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 SANDRA LYON, ET AL.

10 UNITED STATES DISTRICT COURT

11 CENTRAL DISTRICT OF CALIFORNIA

13	AMERICA UNITES FOR KIDS, et	)	No. 2:15-CV-02124
14	al.,	)	DISCOVERY MATTER
15)	
16	Plaintiffs,	)	JOINT STIPULATION
17	vs.	)	REGARDING DEFENDANTS'
18	SANDRA LYON, et al.,	)	MOTION TO COMPEL
19		)	FURTHER RESPONSES IN
20	Defendants.	)	DISCOVERY
21		)	Hearing Date: Jan. 11, 2016
22		)	Time: 10:00 am
23		)	Place: 255 East Temple Street
24		)	Dept. 690
25		)	Judge: Wistrich
26)	
27		)	Complaint Filed: Mar. 23, 2015
28)	Discovery Cutoff: Mar. 7, 2016
)	Pretrial Conf.: Apr. 15, 2016
)	Trial Date: May 17, 2016

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

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

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

26
27 ¹ Pursuant to Local Rules 37-2 and 7-7, a copy of the Scheduling Order (ECF No.
28 61) is attached as Exhibit A to the Declaration of Caroline Plant filed concurrently
herewith.

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

4 **I. DEFENDANTS’ INTRODUCTORY STATEMENT**

5 **A. DISCOVERY REGARDING PLAINTIFFS’ “INDEPENDENT TESTS.”**

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

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

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

27 **3. Attorney-Client, Attorney Work Product, and Common Interest**
28

1 **Privileges.** Similarly, Plaintiffs assert boilerplate objections and make no showing
2 that any materials regarding Plaintiffs’ “Independent Tests” are protected by any
3 privilege. “The attorney-client privilege protects confidential communications
4 between attorneys and clients, which are made for the purpose of giving legal
5 advice.” *United States v. Richey*, 632 F. 3d 559, 566 (9th Cir. 2011). The work
6 product doctrine protects materials “prepared by a party or his representative in
7 anticipation of litigation.” *Richey* 632 F. 3d at 567. And the common interest
8 doctrine is relevant only if the communication at issue is privileged in the first
9 place. *Nidec Corp. v. Victor Co.*, 249 F.R.D. 575, 578 (N.D. Cal. 2007).

10 Accordingly, this material cannot be withheld based on any privilege.

11 **4. First Amendment.** A valid objection on First Amendment grounds requires
12 that Plaintiffs make a *prima facie* showing that disclosure of these materials
13 requested would lead to “(1) harassment, membership withdrawal, or
14 discouragement of new members, or (2) other consequences which objectively
15 suggest an impact on, or ‘chilling’ of, the members’ associational rights” under the
16 First Amendment. *Brock v. Local 375, Plumbers Int’l Union of Am.*, 860 F. 2d 346,
17 350 (9th Cir. 1988). Plaintiffs have made no such showing here.

18 **B. COMMUNICATIONS REGARDING PCBs AT OTHER SCHOOLS.**

19 Plaintiffs assert the same unsupported objections to Defendants’ requests for
20 communications regarding PCBs at other schools as those discussed above. In their
21 press releases and blog posts, Plaintiffs’ frequently draw comparisons between the
22 PCB remediation conducted at the Malibu Schools and that which has been
23 conducted by other schools. Decl. Plant, Ex. E-G. This information may be used as
24 part of Plaintiffs’ claims against Defendants at trial and accordingly is entirely
25 relevant. Further, Plaintiffs have made no showing that this request is overbroad,
26 oppressive, vague, ambiguous, unduly burdensome, or protected by any privilege.
27 Finally, Plaintiffs have not made any showing that disclosure of these materials
28

1 would lead to “harassment, membership withdrawal, or discouragement of new
2 members,” or that it would result in other consequences that could “chill” members’
3 associational rights under the First Amendment. Accordingly, Plaintiffs must
4 produce the requested materials.

5 **C. DISCOVERY REGARDING PEER’S STANDING.**

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

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

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

3 **II. PLAINTIFFS' INTRODUCTORY STATEMENT**

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

8 As set forth in Plaintiffs' First Amended Complaint ("FAC"), the Malibu
9 Schools are contaminated with polychlorinated biphenyls ("PCBs"), a highly-toxic
10 substance which causes cancers and numerous other serious diseases. (Plant Decl.
11 Ex. D., at ¶¶ 41-49) TSCA and the regulations thereunder prohibit the use of
12 materials containing PCBs at concentrations of 50 parts per million ("ppm") or
13 greater. (*Id.* at ¶¶ 12-22) TSCA imposes a near-total ban on PCBs because of the
14 "extreme threat PCBs pose to human health and the environment." *United States v.*
15 *Commonwealth Edison Co.*, 620 F. Supp. 1404, 1408 (N.D. Ill. 1985).

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

18 **A. The Identities Of Individuals Who Took The Independent Samples**

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

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

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

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

16 Moreover, requiring Plaintiffs to disclose the identities of the individuals who
17 took the samples would place an undue burden on them and chill the exercise of
18 their First Amendment rights. Defendants have already filed a false and malicious
19 criminal complaint against the president of Plaintiff AU and her husband, alleging
20 that they committed felony acts of trespassing and vandalism by collecting samples.
21 (See Declaration of Jennifer DeNicola filed in this action (Dkt. 70-1), ¶¶2-3 and
22 Exs. A and E thereto. The DeNicola declaration is attached as Exhibit A to the
23 accompanying Declaration of Charles Avrith ("Avrith Decl."). Although the
24 District Attorney has declined to file charges, Plaintiffs are rightfully concerned that
25

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

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

3 **B. Communications Regarding PCBs At Other Schools**

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

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

16 **C. Identities Of PEER’s Trial Witnesses**

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

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

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

28

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

3 **1. INTERROGATORY NO. 3.**

4 a. INTERROGATORY NO. 3.

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

7 b. RESPONSE TO INTERROGATORY NO. 3.

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

11 c. DEFENDANTS' CONTENTIONS REGARDING INTERROGATORY
12 NO. 3.

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

22 Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the
23 instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying
24 on such testing. References to "Independent Tests" and independent testing are
25 specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl.
26 Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-
27 26, 128, 132.

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

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

11 [A]ny nonprivileged matter that is relevant to any party's claim or
12 defense and proportional to the needs of the case, considering the
13 importance of the issues at stake in the action, the amount in
14 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.

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

17 The identities of those individuals who have taken samples at the Malibu
18 Schools is of great importance, is clearly relevant to Plaintiffs' claims, and is further
19 relevant to Defendants' defenses. One of Defendants' defenses is that those areas
20 from which samples were taken have been remediated, and accordingly, Plaintiffs'
21 TSCA claim is moot. Defendants are entitled to take discovery, including
22 depositions, of the individuals involved in Plaintiffs' independent testing to confirm
23 the specific locations from which the samples were obtained and prepare this
24 defense. Further, Defendants are entitled to this information so that they can
25 examine the chain of custody for the samples, and assess the reliability of the
26

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

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

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

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

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

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

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

27 Defendants contend that the identities of the individuals who took samples of
28

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

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

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

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

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

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

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

22 However, at this point Defendants have not propounded any discovery
23 requests related to this later sampling, the discovery requests at issue being limited
24 by their terms to the three sets of independent tests. Also, Plaintiffs have not even
25 attempted to use any such additional testing in the case. Moreover, Defendants do
26 not explain why they need to know the "extent" of the sample. The "extent" of the
27 sample is not relevant to determine a TSCA violation. Furthermore, Defendants do
28

1 not need to know the identities of the persons taking the samples to determine the
2 “locations” of the samples. The location of the sampling is shown on the lab reports
3 which Defendants already have. The exact location of the sampling is irrelevant.
4 Defendants’ obligation to remediate is not limited to the exact square inch where a
5 sample was taken.

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

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

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

24 “[I]f the government is successful in compelling [the
25 organization’s lawyer] to reveal the information given to her, especially
26 the identity of those she represents, GAP will lose the confidence of
27 some of its whistleblower informants and its efforts to gather and
28

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

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

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

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

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

11 **2. INTERROGATORY NO. 4.**

12 a. INTERROGATORY NO. 4.

13 IDENTIFY all PERSONS who obtained or collected the “First Set of
14 Independent Tests,” referred to at paragraph 80 of the FAC, at the MALIBU
15 SCHOOLS.

16 b. RESPONSE TO INTERROGATORY NO. 4.

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

20 c. DEFENDANTS’ CONTENTIONS REGARDING INTERROGATORY
21 NO. 4.

22 Prior to initiation of this suit, Plaintiffs served Defendants with two Notices
23 of Intent to File Suit under TSCA (“Notices”), the first dated August 19, 2014, and
24 the second dated January 12, 2015. Decl. Plant, Exs. D, ¶ 32; H-I. Such Notices
25 were sent because, under TSCA’s citizen suit provision, a citizen plaintiff must give
26 the alleged violator and EPA specific notice of the alleged violations of TSCA. 15
27 U.S.C.S. § 2619(b)(1). TSCA’s 60-day notice period is mandatory to the
28

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

4 Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the
5 instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying
6 on such testing. References to “Independent Tests” and independent testing are
7 specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl.
8 Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-
9 26, 128, 132.

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

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

20 [A]ny nonprivileged matter that is relevant to any party’s claim or
21 defense and proportional to the needs of the case, considering the
22 importance of the issues at stake in the action, the amount in
23 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.

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

26 The identities of those individuals who have taken samples at the Malibu
27 Schools is of great importance, is clearly relevant to Plaintiffs’ claims, and is further
28

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

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

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

25 For all of the foregoing reasons, Plaintiffs should be required to identify those
26 individuals who conducted sampling in connection to Plaintiffs' "Independent
27 Tests."
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1 d. AU'S CONTENTIONS REGARDING INTERROGATORY NO. 4.

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

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

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

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

27 _____
28 ⁴ Plaintiffs are relying on the Independent Test in Room 722.

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

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

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

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

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

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

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

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

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

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

15 “Importantly, the party seeking the discovery must show that the
16 information sought is highly relevant to the claims or defenses in the
17 litigation—a more demanding standard of relevance than that under
18 Federal Rule of Civil Procedure 26(b)(1). The request must also be
19 carefully tailored to avoid unnecessary interference with protected
20 activities, and the information must be otherwise unavailable.” *Perry*,
21 591 F.3d at 1161.

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

3 **3. INTERROGATORY NO. 5.**

4 a. INTERROGATORY NO. 5.

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

7 b. RESPONSE TO INTERROGATORY NO. 5.

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

11 c. DEFENDANTS’ CONTENTIONS REGARDING INTERROGATORY NO.
12 5.

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

22 Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the
23 instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying
24 on such testing. References to “Independent Tests” and independent testing are
25 specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl.
26 Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-
27 26, 128, 132.

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

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

11 [A]ny nonprivileged matter that is relevant to any party's claim or
12 defense and proportional to the needs of the case, considering the
13 importance of the issues at stake in the action, the amount in
14 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.

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

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

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

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

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

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

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

26 Defendants contend that the identities of the individuals who took the samples
27 is relevant because Plaintiffs are purportedly relying on the Second Set of
28

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

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

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

22 Defendants also contend that they need to confirm the specific locations from
23 which the samples were obtained, so they can prepare their defenses that those areas
24 from which the samples were taken have been remediated. This contention is
25 equally without merit. Plaintiffs are not relying on the Independent Tests for any
26

27 _____
28 ⁵ Plaintiffs are relying on the Independent Test in Room 205.

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

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

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

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

23 Furthermore, the potential for harm to Plaintiffs or the samplers by disclosure
24 of the requested information greatly outweighs any possible benefit of disclosure.
25 As discussed above, Defendants have already filed a malicious criminal complaint
26 for trespassing and vandalism against individuals who allegedly took samples.
27 Although the District Attorney declined to file any charges, Plaintiffs are
28

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

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

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

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

27 Once a prima facie case of First Amendment infringement is made, “the
28

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

7 “Importantly, the party seeking the discovery must show that the
8 information sought is highly relevant to the claims or defenses in the
9 litigation—a more demanding standard of relevance than that under
10 Federal Rule of Civil Procedure 26(b)(1). The request must also be
11 carefully tailored to avoid unnecessary interference with protected
12 activities, and the information must be otherwise unavailable.” *Perry*,
13 591 F.3d at 1161.

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

21 **4. INTERROGATORY NO. 6.**

22 a. INTERROGATORY NO. 6.

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

25 b. RESPONSE TO INTERROGATORY NO. 6.

26 Plaintiffs objects to this interrogatory on the ground that it seeks information
27
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1 that is not relevant to the party's claims or defenses or the subject matter of this
2 action.

3 c. DEFENDANTS' CONTENTIONS REGARDING INTERROGATORY NO.
4 6.

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

14 Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the
15 instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying
16 on such testing. References to "Independent Tests" and independent testing are
17 specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl.
18 Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-
19 26, 128, 132.

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

24 Now, in response to discovery requests for information regarding this
25 sampling, including the identities of persons who conducted such independent
26 testing, Plaintiffs have taken the specious position that the identities of the
27 individuals who conducted the testing are not relevant. Relevancy is not a valid
28

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

3 [A]ny nonprivileged matter that is relevant to any party's claim or
4 defense and proportional to the needs of the case, considering the
5 importance of the issues at stake in the action, the amount in
6 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.

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

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

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

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

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

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

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

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

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

27 _____

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

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

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

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

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

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

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

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

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

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

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

21 Once a prima facie case of First Amendment infringement is made, “the
22 evidentiary burden will then shift to the government...[to] demonstrate that the
23 information sought through the [discovery] is rationally related to a compelling
24 governmental interest...[and] the ‘least restrictive means’ of obtaining the desired
25 information.” *Perry*, 591 F.3d at 1161 (quoting *brock v. Local 375, Plumbers Int’l*
26 *Union of Am.*, 960 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v.*
27 *Trader’s State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)).
28

1 “Importantly, the party seeking the discovery must show that the
2 information sought is highly relevant to the claims or defenses in the
3 litigation—a more demanding standard of relevance than that under
4 Federal Rule of Civil Procedure 26(b)(1). The request must also be
5 carefully tailored to avoid unnecessary interference with protected
6 activities, and the information must be otherwise unavailable.” *Perry*,
7 591 F.3d at 1161.

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

15 **5. INTERROGATORY NO. 8.**

16 a. INTERROGATORY NO. 8.

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

19 b. RESPONSE TO INTERROGATORY NO. 8.

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

23 c. DEFENDANTS’ CONTENTIONS REGARDING INTERROGATORY NO.
24 8.

25 The “BC Labs Key” refers to the “Key to BC Laboratories, Inc [*sic*] Report.”
26 This key, which was created by Plaintiffs, purportedly shows the locations from
27
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1 which independent sampling was taken. A true and correct copy of the “BC Labs
2 Key” is attached to the Declaration of Caroline L. Plant as Exhibit J.

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

5 [A]ny nonprivileged matter that is relevant to any party’s claim or
6 defense and proportional to the needs of the case, considering the
7 importance of the issues at stake in the action, the amount in
8 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.

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

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

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

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

3 d. AU'S CONTENTIONS REGARDING INTERROGATORY NO. 8

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

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

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

22 Furthermore, the potential for harm to Plaintiffs or the persons creating the
23 key by disclosure of the requested information greatly outweighs any possible
24 benefit of disclosure. As discussed above, Defendants have already filed a
25 malicious criminal complaint for trespassing and vandalism against individuals who
26 allegedly took samples. Although the District Attorney declined to file any charges,
27 Plaintiffs are legitimately concerned that Defendants will use the requested
28

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

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

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

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

27 Once a prima facie case of First Amendment infringement is made, “the
28

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

7 “Importantly, the party seeking the discovery must show that the
 8 information sought is highly relevant to the claims or defenses in the
 9 litigation—a more demanding standard of relevance than that under
 10 Federal Rule of Civil Procedure 26(b)(1). The request must also be
 11 carefully tailored to avoid unnecessary interference with protected
 12 activities, and the information must be otherwise unavailable.” *Perry*,
 13 591 F.3d at 1161.

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

21 **6. INTERROGATORY NO. 9.**

22 a. INTERROGATORY NO. 9.

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

25 b. RESPONSE TO INTERROGATORY NO. 9.

26 Plaintiffs objects to this interrogatory on the ground that it seeks information
 27 that is not relevant to the party’s claims or defenses or the subject matter of this
 28

1 action.

2 c. DEFENDANTS' CONTENTIONS REGARDING INTERROGATORY NO.
3 9.

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

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

10 [A]ny nonprivileged matter that is relevant to any party's claim or
11 defense and proportional to the needs of the case, considering the
12 importance of the issues at stake in the action, the amount in
13 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.

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

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

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

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

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

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

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

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

26 Furthermore, the potential for harm to Plaintiffs or the persons creating the
27 key by disclosure of the requested information greatly outweighs any possible
28

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

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

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

18 Plaintiffs have made a “prima facie showing of arguable first amendment
19 infringement.” *Perry v. Schwazanegger*, 591 F.3d 1126, 1140 (9th Cir. 2010)
20 (quoting *United States v. Trader’s State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983)
21 (per curiam)). Disclosure of the identities of the samplers would severely
22 discourage Plaintiffs’ ability to gather evidence of environmental violations because
23 Plaintiffs would be unable to protect the samplers’ confidentiality, and thus lose the
24 confidence of their informants, thereby severely hampering Plaintiffs’
25 organizational missions. It could also result in harassment of individuals who took
26 the samples. Defendants have already filed a false criminal complaint against the
27 President of America Unites, Ms. Denicola, and her husband, seeking to subject
28

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

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

11 “Importantly, the party seeking the discovery must show that the
12 information sought is highly relevant to the claims or defenses in the
13 litigation—a more demanding standard of relevance than that under
14 Federal Rule of Civil Procedure 26(b)(1). The request must also be
15 carefully tailored to avoid unnecessary interference with protected
16 activities, and the information must be otherwise unavailable.” *Perry*,
17 591 F.3d at 1161.

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

25 **B. REQUESTS FOR PRODUCTION TO AU REGARDING THE**
26 **INDEPENDENT SAMPLING AT THE MALIBU SCHOOLS**

27 Defendants’ Requests for Production 5, 15, 17, and 19 to AU seek the
28

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

3 **1. REQUEST FOR PRODUCTION NO. 5.**

4 a. REQUEST FOR PRODUCTION NO. 5

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

8 b. RESPONSE TO REQUEST FOR PRODUCTION NO. 5.

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

17 c. DEFENDANTS’ CONTENTIONS REGARDING RFP NO. 5.

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

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

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1 Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the
2 instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying
3 on such testing. References to “Independent Tests” and independent testing are
4 specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl.
5 Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-
6 26, 128, 132.

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

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

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

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

26 The identities of those individuals who have taken samples at the Malibu
27 Schools is of great importance, is clearly relevant to Plaintiffs’ claims, and is further
28 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

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

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

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

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

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

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

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

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

19 (a) Attorney-Client Privilege.

20 “The attorney-client privilege protects confidential communications between
 21 attorneys and clients, which are made for the purpose of giving legal advice.”
 22 *United States v. Richey*, 632 F. 3d 559, 566 (9th Cir. 2011). The party asserting this
 23 privilege bears the burden of showing that there is an attorney-client relationship
 24 and the privileged nature of the communication. *Id.*; *United States v. Bauer*, 132 F.
 25 3d 504, 507 (9th Cir. 1997). There is an attorney-client privilege where: “(1) []
 26 legal advice of any kind is sought (2) from a professional legal advisor in his
 27 capacity as such, (3) the communications relating to that purpose, (4) made in
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1 confidence (5) by the client, (6) are at his instance permanently protected (7) from
2 disclosure by himself or by the legal advisor, (8) unless the protection be waved.”
3 *Id.* (quoting *United States v. Graf*, 610 F. 3d 1148, 1156 (9th Cir. 2010)). The
4 privilege is waived when privileged communications are disclosed. *Weil v. Inv.*
5 *Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). While the
6 privilege may extend to those communications with third parties assisting the
7 attorney in legal advice, it does not extend where the advice sought is not legal
8 advice. *Id.*

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

19 (b) Attorney Work Product.

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

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

18 (c) Common Interest Doctrine.

19 In general, the attorney-client privilege is waived when communications
20 between an attorney and client are disclosed to a third party. *Weil v. Inv/ Indicators,*
21 *Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). There is a rare exception
22 to this waiver rule where individuals with a common interest in a legal matter may
23 “communicate among themselves and with the separate attorneys on matters of
24 common legal interest, for the purpose of preparing a joint strategy, and the
25 attorney-client privilege will protect these communications to the same extent as it
26 would communications between each client and his own attorney.” *Nidex Corp. v.*
27 *Victor Co.*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) (quoting 1 PAUL R. RICE,
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1 ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:35, at 192 (1999 ed.);
2 *United States v. Gonzales*, 669 F. 3d 974, 978 (9th Cir. 2012). This common
3 interest doctrine is not a privilege, but an exception to the rule on waiver where
4 communications are disclosed to third parties. *See Griffith v. Davis*, 161 F.R.D.
5 687, 692 (C.D. Cal. 1995). For this reason, the common interest doctrine comes
6 into play only if the communication at issue is privileged in the first place. *Nidec*
7 *Corp*, 249 F.R.D. at 578.

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

15 iv. First Amendment Privilege Is Not a Valid Objection.

16 Plaintiff objects to this Request on the ground that it violates the First
17 Amendment rights of association of Plaintiff and its members. A party objecting on
18 the basis of a First Amendment privilege must satisfy a two-part test. The objecting
19 party must first make a "prima facie showing of arguable first amendment
20 infringement." *Perry v. Schwarzenegger*, 591 F. 3d 1126, 1140 (9th Cir. 2010)
21 (quoting *Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F. 2d 346, 349-50
22 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is
23 enforced, there will be "(1) harassment, membership withdrawal, or discouragement
24 of new members, or (2) other consequences which objectively suggest an impact on,
25 or 'chilling' of, the members' associational rights." *Brock*, 860 F. 2d at 350.

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

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

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

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

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

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

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

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

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

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

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

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

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

11 Forced disclosure of the identities of those who took samples would greatly
12 inhibit Plaintiffs' ability to fulfill their mission of advocating for remediation of
13 environmental hazards. *See, e.g., United States v. Garde*, 673 F.Supp. 604, 607
14 (D.D.C. 1987). Plaintiffs have made a "prima facie showing of arguable first
15 amendment infringement." *Perry v. Schwazanegger*, 591 F.3d 1126, 1140 (9th Cir.
16 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir.
17 1983) (per curiam)). Disclosure of the identities of the samplers would severely
18 discourage Plaintiffs' ability to gather evidence of environmental violations because
19 Plaintiffs would be unable to protect the samplers' confidentiality, and thus lose the
20 confidence of their informants, thereby severely hampering Plaintiffs'
21 organizational missions. It could also result in harassment of individuals who took
22 the samples. Defendants have already filed a false criminal complaint against the
23 President of America Unites, Ms. Denicola, and her husband, seeking to subject
24 them to felony charges punishable by fines and imprisonment, for allegedly taking
25 caulk samples. It is difficult to imagine a more "chilling" action against those who
26 advocate for PCB testing and remediation at the Malibu Schools.

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

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

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

18 **2. REQUEST FOR PRODUCTION NO. 15.**

19 a. REQUEST FOR PRODUCTION NO. 15.

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

23 b. RESPONSE TO REQUEST FOR PRODUCTION NO. 15.

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

5 c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 15.

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

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

16 Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the
17 instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying
18 on such testing. References to "Independent Tests" and independent testing are
19 specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl.
20 Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-
21 26, 128, 132.

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

26 Now, in response to discovery requests for information regarding this
27 sampling, including the identities of persons who conducted such independent
28

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

5 [A]ny nonprivileged matter that is relevant to any party's claim or
6 defense and proportional to the needs of the case, considering the
7 importance of the issues at stake in the action, the amount in
8 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.

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

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

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

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

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

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

16 Plaintiff's objection that Requests for Production No. 15 is vague, ambiguous
17 and overbroad is unfounded. "The party who resists discovery has the burden to
18 show discovery should not be allowed, and has the burden of clarifying, explaining,
19 and supporting its objections." *Bible v. Rio Props., Inc.*, 246 F. R. D. 614 (C.D.
20 Cal. 2007) (citing *Blankenship v. Hearst Corp.*, 519 F. 2d 418, 429 (9th Cir. 1975)
21 and *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 655-56 (C.D. Cal.
22 2005)). There is no merit to "general or boilerplate objections such as 'overly
23 broad' [or] 'vague and ambiguous.'" *Bible*, 246 F. R. D. at 619; *A. Farber &*
24 *Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal. 2006).

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

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

9 (a) Attorney-Client Privilege.

10 “The attorney-client privilege protects confidential communications between
11 attorneys and clients, which are made for the purpose of giving legal advice.”
12 *United States v. Richey*, 632 F. 3d 559, 566 (9th Cir. 2011). The party asserting this
13 privilege bears the burden of showing that there is an attorney-client relationship
14 and the privileged nature of the communication. *Id.*; *United States v. Bauer*, 132 F.
15 3d 504, 507 (9th Cir. 1997). There is an attorney-client privilege where: “(1) []
16 legal advice of any kind is sought (2) from a professional legal advisor in his
17 capacity as such, (3) the communications relating to that purpose, (4) made in
18 confidence (5) by the client, (6) are at his instance permanently protected (7) from
19 disclosure by himself or by the legal advisor, (8) unless the protection be waved.”
20 *Id.* (quoting *United States v. Graf*, 610 F. 3d 1148, 1156 (9th Cir. 2010)). The
21 privilege is waived when privileged communications are disclosed. *Weil v.*
22 *Inv./Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). While
23 the privilege may extend to those communications with third parties assisting the
24 attorney in legal advice, it does not extend where the advice sought is not legal
25 advice. *Id.*

26 Documents identifying those involved in Plaintiffs’ “Independent Tests” are
27 not protected by the attorney-client privilege to the extent that they include
28

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

9 (b) Attorney Work Product.

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

20 Plaintiffs cannot claim work product immunity because they have made no
21 showing that this protection applies to any of the information sought in Defendants'
22 Requests. For example, Plaintiffs have not demonstrated how documents
23 identifying those who obtained or collected samples in Plaintiffs' independent
24 testing bears any relation to Plaintiffs' efforts in preparation for trial. Furthermore,
25 Defendants have good cause to request information sought, because the data from
26 the "Independent Tests" will surely be used against Defendants in this litigation, and
27 Defendants must be afforded the opportunity to confront the validity and reliability
28

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

7 (c) Common Interest Doctrine.

8 In general, the attorney-client privilege is waived when communications
9 between an attorney and client are disclosed to a third party. *Weil v. Inv/ Indicators,*
10 *Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). There is a rare exception
11 to this waiver rule where individuals with a common interest in a legal matter may
12 "communicate among themselves and with the separate attorneys on matters of
13 common legal interest, for the purpose of preparing a joint strategy, and the
14 attorney-client privilege will protect these communications to the same extent as it
15 would communications between each client and his own attorney." *Nidec Corp. v.*
16 *Victor Co.*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) (*quoting* 1 PAUL R. RICE,
17 ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:35, at 192 (1999 ed.);
18 *United States v. Gonzales*, 669 F. 3d 974, 978 (9th Cir. 2012). This common
19 interest doctrine is not a privilege, but an exception to the rule on waiver where
20 communications are disclosed to third parties. *See Griffith*, 161 F.R.D. at 692. For
21 this reason, the common interest doctrine comes into play only if the
22 communication at issue is privileged in the first place. *Nidec Corp*, 249 F.R.D. at
23 578.

24 As the common interest doctrine applies only to those materials protected by
25 the attorney-client privilege with regard to America Unites and PEER, the parties
26 with a common legal interest in this case, not all communications between America
27 Unites and PEER are protected. Defendants request that Plaintiff produce
28

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

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

5 Plaintiff objects to RFP No. 15 on the ground that this Request violates the
6 First Amendment rights of association of Plaintiff and its members. A party
7 objecting on the basis of a First Amendment privilege must satisfy a two-part test.
8 The objecting party must first make a "prima facie showing of arguable first
9 amendment infringement." *Perry v. Schwarzenegger*, 591 F. 3d 1126, 1140 (9th
10 Cir. 2010) (quoting *Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F. 2d 346,
11 349-50 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request
12 is enforced, there will be "(1) harassment, membership withdrawal, or
13 discouragement of new members, or (2) other consequences which objectively
14 suggest an impact on, or 'chilling' of, the members' associational rights." *Brock*,
15 860 F. 2d at 350.

16 Here, Plaintiff has made no such showing that disclosure of the documents
17 requested would lead to "harassment, membership withdrawal, or discouragement
18 of new members," or that it would result in other consequences that could "chill"
19 members' associational rights. The Request for documents identifying those who
20 obtained or collected the "Independent Tests" calls for chain of custody documents
21 and documents prepared for Plaintiffs by environmental testing companies. The
22 Request propounded by Defendants is not seeking personal information, does
23 nothing to harass members of Plaintiff organizations, and would not have a deterrent
24 effect on membership. Moreover, the documents requested by Defendants are
25 necessary so that Defendants can defend themselves in this litigation and fairness
26 justifies their production. Defendants will not be afforded a fair discovery if they
27
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1 are precluded from accessing information regarding the independent testing data
2 acquired by Plaintiffs, which will surely be used against Defendants in trial.

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

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

20 d. AU’S CONTENTIONS REGARDING RFP NO. 15.

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

26 Defendants contend that the identities of the individuals who took samples of
27 caulk at the Malibu Schools is relevant because Plaintiffs are purportedly relying on
28

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

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

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

22 Defendants also contend that they need to confirm the specific locations from
23 which the samples were obtained, so they can prepare their defenses that those areas
24 from which the samples were taken have been remediated. This contention is
25 equally without merit. Plaintiffs are not relying on the Independent Tests for any
26 purpose with respect to any of the rooms that Defendants claim to have remediated.
27 Thus, there is nothing for Defendants to confirm.
28

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

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

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

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

28

1 Forced disclosure of the identities of those who took samples would greatly
2 inhibit Plaintiffs’ ability to fulfill their mission of advocating for remediation of
3 environmental hazards. *See, e.g., United States v. Garde*, 673 F.Supp. 604, 607
4 (D.D.C. 1987). Plaintiffs have made a “prima facie showing of arguable first
5 amendment infringement.” *Perry v. Schwazanegger*, 591 F.3d 1126, 1140 (9th Cir.
6 2010) (quoting *United States v. Trader’s State Bank*, 695 F.2d 1132, 1133 (9th Cir.
7 1983) (per curiam)). Disclosure of the identities of the samplers would severely
8 discourage Plaintiffs’ ability to gather evidence of environmental violations because
9 Plaintiffs would be unable to protect the samplers’ confidentiality, and thus lose the
10 confidence of their informants, thereby severely hampering Plaintiffs’
11 organizational missions. It could also result in harassment of individuals who took
12 the samples. Defendants have already filed a false criminal complaint against the
13 President of America Unites, Ms. Denicola, and her husband, seeking to subject
14 them to felony charges punishable by fines and imprisonment, for allegedly taking
15 caulk samples. It is difficult to imagine a more “chilling” action against those who
16 advocate for PCB testing and remediation at the Malibu Schools.

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

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

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

8 **3. REQUEST FOR PRODUCTION NO. 17.**

9 a. REQUEST FOR PRODUCTION NO. 17.

10 All DOCUMENTS that IDENTIFY the PERSON or PERSONS who obtained
11 OR COLLECTED THE PIECE OF CAULK REFERRED TO AT PARAGRAPH
12 104 OF THE FAC.

13 b. RESPONSE TO REQUEST FOR PRODUCTION NO. 17.

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

22 c. DEFENDANTS’ CONTENTIONS REGARDING RFP NO. 17.

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

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

6 Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the
7 instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying
8 on such testing. References to “Independent Tests” and independent testing are
9 specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl.
10 Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-
11 26, 128, 132.

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

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

22 [A]ny nonprivileged matter that is relevant to any party’s claim or
23 defense and proportional to the needs of the case, considering the
24 importance of the issues at stake in the action, the amount in
25 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.

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

28

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

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

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

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

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

6 Plaintiff's objection that Requests for Production No. 17 is vague, ambiguous
7 and overbroad is unfounded. "The party who resists discovery has the burden to
8 show discovery should not be allowed, and has the burden of clarifying, explaining,
9 and supporting its objections." *Bible v. Rio Props., Inc.*, 246 F. R. D. 614 (C.D.
10 Cal. 2007) (citing *Blankenship v. Hearst Corp.*, 519 F. 2d 418, 429 (9th Cir. 1975)
11 and *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 655-56 (C.D. Cal.
12 2005)). There is no merit to "general or boilerplate objections such as 'overly
13 broad' [or] 'vague and ambiguous.'" *Bible*, 246 F. R. D. at 619; *A. Farber &*
14 *Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal. 2006).

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

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

26 (a) Attorney-Client Privilege.

27 "The attorney-client privilege protects confidential communications between
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1 attorneys and clients, which are made for the purpose of giving legal advice.”
2 *United States v. Richey*, 632 F. 3d 559, 566 (9th Cir. 2011). The party asserting this
3 privilege bears the burden of showing that there is an attorney-client relationship
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5 3d 504, 507 (9th Cir. 1997). There is an attorney-client privilege where: “(1) []
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9 disclosure by himself or by the legal advisor, (8) unless the protection be waved.”
10 *Id.* (quoting *United States v. Graf*, 610 F. 3d 1148, 1156 (9th Cir. 2010)). The
11 privilege is waived when privileged communications are disclosed. *Weil v.*
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14 attorney in legal advice, it does not extend where the advice sought is not legal
15 advice. *Id.*

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

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10 192.

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12 showing that this protection applies to any of the information sought in Defendants’
13 Requests. For example, Plaintiffs have not demonstrated how documents
14 identifying those who obtained or collected samples in Plaintiffs’ independent
15 testing bears any relation to Plaintiffs’ efforts in preparation for trial. Furthermore,
16 Defendants have good cause to request information sought, because the data from
17 the “Independent Tests” will surely be used against Defendants in this litigation, and
18 Defendants must be afforded the opportunity to confront the validity and reliability
19 of the data. This necessarily entails a complete knowledge of the chain of custody,
20 which can only be discovered through documents identifying those involved in the
21 testing process. Plaintiffs have not met the burden of demonstrating the
22 applicability of the work product doctrine, so their objection on this basis is not
23 appropriate. Accordingly, Plaintiffs may not refuse to produce documents in
24 response to Defendants’ Requests on the basis of attorney-client privilege.

25 (c) Common Interest Doctrine.

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

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1 Cir. 2010) (*quoting Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F. 2d 346,
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10 members’ associational rights. The Request for documents identifying those who
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12 and documents prepared for Plaintiffs by environmental testing companies. The
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14 nothing to harass members of Plaintiff organizations, and would not have a deterrent
15 effect on membership. Moreover, the documents requested by Defendants are
16 necessary so that Defendants can defend themselves in this litigation and fairness
17 justifies their production. Defendants will not be afforded a fair discovery if they
18 are precluded from accessing information regarding the independent testing data
19 acquired by Plaintiffs, which will surely be used against Defendants in trial.

20 Additionally, there would be no “chilling” effect if Plaintiffs responded to
21 Defendants’ RFP, because AU is publicly vocal about its activities and its
22 membership, listing members of its Advisory Board and Leadership Team on its
23 website. *See Decl. Plant, Exs. L, M.* In particular, Plaintiff frequently publicizes its
24 activities with regard to the subject matter of this very case on its website. *See Decl.*
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2 The documents and information requested are necessary and relevant to
3 Defendants' preparation for trial, and the names and email addresses of those
4 members who would like their membership in America Unites to remain private
5 could be redacted so as to balance any associational issues with the Court's strong
6 interest in ensuring Defendants' ability to fairly defend their case. Plaintiffs' entire
7 case is premised on data from the "Independent Tests" referenced in Plaintiffs'
8 FAC, and it is imperative that Defendants are granted full access to information and
9 communications regarding these tests and their chains of custody.

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

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

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

23 Furthermore, the potential for harm to Plaintiffs or the samplers by disclosure
24 of the requested information greatly outweighs any possible benefit of disclosure.
25 As discussed above, Defendants have already filed a malicious criminal complaint
26 for trespassing and vandalism against individuals who allegedly took samples.
27 Although the District Attorney declined to file any charges, Plaintiffs are
28

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

3 Forced disclosure of the identities of those who took samples would greatly
4 inhibit Plaintiffs' ability to fulfill their mission of advocating for remediation of
5 environmental hazards. *See, e.g., United States v. Garde*, 673 F.Supp. 604, 607
6 (D.D.C. 1987). Plaintiffs have made a "prima facie showing of arguable first
7 amendment infringement." *Perry v. Schwazanegger*, 591 F.3d 1126, 1140 (9th Cir.
8 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir.
9 1983) (per curiam)). Disclosure of the identities of the samplers would severely
10 discourage Plaintiffs' ability to gather evidence of environmental violations because
11 Plaintiffs would be unable to protect the samplers' confidentiality, and thus lose the
12 confidence of their informants, thereby severely hampering Plaintiffs'
13 organizational missions. It could also result in harassment of individuals who took
14 the samples. Defendants have already filed a false criminal complaint against the
15 President of America Unites, Ms. Denicola, and her husband, seeking to subject
16 them to felony charges punishable by fines and imprisonment, for allegedly taking
17 caulk samples. It is difficult to imagine a more "chilling" action against those who
18 advocate for PCB testing and remediation at the Malibu Schools.

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

26 Here, Defendants cannot even show that this discovery meets the relevance
27 requirements of Rule 26, much less the more demanding standard of relevance when
28

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

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

10 **4. REQUEST FOR PRODUCTION NO. 19.**

11 a. REQUEST FOR PRODUCTION NO. 19.

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

15 b. RESPONSE TO REQUEST FOR PRODUCTION NO. 19.

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

24 c. DEFENDANTS’ CONTENTIONS REGARDING RFP NO. 19.

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

26 Prior to initiation of this suit, Plaintiffs served Defendants with two Notices
27 of Intent to File Suit under TSCA (“Notices”), the first dated August 19, 2014, and
28

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

8 Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the
9 instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying
10 on such testing. References to “Independent Tests” and independent testing are
11 specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl.
12 Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-
13 26, 128, 132.

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

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

24 [A]ny nonprivileged matter that is relevant to any party’s claim or
25 defense and proportional to the needs of the case, considering the
26 importance of the issues at stake in the action, the amount in
27 controversy, the parties’ relative access to relevant information, the
28 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.

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

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

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

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

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

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

7 Plaintiff's objection that Requests for Production No. 19 is vague, ambiguous
8 and overbroad is unfounded. "The party who resists discovery has the burden to
9 show discovery should not be allowed, and has the burden of clarifying, explaining,
10 and supporting its objections." *Bible v. Rio Props., Inc.*, 246 F. R. D. 614 (C.D.
11 Cal. 2007) (citing *Blankenship v. Hearst Corp.*, 519 F. 2d 418, 429 (9th Cir. 1975)
12 and *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 655-56 (C.D. Cal.
13 2005)). There is no merit to "general or boilerplate objections such as 'overly
14 broad' [or] 'vague and ambiguous.'" *Bible*, 246 F. R. D. at 619; *A. Farber &*
15 *Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal. 2006).

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

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

27 (a) Attorney-Client Privilege.

28

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

17 Documents identifying those involved in Plaintiffs’ “Independent Tests” are
18 not protected by the attorney-client privilege to the extent that they include
19 correspondences and records from the environmental testing entities engaged in the
20 testing process. The entities involved in the testing process were not engaged in this
21 process for the purpose of aiding Plaintiffs or their counsel in litigation; rather, the
22 sole role of these entities was to provide testing services. Furthermore, Plaintiffs
23 have failed to indicate in their responses which communications they believe to be
24 protected by the attorney-client privilege. *Richey*, 632 F. 3d at 567 (9th Cir. 2011).
25 Accordingly, Plaintiffs may not refuse to produce documents in response to
26 Defendants’ Requests on the basis of attorney-client privilege.
27
28

1 (b) Attorney Work Product.

2 The work product doctrine prohibits discovery of documents and other
3 materials “prepared by a party or his representative in anticipation of litigation.”
4 *United States v. Richey* 632 F. 3d 559, 567 (9th Cir. 2011) (quoting *Admiral Ins. Co.*
5 *v. U.S. Dist. Ct.*, 881 F. 2d 1486, 1494 (9th Cir. 1989); Fed. R. Civ. P. 26(b)(3).
6 The work product doctrine is a qualified immunity rather than a privilege, and a
7 showing of good cause for the information desired is sufficient to overcome the
8 qualified immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D.
9 Cal. 2006); *Admiral Ins. Co. v. United States Dist. Court.*, 881 F. 2d 1486, 1494
10 (9th Cir. 1989). “The party claiming work product immunity has the burden of
11 proving the applicability of the doctrine.” *A. Farbers & Ptnrs., Inc.*, 234 F.R.D. at
12 192.

13 Plaintiffs cannot claim work product immunity because they have made no
14 showing that this protection applies to any of the information sought in Defendants’
15 Requests. For example, Plaintiffs have not demonstrated how documents
16 identifying those who obtained or collected samples in Plaintiffs’ independent
17 testing bears any relation to Plaintiffs’ efforts in preparation for trial. Furthermore,
18 Defendants have good cause to request information sought, because the data from
19 the “Independent Tests” will surely be used against Defendants in this litigation, and
20 Defendants must be afforded the opportunity to confront the validity and reliability
21 of the data. This necessarily entails a complete knowledge of the chain of custody,
22 which can only be discovered through documents identifying those involved in the
23 testing process. Plaintiffs have not met the burden of demonstrating the
24 applicability of the work product doctrine, so their objection on this basis is not
25 appropriate. Accordingly, Plaintiffs may not refuse to produce documents in
26 response to Defendants’ Requests on the basis of attorney-client privilege.
27
28

1 (c) Common Interest Doctrine.

2 In general, the attorney-client privilege is waived when communications
3 between an attorney and client are disclosed to a third party. *Weil v. Inv/ Indicators,*
4 *Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). There is a rare exception
5 to this waiver rule where individuals with a common interest in a legal matter may
6 “communicate among themselves and with the separate attorneys on matters of
7 common legal interest, for the purpose of preparing a joint strategy, and the
8 attorney-client privilege will protect these communications to the same extent as it
9 would communications between each client and his own attorney.” *Nidex Corp. v.*
10 *Victor Co.*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) (quoting 1 PAUL R. RICE,
11 ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:35, at 192 (1999 ed.);
12 *United States v. Gonzales*, 669 F. 3d 974, 978 (9th Cir. 2012). This common
13 interest doctrine is not a privilege, but an exception to the rule on waiver where
14 communications are disclosed to third parties. *See Griffith v. Davis*, 161 F.R.D. at
15 692. For this reason, the common interest doctrine comes into play only if the
16 communication at issue is privileged in the first place. *Nidex Corp.*, 249 F.R.D. at
17 578.

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

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

26 Plaintiff objects to RFP No. 19 on the ground that this Request violates the
27 First Amendment rights of association of Plaintiff and its members. A party
28

1 objecting on the basis of a First Amendment privilege must satisfy a two-part test.
2 The objecting party must first make a “prima facie showing of arguable first
3 amendment infringement.” *Perry v. Schwarzenegger*, 591 F. 3d 1126, 1140 (9th
4 Cir. 2010) (quoting *Brock v. Local 375, Plumbers Int’l Union of Am.*, 860 F. 2d 346,
5 349-50 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request
6 is enforced, there will be “(1) harassment, membership withdrawal, or
7 discouragement of new members, or (2) other consequences which objectively
8 suggest an impact on, or ‘chilling’ of, the members’ associational rights.” *Brock*,
9 860 F. 2d at 350.

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

23 Additionally, there would be no “chilling” effect if Plaintiffs responded to
24 Defendants’ RFP, because AU is publicly vocal about its activities and its
25 membership, listing members of its Advisory Board and Leadership Team on its
26 website. *See Decl. Plant, Exs. L, M.* In particular, Plaintiff frequently publicizes its
27 activities with regard to the subject matter of this very case on its website. *See Decl.*
28

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

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

13 d. AU’S CONTENTIONS REGARDING RFP NO. 19.

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

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

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

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

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

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

28

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

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

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

21 Forced disclosure of the identities of those who took samples would greatly
22 inhibit Plaintiffs' ability to fulfill their mission of advocating for remediation of
23 environmental hazards. *See, e.g., United States v. Garde*, 673 F.Supp. 604, 607
24 (D.D.C. 1987). Plaintiffs have made a "prima facie showing of arguable first
25 amendment infringement." *Perry v. Schwazanegger*, 591 F.3d 1126, 1140 (9th Cir.
26 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir.
27 1983) (per curiam)). Disclosure of the identities of the samplers would severely
28

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

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

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

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

28

1 **C. INTERROGATORIES TO PEER REGARDING INDEPENDENT**
2 **SAMPLING.**

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

7 **1. INTERROGATORY NO. 1**

8 a. INTERROGATORY NO. 1.

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

11 b. RESPONSE TO INTERROGATORY NO. 1.

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

15 c. DEFENDANTS' CONTENTIONS REGARDING INTERROGATORY NO.
16 1.

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

26 Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the
27 instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying
28

1 on such testing. References to “Independent Tests” and independent testing are
2 specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl.
3 Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-
4 26, 128, 132.

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

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

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

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

24 The identities of those individuals who have taken samples at the Malibu
25 Schools is of great importance, is clearly relevant to Plaintiffs’ claims, and is further
26 relevant to Defendants’ defenses. One of Defendants’ defenses is that those areas
27 from which samples were taken have been remediated, and accordingly, Plaintiffs’
28 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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 However, at this point Plaintiffs have not even attempted to use any such
25 additional testing in the case. Moreover, Defendants do not explain why they need
26 to know the "extent" of the sample. The "extent" of the sample is not relevant to
27 determine a TSCA violation. Moreover, Defendants do not need to know the
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1 identities of the persons taking the samples to determine the “locations” of the
2 samples. The location of the sampling is shown on the lab reports which
3 Defendants already have. The “exact” location of the sampling is irrelevant.
4 Defendants’ obligation to remediate is not limited to the exact square inch where a
5 sample was taken.

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

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

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

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

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

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

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

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1 Perry, 591 F.3d at 1161.

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

11 **2. INTERROGATORY NO. 2.**

12 a. INTERROGATORY NO. 2.

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

16 b. RESPONSE TO INTERROGATORY NO. 2.

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

20 c. DEFENDANTS' CONTENTIONS REGARDING INTERROGATORY NO.
21 2.

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

4 Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the
5 instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying
6 on such testing. References to “Independent Tests” and independent testing are
7 specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl.
8 Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-
9 26, 128, 132.

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

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

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

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

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

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

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

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

25 For all of the foregoing reasons, Plaintiffs should be required to identify those
26 individuals who conducted sampling in connection to Plaintiffs' "Independent
27 Tests."
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1 d. PEER’S CONTENTIONS REGARDING INTERROGATORY NO. 2.

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

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

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

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

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

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

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

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

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

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

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

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

18 Plaintiff has made a "prima facie showing of arguable first amendment
19 infringement." *Perry v. Schwazanegger*, 591 F.3d 1126, 1140 (9th Cir. 2010)
20 (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983)
21 (per curiam)). Disclosure of the identities of the samplers would severely
22 discourage Plaintiff's ability to gather evidence of environmental violations because
23 Plaintiff would be unable to protect the samplers' confidentiality, thereby severely
24 hampering Plaintiff's organizational mission. It could also result in harassment of
25 individuals who took the samples. Defendants have already filed a false criminal
26 complaint against the President of America Unites, Ms. DeNicola, and her husband,
27 seeking to subject them to felony charges punishable by fines and imprisonment, for
28

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

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

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

17 *Perry*, 591 F.3d at 1161.

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

1 **3. INTERROGATORY NO. 3.**

2 a. INTERROGATORY NO. 3.

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

5 b. RESPONSE TO INTERROGATORY NO. 3.

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

9 c. DEFENDANTS’ CONTENTIONS REGARDING INTERROGATORY NO.
10 3.

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

20 Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the
21 instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying
22 on such testing. References to “Independent Tests” and independent testing are
23 specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl.
24 Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-
25 26, 128, 132.

26 Further, on April 1, 2015, Plaintiffs filed a motion for a preliminary
27 injunction, again relying on the results of such independent testing, for its request
28

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

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

9 [A]ny nonprivileged matter that is relevant to any party's claim or
10 defense and proportional to the needs of the case, considering the
11 importance of the issues at stake in the action, the amount in
12 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.

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

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

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

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

15 For all of the foregoing reasons, Plaintiffs should be required to identify those
16 individuals who conducted sampling in connection to Plaintiffs’ “Independent
17 Tests.”

18 d. PEER’S CONTENTIONS REGARDING INTERROGATORY NO. 3.

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

24 Information regarding the “Second Set of Independent Tests” is not relevant
25 to the matters at issue in this lawsuit because Defendants have verified through their
26 own testing that three out of the four rooms in the “Second Set of Independent
27 Tests” were in violation of TSCA, the matter which Plaintiffs are seeking to prove
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1 in this lawsuit. Although Defendants argue that Plaintiffs relied on this
2 independent testing in their Amended Complaint, in fact Plaintiffs' Amended
3 Complaint included information about the independent testing primarily for
4 informational purposes and to describe the chronology of events at the Malibu
5 School. Plaintiffs also recited that Defendants had verified the independent test
6 results and found TSCA violations in every single one of 24 verification samples
7 they took in ten rooms, FAC ¶¶ 127-129, confirming the appropriateness of the
8 methodology and accuracy of the analysis of the independent testing generally, and
9 making it unnecessary to rely on the independent testing to prove Plaintiffs' case at
10 the least with regard to the verified rooms and the buildings in which they are
11 located. There is no possible reason why Defendants would need to know the
12 identities of the persons who took samples for tests on which Plaintiffs are not
13 relying. From the Second Set of Independent Tests, Plaintiffs would possibly
14 introduce evidence only with regard to the test results regarding MHS Room 205, a
15 French language classroom in which Defendants did not conduct verification testing
16 or remediation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 *Perry*, 591 F.3d at 1161.

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

18 **4. INTERROGATORY NO. 4.**

19 a. INTERROGATORY NO. 4.

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

22 b. RESPONSE TO INTERROGATORY NO. 4.

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

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1 c. DEFENDANTS' CONTENTIONS REGARDING INTERROGATORY NO.
2 4.

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

12 Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the
13 instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying
14 on such testing. References to "Independent Tests" and independent testing are
15 specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl.
16 Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-
17 26, 128, 132.

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

22 Now, in response to discovery requests for information regarding this
23 sampling, including the identities of persons who conducted such independent
24 testing, Plaintiffs have taken the specious position that the identities of the
25 individuals who conducted the testing are not relevant. Relevancy is not a valid
26 objection to this Interrogatory. Under Rule 26(b)(1), parties may obtain discovery
27 regarding:
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1 [A]ny nonprivileged matter that is relevant to any party's claim or
2 defense and proportional to the needs of the case, considering the
3 importance of the issues at stake in the action, the amount in
4 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.

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

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

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

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

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

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

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

19 Although Defendants argue that Plaintiffs relied on this independent testing in
20 their Amended Complaint, in fact Plaintiffs' Amended Complaint included
21 information about the independent testing primarily for informational purposes and
22 to describe the chronology of events at the Malibu School. Plaintiffs also recited
23 that Defendants had verified the independent test results and found TSCA violations
24 in every single one of 24 verification samples they took in ten rooms, FAC ¶¶ 127-
25 129, confirming the appropriateness of the methodology and accuracy of the
26 analysis of the independent testing generally, and making it unnecessary to rely on
27 the independent testing to prove Plaintiffs' case at the least with regard to the
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1 verified rooms and the buildings in which they are located. There is no possible
2 reason why Defendants would need to know the identities of the persons who took
3 samples for tests on which Plaintiffs are not relying. From the Third Set of
4 Independent Tests, Plaintiffs would possibly introduce evidence only with regard to
5 the test results regarding a JCES office next to the teacher’s lounge, which includes
6 the principal’s office, in which Defendants did not conduct verification testing or
7 remediation.

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

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

22 Even with respect to the one room for which Plaintiffs continue to rely on the
23 Third Set of Independent Tests, Defendants do not need to know the identities of the
24 person who took the samples. With regard to the JCES Office, Plaintiffs have
25 produced the laboratory reports. Although Defendants conclusorily contend they
26 need the identity of the samplers to assess the reliability of the testing data, they do
27 not explain why that is the case. Defendants’ reports of its own testing do not state
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1 the name of the individuals who took the samples. The test data is a product of a lab
2 analysis of the samples. There is nothing that the sampler can do to affect the
3 reliability of the data derived from a sample.

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

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

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

23 However, this interrogatory only relates to the Third Set of Independent Tests
24 and therefore the identity of the samples for different tests would not be responsive.
25 In addition, at this point Plaintiffs have not even attempted to use any such
26 additional testing in the case. Moreover, Defendants do not explain why they need
27 to know the "extent" of the sample. The "extent" of the sample is not relevant to
28

1 determine a TSCA violation. Moreover, Defendants do not need to know the
2 identities of the persons taking the samples to determine the “locations” of the
3 samples. The location of the sampling is shown on the lab reports which
4 Defendants already have. The “exact” location of the sampling is irrelevant.
5 Defendants’ obligation to remediate is not limited to the exact square inch where a
6 sample was taken.

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

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

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

24 Plaintiff has made a “prima facie showing of arguable first amendment
25 infringement.” *Perry v. Schwazanegger*, 591 F.3d 1126, 1140 (9th Cir. 2010)
26 (quoting *United States v. Trader’s State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983)
27 (per curiam)). Disclosure of the identities of the samplers would severely
28

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

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

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

23 *Perry*, 591 F.3d at 1161.

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

6 **5. INTERROGATORY NO. 6.**

7 a. INTERROGATORY NO. 6.

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

10 b. RESPONSE TO INTERROGATORY NO. 6.

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

14 c. DEFENDANTS' CONTENTIONS REGARDING INTERROGATORY NO.
15 6.

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

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

22 [A]ny nonprivileged matter that is relevant to any party's claim or
23 defense and proportional to the needs of the case, considering the
24 importance of the issues at stake in the action, the amount in
25 controversy, the parties' relative access to relevant information, the
26 parties' resources, the importance of the discovery in resolving the
27 issues, and whether the burden or expense of the proposed discovery
28 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).

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

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

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

19 d. PEER’S CONTENTIONS REGARDING INTERROGATORY NO. 6.

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

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

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

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

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

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

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

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

25 “Importantly, the party seeking the discovery must show that the
26 information sought is highly relevant to the claims or defenses in the
27 litigation—a more demanding standard of relevance than that under
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1 Federal Rule of Civil Procedure 26(b)(1). The request must also be
2 carefully tailored to avoid unnecessary interference with protected
3 activities, and the information must be otherwise unavailable.” *Perry*,
4 591 F.3d at 1161.

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

12 **6. INTERROGATORY NO. 7.**

13 a. INTERROGATORY NO. 7.

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

16 b. RESPONSE TO INTERROGATORY NO. 7.

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

20 c. DEFENDANTS’ CONTENTIONS REGARDING INTERROGATORY NO.
21 7.

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

26 Relevancy is not a valid objection to this Interrogatory. Under Rule 26(b)(1),
27 parties may obtain discovery regarding:
28

1 [A]ny nonprivileged matter that is relevant to any party's claim or
2 defense and proportional to the needs of the case, considering the
3 importance of the issues at stake in the action, the amount in
4 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.

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

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

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

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

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

26 This interrogatory seeks the identity of the individuals who created the
27 "Eurofins key," which shows the locations from which independent sampling was
28

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

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

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

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

25 Forced disclosure of the identities of those who created the key (and therefore
26 either were the samplers or obtained information from the samplers) would greatly
27 inhibit Plaintiffs’ ability to fulfill their mission of advocating for remediation of
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1 environmental hazards. See, e.g., *United States v. Garde*, 673 F.Supp. 604, 607
2 (D.D.C. 1987)

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

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

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

3 “Importantly, the party seeking the discovery must show that the
4 information sought is highly relevant to the claims or defenses in the
5 litigation—a more demanding standard of relevance than that under
6 Federal Rule of Civil Procedure 26(b)(1). The request must also be
7 carefully tailored to avoid unnecessary interference with protected
8 activities, and the information must be otherwise unavailable.” *Perry*,
9 591 F.3d at 1161.

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

17 **D. REQUESTS FOR PRODUCTION TO PEER REGARDING**
18 **INDEPENDENT SAMPLING**

19 Requests for Production No. 6, 8, 21, 22, 24, 26, and 27 seek information
20 regarding the “Independent Tests” referred to in Plaintiffs’ FAC.

21 **1. REQUEST FOR PRODUCTION NO. 6.**

22 a. **REQUEST FOR PRODUCTION NO. 6.**

23 All DOCUMENTS that IDENTIFY the PERSON or PERSONS who obtained
24 or collected the “First Set of Independent Tests,” referred to at paragraph 80 of the
25 FAC, at the MALIBU SCHOOLS.
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1 b. RESPONSE TO REQUEST FOR PRODUCTION NO. 6.

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

10 c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 6.

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

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

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

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

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

11 [A]ny nonprivileged matter that is relevant to any party's claim or
12 defense and proportional to the needs of the case, considering the
13 importance of the issues at stake in the action, the amount in
14 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.

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

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

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

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

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

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

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

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

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

14 (a) Attorney-Client Privilege.

15 “The attorney-client privilege protects confidential communications between
16 attorneys and clients, which are made for the purpose of giving legal advice.”
17 *United States v. Richey*, 632 F. 3d 559, 566 (9th Cir. 2011). The party asserting this
18 privilege bears the burden of showing that there is an attorney-client relationship
19 and the privileged nature of the communication. *Id.*; *United States v. Bauer*, 132 F.
20 3d 504, 507 (9th Cir. 1997). There is an attorney-client privilege where: “(1) []
21 legal advice of any kind is sought (2) from a professional legal advisor in his
22 capacity as such, (3) the communications relating to that purpose, (4) made in
23 confidence (5) by the client, (6) are at his instance permanently protected (7) from
24 disclosure by himself or by the legal advisor, (8) unless the protection be waved.”
25 *Id.* (quoting *United States v. Graf*, 610 F. 3d 1148, 1156 (9th Cir. 2010)). The
26 privilege is waived when privileged communications are disclosed. *Weil v.*
27 *Inv./Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). While
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1 the privilege may extend to those communications with third parties assisting the
2 attorney in legal advice, it does not extend where the advice sought is not legal
3 advice. *Id.*

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

14 (b) Attorney Work Product.

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

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

13 (c) Common Interest Doctrine.

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

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

10 iv. First Amendment Privilege Is Not a Valid Objection.

11 Plaintiff objects to this Request on the ground that it violates the First
12 Amendment rights of association of Plaintiff and its members. A party objecting on
13 the basis of a First Amendment privilege must satisfy a two-part test. The objecting
14 party must first make a "prima facie showing of arguable first amendment
15 infringement." *Perry v. Schwarzenegger*, 591 F. 3d 1126, 1140 (9th Cir. 2010)
16 (quoting *Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F. 2d 346, 349-50
17 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is
18 enforced, there will be "(1) harassment, membership withdrawal, or discouragement
19 of new members, or (2) other consequences which objectively suggest an impact on,
20 or 'chilling' of, the members' associational rights." *Brock*, 860 F. 2d at 350.

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

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

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

23 d. PEER’S CONTENTIONS REGARDING REQUEST FOR PRODUCTION
24 NO. 6

25 This request for production seeks documents which identify the individuals
26 who took samples for the First Set of Independent Tests at the Malibu Schools.
27 Defendants have not shown that the requested information is relevant. As discussed
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1 below, the information is not necessary for resolution of any of the issues in this
2 case. Moreover, the burden of providing it outweighs any possible relevance.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 *Perry*, 591 F.3d at 1161.

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

22 **2. REQUEST FOR PRODUCTION NO. 8.**

23 a. **REQUEST FOR PRODUCTION NO. 8.**

24 All COMMUNICATIONS by and between PEER and AMERICA UNITES
25 regarding the “First Set of Independent Tests,” referred to at paragraph 80 of the
26 FAC.

1 b. RESPONSE TO REQUEST FOR PRODUCTION NO. 8.

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

10 c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 8.

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

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

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

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

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

10 [A]ny nonprivileged matter that is relevant to any party's claim or
11 defense and proportional to the needs of the case, considering the
12 importance of the issues at stake in the action, the amount in
13 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.

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

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

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

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

15 For all of the foregoing reasons, Plaintiffs should be required to identify those
16 individuals who conducted sampling in connection to Plaintiffs’ “Independent
17 Tests.”

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

20 Plaintiff’s objection that Requests for Production No. 8 is vague, ambiguous
21 and overbroad is unfounded. “The party who resists discovery has the burden to
22 show discovery should not be allowed, and has the burden of clarifying, explaining,
23 and supporting its objections.” *Bible v. Rio Props., Inc.*, 246 F. R. D. 614 (C.D.
24 Cal. 2007) (citing *Blankenship v. Hearst Corp.*, 519 F. 2d 418, 429 (9th Cir. 1975)
25 and *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 655-56 (C.D. Cal.
26 2005)). There is no merit to “general or boilerplate objections such as ‘overly
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1 broad' [or] 'vague and ambiguous.'" *Bible*, 246 F. R. D. at 619; *A. Farber &*
2 *Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal. 2006).

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

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

14 (a) Attorney-Client Privilege.

15 "The attorney-client privilege protects confidential communications between
16 attorneys and clients, which are made for the purpose of giving legal advice."
17 *United States v. Richey*, 632 F. 3d 559, 566 (9th Cir. 2011). The party asserting this
18 privilege bears the burden of showing that there is an attorney-client relationship
19 and the privileged nature of the communication. *Id.*; *United States v. Bauer*, 132 F.
20 3d 504, 507 (9th Cir. 1997). There is an attorney-client privilege where: "(1) []
21 legal advice of any kind is sought (2) from a professional legal advisor in his
22 capacity as such, (3) the communications relating to that purpose, (4) made in
23 confidence (5) by the client, (6) are at his instance permanently protected (7) from
24 disclosure by himself or by the legal advisor, (8) unless the protection be waved."
25 *Id.* (quoting *United States v. Graf*, 610 F. 3d 1148, 1156 (9th Cir. 2010)). The
26 privilege is waived when privileged communications are disclosed. *Weil v.*
27 *Inv./Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). While
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1 the privilege may extend to those communications with third parties assisting the
2 attorney in legal advice, it does not extend where the advice sought is not legal
3 advice. *Id.*

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

14 (b) Attorney Work Product.

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

25 Plaintiffs cannot claim work product immunity because they have made no
26 showing that this protection applies to any of the information or documents sought
27 in Defendants’ Requests. For example, Plaintiffs have not demonstrated how
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1 correspondences between the Plaintiffs regarding the “Independent Tests” referred
2 to in the FAC bears any relation to Plaintiffs’ efforts in preparation for trial.
3 Furthermore, Defendants have good cause to request the information sought,
4 because the data from the “Independent Tests” will surely be used against
5 Defendants in this litigation, and Defendants must be afforded the opportunity to
6 confront the validity and reliability of the data. This necessarily entails a complete
7 knowledge of the chain of custody, which can only be discovered through
8 documents identifying those involved in the testing process. Plaintiffs have not met
9 the burden of demonstrating the applicability of the work product doctrine, so their
10 objection on this basis is not appropriate. Accordingly, Plaintiffs may not refuse to
11 produce documents in response to Defendants’ Requests on the basis of attorney-
12 client privilege.

13 (c) Common Interest Doctrine.

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

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

10 iv. First Amendment Privilege Is Not a Valid Objection.

11 Plaintiff objects to this Request on the ground that it violates the First
12 Amendment rights of association of Plaintiff and its members. A party objecting on
13 the basis of a First Amendment privilege must satisfy a two-part test. The objecting
14 party must first make a "prima facie showing of arguable first amendment
15 infringement." *Perry v. Schwarzenegger*, 591 F. 3d 1126, 1140 (9th Cir. 2010)
16 (quoting *Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F. 2d 346, 349-50
17 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is
18 enforced, there will be "(1) harassment, membership withdrawal, or discouragement
19 of new members, or (2) other consequences which objectively suggest an impact on,
20 or 'chilling' of, the members' associational rights." *Brock*, 860 F. 2d at 350.

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

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

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

24 d. PEER’S CONTENTIONS REGARDING RFP NO. 8.

25 Relevance

26 Information regarding the “First Set of Independent Tests” is not relevant to
27 the matters at issue in this lawsuit because Defendants have verified through their
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1 own testing that two out of the three rooms in the “First Set of Independent Tests”
2 were in violation of TSCA, the matter which Plaintiffs are seeking to prove in this
3 lawsuit. Although Defendants argue that Plaintiffs relied on this independent
4 testing in their Amended Complaint, in fact Plaintiffs’ Amended Complaint
5 included information about the independent testing primarily for informational
6 purposes and to describe the chronology of events at the Malibu School. Plaintiffs
7 also recited that Defendants had verified the independent test results and found
8 TSCA violations in every single one of 24 verification samples they took in ten
9 rooms, FAC ¶¶ 127-129, confirming the appropriateness of the methodology and
10 accuracy of the analysis of the independent testing generally, and making it
11 unnecessary to rely on the independent testing to prove Plaintiffs’ case at the least
12 with regard to the verified rooms and the buildings in which they are located. From
13 the First Set of Independent Tests, Plaintiffs would possibly introduce evidence only
14 with regard to the test results regarding MHS Room 722, a physical education
15 faculty office in which Defendants did not conduct verification testing or
16 remediation.

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

21 With regard to Room 722, Plaintiffs have produced the laboratory reports,
22 and a “key” supplying additional information on the location of samples.
23 Defendants have supplied no valid reason that they need more than this, or how the
24 request for communications between PEER and America Unites about the First Set
25 of Independent Tests is reasonably calculated to lead to the discovery of admissible
26 evidence. Defendants' claim that they need more information on the exact location
27 of the sampling to prepare their defense of mootness because that area had been
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1 remediated is not applicable here because Defendants have not claimed to have
2 remediated this room.

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

16 Vagueness, Ambiguity, and Overbreadth

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

1 Attorney-Client, Attorney Work Product and Common Interest

2 Communication Privileges

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

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

19 First Amendment Privilege

20 PEER is a whistleblower organization which promises confidentiality to all
21 those who contact it concerning environmental issues and government wrongdoing.
22 Confidentiality is promised with regard to the content of the communication and not
23 only the identity of the person. (See PEER webpage, Ex. 1 to Dinerstein
24 Declaration.) This promise of confidentiality applies to all of those who have
25 contacted PEER about the PCBs in the Malibu Schools, whether or not they are
26 associated with America Unites. If PEER were to disclose communications with
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1 those persons in discovery, it would greatly inhibit PEER's ability to function as an
2 organization where people may raise issues in confidence.⁷

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

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

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

13 The same would hold for PEER, which has thus made a "prima facie showing
14 of arguable first amendment infringement." *Perry v. Schwarzenegger*, 591 F.3d
15 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d
16 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of communications between
17 members of the public and PEER is likely to result in discouraging such
18 communications because PEER is unable to protect their confidentiality, thereby
19 severely hampering PEER's organizational mission. It could also result in

21 ⁷ Defendants claim that PEER is "publicly vocal about its activities and its
22 membership, listing members of its Board and DC Staff on its website." Although
23 PEER may be publicly vocal about its activities, and does list the members of its
24 Board and staff on its website, revealing the identity of PEER's employees and
25 Board is an entirely different matter from revealing the identities of or the content
26 of communications with those who contact PEER in confidence. PEER does not
27 reveal its membership list to anyone. While certain members may choose to
28 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.

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

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

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

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

1 on whether disclosure of the information will have a deterrent effect on
2 the exercise of protected activities.”

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

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

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

14 “Importantly, the party seeking the discovery must show that the
15 information sought is highly relevant to the claims or defenses in the
16 litigation -- a more demanding standard of relevance than that under
17 Federal Rule of Civil Procedure 26(b)(1). The request must also be
18 carefully tailored to avoid unnecessary interference with protected
19 activities, and the information must be otherwise unavailable.” *Perry*,
20 591 F.3d at 1161.

21 Here, Defendants cannot even show that this discovery meets the relevance
22 requirements of Rule 26, much less the more demanding standard of relevance when
23 First Amendment interests are implicated. Moreover, there are other means of
24 acquiring the desired information – whether or not there are TSCA violations in the
25 locations of the First Set of Independent Tests – namely, by examining the
26 laboratory reports and the information provided in accordance with Defendants’
27 subpoenas to the laboratories, or by conducting verification testing, without
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1 requiring PEER to disclose its communications with its members, supporters and
2 others who have contacted PEER concerning PCBs at the Malibu Schools.

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

6 **3. REQUEST FOR PRODUCTION NO. 21.**

7 a. REQUEST FOR PRODUCTION NO. 21.

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

11 b. RESPONSE TO REQUEST FOR PRODUCTION NO. 21.

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

20 c. DEFENDANTS’ CONTENTIONS REGARDING RFP NO. 21.

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

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

4 Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the
5 instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying
6 on such testing. References to “Independent Tests” and independent testing are
7 specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl.
8 Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-
9 26, 128, 132.

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

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

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

27 Information within the scope of discovery does not need to be admissible in
28 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

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

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

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

25 For all of the foregoing reasons, Plaintiffs should be required to identify those
26 individuals who conducted sampling in connection to Plaintiffs' "Independent
27 Tests."
28

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

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

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

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

23 (a) Attorney-Client Privilege.

24 "The attorney-client privilege protects confidential communications between
25 attorneys and clients, which are made for the purpose of giving legal advice."
26 *United States v. Richey*, 632 F. 3d 559, 566 (9th Cir. 2011). The party asserting this
27 privilege bears the burden of showing that there is an attorney-client relationship
28

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

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

23 (b) Attorney Work Product.

24 The work product doctrine prohibits discovery of documents and other
25 materials “prepared by a party or his representative in anticipation of litigation.”
26 *United States v. Richey* 632 F. 3d 559, 567 (9th Cir. 2011) (*quoting Admiral Ins. Co.*
27 *v. U.S. Dist. Ct.*, 881 F. 2d 1486, 1494 (9th Cir. 1989)); Fed. R. Civ. P. 26(b)(3).
28

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

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

22 (c) Common Interest Doctrine.

23 In general, the attorney-client privilege is waived when communications
24 between an attorney and client are disclosed to a third party. *Weil v. Inv/ Indicators,*
25 *Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). There is a rare exception
26 to this waiver rule where individuals with a common interest in a legal matter may
27 “communicate among themselves and with the separate attorneys on matters of
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1 common legal interest, for the purpose of preparing a joint strategy, and the
2 attorney-client privilege will protect these communications to the same extent as it
3 would communications between each client and his own attorney.” *Nidec Corp. v.*
4 *Victor Co.*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) (quoting 1 PAUL R. RICE,
5 ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:35, at 192 (1999 ed.);
6 *United States v. Gonzales*, 669 F. 3d 974, 978 (9th Cir. 2012). This common
7 interest doctrine is not a privilege, but an exception to the rule on waiver where
8 communications are disclosed to third parties. *See Griffith v. Davis*, 161 F.R.D. at
9 692. For this reason, the common interest doctrine comes into play only if the
10 communication at issue is privileged in the first place. *Nidec Corp.*, 249 F.R.D. at
11 578.

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

19 iv. First Amendment Privilege Is Not a Valid Objection.

20 Plaintiff objects to this Request on the ground that it violates the First
21 Amendment rights of association of Plaintiff and its members. A party objecting on
22 the basis of a First Amendment privilege must satisfy a two-part test. The objecting
23 party must first make a “prima facie showing of arguable first amendment
24 infringement.” *Perry v. Schwarzenegger*, 591 F. 3d 1126, 1140 (9th Cir. 2010)
25 (quoting *Brock v. Local 375, Plumbers Int’l Union of Am.*, 860 F. 2d 346, 349-50
26 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is
27 enforced, there will be “(1) harassment, membership withdrawal, or discouragement
28

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

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

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

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

5 d. PEER’S CONTENTIONS REGARDING RFP NO. 21.

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

11 Information regarding the “Second Set of Independent Tests” is not relevant
12 to the matters at issue in this lawsuit because Defendants have verified through their
13 own testing that three out of the four rooms in the “Second Set of Independent
14 Tests” were in violation of TSCA, the matter which Plaintiffs are seeking to prove
15 in this lawsuit. Although Defendants argue that Plaintiffs relied on this
16 independent testing in their Amended Complaint, in fact Plaintiffs’ Amended
17 Complaint included information about the independent testing primarily for
18 informational purposes and to describe the chronology of events at the Malibu
19 School. Plaintiffs also recited that Defendants had verified the independent test
20 results and found TSCA violations in every single one of 24 verification samples
21 they took in ten rooms, FAC ¶¶ 127-129, confirming the appropriateness of the
22 methodology and accuracy of the analysis of the independent testing generally, and
23 making it unnecessary to rely on the independent testing to prove Plaintiffs’ case at
24 the least with regard to the verified rooms and the buildings in which they are
25 located. There is no possible reason why Defendants would need to know the
26 identities of the persons who took samples for tests on which Plaintiffs are not
27 relying. From the Second Set of Independent Tests, Plaintiffs would possibly
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1 introduce evidence only with regard to the test results regarding MHS Room 205, a
2 French language classroom in which Defendants did not conduct verification testing
3 or remediation.

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

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

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

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

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

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

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

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

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

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

21 Plaintiff has made a “prima facie showing of arguable first amendment
22 infringement.” *Perry v. Schwazanegger*, 591 F.3d 1126, 1140 (9th Cir. 2010)
23 (quoting *United States v. Trader’s State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983)
24 (per curiam)). Disclosure of the identities of the samplers would severely
25 discourage Plaintiff’s ability to gather evidence of environmental violations because
26 Plaintiff would be unable to protect the samplers’ confidentiality, thereby severely
27 hampering Plaintiff’s organizational mission. It could also result in harassment of
28

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

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

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

20 *Perry*, 591 F.3d at 1161.

21 Here, Defendants cannot even show that this discovery meets the relevance
22 requirements of Rule 26, much less the more demanding standard of relevance when
23 First Amendment interests are implicated. As discussed above, there are other
24 means of acquiring the desired information, namely, by examining the laboratory
25 reports and the information provided in accordance with Defendants’ subpoenas to
26 the laboratories, or by conducting verification testing, without requiring Plaintiff to
27 disclose its communications with its members, supporters and others who have
28

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

3 **4. REQUEST FOR PRODUCTION NO. 22.**

4 a. REQUEST FOR PRODUCTION NO. 22.

5 All COMMUNICATIONS by and between PEER and AMERICA UNITES,
6 regarding the “Second Set of Independent Tests,” referred to at paragraph 103 of the
7 FAC.

8 b. RESPONSE TO REQUEST FOR PRODUCTION NO. 22.

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

17 c. DEFENDANTS’ CONTENTIONS REGARDING RFP NO. 22.

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

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

28

1 Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the
2 instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying
3 on such testing. References to “Independent Tests” and independent testing are
4 specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl.
5 Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-
6 26, 128, 132.

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

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

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

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

26 The identities of those individuals who have taken samples at the Malibu
27 Schools is of great importance, is clearly relevant to Plaintiffs’ claims, and is further
28 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

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

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

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

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

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

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

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

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

23 (a) Attorney-Client Privilege.

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

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

23 (b) Attorney Work Product.

24 The work product doctrine prohibits discovery of documents and other
25 materials “prepared by a party or his representative in anticipation of litigation.”
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2 showing of good cause for the information desired is sufficient to overcome the
3 qualified immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D.
4 Cal. 2006); *Admiral Ins. Co. v. United States Dist. Court*, 881 F. 2d 1486, 1494 (9th
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6 the applicability of the doctrine.” *A. Farbers & Ptnrs., Inc.*, 234 F.R.D. at 192.

7 Plaintiffs cannot claim work product immunity because they have made no
8 showing that this protection applies to any of the information or documents sought
9 in Defendants’ Requests. For example, Plaintiffs have not demonstrated how
10 correspondences between the Plaintiffs regarding the “Independent Tests” referred
11 to in the FAC bears any relation to Plaintiffs’ efforts in preparation for trial.
12 Furthermore, Defendants have good cause to request the information sought,
13 because the data from the “Independent Tests” will surely be used against
14 Defendants in this litigation, and Defendants must be afforded the opportunity to
15 confront the validity and reliability of the data. This necessarily entails a complete
16 knowledge of the chain of custody, which can only be discovered through
17 documents identifying those involved in the testing process. Plaintiffs have not met
18 the burden of demonstrating the applicability of the work product doctrine, so their
19 objection on this basis is not appropriate. Accordingly, Plaintiffs may not refuse to
20 produce documents in response to Defendants’ Requests on the basis of attorney-
21 client privilege.

22 (c) Common Interest Doctrine.

23 In general, the attorney-client privilege is waived when communications
24 between an attorney and client are disclosed to a third party. *Weil v. Inv/ Indicators,*
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26 to this waiver rule where individuals with a common interest in a legal matter may
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1 common legal interest, for the purpose of preparing a joint strategy, and the
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3 would communications between each client and his own attorney.” *Nidec Corp. v.*
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9 this reason, the common interest doctrine comes into play only if the
10 communication at issue is privileged in the first place. *Nidec Corp*, 249 F.R.D. at
11 578.

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

19 iv. First Amendment Privilege Is Not a Valid Objection.

20 Plaintiff objects to this Request on the ground that it violates the First
21 Amendment rights of association of Plaintiff and its members. A party objecting on
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24 infringement.” *Perry v. Schwarzenegger*, 591 F. 3d 1126, 1140 (9th Cir. 2010)
25 (quoting *Brock v. Local 375, Plumbers Int’l Union of Am.*, 860 F. 2d 346, 349-50
26 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is
27 enforced, there will be “(1) harassment, membership withdrawal, or discouragement
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1 of new members, or (2) other consequences which objectively suggest an impact on,
2 or ‘chilling’ of, the members’ associational rights.” *Brock*, 860 F. 2d at 350.

3 Here, Plaintiff has made no such showing that disclosure of the
4 communications requested would lead to “harassment, membership withdrawal, or
5 discouragement of new members,” or that it would result in other consequences that
6 could “chill” members’ associational rights. The Request for communications
7 regarding the “Independent Tests” calls for communications regarding the chain of
8 custody documents and documents prepared for Plaintiffs by environmental testing
9 companies. The Request propounded by Defendants is not seeking personal
10 information, does nothing to harass members of Plaintiff organizations, and would
11 not have a deterrent effect on membership. Moreover, the materials requested by
12 Defendants are necessary so that Defendants can defend themselves in this
13 litigation, and fairness justifies their production. Defendants will not be afforded a
14 fair discovery if they are precluded from accessing information regarding the
15 independent testing data acquired by Plaintiffs, which will surely be used against
16 Defendants in trial.

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

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

6 d. PEER’S CONTENTIONS REGARDING RFP NO. 22.

7 Relevance

8 Information regarding the “Second Set of Independent Tests” is not relevant
9 to the matters at issue in this lawsuit because Defendants have verified through their
10 own testing that three out of the four rooms in the “Second Set of Independent
11 Tests” were in violation of TSCA, the matter which Plaintiffs are seeking to prove
12 in this lawsuit. Although Defendants argue that Plaintiffs relied on this independent
13 testing in their Amended Complaint, in fact Plaintiffs’ Amended Complaint
14 included information about the independent testing primarily for informational
15 purposes and to describe the chronology of events at the Malibu School. Plaintiffs
16 also recited that Defendants had verified the independent test results and found
17 TSCA violations in every single one of 24 verification samples they took in ten
18 rooms, FAC ¶¶ 127-129, confirming the appropriateness of the methodology and
19 accuracy of the analysis of the independent testing generally, and making it
20 unnecessary to rely on the independent testing to prove Plaintiffs’ case at the least
21 with regard to the verified rooms and the buildings in which they are located. From
22 the Second Set of Independent Tests, Plaintiffs would possibly introduce evidence
23 only with regard to the test results regarding MHS Room 205, a French language
24 classroom in which Defendants did not conduct verification testing or remediation.

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

3 With regard to Room 205, Plaintiffs have produced the laboratory reports,
4 and a “key” supplying additional information on the location of samples.
5 Defendants have supplied no valid reason that they need more than this, or how the
6 request for communications between PEER and America Unites about the Second
7 Set of Independent Tests is reasonably calculated to lead to the discovery of
8 admissible evidence. Defendants' claim that they need more information on the
9 exact location of the sampling to prepare their defense of mootness because that
10 area had been remediated is not applicable here because Defendants have not
11 claimed to have remediated this room.

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

25 Vagueness, Ambiguity, and Overbreadth

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

9 Attorney-Client, Attorney Work Product and Common Interest

10 Communication Privileges

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

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

27 First Amendment Privilege

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1 PEER is a whistleblower organization which promises confidentiality to all
2 those who contact it concerning environmental issues and government wrongdoing.
3 Confidentiality is promised with regard to the content of the communication and not
4 only the identity of the person. (See PEER webpage, Ex. 1 to Dinerstein
5 Declaration). This promise of confidentiality applies to all of those who have
6 contacted PEER about the PCBs in the Malibu Schools, whether or not they are
7 associated with America Unites. If PEER were to disclose communications with
8 those persons in discovery, it would greatly inhibit PEER's ability to function as an
9 organization where people may raise issues in confidence.⁸

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

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

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

20 _____
21 ⁸ Defendants claim that PEER is "publicly vocal about its activities and its
22 membership, listing members of its Board and DC Staff on its website." Although
23 PEER may be publicly vocal about its activities, and does list the members of its
24 Board and staff on its website, revealing the identity of PEER's employees and
25 Board is an entirely different matter from revealing the identities of or the content
26 of communications with those who contact PEER in confidence. PEER does not
27 reveal its membership list to anyone. While certain members may choose to
28 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.

1 The same would hold for PEER, which has thus made a “prima facie showing
2 of arguable first amendment infringement.” *Perry v. Schwarzenegger*, 591 F.3d
3 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d
4 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of communications between
5 members of the public and PEER is likely to result in discouraging such
6 communications because PEER is unable to protect their confidentiality, thereby
7 severely hampering PEER’s organizational mission. It could also result in
8 harassment of individuals who are parties to these communications. Defendants
9 have already filed a false criminal complaint against the President of America
10 Unites, Ms. DeNicola, and her husband, seeking to subject them to felony charges
11 punishable by fines and imprisonment, for allegedly taking caulk samples. It is
12 difficult to imagine a more “chilling” action against those who advocate for PCB
13 testing and remediation at the Malibu Schools.

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

24 Defendants suggest that “names and email addresses of those members who
25 would like their membership in PEER to remain private could be redacted ...”.
26 However, while persons who communicate with PEER certainly have First
27 Amendment protection against revealing the fact of their membership in PEER and
28 their personal contact information, *NAACP v. State of Alabama*, 357 U.S. 449

1 (1958), the First Amendment also protects the confidentiality of the fact that they
2 have communicated with PEER, whether or not they are members, and the
3 confidentiality of the content of their communications. The Ninth Circuit in Perry
4 ordered protection for communications, not the identities of members, emphasizing
5 that:

6 “The First Amendment privilege, however, has never been limited to
7 the disclosure of identities of rank-and-file members. . . . The existence
8 of a prima facie case turns not on the type of information sought, but
9 on whether disclosure of the information will have a deterrent effect on
10 the exercise of protected activities.”

11 591 F.3d at 1162 (citations omitted).

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

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

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

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1 Here, Defendants cannot even show that this discovery meets the relevance
2 requirements of Rule 26, much less the more demanding standard of relevance when
3 First Amendment interests are implicated. Moreover, there are other means of
4 acquiring the desired information – whether or not there are TSCA violations in the
5 locations of the Second Set of Independent Tests – namely, by examining the
6 laboratory reports and the information provided in accordance with Defendants’
7 subpoenas to the laboratories, or by doing verification testing, without requiring
8 PEER to disclose its communications with its members, supporters and others who
9 have contacted PEER concerning PCBs at the Malibu Schools.

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

13 **5. REQUEST FOR PRODUCTION NO. 24.**

14 a. REQUEST FOR PRODUCTION NO. 24

15 All DOCUMENTS that IDENTIFY the PERSON or PERSONS who obtained
16 or collected the piece of caulk referred to at paragraph 104 of the FAC.

17 b. RESPONSE TO REQUEST FOR PRODUCTION NO. 24.

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

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1 c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 24.

2 i. Relevancy Is Not a Valid Objection to RFP No. 24.

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

12 Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the
13 instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying
14 on such testing. References to "Independent Tests" and independent testing are
15 specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl.
16 Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-
17 26, 128, 132.

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

22 Now, in response to discovery requests for information regarding this
23 sampling, including the identities of persons who conducted such independent
24 testing, Plaintiffs have taken the specious position that the identities of the
25 individuals who conducted the testing are not relevant. Relevancy is not a valid
26 objection to this Interrogatory. Under Rule 26(b)(1), parties may obtain discovery
27 regarding:
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1 [A]ny nonprivileged matter that is relevant to any party's claim or
2 defense and proportional to the needs of the case, considering the
3 importance of the issues at stake in the action, the amount in
4 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.

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

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

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

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

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

9 ii. Vagueness, Ambiguity, and Overbreadth Are Not Valid Objections to RFP
10 No. 24.

11 Plaintiff's objection that Requests for Production No. 24 is vague, ambiguous
12 and overbroad is unfounded. "The party who resists discovery has the burden to
13 show discovery should not be allowed, and has the burden of clarifying, explaining,
14 and supporting its objections." *Bible v. Rio Props., Inc.*, 246 F. R. D. 614 (C.D.
15 Cal. 2007) (citing *Blankenship v. Hearst Corp.*, 519 F. 2d 418, 429 (9th Cir. 1975)
16 and *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 655-56 (C.D. Cal.
17 2005)). There is no merit to "general or boilerplate objections such as 'overly
18 broad' [or] 'vague and ambiguous.'" *Bible*, 246 F. R. D. at 619; *A. Farber &*
19 *Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal. 2006).

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

3 iii. Attorney-Client, Attorney Work Product, and Common-Interest
4 Communication Privileges Are Not Valid Objections to RFP No. 24.

5 (a) Attorney-Client Privilege.

6 “The attorney-client privilege protects confidential communications between
7 attorneys and clients, which are made for the purpose of giving legal advice.”
8 *United States v. Richey*, 632 F. 3d 559, 566 (9th Cir. 2011). The party asserting this
9 privilege bears the burden of showing that there is an attorney-client relationship
10 and the privileged nature of the communication. *Id.*; *United States v. Bauer*, 132 F.
11 3d 504, 507 (9th Cir. 1997). There is an attorney-client privilege where: “(1) []
12 legal advice of any kind is sought (2) from a professional legal advisor in his
13 capacity as such, (3) the communications relating to that purpose, (4) made in
14 confidence (5) by the client, (6) are at his instance permanently protected (7) from
15 disclosure by himself or by the legal advisor, (8) unless the protection be waved.”
16 *Id.* (quoting *United States v. Graf*, 610 F. 3d 1148, 1156 (9th Cir. 2010)). The
17 privilege is waived when privileged communications are disclosed. *Weil v.*
18 *Inv./Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). While
19 the privilege may extend to those communications with third parties assisting the
20 attorney in legal advice, it does not extend where the advice sought is not legal
21 advice. *Id.*

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

5 (b) Attorney Work Product.

6 The work product doctrine prohibits discovery of documents and other
7 materials "prepared by a party or his representative in anticipation of litigation."
8 *United States v. Richey* 632 F. 3d 559, 567 (9th Cir. 2011) (*quoting Admiral Ins. Co.*
9 *v. U.S. Dist. Ct.*, 881 F. 2d 1486, 1494 (9th Cir. 1989)); Fed. R. Civ. P. 26(b)(3).
10 The work product doctrine is a qualified immunity rather than a privilege, and a
11 showing of good cause for the information desired is sufficient to overcome the
12 qualified immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D.
13 Cal. 2006); *Admiral Ins. Co. v. United States Dist. Court.*, 881 F. 2d 1486, 1494
14 (9th Cir. 1989). "The party claiming work product immunity has the burden of
15 proving the applicability of the doctrine." *A. Farbers & Ptnrs., Inc.*, 234 F.R.D. at
16 192.

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

5 (c) Common Interest Doctrine.

6 In general, the attorney-client privilege is waived when communications
7 between an attorney and client are disclosed to a third party. *Weil v. Inv/ Indicators,*
8 *Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). There is a rare exception
9 to this waiver rule where individuals with a common interest in a legal matter may
10 "communicate among themselves and with the separate attorneys on matters of
11 common legal interest, for the purpose of preparing a joint strategy, and the
12 attorney-client privilege will protect these communications to the same extent as it
13 would communications between each client and his own attorney." *Nidex Corp. v.*
14 *Victor Co.*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) (quoting 1 PAUL R. RICE,
15 ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:35, at 192 (1999 ed.);
16 *United States v. Gonzales*, 669 F. 3d 974, 978 (9th Cir. 2012). This common
17 interest doctrine is not a privilege, but an exception to the rule on waiver where
18 communications are disclosed to third parties. *See Griffith*, 161 F.R.D. at 692. For
19 this reason, the common interest doctrine comes into play only if the
20 communication at issue is privileged in the first place. *Nidex Corp*, 249 F.R.D. at
21 578.

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

3 iv. First Amendment Privilege Is Not a Valid Objection.

4 Plaintiff objects to this Request on the ground that it violates the First
5 Amendment rights of association of Plaintiff and its members. A party objecting on
6 the basis of a First Amendment privilege must satisfy a two-part test. The objecting
7 party must first make a “prima facie showing of arguable first amendment
8 infringement.” *Perry v. Schwarzenegger*, 591 F. 3d 1126, 1140 (9th Cir. 2010)
9 (quoting *Brock v. Local 375, Plumbers Int’l Union of Am.*, 860 F. 2d 346, 349-50
10 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is
11 enforced, there will be “(1) harassment, membership withdrawal, or discouragement
12 of new members, or (2) other consequences which objectively suggest an impact on,
13 or ‘chilling’ of, the members’ associational rights.” *Brock*, 860 F. 2d at 350.

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

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

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

17 d. PEER’S CONTENTIONS REGARDING RFP NO. 24.

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

23 Defendants contend that the identities of the individuals who obtained or
24 collected the piece of caulk which fell out of a trash bag on the MHS campus is
25 relevant because Plaintiffs are purportedly relying on the “Independent Tests” of
26 caulk samples in 13 rooms that Plaintiff AU conducted prior to the filing of this
27 action. However, the piece of caulk in question was not tied to any particular room
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1 and Plaintiffs are not relying on the testing of it. There is no possible reason why
2 Defendants would need to know the identities of the persons who took samples for
3 tests on which Plaintiffs are not relying.

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

11 Forced disclosure of the identities of those who took samples would greatly
12 inhibit Plaintiffs' ability to fulfill their mission of advocating for remediation of
13 environmental hazards. See, e.g., *United States v. Garde*, 673 F.Supp. 604, 607
14 (D.D.C. 1987). Plaintiffs have made a "prima facie showing of arguable first
15 amendment infringement." *Perry v. Schwazanegger*, 591 F.3d 1126, 1140 (9th Cir.
16 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir.
17 1983) (per curiam)). Disclosure of the identities of the samplers would severely
18 discourage Plaintiffs' ability to gather evidence of environmental violations because
19 Plaintiffs would be unable to protect the samplers' confidentiality, and thus lose the
20 confidence of their informants, thereby severely hampering Plaintiffs'
21 organizational missions. It could also result in harassment of individuals who took
22 the samples. Defendants have already filed a false criminal complaint against the
23 President of America Unites, Ms. DeNicola, and her husband, seeking to subject
24 them to felony charges punishable by fines and imprisonment, for allegedly taking
25 caulk samples. It is difficult to imagine a more "chilling" action against those who
26 advocate for PCB testing and remediation at the Malibu Schools.

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

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

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

18 **6. REQUEST FOR PRODUCTION NO. 26.**

19 a. REQUEST FOR PRODUCTION NO. 26.

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

23 b. RESPONSE TO REQUEST FOR PRODUCTION NO. 26.

24 Plaintiff objects to this Request on the ground that it seeks information that is
25 not relevant to the parties’ claims or defenses or the subject matter of the instant
26 action. Plaintiff further objects to this Request on the ground that it is vague and
27 ambiguous and overbroad. Plaintiff further objects to this Request to the extent that
28

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

5 c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 26.

6 i. Relevancy Is Not a Valid Objection to RFP No. 26.

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

16 Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the
17 instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying
18 on such testing. References to "Independent Tests" and independent testing are
19 specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl.
20 Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-
21 26, 128, 132.

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

26 Now, in response to discovery requests for information regarding this
27 sampling, including the identities of persons who conducted such independent
28

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

5 [A]ny nonprivileged matter that is relevant to any party's claim or
6 defense and proportional to the needs of the case, considering the
7 importance of the issues at stake in the action, the amount in
8 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.

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

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

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

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

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

14 ii. Vagueness, Ambiguity, and Overbreadth Are Not Valid Objections to RFP
15 No. 26.

16 Plaintiff's objection that Requests for Production No. 26 is vague, ambiguous
17 and overbroad is unfounded. "The party who resists discovery has the burden to
18 show discovery should not be allowed, and has the burden of clarifying, explaining,
19 and supporting its objections." *Bible v. Rio Props., Inc.*, 246 F. R. D. 614 (C.D.
20 Cal. 2007) (citing *Blankenship v. Hearst Corp.*, 519 F. 2d 418, 429 (9th Cir. 1975)
21 and *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 655-56 (C.D. Cal.
22 2005)). There is no merit to "general or boilerplate objections such as 'overly
23 broad' [or] 'vague and ambiguous.'" *Bible*, 246 F. R. D. at 619; *A. Farber &*
24 *Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal. 2006).

25 Plaintiff PEER has not met its burden of demonstrating that discovery of the
26 information sought in this Request should not be allowed, because it has not
27 supported or explained its objections on the basis of the requests being vague,
28

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

7 iii. Attorney-Client, Attorney Work Product, and Common-Interest
8 Communication Privileges Are Not Valid Objections to RFP No. 26.

9 (a) Attorney-Client Privilege.

10 “The attorney-client privilege protects confidential communications between
11 attorneys and clients, which are made for the purpose of giving legal advice.”
12 *United States v. Richey*, 632 F. 3d 559, 566 (9th Cir. 2011). The party asserting this
13 privilege bears the burden of showing that there is an attorney-client relationship
14 and the privileged nature of the communication. *Id.*; *United States v. Bauer*, 132 F.
15 3d 504, 507 (9th Cir. 1997). There is an attorney-client privilege where: “(1) []
16 legal advice of any kind is sought (2) from a professional legal advisor in his
17 capacity as such, (3) the communications relating to that purpose, (4) made in
18 confidence (5) by the client, (6) are at his instance permanently protected (7) from
19 disclosure by himself or by the legal advisor, (8) unless the protection be waved.”
20 *Id.* (quoting *United States v. Graf*, 610 F. 3d 1148, 1156 (9th Cir. 2010)). The
21 privilege is waived when privileged communications are disclosed. *Weil v.*
22 *Inv./Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). While
23 the privilege may extend to those communications with third parties assisting the
24 attorney in legal advice, it does not extend where the advice sought is not legal
25 advice. *Id.*

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

9 (b) Attorney Work Product.

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

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

8 (c) Common Interest Doctrine.

9 In general, the attorney-client privilege is waived when communications
10 between an attorney and client are disclosed to a third party. *Weil v. Inv/ Indicators,*
11 *Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). There is a rare exception
12 to this waiver rule where individuals with a common interest in a legal matter may
13 "communicate among themselves and with the separate attorneys on matters of
14 common legal interest, for the purpose of preparing a joint strategy, and the
15 attorney-client privilege will protect these communications to the same extent as it
16 would communications between each client and his own attorney." *Nidec Corp. v.*
17 *Victor Co.*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) (*quoting* 1 PAUL R. RICE,
18 ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:35, at 192 (1999 ed.);
19 *United States v. Gonzales*, 669 F. 3d 974, 978 (9th Cir. 2012). This common
20 interest doctrine is not a privilege, but an exception to the rule on waiver where
21 communications are disclosed to third parties. *See Griffith*, 161 F.R.D. 687, 692.
22 For this reason, the common interest doctrine comes into play only if the
23 communication at issue is privileged in the first place. *Nidec Corp*, 249 F.R.D. at
24 578.

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

5 iv. First Amendment Privilege Is Not a Valid Objection.

6 Plaintiff objects to this Request on the ground that it violates the First
7 Amendment rights of association of Plaintiff and its members. A party objecting on
8 the basis of a First Amendment privilege must satisfy a two-part test. The objecting
9 party must first make a "prima facie showing of arguable first amendment
10 infringement." *Perry v. Schwarzenegger*, 591 F. 3d 1126, 1140 (9th Cir. 2010)
11 (quoting *Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F. 2d 346, 349-50
12 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is
13 enforced, there will be "(1) harassment, membership withdrawal, or discouragement
14 of new members, or (2) other consequences which objectively suggest an impact on,
15 or 'chilling' of, the members' associational rights." *Brock*, 860 F. 2d at 350.

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

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

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

19 d. PEER’S CONTENTIONS REGARDING RFP NO. 26.

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

25 Information regarding the “Third Set of Independent Tests” is not relevant to
26 the matters at issue in this lawsuit because Defendants have verified through their
27 own testing that four out of the five rooms in the “Third Set of Independent Tests”
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1 were in violation of TSCA, the matter which Plaintiffs are seeking to prove in this
2 lawsuit. Although Defendants argue that Plaintiffs relied on this independent
3 testing in their Amended Complaint, in fact Plaintiffs' Amended Complaint
4 included information about the independent testing primarily for informational
5 purposes and to describe the chronology of events at the Malibu School. Plaintiffs
6 also recited that Defendants had verified the independent test results and found
7 TSCA violations in every single one of 24 verification samples they took in ten
8 rooms, FAC ¶¶ 127-129, confirming the appropriateness of the methodology and
9 accuracy of the analysis of the independent testing generally, and making it
10 unnecessary to rely on the independent testing to prove Plaintiffs' case at the least
11 with regard to the verified rooms and the buildings in which they are located. There
12 is no possible reason why Defendants would need to know the identities of the
13 persons who took samples for tests on which Plaintiffs are not relying. From the
14 Third Set of Independent Tests, Plaintiffs would possibly introduce evidence only
15 with regard to the test results regarding a JCES office next to the teacher's lounge,
16 which includes the principal's office, in which Defendants did not conduct
17 verification testing or remediation.

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

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

5 Even with respect to the one room for which Plaintiffs continue to rely on the
6 Third Set of Independent Tests, Defendants do not need to know the identities of the
7 person who took the samples. With regard to the JCES Office, Plaintiffs have
8 produced the laboratory reports. Although Defendants conclusorily contend they
9 need the identity of the samplers to assess the reliability of the testing data, they do
10 not explain why that is the case. Defendants’ reports of its own testing do not state
11 the name of the individuals who took the samples. The test data is a product of a lab
12 analysis of the samples. There is nothing that the sampler can do to affect the
13 reliability of the data derived from a sample.

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

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

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

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

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

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

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

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

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

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

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

8 *Perry*, 591 F.3d at 1161.

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

18 **7. REQUEST FOR PRODUCTION NO. 27.**

19 a. REQUEST FOR PRODUCTION NO. 27

20 All COMMUNICATIONS by and between PEER and AMERICA UNITES
21 regarding the “Third Set of Independent Tests,” referred to at paragraph 109 of the
22 FAC.

23 b. RESPONSE TO REQUEST FOR PRODUCTION NO. 27.

24 Plaintiff objects to this Request on the ground that it seeks information that is
25 not relevant to the parties’ claims or defenses or the subject matter of the instant
26 action. Plaintiff further objects to this Request on the ground that it is vague and
27 ambiguous and overbroad. Plaintiff further objects to this Request to the extent that
28

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

5 c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 27.

6 i. Relevancy Is Not a Valid Objection to RFP No. 27.

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

16 Relying on this independent sampling, on March 23, 2015, Plaintiffs filed the
17 instant action. On April 1, 2015, Plaintiffs amended their Complaint, again relying
18 on such testing. References to "Independent Tests" and independent testing are
19 specifically relied upon by Plaintiffs in the FAC at least twenty (20) times. Decl.
20 Plant, Ex. D; ¶¶ 70, 80, 82-83, 96, 101-104, 106-07, 109-110, 112, 119, 122, 125-
21 26, 128, 132.

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

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

5 [A]ny nonprivileged matter that is relevant to any party's claim or
6 defense and proportional to the needs of the case, considering the
7 importance of the issues at stake in the action, the amount in
8 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.

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

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

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

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

11 For all of the foregoing reasons, Plaintiffs should be required to identify those
12 individuals who conducted sampling in connection to Plaintiffs’ “Independent
13 Tests.”

14 ii. Vagueness, Ambiguity, and Overbreadth Are Not Valid Objections to RFP
15 No. 27.

16 Plaintiff’s objection that Requests for Production No. 27 is vague, ambiguous
17 and overbroad is unfounded. “The party who resists discovery has the burden to
18 show discovery should not be allowed, and has the burden of clarifying, explaining,
19 and supporting its objections.” *Bible v. Rio Props., Inc.*, 246 F. R. D. 614 (C.D.
20 Cal. 2007) (citing *Blankenship v. Hearst Corp.*, 519 F. 2d 418, 429 (9th Cir. 1975)
21 and *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 655-56 (C.D. Cal.
22 2005)). There is no merit to “general or boilerplate objections such as ‘overly
23 broad’ [or] ‘vague and ambiguous.’” *Bible*, 246 F. R. D. at 619; *A. Farber &*
24 *Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal. 2006).

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

7 iii. Attorney-Client, Attorney Work Product, and Common-Interest
8 Communication Privileges Are Not Valid Objections to RFP No. 27.

9 (a) Attorney-Client Privilege.

10 “The attorney-client privilege protects confidential communications between
11 attorneys and clients, which are made for the purpose of giving legal advice.”
12 *United States v. Richey*, 632 F. 3d 559, 566 (9th Cir. 2011). The party asserting this
13 privilege bears the burden of showing that there is an attorney-client relationship
14 and the privileged nature of the communication. *Id.*; *United States v. Bauer*, 132 F.
15 3d 504, 507 (9th Cir. 1997). There is an attorney-client privilege where: “(1) []
16 legal advice of any kind is sought (2) from a professional legal advisor in his
17 capacity as such, (3) the communications relating to that purpose, (4) made in
18 confidence (5) by the client, (6) are at his instance permanently protected (7) from
19 disclosure by himself or by the legal advisor, (8) unless the protection be waved.”
20 *Id.* (quoting *United States v. Graf*, 610 F. 3d 1148, 1156 (9th Cir. 2010)). The
21 privilege is waived when privileged communications are disclosed. *Weil v.*
22 *Inv./Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). While
23 the privilege may extend to those communications with third parties assisting the
24 attorney in legal advice, it does not extend where the advice sought is not legal
25 advice. *Id.*

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

9 (b) Attorney Work Product.

10 The work product doctrine prohibits discovery of documents and other
11 materials "prepared by a party or his representative in anticipation of litigation."
12 *United States v. Richey* 632 F. 3d 559, 567 (9th Cir. 2011) (*quoting Admiral Ins. Co.*
13 *v. U.S. Dist. Ct.*, 881 F. 2d 1486, 1494 (9th Cir. 1989)); Fed. R. Civ. P. 26(b)(3).
14 The work product doctrine is a qualified immunity rather than a privilege, and a
15 showing of good cause for the information desired is sufficient to overcome the
16 qualified immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D.
17 Cal. 2006); *Admiral Ins. Co. v. United States Dist. Court.*, 881 F. 2d 1486, 1494
18 (9th Cir. 1989). "The party claiming work product immunity has the burden of
19 proving the applicability of the doctrine." *A. Farbers & Ptnrs., Inc.*, 234 F.R.D. at
20 192.

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

9 (c) Common Interest Doctrine.

10 In general, the attorney-client privilege is waived when communications
11 between an attorney and client are disclosed to a third party. *Weil v. Inv/ Indicators,*
12 *Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). There is a rare exception
13 to this waiver rule where individuals with a common interest in a legal matter may
14 "communicate among themselves and with the separate attorneys on matters of
15 common legal interest, for the purpose of preparing a joint strategy, and the
16 attorney-client privilege will protect these communications to the same extent as it
17 would communications between each client and his own attorney." *Nidex Corp. v.*
18 *Victor Co.*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) (*quoting* 1 PAUL R. RICE,
19 ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:35, at 192 (1999 ed.);
20 *United States v. Gonzales*, 669 F. 3d 974, 978 (9th Cir. 2012). This common
21 interest doctrine is not a privilege, but an exception to the rule on waiver where
22 communications are disclosed to third parties. *See Griffith*, 161 F.R.D. at 692. For
23 this reason, the common interest doctrine comes into play only if the
24 communication at issue is privileged in the first place. *Nidex Corp*, 249 F.R.D. at
25 578.

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

6 iv. First Amendment Privilege Is Not a Valid Objection.

7 Plaintiff objects to this Request on the ground that it violates the First
8 Amendment rights of association of Plaintiff and its members. A party objecting on
9 the basis of a First Amendment privilege must satisfy a two-part test. The objecting
10 party must first make a "prima facie showing of arguable first amendment
11 infringement." *Perry v. Schwarzenegger*, 591 F. 3d 1126, 1140 (9th Cir. 2010)
12 (quoting *Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F. 2d 346, 349-50
13 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is
14 enforced, there will be "(1) harassment, membership withdrawal, or discouragement
15 of new members, or (2) other consequences which objectively suggest an impact on,
16 or 'chilling' of, the members' associational rights." *Brock*, 860 F. 2d at 350.

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

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

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

20 d. PEER’S CONTENTIONS REGARDING RFP NO. 27.

21 Relevance

22 Information regarding the “Third Set of Independent Tests” is not relevant to
23 the matters at issue in this lawsuit because Defendants have verified through their
24 own testing that four out of the five rooms in the “Third Set of Independent Tests”
25 were in violation of TSCA, the matter which Plaintiffs are seeking to prove in this
26 lawsuit. Although Defendants argue that Plaintiffs relied on this independent
27 testing in their Amended Complaint, in fact Plaintiffs’ Amended Complaint
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1 included information about the independent testing primarily for informational
2 purposes and to describe the chronology of events at the Malibu School. Plaintiffs
3 also recited that Defendants had verified the independent test results and found
4 TSCA violations in every single one of 24 verification samples they took in ten
5 rooms, FAC ¶¶ 127-129, confirming the appropriateness of the methodology and
6 accuracy of the analysis of the independent testing generally, and making it
7 unnecessary to rely on the independent testing to prove Plaintiffs' case at the least
8 with regard to the verified rooms and the buildings in which they are located. From
9 the Third Set of Independent Tests, Plaintiffs would possibly introduce evidence
10 only with regard to the test results regarding the JCES office next to the teacher's
11 lounge, which includes the principal's office, in which Defendants did not conduct
12 verification testing or remediation.

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

17 With regard to the JCES office, Plaintiffs have produced the laboratory report
18 for the testing of that room, and Defendants have supplied no valid reason that they
19 need more than this, or how the request for communications between PEER and
20 America Unites about the Third Set of Independent Tests is reasonably calculated to
21 lead to the discovery of admissible evidence. Defendants' claim that they need more
22 information on the exact location of the sampling to prepare their defense of
23 mootness because that area had been remediated is not applicable here because
24 Defendants have not claimed to have remediated this room.

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

11 Vagueness, Ambiguity, and Overbreadth

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

22 Attorney-Client, Attorney Work Product and Common Interest

23 Communication Privileges

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

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

13 First Amendment Privilege

14 PEER is a whistleblower organization which promises confidentiality to all
15 those who contact it concerning environmental issues and government wrongdoing.
16 Confidentiality is promised with regard to the content of the communication and not
17 only the identity of the person. (See PEER webpage, Ex. 1 to Dinerstein
18 Declaration) This promise of confidentiality applies to all of those who have
19 contacted PEER about the PCBs in the Malibu Schools, whether or not they are
20 associated with America Unites. If PEER were to disclose communications with
21 those persons in discovery, it would greatly inhibit PEER’s ability to function as an
22 organization where people may raise issues in confidence.⁹

23
24 _____
25 ⁹ Defendants claim that PEER is “publicly vocal about its activities and its
26 membership, listing members of its Board and DC Staff on its website.” Although
27 PEER may be publicly vocal about its activities, and does list the members of its
28 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

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

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

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

11 The same would hold for PEER, which has thus made a “prima facie showing
12 of arguable first amendment infringement.” *Perry v. Schwarzenegger*, 591 F.3d
13 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d
14 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of communications between
15 members of the public and PEER is likely to result in discouraging such
16 communications because PEER is unable to protect their confidentiality, thereby
17 severely hampering PEER’s organizational mission. It could also result in
18 harassment of individuals who are parties to these communications. Defendants
19 have already filed a false criminal complaint against the President of America
20 Unites, Ms. DeNicola, and her husband, seeking to subject them to felony charges
21 punishable by fines and imprisonment, for allegedly taking caulk samples. It is
22 difficult to imagine a more “chilling” action against those who advocate for PCB
23 testing and remediation at the Malibu Schools.

24
25 reveal its membership list to anyone. While certain members may choose to
26 reveal their membership in PEER or their communications with PEER, PEER has
27 promised them confidentiality and would never reveal their identities or the
28 contents of their communications without their permission. No such permission
has been given here.

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

11 Defendants suggest that “names and email addresses of those members who
12 would like their membership in PEER to remain private could be redacted ...”.
13 However, while persons who communicate with PEER certainly have First
14 Amendment protection against revealing the fact of their membership in PEER and
15 their personal contact information, *NAACP v. State of Alabama*, 357 U.S. 449
16 (1958), the First Amendment also protects the confidentiality of the fact that they
17 have communicated with PEER, whether or not they are members, and the
18 confidentiality of the content of their communications. The Ninth Circuit in *Perry*
19 ordered protection for communications, not the identities of members, emphasizing
20 that:

21 “The First Amendment privilege, however, has never been limited to
22 the disclosure of identities of rank-and-file members. ... The existence
23 of a prima facie case turns not on the type of information sought, but
24 on whether disclosure of the information will have a deterrent effect on
25 the exercise of protected activities.”

26 591 F.3d at 1162 (citations omitted).

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

4 Once a prima facie case of First Amendment infringement is made, “the
5 evidentiary burden will then shift to the government . . . [to] demonstrate that the
6 information sought through the [discovery] is rationally related to a compelling
7 governmental interest . . . [and] the 'least restrictive means' of obtaining the desired
8 information.” *Perry*, 591 F.3d at 1161 (quoting *Brock v. Local 375, Plumbers Int'l*
9 *Union of Am.*, 860 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v.*
10 *Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)).
11 “Importantly, the party seeking the discovery must show that the information sought
12 is highly relevant to the claims or defenses in the litigation -- a more demanding
13 standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1). The
14 request must also be carefully tailored to avoid unnecessary interference with
15 protected activities, and the information must be otherwise unavailable.” *Perry*, 591
16 F.3d at 1161.

17 Here, Defendants cannot even show that this discovery meets the relevance
18 requirements of Rule 26, much less the more demanding standard of relevance when
19 First Amendment interests are implicated. Moreover, there are other means of
20 acquiring the desired information – whether or not there are TSCA violations in the
21 locations of the Third Set of Independent Tests – namely, by examining the
22 laboratory reports and the information provided in accordance with Defendants’
23 subpoenas to the laboratories, or by doing verification testing, without requiring
24 PEER to disclose its communications with its members, supporters and others who
25 have contacted PEER concerning PCBs at the Malibu Schools.

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

1 **IV. DISCOVERY TO PLAINTIFFS REGARDING PCBs AT OTHER**
2 **SCHOOLS IN THE UNITED STATES**

3 RFP No. 11 to AU and RFP No. 17 to PEER request communications
4 regarding PCBs at any school in the United States. Defendants move to compel on
5 RFPs No. 11 to AU and 17 to PEER.

6 **A. REQUEST FOR PRODUCTION TO AU REGARDING PCBs AT**
7 **OTHER SCHOOLS**

8 **1. REQUEST FOR PRODUCTION NO. 11.**

9 a. REQUEST FOR PRODUCTION NO. 11.

10 All COMMUNICATIONS by and between AMERICA UNITES, its
11 MEMBERS and any third parties regarding PCBs at any school in the United States.

12 b. RESPONSE TO REQUEST FOR PRODUCTION NO. 11.

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

22 c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 11.

23 i. Relevancy Is Not a Valid Objection to RFP No. 11.

24 In response to discovery requests for information regarding PCBs in schools
25 in the United States, Plaintiffs have taken the tenuous position that this information
26 is not relevant. However, Plaintiffs have referenced information regarding PCBs at
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1 other schools in the United States and will likely use such information to support
2 their claim.

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

5 [A]ny nonprivileged matter that is relevant to any party's claim or
6 defense and proportional to the needs of the case, considering the
7 importance of the issues at stake in the action, the amount in
8 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.

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

11 Defendants have remediated all known exceedances of the regulatory
12 threshold for PCBs, including those resulting from surreptitious sampling by
13 Plaintiffs. Now, it is important that Defendants have access to other foundational
14 information or data regarding PCBs that Plaintiffs may rely on to support their claim
15 of a TSCA violation so that Defendants can adequately defend themselves in this
16 litigation. Plaintiffs referenced PCBs in New York schools twice in their FAC.
17 Decl. Plant, Ex. D; ¶¶ 62, 95. Plaintiffs regularly post information regarding PCB
18 cases and remediation activities at schools around the United States, so as to draw
19 comparisons between these schools and the Malibu Schools. *See* Decl. Plant, Ex. E;
20 Ex. F; Ex. G. Even though they will rely on this information and data, Plaintiffs
21 have taken the specious position that information regarding PCBs at schools in the
22 United States not relevant. The information requested is highly relevant, because it
23 will serve as a foundation from which Plaintiffs will attempt to prove their claim.

24 Additionally, the issues at stake are significant. If deprived of relevant,
25 foundational information that is necessary for preparation of a defense, Defendants
26 could be held liable for millions of dollars of unnecessary remediation and
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1 renovation. Furthermore, Plaintiffs are the sole source of this information and the
2 burden of its production to Plaintiffs is non-existent.

3 For all of the foregoing reasons, Plaintiffs should be required to produce
4 communications regarding PCBs at any school in the United States.

5 ii. Vagueness, Ambiguity, Overbreadth, and Undue Burden and Oppression Are
6 Not Valid Objections to RFP No. 11.

7 Plaintiff's objection that Requests for Production No. 11 is vague, ambiguous,
8 overbroad, and unduly burdensome and oppressive is unfounded. "The party who
9 resists discovery has the burden to show discovery should not be allowed, and has
10 the burden of clarifying, explaining, and supporting its objections." *Bible v. Rio*
11 *Props., Inc.*, 246 F. R. D. 614 (C.D. Cal. 2007) (citing *Blankenship v. Hearst Corp.*,
12 519 F. 2d 418, 429 (9th Cir. 1975) and *Keith H. v. Long Beach Unified Sch. Dist.*,
13 228 F.R.D. 652, 655-56 (C.D. Cal. 2005)). There is no merit to "general or
14 boilerplate objections such as 'overly broad' [or] 'vague and ambiguous.'" *Bible*,
15 246 F. R. D. at 619; *A. Farber & Partners, Inc. v. Garber*, 234 F. R. D. 186, 188
16 (C.D. Cal. 2006).

17 AU has not met its burden of demonstrating that discovery of the information
18 sought in this Request should not be allowed, because it has not supported or
19 explained its objections on the basis of the requests being vague, ambiguous,
20 overbroad, or unduly burdensome or oppressive. Defendants have requested
21 communications by or between America Unites, its members and any third parties
22 regarding PCBs at any school in the United States. Plaintiff need only look for
23 correspondences that reference PCBs at schools in the United States. Without
24 further explanation, Plaintiff's objection is without merit, and Plaintiff should
25 produce documents in response to this Request.

1 iii. Attorney-Client, Attorney Work Product, and Common-Interest
2 Communication Privileges Are Not Valid Objections to RFP No. 11.

3 (a) Attorney-Client Privilege.

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

20 Communications regarding PCBs at any school in the United States are not
21 protected by the attorney-client privilege to the extent that they include
22 communications regarding publically available information regarding PCBs and
23 information and data communicated to third parties other than Plaintiffs and their
24 counsel. Defendants’ request is not asking for communications between Plaintiffs
25 and their counsel. Plaintiffs have failed to indicate in their responses which
26 communications they believe to be protected by the attorney-client privilege.
27 *Richey*, 632 F. 3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to
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1 produce documents in response to Defendants’ Requests on the basis of attorney-
2 client privilege.

3 (b) Attorney Work Product.

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

14 Plaintiffs cannot claim work product immunity because they have made no
15 showing that this protection applies to any of the information or communications
16 sought in Defendants’ Requests. For example, Plaintiffs have not demonstrated
17 how communications regarding PCBs at schools in the United States other than the
18 Malibu Schools bears any relation to Plaintiffs’ efforts in preparation for trial.
19 Furthermore, Defendants have good cause to request the information sought,
20 because the information and data pertaining to PCBs at other schools will surely be
21 used against Defendants in this litigation, and Defendants must be afforded the
22 opportunity to confront the validity and reliability of this information. This
23 necessarily entails access to this information through the discovery process.
24 Plaintiffs have not met the burden of demonstrating the applicability of the work
25 product doctrine, so their objection on this basis is not appropriate. Accordingly,
26 Plaintiffs may not refuse to produce documents in response to Defendants’ Requests
27 on the basis of attorney-client privilege.

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1 (c) Common Interest Doctrine.

2 In general, the attorney-client privilege is waived when communications
3 between an attorney and client are disclosed to a third party. *Weil v. Inv/ Indicators,*
4 *Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). There is a rare exception
5 to this waiver rule where individuals with a common interest in a legal matter may
6 “communicate among themselves and with the separate attorneys on matters of
7 common legal interest, for the purpose of preparing a joint strategy, and the
8 attorney-client privilege will protect these communications to the same extent as it
9 would communications between each client and his own attorney.” *Nidec Corp. v.*
10 *Victor Co.*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) (quoting 1 PAUL R. RICE,
11 ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:35, at 192 (1999 ed.);
12 *United States v. Gonzales*, 669 F. 3d 974, 978 (9th Cir. 2012). This common
13 interest doctrine is not a privilege, but an exception to the rule on waiver where
14 communications are disclosed to third parties. *See Griffith*, 161 F.R.D. at 692. For
15 this reason, the common interest doctrine comes into play only if the
16 communication at issue is privileged in the first place. *Nidec Corp*, 249 F.R.D. at
17 578.

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

25 iv. First Amendment Privilege Is Not a Valid Objection.

26 Plaintiff further objects to this Request on the ground that it violates the First
27 Amendment rights of association of Plaintiff and its members. A party objecting on
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1 the basis of a First Amendment privilege must satisfy a two-part test. The objecting
2 party must first make a “prima facie showing of arguable first amendment
3 infringement.” *Perry v. Schwarzenegger*, 591 F. 3d 1126, 1140 (9th Cir. 2010)
4 (quoting *Brock v. Local 375, Plumbers Int’l Union of Am.*, 860 F. 2d 346, 349-50
5 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is
6 enforced, there will be “(1) harassment, membership withdrawal, or discouragement
7 of new members, or (2) other consequences which objectively suggest an impact on,
8 or ‘chilling’ of, the members’ associational rights.” *Brock*, 860 F. 2d at 350.

9 Here, Plaintiff has made no such showing that disclosure of the
10 communications requested would lead to “harassment, membership withdrawal, or
11 discouragement of new members,” or that it would result in other consequences that
12 could “chill” members’ associational rights. The Request for communications
13 regarding PCBs at any school in the United States calls for communications
14 regarding the underlying information and data pertaining to PCBs that will be used
15 by Plaintiffs at trial. The Request propounded by Defendants is not seeking
16 personal information, does nothing to harass members of Plaintiff organizations,
17 and would not have a deterrent effect on membership. Moreover, the materials
18 requested by Defendants are necessary so that Defendants can defend themselves in
19 this litigation and fairness justifies their production. Defendants will not be
20 afforded a fair discovery if they are precluded from accessing information regarding
21 PCBs at other schools, which will surely be used against Defendants in trial.

22 Additionally, there would be no “chilling” effect if Plaintiffs responded to
23 Defendants’ requests for this information, because AU is publicly vocal about its
24 activities and its membership, listing members of its Advisory Board and
25 Leadership Team on its website. *See Decl. Plant, Exs. L, M.* In particular, Plaintiff
26 frequently publicizes its activities with regard to the subject matter of this very case
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1 on its website. The information sought in the above Request relates **only** to
2 communications regarding PCBs, the subject matter of this lawsuit.

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

11 d. AU'S CONTENTIONS REGARDING RFP NO. 11

12 Defendants are seeking communications "by and between AU, its members
13 and third parties concerning PCBs at other schools." The request is objectionable
14 for a number of reasons.

15 First, the requested documents are not relevant. The issue here is whether the
16 Malibu Schools, not other schools, violate TSCA. Communications by Plaintiffs, its
17 members and third parties about PCBs at other schools is simply not relevant to that
18 issue.

19 Defendants contend that the requested documents are relevant because
20 Plaintiffs referenced PCBs in New York schools twice in their FAC, citing ¶¶ 62
21 and 95 of the FAC. (Plant Decl. Ex. D, ¶¶62 and 95) Paragraph 62 alleges that
22 EPA's January 27, 2014 screening levels for PCBs in the air at the Malibu Schools
23 was based on calculations for schools in New York. However, this fact is
24 undisputed; it is what the EPA told Defendant Lyon in a January 27, 2014 letter.
25 (Avrith Decl. Ex. 3) To the extent that they have not already done so, Plaintiffs will
26 produce all non-privileged documents which support this allegation.

1 Paragraph 95 of the FAC alleges that based on testing in other schools, it has
2 been shown that air and dust levels of PCBs are highly variable over time.
3 Defendants have requested, and Plaintiffs have agreed to produce, all non-privileged
4 documents that support or refer to this allegation. (Avrith Decl. Ex. 4, at Request
5 No. 10) Neither of these limited references to PCBs in other schools in the FAC
6 makes other communications by Plaintiffs or its supporters or third parties about
7 PCBs in other schools relevant.

8 Defendants also contend that “Plaintiffs regularly post information regarding
9 PCB cases and remediation activities at schools around the United States, so as to
10 draw comparisons between these schools and the Malibu Schools.” Obviously, the
11 fact that AU “posts” information about remediation of PCBs at other schools, does
12 not make all communications regarding PCBs at other schools relevant in this
13 lawsuit.

14 It should be noted that Plaintiffs are not contending that information about
15 PCBs at other schools is always irrelevant. What happened with PCBs at other
16 schools may very well be relevant in this case. Indeed, Plaintiffs have already
17 produced documents concerning PCBs at other schools and to the extent not already
18 done, and will produce whatever publicly-available documents they have in their
19 possession, custody or control concerning PCBs at other schools.

20 However, there is a difference between documents that evidence what
21 happened with PCBs at other schools, and the documents that Defendants are
22 requesting. Defendants are requesting “communications” by Plaintiffs, their
23 members and third parties concerning PCBs at other schools. Although what
24 happened with PCBs at other schools may be relevant here, Defendants are unable
25 to explain why what Plaintiffs, their members or third parties may have said about
26 PCBs at other schools is relevant to any issue in this case.

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1 Second, the request is vague, ambiguous and overbroad. It pertains to all
2 communications “by and between [AU], its members and any third parties.” It is
3 not clear what is meant by “by and between.” Is the request limited to
4 communications to which AU or its members are parties, or does it encompass all
5 communications by a third party whether or not AU or its members are parties to the
6 communication?

7 Third, the request seeks privileged information. All communications between
8 America Unites and PEER regarding PCBs at other schools would involve PEER
9 counsel, as no one else at PEER communicated with America Unites about these
10 matters. (See accompanying Declaration of Paula Dinerstein (“Dinerstein Decl.”),
11 ¶3) PEER and America Unites are jointly pursuing this case, and therefore
12 communications with either PEER or America Unites counsel (America Unites
13 counsel is also PEER counsel) would be privileged pursuant to the attorney-client
14 privilege and common interest doctrine. See *In re Teliglobe Communications*
15 *Corp.*, 493 F.3d 345, 363-64 (3d. Cir. 2007) Therefore, all such communications
16 sought in this request would be privileged.

17 Furthermore, requests for communications between AU and its members or
18 members of the public violate AU’s First Amendment Right of Association.

19 “If the government is successful in compelling [the
20 organization’s lawyer] to reveal the information given to her,
21 especially the identity of those she represents, GAP will lose the
22 confidence of some of its whistleblower informants and its efforts to
23 gather and present safety allegations will suffer. This is the harm that
24 GAP claims, and it is cognizable under the [First Amendment] right to
25 association.”

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

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1 The same would hold for AU, which has thus made a “prima facie showing of
2 arguable first amendment infringement.” *Perry v. Schwazenegger*, 591 F.3d 1126,
3 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132,
4 1133 (9th Cir. 1983) (per curiam)). Disclosure of communications between Plaintiff
5 and its members or members of the public is likely to result in discouraging such
6 communications because Plaintiff is unable to protect their confidentiality, thereby
7 severely hampering their organizational mission. It could also result in harassment
8 of individuals who are parties to these communications. Defendants have already
9 filed a false criminal complaint against the President of America Unites, Ms.
10 DeNicola, and her husband, seeking to subject them to felony charges punishable by
11 fines and imprisonment, for allegedly taking caulk samples. It is difficult to
12 imagine a more “chilling” action against those who advocate for PCB testing and
13 remediation at the Malibu Schools.

14 It is more than understandable that persons who communicate with Plaintiffs
15 on this subject would not want their communications disclosed.¹⁰ In fact, given the
16 marginal, if any, relevance to this litigation of the communications sought here, one
17 cannot help but suspect that this discovery is being sought for the purpose of
18 harassing people who have communicated with Plaintiffs about PCBs at other
19 schools.

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

27 ¹⁰ Defendants contend that Plaintiff AU is “publicly vocal” about its activities.
28 However, Plaintiff is not publicly vocal about the information being sought.

1 *Union of Am.*, 860 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v.*
2 *Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)).

3 “Importantly, the party seeking the discovery must show that the
4 information sought is highly relevant to the claims or defenses in the
5 litigation -- a more demanding standard of relevance than that under
6 Federal Rule of Civil Procedure 26(b)(1). The request must also be
7 carefully tailored to avoid unnecessary interference with protected
8 activities, and the information must be otherwise unavailable.” *Perry*,
9 591 F.3d at 1161.

10 Here, Defendants cannot even show that this discovery meets the relevance
11 requirements of Rule 26, much less the more demanding standard of relevance when
12 First Amendment interests are implicated.

13 **B. REQUEST FOR PRODUCTION TO PEER REGARDING PCBS AT**
14 **OTHER SCHOOLS**

15 **1. REQUEST FOR PRODUCTION NO. 17.**

16 a. **REQUEST FOR PRODUCTION NO. 17.**

17 All COMMUNICATIONS between PEER and AMERICA UNITES
18 regarding PCBs at any school in the United States.

19 b. **RESPONSE TO REQUEST FOR PRODUCTION NO. 17.**

20 Plaintiff objects to this Request on the ground that it seeks information that is
21 not relevant to the parties’ claims or defenses or the subject matter of the instant
22 action and is overbroad and oppressive. Plaintiff further objects to this Request on
23 the ground that it is vague and ambiguous, given that Defendants’ response to
24 Plaintiffs’ discovery requests define PCBs as ‘PCBs in caulk or other building
25 material at the Malibu School known to Defendants to contain PCBs at
26 concentrations of 50 parts per million (‘ppm’) or greater.’ Plaintiff further objects
27 to this Request to the extent that it calls for the production of privileged attorney-
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1 client communications, work product, common-interest communications or other
2 privileged information. Plaintiff further objects to this Request on the ground that it
3 violates the First Amendment rights of association of Plaintiff and its members and
4 supporters.

5 c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 17.

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

7 In response to discovery requests for information regarding PCBs in schools
8 in the United States, Plaintiffs have taken the tenuous position that this information
9 is not relevant. However, Plaintiffs have referenced information regarding PCBs at
10 other schools in the United States and will likely use such information to support
11 their claim.

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

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

21 Information within the scope of discovery does not need to be admissible in
22 evidence. Fed. R. Civ. P. 26(b)(1).¹¹

23 Defendants have remediated all known exceedances of the regulatory
24 threshold for PCBs, including those resulting from surreptitious sampling by
25 Plaintiffs. Now, it is important that Defendants have access to other foundational
26 information or data regarding PCBs that Plaintiffs may rely on to support their claim
27 of a TSCA violation so that Defendants can adequately defend themselves in this
28 litigation. Plaintiffs referenced PCBs in New York schools twice in their FAC.

¹¹ The Rule quoted here is the amended version of Rule 26(b)(1), which became effective December 1, 2015.

1 Decl. Plant, Ex. D; ¶¶ 62, 95. Plaintiffs regularly post information regarding PCB
2 cases and remediation activities at schools around the United States, so as to draw
3 comparisons between these schools and the Malibu Schools. *See* Decl. Plant, Ex. E;
4 Ex. F; Ex. G. Even though they will rely on this information and data, Plaintiffs
5 have taken the specious position that information regarding PCBs at schools in the
6 United States not relevant. The information requested is highly relevant, because it
7 will serve as a foundation from which Plaintiffs will attempt to prove their claim.

8 Additionally, the issues at stake are significant. If deprived of relevant,
9 foundational information that is necessary for preparation of a defense, Defendants
10 could be held liable for millions of dollars of unnecessary remediation and
11 renovation. Furthermore, Plaintiffs are the sole source of this information and the
12 burden of its production to Plaintiffs is non-existent.

13 For all of the foregoing reasons, Plaintiffs should be required to produce
14 communications regarding PCBs at any school in the United States.

15 ii. Vagueness, Ambiguity, Overbreadth, and Undue Burden and Oppression Are
16 Not Valid Objections to RFP No. 17.

17 Plaintiff's objection that Requests for Production No. 17 is vague, ambiguous,
18 overbroad, and unduly burdensome and oppressive is unfounded. "The party who
19 resists discovery has the burden to show discovery should not be allowed, and has
20 the burden of clarifying, explaining, and supporting its objections." *Bible v. Rio*
21 *Props., Inc.*, 246 F. R. D. 614 (C.D. Cal. 2007) (citing *Blankenship v. Hearst Corp.*,
22 519 F. 2d 418, 429 (9th Cir. 1975) and *Keith H. v. Long Beach Unified Sch. Dist.*,
23 228 F.R.D. 652, 655-56 (C.D. Cal. 2005)). There is no merit to "general or
24 boilerplate objections such as 'overly broad' [or] 'vague and ambiguous.'" *Bible*,
25 246 F. R. D. at 619; *A. Farber & Partners, Inc. v. Garber*, 234 F. R. D. 186, 188
26 (C.D. Cal. 2006).

1 Plaintiff PEER has not met its burden of demonstrating that discovery of the
2 information sought in this Request should not be allowed, because it has not
3 supported or explained its objections on the basis of the requests being vague,
4 ambiguous, or overbroad. Defendants have requested communications between
5 PEER and America Unites regarding PCBs at schools in the United States. Plaintiff
6 need only look for correspondences between itself and America Unites that related
7 to PCBs at schools in the United States. Without further explanation, Plaintiff’s
8 objection is without merit, and Plaintiff should produce documents in response to
9 this Request.

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

12 (a) Attorney-Client Privilege.

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

3 Communications regarding PCBs at any school in the United States are not
4 protected by the attorney-client privilege to the extent that they include
5 communications regarding publically available information regarding PCBs and
6 information and data communicated to third parties other than Plaintiffs and their
7 counsel. Defendants' request is not asking for communications between Plaintiffs
8 and their counsel. Plaintiffs have failed to indicate in their responses which
9 communications they believe to be protected by the attorney-client privilege.
10 *Richey*, 632 F. 3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to
11 produce documents in response to Defendants' Requests on the basis of attorney-
12 client privilege.

13 (b) Attorney Work Product.

14 The work product doctrine prohibits discovery of documents and other
15 materials "prepared by a party or his representative in anticipation of litigation."
16 *United States v. Richey* 632 F. 3d 559, 567 (9th Cir. 2011) (*quoting Admiral Ins. Co.*
17 *v. U.S. Dist. Ct.*, 881 F. 2d 1486, 1494 (9th Cir. 1989)); Fed. R. Civ. P. 26(b)(3).
18 The work product doctrine is a qualified immunity rather than a privilege, and a
19 showing of good cause for the information desired is sufficient to overcome the
20 qualified immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D.
21 Cal. 2006); *Admiral Ins. Co. v. United States Dist. Court.*, 881 F. 2d 1486, 1494
22 (9th Cir. 1989). "The party claiming work product immunity has the burden of
23 proving the applicability of the doctrine." *A. Farbers & Ptnrs., Inc.*, 234 F.R.D. at
24 192.

25 Plaintiffs cannot claim work product immunity because they have made no
26 showing that this protection applies to any of the information or communications
27 sought in Defendants' Requests. For example, Plaintiffs have not demonstrated
28

1 how communications regarding PCBs at schools in the United States other than the
2 Malibu Schools bears any relation to Plaintiffs' efforts in preparation for trial.
3 Furthermore, Defendants have good cause to request the information sought,
4 because the information and data pertaining to PCBs at other schools will surely be
5 used against Defendants in this litigation, and Defendants must be afforded the
6 opportunity to confront the validity and reliability of this information. This
7 necessarily entails access to this information through the discovery process.
8 Plaintiffs have not met the burden of demonstrating the applicability of the work
9 product doctrine, so their objection on this basis is not appropriate. Accordingly,
10 Plaintiffs may not refuse to produce documents in response to Defendants' Requests
11 on the basis of attorney-client privilege.

12 (c) Common Interest Doctrine.

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

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

10 iv. First Amendment Privilege Is Not a Valid Objection.

11 Plaintiff further objects to this Request on the ground that it violates the First
12 Amendment rights of association of Plaintiff and its members. A party objecting on
13 the basis of a First Amendment privilege must satisfy a two-part test. The objecting
14 party must first make a "prima facie showing of arguable first amendment
15 infringement." *Perry v. Schwarzenegger*, 591 F. 3d 1126, 1140 (9th Cir. 2010)
16 (quoting *Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F. 2d 346, 349-50
17 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is
18 enforced, there will be "(1) harassment, membership withdrawal, or discouragement
19 of new members, or (2) other consequences which objectively suggest an impact on,
20 or 'chilling' of, the members' associational rights." *Brock*, 860 F. 2d at 350.

21 Here, Plaintiff has made no such showing that disclosure of the
22 communications requested would lead to "harassment, membership withdrawal, or
23 discouragement of new members," or that it would result in other consequences that
24 could "chill" members' associational rights. The Request for communications
25 regarding PCBs at any school in the United States calls for communications
26 regarding the underlying information and data pertaining to PCBs that will be used
27 by Plaintiffs at trial. The Request propounded by Defendants is not seeking
28

1 personal information, does nothing to harass members of Plaintiff organizations,
2 and would not have a deterrent effect on membership. Moreover, the materials
3 requested by Defendants are necessary so that Defendants can defend themselves in
4 this litigation, and fairness justifies their production. Defendants will not be
5 afforded a fair discovery if they are precluded from accessing information regarding
6 PCBs at other schools, which will surely be used against Defendants in trial.

7 Additionally, there would be no “chilling” effect if Plaintiffs responded to
8 Defendants’ requests for this information, because PEER is publicly vocal about its
9 activities and its membership, listing members of its Board and DC Staff on its
10 website. *See Decl. Plant, M.* In particular, Plaintiff frequently publicizes its
11 activities with regard to the subject matter of this very case on its website. The
12 information sought in the above Request relates **only** to communications regarding
13 PCBs, the subject matter of this lawsuit.

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

22 d. PEER’S CONTENTIONS REGARDING RFP NO. 17.

23 Defendants are seeking communications “by and between PEER and any
24 third parties concerning PCBs at any school in the United States.” The request is
25 objectionable for a number of reasons.
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1 First, the requested documents are not relevant. The issue here is whether the
2 Malibu Schools, not other schools, violate TSCA. Communications by Plaintiff and
3 third parties about PCBs at other schools is simply not relevant to that issue.

4 Defendants contend that the requested documents are relevant because
5 Plaintiffs referenced PCBs in New York schools twice in their FAC, citing ¶¶ 62
6 and 95 of the FAC. Paragraph 62 alleges that EPA’s January 27, 2014 screening
7 levels for PCBs in the air at the Malibu Schools was based on calculations for
8 schools in New York. However, this fact is undisputed; it is what the EPA told
9 Defendant Lyon in a January 27, 2014 letter. To the extent that they have not
10 already done so, Plaintiffs will produce all non-privileged documents which support
11 this allegation.

12 Paragraph 95 of the FAC alleges that based on testing in other schools, it has
13 been shown that air and dust levels of PCBs are highly variable over time.
14 Defendants have requested, and Plaintiffs have agreed to produce, all non-privileged
15 documents that support this allegation. Neither of these limited references to PCBs
16 in other schools in the FAC makes other communications by PEER and third parties
17 about PCBs in other schools relevant.

18 Defendants also contend that “Plaintiffs regularly post information regarding
19 PCB cases and remediation activities at schools around the United States, so as to
20 draw comparisons between these schools and the Malibu Schools.” Obviously, the
21 fact that PEER “posts” information about remediation of PCBs at other schools,
22 does not make all communications regarding PCBs at other schools relevant in this
23 lawsuit.

24 It should be noted that Plaintiffs are not contending that information about
25 PCBs at other schools is always irrelevant. What happened with PCBs at other
26 schools may very well be relevant in this case. Indeed, Plaintiffs have already
27 produced documents concerning PCBs at other schools and to the extent not already
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1 done, and will produce whatever publicly-available documents they have in their
2 possession, custody or control concerning PCBs at other schools.

3 However, there is a difference between documents that evidence what
4 happened with PCBs at other schools, and the documents that Defendants are
5 requesting. Defendants are requesting “communications” by PEER with third
6 parties concerning PCBs at other schools. Although what happened with PCBs at
7 other schools may be relevant here, Defendants are unable to explain why what
8 PEER may have said about PCBs at other schools to third parties is relevant to any
9 issue in this case.

10 Second, the request is vague, ambiguous and overbroad. It pertains to all
11 communications “by and between PEER and any third parties.” It is not clear what
12 is meant by “by and between.” Is the request limited to communications to which
13 PEER is a party, or does it encompass all communications by a third party whether
14 or not PEER is a party to the communication?

15 Third, the request seeks privileged information. All communications between
16 PEER and third parties regarding PCBs at other schools would involve PEER
17 counsel, as no one else at PEER communicated with anyone concerning PCBs in
18 schools in the United States. Therefore, all such communications sought in this
19 request would be privileged.

20 Furthermore, requests for communications between PEER and third parties
21 violate PEER’s First Amendment Right of Association.

22 “If the government is successful in compelling [the
23 organization’s lawyer] to reveal the information given to her,
24 especially the identity of those she represents, GAP will lose the
25 confidence of some of its whistleblower informants and its efforts to
26 gather and present safety allegations will suffer. This is the harm that
27 GAP claims, and it is cognizable under the right to association.”

28

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

2 The same would hold for PEER, which has thus made a “prima facie showing
3 of arguable first amendment infringement.” *Perry v. Schwarzenegger*, 591 F.3d
4 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d
5 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of communications between
6 Plaintiff and third parties, including members of the public is likely to result in
7 discouraging such communications because PEER is unable to protect their
8 confidentiality, thereby severely hampering PEER’s organizational mission. It
9 could also result in harassment of individuals who are parties to these
10 communications. Defendants have already filed a false criminal complaint against
11 the President of America Unites, Ms. DeNicola, and her husband, seeking to subject
12 them to felony charges punishable by fines and imprisonment, for allegedly taking
13 caulk samples. It is difficult to imagine a more “chilling” action against those who
14 advocate for PCB testing and remediation at the Malibu Schools.

15 It is more than understandable that persons who communicate with PEER on
16 this subject would not want their communications disclosed. In fact, given the
17 marginal, if any, relevance to this litigation of the communications sought here, one
18 cannot help but suspect that this discovery is being sought for the purpose of
19 harassing people who have communicated with Plaintiffs about PCBs at other
20 schools.

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

3 “The First Amendment privilege, however, has never been
4 limited to the disclosure of identities of rank-and-file members. . . . The
5 existence of a prima facie case turns not on the type of information
6 sought, but on whether disclosure of the information will have a
7 deterrent effect on the exercise of protected activities.”

8 591 F.3d at 1162 (citations omitted).

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

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

19 “Importantly, the party seeking the discovery must show that the
20 information sought is highly relevant to the claims or defenses in the
21 litigation -- a more demanding standard of relevance than that under
22 Federal Rule of Civil Procedure 26(b)(1). The request must also be
23 carefully tailored to avoid unnecessary interference with protected
24 activities, and the information must be otherwise unavailable.” *Perry*,
25 591 F.3d at 1161.

26 Here, Defendants cannot even show that this discovery meets the relevance
27 requirements of Rule 26, much less the more demanding standard of relevance when
28 First Amendment interests are implicated.

1 **V. DISCOVERY Requests to PEER Regarding Standing**

2 Defendants move to compel further responses and production of documents
3 to Interrogatory No. 8 and RFPs No. 40 and 42, which relate to PEER's standing in
4 this lawsuit.

5 **A. INTERROGATORY TO PEER REGARDING STANDING**

6 **1. INTERROGATORY NO. 8.**

7 a. INTERROGATORY NO. 8

8 IDENTIFY the PERSON or PERSONS that PEER intends to rely on as
9 STANDING WITNESSES at trial.

10 b. RESPONSE TO INTERROGATORY NO. 8.

11 Plaintiff objects to this interrogatory on the ground that it seeks information
12 that is protected by the attorney work product privilege.

13 c. DEFENDANTS' CONTENTIONS REGARDING INTERROGATORY NO.
14 8.

15 In this Interrogatory Defendants seek discovery regarding the identity of that
16 individual or individuals which PEER intends to rely upon to establish PEER's
17 standing in this case. In response, PEER erroneously contends that the identity of
18 these witnesses is protected by the attorney work product privilege.

19 i. Defendants are Entitled to Discovery Regarding PEER's Standing.

20 PEER's lack of standing is a complete defense to this lawsuit, and Defendants
21 are entitled to take discovery regarding PEER's standing so that they may challenge
22 its ability to maintain this suit.

23 To demonstrate standing, a plaintiff must show (1) it has suffered an "injury
24 in fact" that is (a) concrete and particularized and (b) actual or imminent, not
25 conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action
26 of the defendant; and (3) it is likely, as opposed to merely speculative, that the
27 injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504
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1 U. S. 555, 560-61 (1992) (citing *Hunt v. Washington Apple Advertising*
2 *Commission*, 432 U.S. 333, 342 (1977)). An association only has standing to bring
3 suit on behalf of its members where: (a) its members would otherwise have standing
4 to sue in their own right; (b) the interests it seeks to protect are germane to the
5 organization’s purpose; and (c) neither the claim asserted nor the relief requested
6 requires the participation of individual members in the lawsuit. *Id.* An
7 association’s standing is subject to challenge in every phase of litigation and the
8 burden of proving standing rests on Plaintiff. *Id.* Defendants should be permitted to
9 interview those individuals who PEER alleges have suffered such an injury and to
10 take further discovery to determine if PEER can satisfy these elements.

11 ii. The Identities of Witnesses Are Not Protected Work Product.

12 The work product doctrine prohibits discovery of documents and other
13 materials “prepared by a party or his representative in anticipation of litigation.”
14 *United States v. Richey* 632 F. 3d 559, 567 (9th Cir. 2011) (quoting *Admiral Ins. Co.*
15 *v. U.S. Dist. Ct.*, 881 F. 2d 1486, 1494 (9th Cir. 1989)); Fed. R. Civ. P. 26(b)(3).
16 The work product doctrine is a qualified immunity rather than a privilege, and a
17 showing of good cause for the information desired is sufficient to overcome the
18 qualified immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D.
19 Cal. 2006); *Admiral Ins. Co. v. United States Dist. Court.*, 881 F. 2d 1486, 1494
20 (9th Cir. 1989). “The party claiming work product immunity has the burden of
21 proving the applicability of the doctrine.” *A. Farbers & Ptnrs., Inc.*, 234 F.R.D. at
22 192.

23 Defendants’ Interrogatory merely requests the identities of any witnesses
24 known by PEER—not any witness statements made in anticipation of litigation or
25 other attorney work product. Plaintiff have made no showing that the attorney
26 work product applies to the names or identities of these witnesses—it has simply
27 asserted this doctrine as a boilerplate objection to Defendants’ request for a
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1 disclosure already compelled under Fed. R. Civ. P. 26(a)(1)(A) and discoverable
2 under Rule 26(b)(1). Additionally, it is clear from the fact that the Federal Rules of
3 Civil Procedure compel disclosure of witnesses' identities that this information is
4 not protected as attorney work product.

5 iii. Disclosure of Witnesses Is Compelled By Rule 26.

6 Under Rule 26, Plaintiffs must disclose all witnesses with discoverable
7 information. Rule 26(b)(1) states that "any nonprivileged matter that is relevant to
8 any party's claim or defense" is discoverable, including "the identity and location of
9 persons who know of any discoverable matter." Rule 26(a)(1)(A) states that "a
10 party must, without awaiting a discovery request, provide to the other parties: (i) the
11 name and, if known, the address and telephone number of each individual likely to
12 have discoverable information—along with the subjects of that information—that
13 the disclosing party may use to support its claims or defenses. . . ." *See Green v.*
14 *Baca*, 226 F.R.D. 624, 655 (C.D. Cal. 2005).

15 The required disclosures under the Federal Rules of Civil Procedure clearly
16 contemplate the timely exchange of witness identities among the parties, and do not
17 protect such information from discovery. Further, if a party later attempts to use a
18 witness it has failed to disclose, it will not be permitted to do so where such a failure
19 is not substantially justified or is harmless. Fed. R. Civ. Proc. 37(c)(1).

20 Accordingly, PEER should be required to identify those individuals it will rely upon
21 as standing witnesses at trial.

22 d. PEER'S CONTENTIONS REGARDING INTERROGATORY NO. 8.

23 There is no requirement that PEER produce the names of any of its witnesses
24 until the exchange of information required at least 40 days before the pre-trial
25 conference, LR 16-2.4, to be filed with the court no later than 21 days before the
26 final pre-trial conference. LR 16-5. See also Fed. R. Civ. P. 26(a)(3)(A)(i) and (B)
27 (requiring disclosure of the name, address and telephone number of witnesses at
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1 least 30 days before trial). The fact that Plaintiffs were required to disclose “the
2 identity and location of persons who know of any discoverable matter” in their
3 initial disclosures under Rule 26(b)(1) does not mean that Plaintiffs must disclose
4 the names of witnesses before the times provided for such disclosure in the Federal
5 and Local Rules. See *D’Onofrio v. Sfx Sports Group, Inc.*, 247 F.R.D. 43, 53-54
6 (D.D.C. 2008). PEER has complied with the requirements for initial disclosures
7 under Rule 26(a)(1)(A) and need not make any disclosures concerning witnesses at
8 this point.

9 In addition, as a practical matter, compelling a response to this interrogatory
10 would serve no purpose since PEER has not determined at this point who it might
11 rely on as a standing witness at trial.

12 **B. REQUESTS FOR PRODUCTION TO PEER REGARDING**
13 **STANDING**

14 **1. REQUEST FOR PRODUCTION NO. 41.**

15 a. **REQUEST FOR PRODUCTION NO. 41**

16 All DOCUMENTS that SUPPORT, REFER, or RELATE TO PEER’S
17 standing in this lawsuit.

18 b. **RESPONSE TO REQUEST FOR PRODUCTION NO. 41.**

19 Plaintiff objects to this Request on the ground that it is vague and ambiguous.
20 Plaintiff further objects to this Request to the extent that it seeks privileged attorney-
21 client communications, work product, common-interest communications or other
22 privileged information.

23 c. **DEFENDANTS’ CONTENTIONS REGARDING RFP NO. 41.**

24 i. **Vagueness and Ambiguity Are Not Valid Objections to RFP No. 41.**

25 Plaintiff’s objection that Requests for Production No. 41 is vague and
26 ambiguous is unfounded. “The party who resists discovery has the burden to show
27 discovery should not be allowed, and has the burden of clarifying, explaining, and
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1 supporting its objections.” *Bible v. Rio Props., Inc.*, 246 F. R. D. 614 (C.D. Cal.
2 2007) (citing *Blankenship v. Hearst Corp.*, 519 F. 2d 418, 429 (9th Cir. 1975) and
3 *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 655-56 (C.D. Cal.
4 2005)). There is no merit to “general or boilerplate objections such as ‘overly
5 broad’ [or] ‘vague and ambiguous.’” *Bible*, 246 F. R. D. at 619; *A. Farber &*
6 *Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal. 2006).

7 Plaintiff has offered no explanation as to why Defendants Request is so
8 “vague” or “ambiguous” that Plaintiff cannot produce any responsive documents.
9 Accordingly, Defendants request that Plaintiff produce documents in response to
10 this Request.

11 ii. Attorney-Client, Attorney Work Product, and Common-Interest
12 Communication Privileges Are Not Valid Objections to RFP No. 41.

13 (a) Attorney-Client Privilege.

14 “The attorney-client privilege protects confidential communications between
15 attorneys and clients, which are made for the purpose of giving legal advice.”
16 *United States v. Richey*, 632 F. 3d 559, 566 (9th Cir. 2011). The party asserting this
17 privilege bears the burden of showing that there is an attorney-client relationship
18 and the privileged nature of the communication. *Id.*; *United States v. Bauer*, 132 F.
19 3d 504, 507 (9th Cir. 1997). There is an attorney-client privilege where: “(1) []
20 legal advice of any kind is sought (2) from a professional legal advisor in his
21 capacity as such, (3) the communications relating to that purpose, (4) made in
22 confidence (5) by the client, (6) are at his instance permanently protected (7) from
23 disclosure by himself or by the legal advisor, (8) unless the protection be waved.”
24 *Id.* (quoting *United States v. Graf*, 610 F. 3d 1148, 1156 (9th Cir. 2010)). The
25 privilege is waived when privileged communications are disclosed. *Weil v.*
26 *Inv./Indicators, Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). While
27 the privilege may extend to those communications with third parties assisting the
28

1 attorney in legal advice, it does not extend where the advice sought is not legal
2 advice. *Id.*

3 Documents that support, refer, or relate to PEER's standing in this lawsuit are
4 not protected by the attorney-client privilege to the extent that these materials are
5 not communications between Plaintiff and its counsel in anticipation of this
6 litigation. Plaintiffs have failed to indicate in their responses which
7 communications they believe to be protected by the attorney-client privilege.
8 *Richey*, 632 F. 3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to
9 produce documents in response to Defendants' Requests on the basis of attorney-
10 client privilege.

11 (b) Attorney Work Product.

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

22 Plaintiffs cannot claim work product immunity because they have made no
23 showing that this protection applies to any of the documents sought in Defendants'
24 Requests. Furthermore, Defendants have good cause to request information sought,
25 because Defendants are entitled to challenge PEER's legal standing to bring this
26 action. Plaintiffs have not met the burden of demonstrating the applicability of the
27 work product doctrine, so their objection on this basis is not appropriate.

28

1 Accordingly, Plaintiffs may not refuse to produce documents in response to
2 Defendants' Requests on the basis of attorney-client privilege.

3 (c) Common Interest Doctrine.

4 In general, the attorney-client privilege is waived when communications
5 between an attorney and client are disclosed to a third party. *Weil v. Inv/ Indicators,*
6 *Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). There is a rare exception
7 to this waiver rule where individuals with a common interest in a legal matter may
8 "communicate among themselves and with the separate attorneys on matters of
9 common legal interest, for the purpose of preparing a joint strategy, and the
10 attorney-client privilege will protect these communications to the same extent as it
11 would communications between each client and his own attorney." *Nidec Corp. v.*
12 *Victor Co.*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) (*quoting* 1 PAUL R. RICE,
13 ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:35, at 192 (1999 ed.);
14 *United States v. Gonzales*, 669 F. 3d 974, 978 (9th Cir. 2012). This common
15 interest doctrine is not a privilege, but an exception to the rule on waiver where
16 communications are disclosed to third parties. *See Griffith*, 161 F.R.D. at 692. For
17 this reason, the common interest doctrine comes into play only if the
18 communication at issue is privileged in the first place. *Nidec Corp*, 249 F.R.D. at
19 578.

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

1 d. PEER'S CONTENTIONS REGARDING RFP NO. 41.

2 PEER has already produced its communications with government agencies
3 and officials and the public at large on behalf of teachers and staff at the Malibu
4 Schools which are relevant to PEER's standing in this lawsuit. PEER's
5 communications with individual members of the public which may be relevant to
6 PEER's standing are being withheld under the attorney-client privilege and under
7 the protection of the First Amendment.

8 Attorney- Client Privilege

9 PEER considers that all persons who contact PEER are seeking legal advice
10 or assistance, and therefore their communications are attorney-client privileged.
11 (See PEER Webpage, Ex. 1 to Dinerstein Declaration)

12 First Amendment Privilege

13 PEER is a whistleblower organization which promises confidentiality to all
14 those who contact it concerning environmental issues and government wrongdoing.
15 Confidentiality is promised with regard to the content of the communication and not
16 only the identity of the person. (See PEER web page, Ex. 1 to Dinerstein
17 Declaration) This promise of confidentiality applies to all of those who have
18 contacted PEER about the PCBs in the Malibu Schools. If PEER were to disclose
19 communications with those persons in discovery, it would greatly inhibit PEER's
20 ability to function as an organization where people may raise issues in confidence.¹²

21
22
23 ¹² Defendants claim that PEER is "publicly vocal about its activities and its
24 membership, listing members of its Board and DC Staff on its website." Although
25 PEER may be publicly vocal about its activities, and does list the members of its
26 Board and staff on its website, revealing the identity of PEER's employees and
27 Board is an entirely different matter from revealing the identities of or the content
28 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

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

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

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

11 The same would hold for PEER, which has thus made a “prima facie showing
12 of arguable first amendment infringement.” *Perry v. Schwarzenegger*, 591 F.3d
13 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d
14 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of communications between
15 members of the public and PEER is likely to result in discouraging such
16 communications because PEER is unable to protect their confidentiality, thereby
17 severely hampering PEER’s organizational mission. It could also result in
18 harassment of individuals who are parties to these communications. Defendants
19 have already filed a false criminal complaint against the President of America
20 Unites, Ms. DeNicola, and her husband, seeking to subject them to felony charges
21 punishable by fines and imprisonment, for allegedly taking caulk samples. It is
22 difficult to imagine a more “chilling” action against those who advocate for PCB
23 testing and remediation at the Malibu Schools.

24 It is more than understandable that persons who communicate with PEER on
25 this subject would not want their communications disclosed. It should also be noted
26 that teachers and other staff who are employees of Defendants, on whose behalf

27 contents of their communications without their permission. No such permission
28 has been given here.

1 PEER advocates, are even more vulnerable to harassment and retaliation than
2 parents at the school such as Mr. and Ms. DeNicola, since they depend on the
3 Defendants for their employment and all of the conditions of that employment.

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

13 “The First Amendment privilege, however, has never been limited to
14 the disclosure of identities of rank-and-file members. ... The existence
15 of a prima facie case turns not on the type of information sought, but
16 on whether disclosure of the information will have a deterrent effect on
17 the exercise of protected activities.”

18 591 F.3d at 1162 (citations omitted).

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

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

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

7 Here, Plaintiffs have produced the primary documents which are relevant to
8 its standing in terms of its public communications on behalf of Malibu School
9 teachers and staff. Defendants cannot even show that additional discovery on this
10 subject meets the relevance requirements of Rule 26, much less the more demanding
11 standard of relevance when First Amendment interests are implicated.

12 **2. REQUEST FOR PRODUCTION NO. 42.**

13 a. REQUEST FOR PRODUCTION NO. 42

14 All DOCUMENTS that SUPPORT, REFER, or RELATE to the standing of
15 the PERSON or PERSONS that PEER intends to call as STANDING WITNESSES
16 at trial.

17 b. RESPONSE TO REQUEST FOR PRODUCTION NO 42.

18 Plaintiff objects to this Request on the ground that it is vague and ambiguous.
19 Plaintiff further objects to this Request to the extent that it seeks privileged attorney-
20 client communications, work product, common-interest communications or other
21 privileged information.

22 c. DEFENDANTS’ CONTENTIONS REGARDING RFP NO. 42.

23 i. Vagueness and Ambiguity Are Not Valid Objections to RFP No. 42.

24 Plaintiff’s objection that Requests for Production No. 42 is vague and
25 ambiguous is unfounded. “The party who resists discovery has the burden to show
26 discovery should not be allowed, and has the burden of clarifying, explaining, and
27 supporting its objections.” *Bible v. Rio Props., Inc.*, 246 F. R. D. 614 (C.D. Cal.
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1 2007) (citing *Blankenship v. Hearst Corp.*, 519 F. 2d 418, 429 (9th Cir. 1975) and
2 *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 655-56 (C.D. Cal.
3 2005)). There is no merit to “general or boilerplate objections such as ‘overly
4 broad’ [or] ‘vague and ambiguous.’” *Bible*, 246 F. R. D. at 619; *A. Farber &*
5 *Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal. 2006).

6 Plaintiff has offered no explanation as to why Defendants Request is so
7 “vague” or “ambiguous” that Plaintiff cannot produce any responsive documents.
8 Accordingly, Defendants request that Plaintiff produce documents in response to
9 this Request.

10 ii. Attorney-Client, Attorney Work Product, and Common-Interest
11 Communication Privileges Are Not Valid Objections to RFP No. 42.

12 (a) Attorney-Client Privilege.

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

3 Documents that support, refer, or relate to the standing of the person or
4 persons that PEER intends to call as standing witnesses at trial are not protected by
5 the attorney-client privilege to the extent that these communications are not between
6 Plaintiff and its counsel in anticipation of this litigation. Plaintiffs have failed to
7 indicate in their responses which communications they believe to be protected by
8 the attorney-client privilege. *Richey*, 632 F. 3d at 567 (9th Cir. 2011). Accordingly,
9 Plaintiffs may not refuse to produce documents in response to Defendants' Requests
10 on the basis of attorney-client privilege.

11 (b) Attorney Work Product.

12 The work product doctrine prohibits discovery of documents and other
13 materials "prepared by a party or his representative in anticipation of litigation."
14 *United States v. Richey* 632 F. 3d 559, 567 (9th Cir. 2011) (*quoting Admiral Ins. Co.*
15 *v. U.S. Dist. Ct.*, 881 F. 2d 1486, 1494 (9th Cir. 1989); Fed. R. Civ. P. 26(b)(3).
16 The work product doctrine is a qualified immunity rather than a privilege, and a
17 showing of good cause for the information desired is sufficient to overcome the
18 qualified immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D.
19 Cal. 2006); *Admiral Ins. Co. v. United States Dist. Court.*, 881 F. 2d 1486, 1494
20 (9th Cir. 1989). "The party claiming work product immunity has the burden of
21 proving the applicability of the doctrine." *A. Farbers & Ptnrs., Inc.*, 234 F.R.D. at
22 192.

23 Plaintiffs cannot claim work product immunity because they have made no
24 showing that this protection applies to any of the documents sought in Defendants'
25 Requests. Under Rule 26, Plaintiffs must disclose all witnesses with discoverable
26 information. Rule 26(b)(1) states that "any nonprivileged matter that is relevant to
27 any party's claim or defense" is discoverable, including "the identity and location of
28

1 persons who know of any discoverable matter.” Rule 26(a)(1)(A) states that “a
2 party must, without awaiting a discovery request, provide to the other parties: (i) the
3 name and, if known, the address and telephone number of each individual likely to
4 have discoverable information—along with the subjects of that information—that
5 the disclosing party may use to support its claims or defenses. . . .” *See Green v.*
6 *Baca*, 226 F.R.D. 624, 655 (C.D. Cal. 2005).

7 The required disclosures under the Federal Rules of Civil Procedure clearly
8 contemplate the timely exchange of witness identities among the parties, and do not
9 protect such information from discovery. Further, if a party later attempts to use a
10 witness it has failed to disclose, it will not be permitted to do so where such a failure
11 is not substantially justified or is harmless. Fed. R. Civ. Proc. 37(c)(1).

12 Request No. 42 is merely requesting any witnesses’ identities known by
13 PEER—not any witness statements or attorney work product.

14 Furthermore, Defendants have good cause to request information sought,
15 because Defendants are entitled to challenge PEER’s legal standing to bring this
16 action. Plaintiffs have not met the burden of demonstrating the applicability of the
17 work product doctrine, so their objection on this basis is not appropriate.

18 Accordingly, Plaintiffs may not refuse to produce documents in response to
19 Defendants’ Requests on the basis of attorney-client privilege.

20 (c) Common Interest Doctrine.

21 In general, the attorney-client privilege is waived when communications
22 between an attorney and client are disclosed to a third party. *Weil v. Inv/ Indicators,*
23 *Research & Mgmt., Inc.*, 647 F. 2d 18, 24 (9th Cir. 1981). There is a rare exception
24 to this waiver rule where individuals with a common interest in a legal matter may
25 “communicate among themselves and with the separate attorneys on matters of
26 common legal interest, for the purpose of preparing a joint strategy, and the
27 attorney-client privilege will protect these communications to the same extent as it
28

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

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

17 d. PEER’S CONTENTIONS REGARDING RFP NO. 42.

18 PEER cannot respond to this document request because it need not identify
19 the standing witness(es) it intends to call at this juncture of the litigation (see
20 response to Interrogatory No. 8) and because PEER has not yet determined who it
21 might call as a standing witness in this case.

22 Respectfully submitted,

23 Dated: December 21, 2015

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