization, the Government Accountability Project (GAP), in which a subpoena seeking information about its informants was quashed, the court stated:

> "if the government is successful in compelling [the organization's lawyer] to reveal the information given to her, especially the identity of those she represents, GAP will lose the confidence of some of its whistleblower informants and its efforts to gather and present safety allegations will suffer. This is the harm that GAP claims, and it is cognizable under the right to association."

United States v. Garde, 673 F. Supp. 604, 607 (D.D.C. 1987).

The same would hold for PEER, which has thus made a "prima facie showing of arguable first amendment infringement." *Perry v. Schwarzenegger*, 591 F.3d 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of communications between members of the public and PEER is likely to result in discouraging such communications because PEER is unable to protect their confidentiality, thereby severely hampering PEER's organizational mission. It could also result in harassment of individuals who are parties to these communications. Defendants have already filed a false criminal complaint against the President of America Unites, Ms. DeNicola, and her husband, seeking to subject them to felony charges punishable by fines and imprisonment, for allegedly taking caulk samples. It is difficult to imagine a more "chilling" action against those who advocate for PCB testing and remediation at the Malibu Schools.

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reveal its membership list to anyone. While certain members may choose to reveal their membership in PEER or their communications with PEER, PEER has promised them confidentiality and would never reveal their identities or the contents of their communications without their permission. No such permission has been given here.

It is more than understandable that persons who communicate with PEER on this subject would not want their communications disclosed. In fact, given the marginal, if any, relevance to this litigation of the communications sought here, one cannot help but suspect that this discovery is being sought for the purpose of harassing people who have communicated with PEER about PCBs at the Malibu Schools. It should also be noted that teachers and other staff who are employees of Defendants, on whose behalf PEER advocates, are even more vulnerable to harassment and retaliation than parents at the school such as Mr. and Ms. DeNicola, since they depend on the Defendants for their employment and all of the conditions of that employment.

Defendants suggest that "names and email addresses of those members who would like their membership in PEER to remain private could be redacted …". However, while persons who communicate with PEER certainly have First Amendment protection against revealing the fact of their membership in PEER and their personal contact information, *NAACP v. State of Alabama*, 357 U.S. 449 (1958), the First Amendment also protects the confidentiality of the fact that they have communicated with PEER, whether or not they are members, and the confidentiality of the content of their communications. The Ninth Circuit in Perry ordered protection for communications, not the identities of members, emphasizing that:

> "The First Amendment privilege, however, has never been limited to the disclosure of identities of rank-and-file members. … The existence of a prima facie case turns not on the type of information sought, but on whether disclosure of the information will have a deterrent effect on the exercise of protected activities."

591 F.3d at 1162 (citations omitted).

In addition, given the relatively small size of the community at the Malibu Schools, it is likely that the identity of those communicating could be deduced from the content of the communication even if names are redacted.

Once a prima facie case of First Amendment infringement is made, "the evidentiary burden will then shift to the government . . . [to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest . . . [and] the 'least restrictive means' of obtaining the desired information." *Perry*, 591 F.3d at 1161 (quoting *Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). "Importantly, the party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation -- a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1). The request must also be carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable." Perry, 591 F.3d at 1161.

Here, Defendants cannot even show that this discovery meets the relevance requirements of Rule 26, much less the more demanding standard of relevance when First Amendment interests are implicated. Moreover, there are other means of acquiring the desired information – whether or not there are TSCA violations in the locations of the Third Set of Independent Tests – namely, by examining the laboratory reports and the information provided in accordance with Defendants' subpoenas to the laboratories, or by doing verification testing, without requiring PEER to disclose its communications with its members, supporters and others who have contacted PEER concerning PCBs at the Malibu Schools.

Again, PEER has already provided all non-privileged communications responsive to this request in its possession in its discovery production – i.e. communications with the general public, the media, and government officials.

IV. DISCOVERY TO PLAINTIFFS REGARDING PCBS AT OTHER SCHOOLS IN THE UNITED STATES

RFP No. 11 to AU and RFP No. 17 to PEER request communications regarding PCBs at any school in the United States. Defendants move to compel on RFPs No. 11 to AU and 17 to PEER.

A. REQUEST FOR PRODUCTION TO AU REGARDING PCBS AT OTHER SCHOOLS

1. REQUEST FOR PRODUCTION NO. 11.

a. REQUEST FOR PRODUCTION NO. 11.

All COMMUNICATIONS by and between AMERICA UNITES, its MEMBERS and any third parties regarding PCBs at any school in the United States.

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 11.

Plaintiff objects to this Request on the ground that it seeks information that is not relevant to the parties' claims or defenses or the subject matter of the instant action. Plaintiff further objects to this Request on the ground that it is vague and ambiguous, overbroad and unduly burdensome and oppressive. Plaintiff further objects to this Request to the extent that it seeks privileged attorney-client communications, work product, common-interest communications or other privileged information. Plaintiff further objects to this Request on the ground that it violates the First Amendment rights of association of Plaintiff and its members and supporters.

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 11.

i. Relevancy Is Not a Valid Objection to RFP No. 11.

In response to discovery requests for information regarding PCBs in schools in the United States, Plaintiffs have taken the tenuous position that this information is not relevant. However, Plaintiffs have referenced information regarding PCBs at

other schools in the United States and will likely use such information to support their claim.

Relevancy is not a valid objection to this Interrogatory. Under Rule 26(b)(1), parties may obtain discovery regarding:

> [A]ny nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within the scope of discovery does not need to be admissible in evidence. Fed. R. Civ. P. 26(b)(1).

Defendants have remediated all known exceedances of the regulatory threshold for PCBs, including those resulting from surreptitious sampling by Plaintiffs. Now, it is important that Defendants have access to other foundational information or data regarding PCBs that Plaintiffs may rely on to support their claim of a TSCA violation so that Defendants can adequately defend themselves in this litigation. Plaintiffs referenced PCBs in New York schools twice in their FAC. Decl. Plant, Ex. D; ¶¶ 62, 95. Plaintiffs regularly post information regarding PCB cases and remediation activities at schools around the United States, so as to draw comparisons between these schools and the Malibu Schools. *See* Decl. Plant, Ex. E; Ex. F; Ex. G. Even though they will rely on this information and data, Plaintiffs have taken the specious position that information regarding PCBs at schools in the United States not relevant. The information requested is highly relevant, because it will serve as a foundation from which Plaintiffs will attempt to prove their claim.

Additionally, the issues at stake are significant. If deprived of relevant, foundational information that is necessary for preparation of a defense, Defendants could be held liable for millions of dollars of unnecessary remediation and

renovation. Furthermore, Plaintiffs are the sole source of this information and the burden of its production to Plaintiffs is non-existent.

For all of the foregoing reasons, Plaintiffs should be required to produce communications regarding PCBs at any school in the United States.

ii. Vagueness, Ambiguity, Overbreadth, and Undue Burden and Oppression Are Not Valid Objections to RFP No. 11.

Plaintiff's objection that Requests for Production No. 11 is vague, ambiguous, overbroad, and unduly burdensome and oppressive is unfounded. "The party who resists discovery has the burden to show discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." *Bible v. Rio Props., Inc.*, 246 F. R. D. 614 (C.D. Cal. 2007) (*citing Blankenship v. Hearst Corp.*, 519 F. 2d 418, 429 (9th Cir. 1975) and *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 655-56 (C.D. Cal. 2005)). There is no merit to "general or boilerplate objections such as 'overly broad' [or] 'vague and ambiguous.'" *Bible*, 246 F. R. D. at 619; *A. Farber & Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal. 2006).

AU has not met its burden of demonstrating that discovery of the information sought in this Request should not be allowed, because it has not supported or explained its objections on the basis of the requests being vague, ambiguous, overbroad, or unduly burdensome or oppressive. Defendants have requested communications by or between America Unites, its members and any third parties regarding PCBs at any school in the United States. Plaintiff need only look for correspondences that reference PCBs at schools in the United States. Without further explanation, Plaintiff's objection is without merit, and Plaintiff should produce documents in response to this Request.

iii. Attorney-Client, Attorney Work Product, and Common-Interest Communication Privileges Are Not Valid Objections to RFP No. 11.

(a) Attorney-Client Privilege.

"The attorney-client privilege protects confidential communications between attorneys and clients, which are made for the purpose of giving legal advice." *United States v. Richey*, 632 F. 3d 559, 566 (9th Cir. 2011). The party asserting this privilege bears the burden of showing that there is an attorney-client relationship and the privileged nature of the communication. *Id.*; *United States v. Bauer*, 132 F. 3d 504, 507 (9th Cir. 1997). There is an attorney-client privilege where: "(1) [ ] legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) unless the protection be waved." *Id.* (quoting *United States v. Graf*, 610 F. 3d 1148, 1156 (9th Cir. 2010)). The privilege is waived when privileged communications are disclosed. *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). While the privilege may extend to those communications with third parties assisting the attorney in legal advice, it does not extend where the advice sought is not legal advice. *Id.*

Communications regarding PCBs at any school in the United States are not protected by the attorney-client privilege to the extent that they include communications regarding publically available information regarding PCBs and information and data communicated to third parties other than Plaintiffs and their counsel. Defendants' request is not asking for communications between Plaintiffs and their counsel. Plaintiffs have failed to indicate in their responses which communications they believe to be protected by the attorney-client privilege. *Richey*, 632 F. 3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to

produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(b) Attorney Work Product.

The work product doctrine prohibits discovery of documents and other materials "prepared by a party or his representative in anticipation of litigation." *United States v. Richey* 632 F. 3d 559, 567 (9th Cir. 2011) (*quoting Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F. 2d 1486, 1494 (9th Cir. 1989)); Fed. R. Civ. P. 26(b)(3). The work product doctrine is a qualified immunity rather than a privilege, and a showing of good cause for the information desired is sufficient to overcome the qualified immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D. Cal. 2006); *Admiral Ins. Co. v. United States Dist. Court*, 881 F. 2d 1486, 1494 (9th Cir. 1989). "The party claiming work product immunity has the burden of proving the applicability of the doctrine." *A. Farbers & Ptnrs., Inc.*, 234 F.R.D. at 192.

Plaintiffs cannot claim work product immunity because they have made no showing that this protection applies to any of the information or communications sought in Defendants' Requests. For example, Plaintiffs have not demonstrated how communications regarding PCBs at schools in the United States other than the Malibu Schools bears any relation to Plaintiffs' efforts in preparation for trial. Furthermore, Defendants have good cause to request the information sought, because the information and data pertaining to PCBs at other schools will surely be used against Defendants in this litigation, and Defendants must be afforded the opportunity to confront the validity and reliability of this information. This necessarily entails access to this information through the discovery process. Plaintiffs have not met the burden of demonstrating the applicability of the work product doctrine, so their objection on this basis is not appropriate. Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(c) Common Interest Doctrine.

In general, the attorney-client privilege is waived when communications between an attorney and client are disclosed to a third party. *Weil v. Inv/ Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). There is a rare exception to this waiver rule where individuals with a common interest in a legal matter may "communicate among themselves and with the separate attorneys on matters of common legal interest, for the purpose of preparing a joint strategy, and the attorney-client privilege will protect these communications to the same extent as it would communications between each client and his own attorney." *Nidec Corp. v. Victor Co.*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) (*quoting* 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:35, at 192 (1999 ed.); *United States v. Gonzales*, 669 F. 3d 974, 978 (9th Cir. 2012). This common interest doctrine is not a privilege, but an exception to the rule on waiver where communications are disclosed to third parties. *See Griffith*, 161 F.R.D. at 692. For this reason, the common interest doctrine comes into play only if the communication at issue is privileged in the first place. *Nidec Corp*, 249 F.R.D. at 578.

As the common interest doctrine applies only to those materials protected by the attorney-client privilege with regard to America Unites and PEER, the parties with a common legal interest in this case, not all communications between America Unites and PEER are protected. Defendants request that Plaintiff produce documents in response to this request to the extent that Plaintiff possesses responsive materials that are not protected as either Plaintiffs' attorney-client communications.

iv. First Amendment Privilege Is Not a Valid Objection.

Plaintiff further objects to this Request on the ground that it violates the First Amendment rights of association of Plaintiff and its members. A party objecting on

the basis of a First Amendment privilege must satisfy a two-part test. The objecting party must first make a "prima facie showing of arguable first amendment infringement." *Perry v. Schwarzenegger*, 591 F. 3d 1126, 1140 (9th Cir. 2010) (*quoting Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F. 2d 346, 349-50 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is enforced, there will be "(1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Brock*, 860 F. 2d at 350.

Here, Plaintiff has made no such showing that disclosure of the communications requested would lead to "harassment, membership withdrawal, or discouragement of new members," or that it would result in other consequences that could "chill" members' associational rights. The Request for communications regarding PCBs at any school in the United States calls for communications regarding the underlying information and data pertaining to PCBs that will be used by Plaintiffs at trial. The Request propounded by Defendants is not seeking personal information, does nothing to harass members of Plaintiff organizations, and would not have a deterrent effect on membership. Moreover, the materials requested by Defendants are necessary so that Defendants can defend themselves in this litigation and fairness justifies their production. Defendants will not be afforded a fair discovery if they are precluded from accessing information regarding PCBs at other schools, which will surely be used against Defendants in trial.

Additionally, there would be no "chilling" effect if Plaintiffs responded to Defendants' requests for this information, because AU is publicly vocal about its activities and its membership, listing members of its Advisory Board and Leadership Team on its website. *See* Decl. Plant, Exs. L, M. In particular, Plaintiff frequently publicizes its activities with regard to the subject matter of this very case

on its website. The information sought in the above Request relates **only** to communications regarding PCBs, the subject matter of this lawsuit.

The documents and information requested are necessary and relevant to Defendants' preparation for trial, and the names and email addresses of those members who would like their membership in AU to remain private could be redacted so as to balance any associational issues with the Court's strong interest in ensuring Defendants' ability to fairly defend their case. Plaintiffs' entire case is premised on data and information regarding PCBs, and it is imperative that Defendants are granted full access to information and communications regarding these tests and their chains of custody.

d. AU'S CONTENTIONS REGARDING RFP NO. 11

Defendants are seeking communications "by and between AU, its members and third parties concerning PCBs at other schools." The request is objectionable for a number of reasons.

First, the requested documents are not relevant. The issue here is whether the Malibu Schools, not other schools, violate TSCA. Communications by Plaintiffs, its members and third parties about PCBs at other schools is simply not relevant to that issue.

Defendants contend that the requested documents are relevant because Plaintiffs referenced PCBs in New York schools twice in their FAC, citing ¶¶ 62 and 95 of the FAC. (Plant Decl. Ex. D, ¶¶62 and 95) Paragraph 62 alleges that EPA's January 27, 2014 screening levels for PCBs in the air at the Malibu Schools was based on calculations for schools in New York. However, this fact is undisputed; it is what the EPA told Defendant Lyon in a January 27, 2014 letter. (Avrith Decl. Ex. 3) To the extent that they have not already done so, Plaintiffs will produce all non-privileged documents which support this allegation.

Paragraph 95 of the FAC alleges that based on testing in other schools, it has been shown that air and dust levels of PCBs are highly variable over time. Defendants have requested, and Plaintiffs have agreed to produce, all non-privileged documents that support or refer to this allegation. (Avrith Decl. Ex. 4, at Request No. 10) Neither of these limited references to PCBs in other schools in the FAC makes other communications by Plaintiffs or its supporters or third parties about PCBs in other schools relevant.

Defendants also contend that "Plaintiffs regularly post information regarding PCB cases and remediation activities at schools around the United States, so as to draw comparisons between these schools and the Malibu Schools." Obviously, the fact that AU "posts" information about remediation of PCBs at other schools, does not make all communications regarding PCBs at other schools relevant in this lawsuit.

It should be noted that Plaintiffs are not contending that information about PCBs at other schools is always irrelevant. What happened with PCBs at other schools may very well be relevant in this case. Indeed, Plaintiffs have already produced documents concerning PCBs at other schools and to the extent not already done, and will produce whatever publicly-available documents they have in their possession, custody or control concerning PCBs at other schools.

However, there is a difference between documents that evidence what happened with PCBs at other schools, and the documents that Defendants are requesting. Defendants are requesting "communications" by Plaintiffs, their members and third parties concerning PCBs at other schools. Although what happened with PCBs at other schools may be relevant here, Defendants are unable to explain why what Plaintiffs, their members or third parties may have said about PCBs at other schools is relevant to any issue in this case.

Second, the request is vague, ambiguous and overbroad. It pertains to all communications "by and between [AU], its members and any third parties." It is not clear what is meant by "by and between." Is the request limited to communications to which AU or its members are parties, or does it encompass all communications by a third party whether or not AU or its members are parties to the communication?

Third, the request seeks privileged information. All communications between America Unites and PEER regarding PCBs at other schools would involve PEER counsel, as no one else at PEER communicated with America Unites about these matters. (See accompanying Declaration of Paula Dinerstein ("Dinerstein Decl.), ¶3) PEER and America Unites are jointly pursuing this case, and therefore communications with either PEER or America Unites counsel (America Unites counsel is also PEER counsel) would be privileged pursuant to the attorney-client privilege and common interest doctrine. See *In re Teliglobe Communications Corp.*, 493 F.3d 345, 363-64 (3d. Cir. 2007) Therefore, all such communications sought in this request would be privileged.

Furthermore, requests for communications between AU and its members or members of the public violate AU's First Amendment Right of Association.

> "If the government is successful in compelling [the organization's lawyer] to reveal the information given to her, especially the identity of those she represents, GAP will lose the confidence of some of its whistleblower informants and its efforts to gather and present safety allegations will suffer. This is the harm that GAP claims, and it is cognizable under the [First Amendment] right to association."

United States v. Garde, 673 F. Supp. 604, 607 (D.D.C. 1987).

The same would hold for AU, which has thus made a "prima facie showing of arguable first amendment infringement." *Perry v. Schwazenegger*, 591 F.3d 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of communications between Plaintiff and its members or members of the public is likely to result in discouraging such communications because Plaintiff is unable to protect their confidentiality, thereby severely hampering their organizational mission. It could also result in harassment of individuals who are parties to these communications. Defendants have already filed a false criminal complaint against the President of America Unites, Ms. DeNicola, and her husband, seeking to subject them to felony charges punishable by fines and imprisonment, for allegedly taking caulk samples. It is difficult to imagine a more "chilling" action against those who advocate for PCB testing and remediation at the Malibu Schools.

It is more than understandable that persons who communicate with Plaintiffs on this subject would not want their communications disclosed.[10] In fact, given the marginal, if any, relevance to this litigation of the communications sought here, one cannot help but suspect that this discovery is being sought for the purpose of harassing people who have communicated with Plaintiffs about PCBs at other schools.

Once a prima facie case of First Amendment infringement is made, "the evidentiary burden will then shift to the government . . . [to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest . . . [and] the 'least restrictive means' of obtaining the desired information." *Perry*, 591 F.3d at 1161 (quoting *Brock v. Local 375, Plumbers Int'l*

[10] Defendants contend that Plaintiff AU is "publicly vocal" about its activities. However, Plaintiff is not publicly vocal about the information being sought.

Union of Am., 860 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)).

> "Importantly, the party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation -- a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1). The request must also be carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable." *Perry*, 591 F.3d at 1161.

Here, Defendants cannot even show that this discovery meets the relevance requirements of Rule 26, much less the more demanding standard of relevance when First Amendment interests are implicated.

B. REQUEST FOR PRODUCTION TO PEER REGARDING PCBS AT OTHER SCHOOLS

1. REQUEST FOR PRODUCTION NO. 17.

a. REQUEST FOR PRODUCTION NO. 17.

All COMMUNICATIONS between PEER and AMERICA UNITES regarding PCBs at any school in the United States.

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 17.

Plaintiff objects to this Request on the ground that it seeks information that is not relevant to the parties' claims or defenses or the subject matter of the instant action and is overbroad and oppressive. Plaintiff further objects to this Request on the ground that it is vague and ambiguous, given that Defendants' response to Plaintiffs' discovery requests define PCBs as 'PCBs in caulk or other building material at the Malibu School known to Defendants to contain PCBs at concentrations of 50 parts per million ('ppm') or greater.' Plaintiff further objects to this Request to the extent that it calls for the production of privileged attorney-

client communications, work product, common-interest communications or other privileged information. Plaintiff further objects to this Request on the ground that it violates the First Amendment rights of association of Plaintiff and its members and supporters.

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 17.

i. Relevancy Is Not a Valid Objection to RFP No. 17.

In response to discovery requests for information regarding PCBs in schools in the United States, Plaintiffs have taken the tenuous position that this information is not relevant. However, Plaintiffs have referenced information regarding PCBs at other schools in the United States and will likely use such information to support their claim.

Relevancy is not a valid objection to this Interrogatory. Under Rule 26(b)(1), parties may obtain discovery regarding:

> [A]ny nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within the scope of discovery does not need to be admissible in evidence. Fed. R. Civ. P. 26(b)(1).[11]

Defendants have remediated all known exceedances of the regulatory threshold for PCBs, including those resulting from surreptitious sampling by Plaintiffs. Now, it is important that Defendants have access to other foundational information or data regarding PCBs that Plaintiffs may rely on to support their claim of a TSCA violation so that Defendants can adequately defend themselves in this litigation. Plaintiffs referenced PCBs in New York schools twice in their FAC.

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[11] The Rule quoted here is the amended version of Rule 26(b)(1), which became effective December 1, 2015.

Decl. Plant, Ex. D; ¶¶ 62, 95. Plaintiffs regularly post information regarding PCB cases and remediation activities at schools around the United States, so as to draw comparisons between these schools and the Malibu Schools. *See* Decl. Plant, Ex. E; Ex. F; Ex. G. Even though they will rely on this information and data, Plaintiffs have taken the specious position that information regarding PCBs at schools in the United States not relevant. The information requested is highly relevant, because it will serve as a foundation from which Plaintiffs will attempt to prove their claim.

Additionally, the issues at stake are significant. If deprived of relevant, foundational information that is necessary for preparation of a defense, Defendants could be held liable for millions of dollars of unnecessary remediation and renovation. Furthermore, Plaintiffs are the sole source of this information and the burden of its production to Plaintiffs is non-existent.

For all of the foregoing reasons, Plaintiffs should be required to produce communications regarding PCBs at any school in the United States.

ii. Vagueness, Ambiguity, Overbreadth, and Undue Burden and Oppression Are Not Valid Objections to RFP No. 17.

Plaintiff's objection that Requests for Production No. 17 is vague, ambiguous, overbroad, and unduly burdensome and oppressive is unfounded. "The party who resists discovery has the burden to show discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." *Bible v. Rio Props., Inc.*, 246 F. R. D. 614 (C.D. Cal. 2007) (*citing Blankenship v. Hearst Corp.*, 519 F. 2d 418, 429 (9th Cir. 1975) and *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 655-56 (C.D. Cal. 2005)). There is no merit to "general or boilerplate objections such as 'overly broad' [or] 'vague and ambiguous.'" *Bible*, 246 F. R. D. at 619; *A. Farber & Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal. 2006).

Plaintiff PEER has not met its burden of demonstrating that discovery of the information sought in this Request should not be allowed, because it has not supported or explained its objections on the basis of the requests being vague, ambiguous, or overbroad. Defendants have requested communications between PEER and America Unites regarding PCBs at schools in the United States. Plaintiff need only look for correspondences between itself and America Unites that related to PCBs at schools in the United States. Without further explanation, Plaintiff's objection is without merit, and Plaintiff should produce documents in response to this Request.

iii. Attorney-Client, Attorney Work Product, and Common-Interest Communication Privileges Are Not Valid Objections to RFP No. 17.

(a) Attorney-Client Privilege.

"The attorney-client privilege protects confidential communications between attorneys and clients, which are made for the purpose of giving legal advice." *United States v. Richey*, 632 F. 3d 559, 566 (9th Cir. 2011). The party asserting this privilege bears the burden of showing that there is an attorney-client relationship and the privileged nature of the communication. *Id.*; *United States v. Bauer*, 132 F. 3d 504, 507 (9th Cir. 1997). There is an attorney-client privilege where: "(1) [ ] legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) unless the protection be waved." *Id.* (quoting *United States v. Graf*, 610 F. 3d 1148, 1156 (9th Cir. 2010)). The privilege is waived when privileged communications are disclosed. *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). While the privilege may extend to those communications with third parties assisting the

attorney in legal advice, it does not extend where the advice sought is not legal advice. *Id.*

Communications regarding PCBs at any school in the United States are not protected by the attorney-client privilege to the extent that they include communications regarding publically available information regarding PCBs and information and data communicated to third parties other than Plaintiffs and their counsel. Defendants' request is not asking for communications between Plaintiffs and their counsel. Plaintiffs have failed to indicate in their responses which communications they believe to be protected by the attorney-client privilege. *Richey*, 632 F. 3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(b) Attorney Work Product.

The work product doctrine prohibits discovery of documents and other materials "prepared by a party or his representative in anticipation of litigation." *United States v. Richey* 632 F. 3d 559, 567 (9th Cir. 2011) (*quoting Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F. 2d 1486, 1494 (9th Cir. 1989)); Fed. R. Civ. P. 26(b)(3). The work product doctrine is a qualified immunity rather than a privilege, and a showing of good cause for the information desired is sufficient to overcome the qualified immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D. Cal. 2006); *Admiral Ins. Co. v. United States Dist. Court.*, 881 F. 2d 1486, 1494 (9th Cir. 1989). "The party claiming work product immunity has the burden of proving the applicability of the doctrine." *A. Farbers & Ptnrs., Inc.*, 234 F.R.D. at 192.

Plaintiffs cannot claim work product immunity because they have made no showing that this protection applies to any of the information or communications sought in Defendants' Requests. For example, Plaintiffs have not demonstrated

how communications regarding PCBs at schools in the United States other than the Malibu Schools bears any relation to Plaintiffs' efforts in preparation for trial. Furthermore, Defendants have good cause to request the information sought, because the information and data pertaining to PCBs at other schools will surely be used against Defendants in this litigation, and Defendants must be afforded the opportunity to confront the validity and reliability of this information. This necessarily entails access to this information through the discovery process. Plaintiffs have not met the burden of demonstrating the applicability of the work product doctrine, so their objection on this basis is not appropriate. Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(c) Common Interest Doctrine.

In general, the attorney-client privilege is waived when communications between an attorney and client are disclosed to a third party. *Weil v. Inv/ Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). There is a rare exception to this waiver rule where individuals with a common interest in a legal matter may "communicate among themselves and with the separate attorneys on matters of common legal interest, for the purpose of preparing a joint strategy, and the attorney-client privilege will protect these communications to the same extent as it would communications between each client and his own attorney." *Nidec Corp. v. Victor Co.*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) (*quoting* 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:35, at 192 (1999 ed.); *United States v. Gonzales*, 669 F. 3d 974, 978 (9th Cir. 2012). This common interest doctrine is not a privilege, but an exception to the rule on waiver where communications are disclosed to third parties. *See Griffith*, 161 F.R.D. at 692. For this reason, the common interest doctrine comes into play only if the

communication at issue is privileged in the first place. *Nidec Corp*, 249 F.R.D. at 578.

As the common interest doctrine applies only to those materials protected by the attorney-client privilege with regard to America Unites and PEER, the parties with a common legal interest in this case, not all communications between America Unites and PEER are protected. Defendants request that Plaintiff produce documents in response to this request to the extent that Plaintiff possesses responsive materials that are not protected as either Plaintiffs' attorney-client communications.

iv. First Amendment Privilege Is Not a Valid Objection.

Plaintiff further objects to this Request on the ground that it violates the First Amendment rights of association of Plaintiff and its members. A party objecting on the basis of a First Amendment privilege must satisfy a two-part test. The objecting party must first make a "prima facie showing of arguable first amendment infringement." *Perry v. Schwarzenegger*, 591 F. 3d 1126, 1140 (9th Cir. 2010) (*quoting Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F. 2d 346, 349-50 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is enforced, there will be "(1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Brock*, 860 F. 2d at 350.

Here, Plaintiff has made no such showing that disclosure of the communications requested would lead to "harassment, membership withdrawal, or discouragement of new members," or that it would result in other consequences that could "chill" members' associational rights. The Request for communications regarding PCBs at any school in the United States calls for communications regarding the underlying information and data pertaining to PCBs that will be used by Plaintiffs at trial. The Request propounded by Defendants is not seeking

personal information, does nothing to harass members of Plaintiff organizations, and would not have a deterrent effect on membership. Moreover, the materials requested by Defendants are necessary so that Defendants can defend themselves in this litigation, and fairness justifies their production. Defendants will not be afforded a fair discovery if they are precluded from accessing information regarding PCBs at other schools, which will surely be used against Defendants in trial.

Additionally, there would be no "chilling" effect if Plaintiffs responded to Defendants' requests for this information, because PEER is publicly vocal about its activities and its membership, listing members of its Board and DC Staff on its website. *See* Decl. Plant, M. In particular, Plaintiff frequently publicizes its activities with regard to the subject matter of this very case on its website. The information sought in the above Request relates **only** to communications regarding PCBs, the subject matter of this lawsuit.

The documents and information requested are necessary and relevant to Defendants' preparation for trial, and the names and email addresses of those members who would like their membership in PEER to remain private could be redacted so as to balance any associational issues with the Court's strong interest in ensuring Defendants' ability to fairly defend their case. Plaintiffs' entire case is premised on data and information regarding PCBs, and it is imperative that Defendants are granted full access to information and communications regarding these tests and their chains of custody.

d. PEER'S CONTENTIONS REGARDING RFP NO. 17.

Defendants are seeking communications "by and between PEER and any third parties concerning PCBs at any school in the United States." The request is objectionable for a number of reasons.

First, the requested documents are not relevant. The issue here is whether the Malibu Schools, not other schools, violate TSCA. Communications by Plaintiff and third parties about PCBs at other schools is simply not relevant to that issue.

Defendants contend that the requested documents are relevant because Plaintiffs referenced PCBs in New York schools twice in their FAC, citing ¶¶ 62 and 95 of the FAC. Paragraph 62 alleges that EPA's January 27, 2014 screening levels for PCBs in the air at the Malibu Schools was based on calculations for schools in New York. However, this fact is undisputed; it is what the EPA told Defendant Lyon in a January 27, 2014 letter. To the extent that they have not already done so, Plaintiffs will produce all non-privileged documents which support this allegation.

Paragraph 95 of the FAC alleges that based on testing in other schools, it has been shown that air and dust levels of PCBs are highly variable over time. Defendants have requested, and Plaintiffs have agreed to produce, all non-privileged documents that support this allegation. Neither of these limited references to PCBs in other schools in the FAC makes other communications by PEER and third parties about PCBs in other schools relevant.

Defendants also contend that "Plaintiffs regularly post information regarding PCB cases and remediation activities at schools around the United States, so as to draw comparisons between these schools and the Malibu Schools." Obviously, the fact that PEER "posts" information about remediation of PCBs at other schools, does not make all communications regarding PCBs at other schools relevant in this lawsuit.

It should be noted that Plaintiffs are not contending that information about PCBs at other schools is always irrelevant. What happened with PCBs at other schools may very well be relevant in this case. Indeed, Plaintiffs have already produced documents concerning PCBs at other schools and to the extent not already

done, and will produce whatever publicly-available documents they have in their possession, custody or control concerning PCBs at other schools.

However, there is a difference between documents that evidence what happened with PCBs at other schools, and the documents that Defendants are requesting. Defendants are requesting "communications" by PEER with third parties concerning PCBs at other schools. Although what happened with PCBs at other schools may be relevant here, Defendants are unable to explain why what PEER may have said about PCBs at other schools to third parties is relevant to any issue in this case.

Second, the request is vague, ambiguous and overbroad. It pertains to all communications "by and between PEER and any third parties." It is not clear what is meant by "by and between." Is the request limited to communications to which PEER is a party, or does it encompass all communications by a third party whether or not PEER is a party to the communication?

Third, the request seeks privileged information. All communications between PEER and third parties regarding PCBs at other schools would involve PEER counsel, as no one else at PEER communicated with anyone concerning PCBs in schools in the United States. Therefore, all such communications sought in this request would be privileged.

Furthermore, requests for communications between PEER and third parties violate PEER's First Amendment Right of Association.

> "If the government is successful in compelling [the organization's lawyer] to reveal the information given to her, especially the identity of those she represents, GAP will lose the confidence of some of its whistleblower informants and its efforts to gather and present safety allegations will suffer. This is the harm that GAP claims, and it is cognizable under the right to association."

United States v. Garde, 673 F. Supp. 604, 607 (D.D.C. 1987).

The same would hold for PEER, which has thus made a "prima facie showing of arguable first amendment infringement." *Perry v. Schwarzenegger*, 591 F.3d 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of communications between Plaintiff and third parties, including members of the public is likely to result in discouraging such communications because PEER is unable to protect their confidentiality, thereby severely hampering PEER's organizational mission. It could also result in harassment of individuals who are parties to these communications. Defendants have already filed a false criminal complaint against the President of America Unites, Ms. DeNicola, and her husband, seeking to subject them to felony charges punishable by fines and imprisonment, for allegedly taking caulk samples. It is difficult to imagine a more "chilling" action against those who advocate for PCB testing and remediation at the Malibu Schools.

It is more than understandable that persons who communicate with PEER on this subject would not want their communications disclosed. In fact, given the marginal, if any, relevance to this litigation of the communications sought here, one cannot help but suspect that this discovery is being sought for the purpose of harassing people who have communicated with Plaintiffs about PCBs at other schools.

Defendants suggest that names and email addresses of those members who would like their membership in PEER to remain private could be redacted. However, while persons who communicate with PEER certainly have First Amendment protection against revealing the fact of their membership and their personal contact information, *NAACP v. State of Alabama*, 357 U.S. 449 (1958), the First Amendment also protects the confidentiality of the fact that they have communicated with PEER, whether or not they are members of PEER, and protects

the content of their communications. The Ninth Circuit in Perry ordered protection of communications, not the identities of members, emphasizing that:

> "The First Amendment privilege, however, has never been limited to the disclosure of identities of rank-and-file members. … The existence of a prima facie case turns not on the type of information sought, but on whether disclosure of the information will have a deterrent effect on the exercise of protected activities."

591 F.3d at 1162 (citations omitted).

In addition, given the relatively small size of the community at the Malibu Schools, it is likely that the identity of those communicating could be deduced from the content of the communication even if names are redacted.

Once a prima facie case of First Amendment infringement is made, "the evidentiary burden will then shift to the government . . . [to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest . . . [and] the 'least restrictive means' of obtaining the desired information." *Perry*, 591 F.3d at 1161 (quoting *Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)).

> "Importantly, the party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation -- a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1). The request must also be carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable." *Perry*, 591 F.3d at 1161.

Here, Defendants cannot even show that this discovery meets the relevance requirements of Rule 26, much less the more demanding standard of relevance when First Amendment interests are implicated.

V. DISCOVERY Requests to PEER Regarding Standing

Defendants move to compel further responses and production of documents to Interrogatory No. 8 and RFPs No. 40 and 42, which relate to PEER's standing in this lawsuit.

A. INTERROGATORY TO PEER REGARDING STANDING

1. INTERROGATORY NO. 8.

a. INTERROGATORY NO. 8

IDENTIFY the PERSON or PERSONS that PEER intends to rely on as STANDING WITNESSES at trial.

b. RESPONSE TO INTERROGATORY NO. 8.

Plaintiff objects to this interrogatory on the ground that it seeks information that is protected by the attorney work product privilege.

c. DEFENDANTS' CONTENTIONS REGARDING INTERROGATORY NO. 8.

In this Interrogatory Defendants seek discovery regarding the identity of that individual or individuals which PEER intends to rely upon to establish PEER's standing in this case. In response, PEER erroneously contends that the identity of these witnesses is protected by the attorney work product privilege.

i. Defendants are Entitled to Discovery Regarding PEER's Standing.

PEER's lack of standing is a complete defense to this lawsuit, and Defendants are entitled to take discovery regarding PEER's standing so that they may challenge its ability to maintain this suit.

To demonstrate standing, a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504

U. S. 555, 560-61 (1992) (citing *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 342 (1977)). An association only has standing to bring suit on behalf of its members where: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Id.* An association's standing is subject to challenge in every phase of litigation and the burden of proving standing rests on Plaintiff. *Id.* Defendants should be permitted to interview those individuals who PEER alleges have suffered such an injury and to take further discovery to determine if PEER can satisfy these elements.

ii. The Identities of Witnesses Are Not Protected Work Product.

The work product doctrine prohibits discovery of documents and other materials "prepared by a party or his representative in anticipation of litigation." *United States v. Richey* 632 F. 3d 559, 567 (9th Cir. 2011) (*quoting Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F. 2d 1486, 1494 (9th Cir. 1989)); Fed. R. Civ. P. 26(b)(3). The work product doctrine is a qualified immunity rather than a privilege, and a showing of good cause for the information desired is sufficient to overcome the qualified immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D. Cal. 2006); *Admiral Ins. Co. v. United States Dist. Court.*, 881 F. 2d 1486, 1494 (9th Cir. 1989). "The party claiming work product immunity has the burden of proving the applicability of the doctrine." *A. Farbers & Ptnrs., Inc.*, 234 F.R.D. at 192.

Defendants' Interrogatory merely requests the identities of any witnesses known by PEER—not any witness statements made in anticipation of litigation or other attorney work product. Plaintiff have made no showing that the attorney work product applies to the names or identities of these witnesses—it has simply asserted this doctrine as a boilerplate objection to Defendants' request for a

disclosure already compelled under Fed. R. Civ. P. 26(a)(1)(A) and discoverable under Rule 26(b)(1). Additionally, it is clear from the fact that the Federal Rules of Civil Procedure compel disclosure of witnesses' identities that this information is not protected as attorney work product.

iii. Disclosure of Witnesses Is Compelled By Rule 26.

Under Rule 26, Plaintiffs must disclose all witnesses with discoverable information. Rule 26(b)(1) states that "any nonprivileged matter that is relevant to any party's claim or defense" is discoverable, including "the identity and location of persons who know of any discoverable matter." Rule 26(a)(1)(A) states that "a party must, without awaiting a discovery request, provide to the other parties: (i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses. . . ." *See Green v. Baca*, 226 F.R.D. 624, 655 (C.D. Cal. 2005).

The required disclosures under the Federal Rules of Civil Procedure clearly contemplate the timely exchange of witness identities among the parties, and do not protect such information from discovery. Further, if a party later attempts to use a witness it has failed to disclose, it will not be permitted to do so where such a failure is not substantially justified or is harmless. Fed. R. Civ. Proc. 37(c)(1). Accordingly, PEER should be required to identify those individuals it will rely upon as standing witnesses at trial.

d. PEER'S CONTENTIONS REGARDING INTERROGATORY NO. 8.

There is no requirement that PEER produce the names of any of its witnesses until the exchange of information required at least 40 days before the pre-trial conference, LR 16-2.4, to be filed with the court no later than 21 days before the final pre-trial conference. LR 16-5. See also Fed. R. Civ. P. 26(a)(3)(A)(i) and (B) (requiring disclosure of the name, address and telephone number of witnesses at

least 30 days before trial). The fact that Plaintiffs were required to disclose "the identity and location of persons who know of any discoverable matter" in their initial disclosures under Rule 26(b)(1) does not mean that Plaintiffs must disclose the names of witnesses before the times provided for such disclosure in the Federal and Local Rules. See *D'Onofrio v. Sfx Sports Group, Inc.*, 247 F.R.D. 43, 53-54 (D.D.C. 2008). PEER has complied with the requirements for initial disclosures under Rule 26(a)(1)(A) and need not make any disclosures concerning witnesses at this point.

In addition, as a practical matter, compelling a response to this interrogatory would serve no purpose since PEER has not determined at this point who it might rely on as a standing witness at trial.

B. REQUESTS FOR PRODUCTION TO PEER REGARDING STANDING

1. REQUEST FOR PRODUCTION NO. 41.

a. REQUEST FOR PRODUCTION NO. 41

All DOCUMENTS that SUPPORT, REFER, or RELATE TO PEER'S standing in this lawsuit.

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 41.

Plaintiff objects to this Request on the ground that it is vague and ambiguous. Plaintiff further objects to this Request to the extent that it seeks privileged attorney-client communications, work product, common-interest communications or other privileged information.

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 41.

i. Vagueness and Ambiguity Are Not Valid Objections to RFP No. 41.

Plaintiff's objection that Requests for Production No. 41 is vague and ambiguous is unfounded. "The party who resists discovery has the burden to show discovery should not be allowed, and has the burden of clarifying, explaining, and

supporting its objections." *Bible v. Rio Props., Inc.*, 246 F. R. D. 614 (C.D. Cal. 2007) (*citing Blankenship v. Hearst Corp.*, 519 F. 2d 418, 429 (9th Cir. 1975) and *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 655-56 (C.D. Cal. 2005)). There is no merit to "general or boilerplate objections such as 'overly broad' [or] 'vague and ambiguous.'" *Bible*, 246 F. R. D. at 619; *A. Farber & Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal. 2006).

Plaintiff has offered no explanation as to why Defendants Request is so "vague" or "ambiguous" that Plaintiff cannot produce any responsive documents. Accordingly, Defendants request that Plaintiff produce documents in response to this Request.

ii. Attorney-Client, Attorney Work Product, and Common-Interest Communication Privileges Are Not Valid Objections to RFP No. 41.

(a) Attorney-Client Privilege.

"The attorney-client privilege protects confidential communications between attorneys and clients, which are made for the purpose of giving legal advice." *United States v. Richey*, 632 F. 3d 559, 566 (9th Cir. 2011). The party asserting this privilege bears the burden of showing that there is an attorney-client relationship and the privileged nature of the communication. *Id.*; *United States v. Bauer*, 132 F. 3d 504, 507 (9th Cir. 1997). There is an attorney-client privilege where: "(1) [ ] legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) unless the protection be waved." *Id.* (quoting *United States v. Graf*, 610 F. 3d 1148, 1156 (9th Cir. 2010)). The privilege is waived when privileged communications are disclosed. *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). While the privilege may extend to those communications with third parties assisting the

attorney in legal advice, it does not extend where the advice sought is not legal advice. *Id.*

Documents that support, refer, or relate to PEER's standing in this lawsuit are not protected by the attorney-client privilege to the extent that these materials are not communications between Plaintiff and its counsel in anticipation of this litigation. Plaintiffs have failed to indicate in their responses which communications they believe to be protected by the attorney-client privilege. *Richey*, 632 F. 3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(b) Attorney Work Product.

The work product doctrine prohibits discovery of documents and other materials "prepared by a party or his representative in anticipation of litigation." *United States v. Richey* 632 F. 3d 559, 567 (9th Cir. 2011) (*quoting Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F. 2d 1486, 1494 (9th Cir. 1989); Fed. R. Civ. P. 26(b)(3). The work product doctrine is a qualified immunity rather than a privilege, and a showing of good cause for the information desired is sufficient to overcome the qualified immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D. Cal. 2006); *Admiral Ins. Co. v. United States Dist. Court*, 881 F. 2d 1486, 1494 (9th Cir. 1989). "The party claiming work product immunity has the burden of proving the applicability of the doctrine." *A. Farbers & Ptnrs., Inc.*, 234 F.R.D. at 192.

Plaintiffs cannot claim work product immunity because they have made no showing that this protection applies to any of the documents sought in Defendants' Requests. Furthermore, Defendants have good cause to request information sought, because Defendants are entitled to challenge PEER's legal standing to bring this action. Plaintiffs have not met the burden of demonstrating the applicability of the work product doctrine, so their objection on this basis is not appropriate.

Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(c) Common Interest Doctrine.

In general, the attorney-client privilege is waived when communications between an attorney and client are disclosed to a third party. *Weil v. Inv/ Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). There is a rare exception to this waiver rule where individuals with a common interest in a legal matter may "communicate among themselves and with the separate attorneys on matters of common legal interest, for the purpose of preparing a joint strategy, and the attorney-client privilege will protect these communications to the same extent as it would communications between each client and his own attorney." *Nidec Corp. v. Victor Co.*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) (*quoting* 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:35, at 192 (1999 ed.); *United States v. Gonzales*, 669 F. 3d 974, 978 (9th Cir. 2012). This common interest doctrine is not a privilege, but an exception to the rule on waiver where communications are disclosed to third parties. *See Griffith*, 161 F.R.D. at 692. For this reason, the common interest doctrine comes into play only if the communication at issue is privileged in the first place. *Nidec Corp*, 249 F.R.D. at 578.

As the common interest doctrine applies only to those materials protected by the attorney-client privilege with regard to America Unites and PEER, the parties with a common legal interest in this case, not all communications between America Unites and PEER are protected. Defendants request that Plaintiff produce documents in response to this request to the extent that Plaintiff possesses responsive materials that are not protected as either Plaintiffs' attorney-client communications.

d. PEER'S CONTENTIONS REGARDING RFP NO. 41.

PEER has already produced its communications with government agencies and officials and the public at large on behalf of teachers and staff at the Malibu Schools which are relevant to PEER's standing in this lawsuit. PEER's communications with individual members of the public which may be relevant to PEER's standing are being withheld under the attorney-client privilege and under the protection of the First Amendment.

Attorney- Client Privilege

PEER considers that all persons who contact PEER are seeking legal advice or assistance, and therefore their communications are attorney-client privileged. (See PEER Webpage, Ex. 1 to Dinerstein Declaration)

First Amendment Privilege

PEER is a whistleblower organization which promises confidentiality to all those who contact it concerning environmental issues and government wrongdoing. Confidentiality is promised with regard to the content of the communication and not only the identity of the person. (See PEER web page, Ex. 1 to Dinerstein Declaration) This promise of confidentiality applies to all of those who have contacted PEER about the PCBs in the Malibu Schools. If PEER were to disclose communications with those persons in discovery, it would greatly inhibit PEER's ability to function as an organization where people may raise issues in confidence.[12]

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[12] Defendants claim that PEER is "publicly vocal about its activities and its membership, listing members of its Board and DC Staff on its website." Although PEER may be publicly vocal about its activities, and does list the members of its Board and staff on its website, revealing the identity of PEER's employees and Board is an entirely different matter from revealing the identities of or the content of communications with those who contact PEER in confidence. PEER does not reveal its membership list to anyone. While certain members may choose to reveal their membership in PEER or their communications with PEER, PEER has promised them confidentiality and would never reveal their identities or the

In a case involving another whistleblower organization, the Government Accountability Project (GAP), in which a subpoena seeking information about its informants was quashed, the court stated:

> "if the government is successful in compelling [the organization's lawyer] to reveal the information given to her, especially the identity of those she represents, GAP will lose the confidence of some of its whistleblower informants and its efforts to gather and present safety allegations will suffer. This is the harm that GAP claims, and it is cognizable under the right to association."

United States v. Garde, 673 F. Supp. 604, 607 (D.D.C. 1987).

The same would hold for PEER, which has thus made a "prima facie showing of arguable first amendment infringement." *Perry v. Schwarzenegger*, 591 F.3d 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of communications between members of the public and PEER is likely to result in discouraging such communications because PEER is unable to protect their confidentiality, thereby severely hampering PEER's organizational mission. It could also result in harassment of individuals who are parties to these communications. Defendants have already filed a false criminal complaint against the President of America Unites, Ms. DeNicola, and her husband, seeking to subject them to felony charges punishable by fines and imprisonment, for allegedly taking caulk samples. It is difficult to imagine a more "chilling" action against those who advocate for PCB testing and remediation at the Malibu Schools.

It is more than understandable that persons who communicate with PEER on this subject would not want their communications disclosed. It should also be noted that teachers and other staff who are employees of Defendants, on whose behalf

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contents of their communications without their permission. No such permission has been given here.

PEER advocates, are even more vulnerable to harassment and retaliation than parents at the school such as Mr. and Ms. DeNicola, since they depend on the Defendants for their employment and all of the conditions of that employment.

Defendants suggest that "names and email addresses of those members who would like their membership in PEER to remain private could be redacted …". However, while persons who communicate with PEER certainly have First Amendment protection against revealing the fact of their membership and their personal contact information, *NAACP v. State of Alabama*, 357 U.S. 449 (1958), the First Amendment also protects the confidentiality of the fact that they have communicated with PEER, whether or not they are members of PEER, and protects the content of their communications. The Ninth Circuit in Perry ordered protection of communications, not the identities of members, emphasizing that:

> "The First Amendment privilege, however, has never been limited to the disclosure of identities of rank-and-file members. … The existence of a prima facie case turns not on the type of information sought, but on whether disclosure of the information will have a deterrent effect on the exercise of protected activities."

591 F.3d at 1162 (citations omitted).

In addition, given the relatively small size of the community at the Malibu Schools, it is likely that the identity of those communicating could be deduced from the content of the communication even if names are redacted.

Once a prima facie case of First Amendment infringement is made, "the evidentiary burden will then shift to the government . . . [to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest . . . [and] the 'least restrictive means' of obtaining the desired information." Perry, 591 F.3d at 1161 (quoting *Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)).

"Importantly, the party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation -- a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1). The request must also be carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable." *Perry*, 591 F.3d at 1161.

Here, Plaintiffs have produced the primary documents which are relevant to its standing in terms of its public communications on behalf of Malibu School teachers and staff. Defendants cannot even show that additional discovery on this subject meets the relevance requirements of Rule 26, much less the more demanding standard of relevance when First Amendment interests are implicated.

2. REQUEST FOR PRODUCTION NO. 42.

a. REQUEST FOR PRODUCTION NO. 42

All DOCUMENTS that SUPPORT, REFER, or RELATE to the standing of the PERSON or PERSONS that PEER intends to call as STANDING WITNESSES at trial.

b. RESPONSE TO REQUEST FOR PRODUCTION NO 42.

Plaintiff objects to this Request on the ground that it is vague and ambiguous. Plaintiff further objects to this Request to the extent that it seeks privileged attorney-client communications, work product, common-interest communications or other privileged information.

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 42.

i. Vagueness and Ambiguity Are Not Valid Objections to RFP No. 42.

Plaintiff's objection that Requests for Production No. 42 is vague and ambiguous is unfounded. "The party who resists discovery has the burden to show discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." *Bible v. Rio Props., Inc.*, 246 F. R. D. 614 (C.D. Cal.

2007) (*citing Blankenship v. Hearst Corp.*, 519 F. 2d 418, 429 (9th Cir. 1975) and *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 655-56 (C.D. Cal. 2005)). There is no merit to "general or boilerplate objections such as 'overly broad' [or] 'vague and ambiguous.'" *Bible*, 246 F. R. D. at 619; *A. Farber & Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal. 2006).

Plaintiff has offered no explanation as to why Defendants Request is so "vague" or "ambiguous" that Plaintiff cannot produce any responsive documents. Accordingly, Defendants request that Plaintiff produce documents in response to this Request.

ii. Attorney-Client, Attorney Work Product, and Common-Interest Communication Privileges Are Not Valid Objections to RFP No. 42.

(a) Attorney-Client Privilege.

"The attorney-client privilege protects confidential communications between attorneys and clients, which are made for the purpose of giving legal advice." *United States v. Richey*, 632 F. 3d 559, 566 (9th Cir. 2011). The party asserting this privilege bears the burden of showing that there is an attorney-client relationship and the privileged nature of the communication. *Id.*; *United States v. Bauer*, 132 F. 3d 504, 507 (9th Cir. 1997). There is an attorney-client privilege where: "(1) [ ] legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) unless the protection be waved." *Id.* (quoting *United States v. Graf*, 610 F. 3d 1148, 1156 (9th Cir. 2010)). The privilege is waived when privileged communications are disclosed. *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). While the privilege may extend to those communications with third parties assisting the

attorney in legal advice, it does not extend where the advice sought is not legal advice. *Id.*

Documents that support, refer, or relate to the standing of the person or persons that PEER intends to call as standing witnesses at trial are not protected by the attorney-client privilege to the extent that these communications are not between Plaintiff and its counsel in anticipation of this litigation. Plaintiffs have failed to indicate in their responses which communications they believe to be protected by the attorney-client privilege. *Richey*, 632 F. 3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(b) Attorney Work Product.

The work product doctrine prohibits discovery of documents and other materials "prepared by a party or his representative in anticipation of litigation." *United States v. Richey* 632 F. 3d 559, 567 (9th Cir. 2011) (*quoting Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F. 2d 1486, 1494 (9th Cir. 1989); Fed. R. Civ. P. 26(b)(3). The work product doctrine is a qualified immunity rather than a privilege, and a showing of good cause for the information desired is sufficient to overcome the qualified immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D. Cal. 2006); *Admiral Ins. Co. v. United States Dist. Court.*, 881 F. 2d 1486, 1494 (9th Cir. 1989). "The party claiming work product immunity has the burden of proving the applicability of the doctrine." *A. Farbers & Ptnrs., Inc.*, 234 F.R.D. at 192.

Plaintiffs cannot claim work product immunity because they have made no showing that this protection applies to any of the documents sought in Defendants' Requests. Under Rule 26, Plaintiffs must disclose all witnesses with discoverable information. Rule 26(b)(1) states that "any nonprivileged matter that is relevant to any party's claim or defense" is discoverable, including "the identity and location of

persons who know of any discoverable matter." Rule 26(a)(1)(A) states that "a party must, without awaiting a discovery request, provide to the other parties: (i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses. . . ." *See Green v. Baca*, 226 F.R.D. 624, 655 (C.D. Cal. 2005).

The required disclosures under the Federal Rules of Civil Procedure clearly contemplate the timely exchange of witness identities among the parties, and do not protect such information from discovery. Further, if a party later attempts to use a witness it has failed to disclose, it will not be permitted to do so where such a failure is not substantially justified or is harmless. Fed. R. Civ. Proc. 37(c)(1).

Request No. 42 is merely requesting any witnesses' identities known by PEER—not any witness statements or attorney work product.

Furthermore, Defendants have good cause to request information sought, because Defendants are entitled to challenge PEER's legal standing to bring this action. Plaintiffs have not met the burden of demonstrating the applicability of the work product doctrine, so their objection on this basis is not appropriate. Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(c) Common Interest Doctrine.

In general, the attorney-client privilege is waived when communications between an attorney and client are disclosed to a third party. *Weil v. Inv/ Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). There is a rare exception to this waiver rule where individuals with a common interest in a legal matter may "communicate among themselves and with the separate attorneys on matters of common legal interest, for the purpose of preparing a joint strategy, and the attorney-client privilege will protect these communications to the same extent as it

would communications between each client and his own attorney." *Nidec Corp. v. Victor Co.*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) (*quoting* 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:35, at 192 (1999 ed.); *United States v. Gonzales*, 669 F. 3d 974, 978 (9th Cir. 2012). This common interest doctrine is not a privilege, but an exception to the rule on waiver where communications are disclosed to third parties. *See Griffith*, 161 F.R.D. at 692. For this reason, the common interest doctrine comes into play only if the communication at issue is privileged in the first place. *Nidec Corp*, 249 F.R.D. at 578.

As the common interest doctrine applies only to those materials protected by the attorney-client privilege with regard to America Unites and PEER, the parties with a common legal interest in this case, not all communications between America Unites and PEER are protected. Defendants request that Plaintiff produce documents in response to this request to the extent that Plaintiff possesses responsive materials that are not protected as either Plaintiffs' attorney-client communications.

d. PEER'S CONTENTIONS REGARDING RFP NO. 42.

PEER cannot respond to this document request because it need not identify the standing witness(es) it intends to call at this juncture of the litigation (see response to Interrogatory No. 8) and because PEER has not yet determined who it might call as a standing witness in this case.

Respectfully submitted,

Dated: December 21, 2015

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