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UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

AMERICA UNITES FOR KIDS, et al.,

Plaintiffs,

v.

SANDRA LYON, et al.,

Defendants.

CASE NO. 2:15-cv-02124-PA-AJW

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

Hearing Date: May 4, 2015
Hearing Time: 1:30 p.m.
Judge: Hon. Percy Anderson
Courtroom: 15

Complaint filed: March 23, 2015

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STATUTES AND CODES

I. Introduction

Defendants do not dispute that PCBs are highly toxic carcinogens and that Congress and the EPA have found that their presence at concentrations of 50 ppm or greater poses an unreasonable risk to human health and the environment. Nor do they dispute that they are violating TSCA by using classrooms that contain PCBs thousands of times over the 50 ppm legal limit. Defendants also do not dispute that under their plan, already tested PCB-contaminated caulk from the 10 PI Rooms may remain in place for a year or more, and untested PCB-contaminated caulk indefinitely. They defend this plan primarily by contending that EPA approved it and that they may not deviate from it. This is not true. EPA has repeatedly stated that removal of caulk with PCBs over 50 ppm is mandated by Federal law. As discussed below, EPA confirms that it has approved only that portion of Defendant's plan relating to "PCBs remaining in the substrate (known as PCB remediation waste) after PCB-containing caulk is removed at both schools."[1] EPA recently confirmed that this approval "is the only TSCA approval EPA has issued for the two Malibu schools."[2]

Defendants have not advanced any valid reason--legal, medical, financial, logistical or otherwise--why Defendants should be allowed to knowingly and willfully continue to violate the law and expose innocent children and teachers to illegal toxins. The Court should issue the requested injunction.

II. The EPA Did Not Approve The District's Plan Regarding Removal Of PCB Contaminated Caulk From The 10 PI Rooms

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[1] EPA letter dated October 31, 2014 [hereafter "EPA 10/31/14 Letter"], attached as Exhibit 4 to the 4/1/15 Avrith Decl., Dkt 18-6.

[2] EPA email to Jennifer deNicola, dated April 17, 2015 [hereinafter "EPA 4/17/15 email"] attached as Exhibit 11 to the accompanying Supplemental Declaration of Jennifer DeNicola.

Contrary to Defendants' claim, the EPA has not approved the District's plan regarding removal of caulk from the 10 PI Rooms. EPA has approved only the District's treatment of the remediation waste (defined as "waste containing PCBs as a result of a spill, release or other unauthorized disposal . . . " 40 C.F.R. §761.3) remaining after caulk removal. This is the case because the PCB regulations contain a categorical, self-implementing ban on materials containing PCBs at or over 50 ppm. 40 C.F.R. 761.20(a). There is no provision in Section 761.20(a) for EPA to review or approve a plan to remove manufactured material (such as PCB contaminated caulk) containing PCB at over 50 ppm. The use of any such PCB contaminated caulk is per se illegal[3]. By contrast, removal of PCB remediation waste (such as PCB migrating from the caulk to the substrate) is subject to EPA review and approval under 40 C.F.R. § 761.61(c)[4], which is what has occurred here.

The only evidence Defendants cite in support of their argument based on EPA approval are August 14 and October 31, 2014 letters from the EPA to Defendant Lyon. (Opp. at 4:27-5:23) In fact, these letters are consistent with EPA's disclaimer of approval of any plan to remove (or leave in place) caulk, but instead to issue an approval limited to the handling of remediation waste. The August 14, 2014 letter does not concern the 10 PI Rooms that are the subject of this motion, but deals only with windows in four rooms tested prior to the 10 PI Rooms. Moreover, the EPA did not "approve" the Defendants' caulk removal plan; it merely "acknowledge(d) the District's plan to remove the caulk from these four windows by June 30, 2015."

As Defendants' opposition relies almost entirely on so-called EPA approval, we quote verbatim below the relevant portion of the EPA 10/31/14 Letter explaining

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[3] Section 761.20(a) permits such use under certain narrow exceptions such as use in a totally enclosed manner or use in transformers, none of which apply here.

[4] EPA approval of removal of PCB remediation waste is required under Section 761.61(c) when removal is not undertaken pursuant to the self-implementing provisions of Section 761.61(a) or the performance-based provisions of Section 761.61(b).

the scope of its approval so the court can judge for itself whether the EPA has approved the District's plans regarding the removal of PCB contaminated caulk:

> "As you know, the federal Toxic Substances Control Act (TSCA) and implementing regulations prohibit the use of caulk containing PCBs at or about 50 ppm. When such caulk is found, it must be removed and disposed of in accordance with TSCA. To date, the District's contractor has found window caulking in four samples above 50 ppm at the high school. Under the District's plan, the District proposed to (1) remove PCB-containing caulk currently known and verified at Malibu High School no later than June 30, 2015; and (2) remove from Malibu High School and Juan Cabrillo Elementary School any newly-discovered caulk within one year after the District verifies that the caulk contains PCBs at or above 50 ppm. **This activity, as proposed by the District, is not required to be part of the enclosed approval. EPA's enclosed approval addresses the PCBs remaining in the substrate (known as PCB remediation waste) after PCB-containing caulk is removed at both schools.**
>
> Pursuant to 40 C.F.R. §761.61(c) the [EPA] is approving certain provisions…from the "Site-Specific PCB-Related Building Materials Management, Characterization and Remediation Plan…. **This approval does not relieve the District and its consultants from complying with other applicable TSCA PCB and Federal regulations….**" (Emphasis added)

In other words, the EPA has approved only the District's remediation of the PCBs in the substrate after caulk removal, and the caulk removal itself remains subject to the PCB regulations, including 40 C.F.R. Section 761.20(a). If there were any doubt about this, the EPA 4/17/15 email makes clear that: "Nothing in the [10/31/14] approval limits the District's ability to perform additional caulk sampling or removal provided the work is performed consistent with TSCA regulations at 40 C.F.R. § 761.62(a) or (b)."

Finally, contrary to what Defendants have repeatedly told the Court, the EPA did not find that allowing caulk containing illegal levels of PCBs over 11,000 times the legal level to remain in place was "safe." The EPA's October 31, 2014 letter states as follows:

> "An approval under TSCA regulations 761.61(c) requires EPA to make a finding that PCB remediation wastes remaining in place at the two schools will not pose an unreasonable risk of injury to health or the environment. EPA is hereby making a finding that the District meets this TSCA standard for Malibu High School and Juan Cabrillo Elementary School as discussed in the enclosure…." (emphasis added)

Thus, the finding was limited to the risks from the remediation waste. It was contingent upon, among other things, removal of the contaminated caulk and "encapsulation" or remediation of the remaining substrate, none of which has happened.[5] Defendants' entire opposition is based on a misrepresentation of the facts.

III. TSCA Authorizes The Requested Relief

Defendants argue that Plaintiffs are not eligible for the requested relief because "under TSCA, Plaintiffs can only request that exceedance be remediated, not that classrooms be vacated." (Opp. at 7:9-10) Defendants are wrong.

Defendants do not dispute that TSCA prohibits the use of caulk containing PCBs over 50 ppm and that the 10 PI Rooms have caulk containing PCBs over 50 ppm. By using the 10 PI Rooms with caulk containing PCBs over 50 ppm, Defendants are clearly violating TSCA. And, as even Defendants agree, TSCA "allows for injunctive relief to halt ongoing or future TSCA violations." (Opp. at

[5] *See* enclosure to EPA 10/31/14 Letter, attached as Ex. 4 to the 4/1/15 Avrith Decl, Dkt. 18-6.

7:10-11) Thus, under TSCA, Plaintiffs are entitled to an order enjoining Defendants' use of the PI Rooms immediately.

Defendants also contend that Plaintiffs are ineligible for injunctive relief that "in essence, asks this Court to override EPA's policy interpretations of its own TSCA regulations, as manifested both in EPA's national 'PCBs in Schools' policy and EPA's actions at the Malibu Campus specifically." (Opp. at 7:22-25) Defendants never really explain what these policies and actions are or how the relief Plaintiffs seek would "override" them, which it does not. To the extent that Defendants are contending that EPA's policies and practices allow PCBs over 50 ppm to remain in place, EPA has repeatedly stated the contrary. *See, e.g.,* EPA, Current Best Practices for PCBs in Caulk Fact Sheet-Removal and Clean-Up of PCBs in Caulk and PCB-Contaminated Soil and Building Material, www.epa.gov/pcbsincaulk/ caulkremoval. htm ("Caulk containing PCBs at levels ≥ 50ppm is not authorized for use under the PCB regulations and must be removed."); EPA 10/31/14 Letter ("As you know, [TSCA] and implementing regulations prohibit the use of caulk containing PCBs at or above 50 ppm. When such caulk is found, it must be removed and disposed of in accordance with TSCA.").

More fundamentally, no alleged EPA policy, approval, finding, guideline, or statement at a school meeting can supersede the law, as expressed in TSCA and the PCB regulations thereunder, that use of PCBs over 50 ppm is illegal. TSCA requires that any exceptions to its PCB ban be promulgated in a rulemaking procedure in accordance with the notice and comment requirements of the Administrative Procedure Act. 15 U.S.C. §2605(e)(4). None of this has occurred with respect to the prohibition against PCBs over 50 ppm. Thus, the EPA's alleged policies or practices notwithstanding, the law prohibits Defendants' use of the 10 PI Rooms. It is Defendants who are arguing for a change in the law, not Plaintiffs.

Defendants also complain that Plaintiffs have not challenged the EPA's policies or actions at the School. This suit is not about EPA's policies or actions (or

more accurately, inaction) at the School. EPA is not a defendant in this case because it is a citizen enforcement suit against Defendants, who are violating TSCA. The fact that EPA Region 9 is not enforcing the law is exactly what TSCA's citizen suit provision was meant to address: situations where the government "cannot or will not command compliance" with the law. *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 62 (1987).

IV. Plaintiffs Have Established The Requirements For Preliminary Injunctive Relief

A. Likelihood Of Success

Plaintiffs have demonstrated a likelihood of success--indeed, a certainty of success--because Defendants' own testing confirms that they are violating TSCA in the 10 PI Rooms. Defendants do not dispute they are violating the statute. However, they argue that Plaintiffs cannot enforce TSCA and restrain their violations for three reasons. Each of these three reasons is completely baseless.

1. Primary Jurisdiction

Defendants' argument that the primary jurisdiction doctrine requires the Court to defer to EPA because it has "sole" authority to compel remediation of PCB wastes (Opp. at 10:22-24) is directly refuted by TSCA's citizen's suit provision, which gives Plaintiffs the right to enforce the statute. *See* 15 U.S.C. 2619(a)(1) ("any person may commence a civil action…against any person who is alleged to be in violation of [TSCA] or any rule promulgated [thereunder]…to restrain such violation.").

Defendants claim the primary jurisdiction doctrine applies when enforcement "requires resolution of issues that are within the special competence of an administrative body." (Opp., at 10:17-19) Defendants do not identify any such issue. Plaintiffs' TSCA claim depends on simple facts, i.e., whether the School contains PCBs over 50 ppm. The Court is well equipped to make such a determination.

Cases cited by Defendants demonstrate the inapplicability of the primary jurisdiction doctrine here. *See, e.g., Boyes v. Shell Oil Prods. Co.*, 199 F.3d 1260 (11th Cir. 2000) (rejecting primary jurisdiction doctrine in citizen's suit under the Resource Conservation and Recovery Act); *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 778 F.2d 1365 (9th Cir. 1985) (primary jurisdiction doctrine inapplicable where Interstate Commerce Commission tariff clear on its face).

NY Cmtys. For Change v. NY City Dept. of Educ., 2013 U.S. Dist. LEXIS 47199 (E.D.N.Y. 3/26/13), a TSCA citizen's suit cited by Defendants, is directly on point. The plaintiffs there sought an order compelling the immediate remediation of all PCB leaks in the city's schools. EPA was involved in the remediation of PCBs at the schools, and defendants argued for dismissal under the primary jurisdiction doctrine. The court rejected this argument because: (a) TSCA specifically provided for citizen's suits; (b) the case did "not turn on the technical interpretation of any agency regulation or expertise [since] PCBs have been well defined and their potential effects are well known [as were] the methods of testing and removal;" and (c) there was no risk of inconsistent rulings from the Court and EPA. 2013 U.S. Dist. LEXIS at p. 18. All of these factors are equally applicable here.

2. Mootness

Defendants contend that Plaintiffs' request is moot in light of its plan to remove illegal PCBs by March 2016. However, a claim is moot only if the requested relief is "no longer needed." (Opp., at 13:22) The requested relief is still needed for a number of reasons.

First, Defendants' "plan" is "voluntary," and Plaintiffs have no way of enforcing it. *See e.g. Kidder, Peabody & Co. v. Maxus Energy Corp.*, 925 F.2d 556, 563 (2d Cir. 1991) (representation that conduct will cease does not moot a claim absent a binding, judicially-enforceable agreement). Second, Plaintiffs are requesting that the illegal caulk be removed before the beginning of the next school year, not by March 2016. Third, Defendants have reserved the right to extend the

March 2016 completion date. (See Pl. Mem., Dkt. 14, at 13:22-24) Finally, the District's plan appears to call for caulk remediation only as to those windows and doors from which they took samples, ignoring other windows in the same room which most likely contain the same PCB-contaminated caulk. (See, April 2, 2015 Daugherty Decl., Exhibit H at pages 2-3)

Most of the cases cited by Defendants in support of their mootness argument are not remotely similar to the facts here. *See, e.g.*, *Feldman v. Bomar*, 518 F. 3d 637 (9th Cir. 2008) (challenge to method of eradication of feral pigs was moot because the feral pigs had been completely eradicated). The remediation cases that they cite are also easily distinguishable. In *New Mexico Env't Dep't. v. Foulston*, 4 F. 3d 887, 889 (10th Cir. 1993), the plaintiff was in effect seeking an advisory opinion, because the properties had been cleaned up to its satisfaction. In *City of Fresno v. United States*, 709 F.Supp.2d 888 (E.D. Cal. 2010) and *Davis Bros. v. Thornton Oil Co.*, 12 F.Supp.2d 1333 (M.D. Ga. 1998), there were already ongoing remedial efforts at the time of the mootness determination. Here, by contrast, Defendants have not yet started the remedial efforts that would allegedly render injunctive relief moot.

3. Improper Notice

Plaintiffs' Notice of Intent to Sue ("Notice") (attached as Exhibit A to the First Amended Complaint, Dkt. 12-1) described with specificity the location of the TSCA violations that the testing to date had found.[6] *See, e.g.,* Notice, at p. 5 ("Room 401 in the Leopard Building had 146,000 ppms in the caulk in the interior of an office window; Room 505 in the Angel Building had 231,000 ppm PCBs in

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[6] Defendants' cynical decision to conduct only limited testing of the caulk has made it impossible for Plaintiffs to detail all the locations throughout the School where PCB contamination can be found. However, it is a virtual certainty that the contamination is widespread throughout the School. Plaintiffs' Notice alleged that the illegal PCB contamination was throughout the School.

the caulk of an interior door frame…."). Nevertheless, Defendants argue that Plaintiffs' Notice is deficient because it did not tell them "exactly" where in the rooms identified in the Notice the illegal PCBs were found. This argument is frivolous. It is also again highlights the Defendants' intention to remove caulk only around the particular windows and doors where samples revealed illegal PCB levels, as opposed to removing all of the caulk in those rooms and buildings.

Case law has consistently rejected the argument that pre-suit notices must provide the type of detail that Defendants are demanding. For example, *NY Cmtys. For Change v. NY Dept. of Educ.*, 2012 WL 7807955, at *11 (E.D.N.Y. 8/29/12), which Defendants cite, states as follows:

> "In this case, however, there is no question as to the nature of the contaminant alleged to be involved and the plaintiff's notice letters clearly state that the defendants' violations relate to PCBs leaking from the light ballasts of specific types of lights found in virtually all of the City schools…. To the extent that defendants object to the failure of the notice letters to identify each and every leaking PCB ballast . . . . all the regulations require is that the notice be sufficient to provide defendants with information so that they can identify the problem. *See, e.g., Ecological Rights Found. v. Pac. Gas & Elec. Co.,* No. C 09–3704, 2010 WL 1881595, at *3 (N.D. Cal. May 10, 2010) (denying motion to dismiss even though plaintiff did not provide specific geographic location of subject utility poles); *Pinoleville Pomo Nation v. Ukiah Auto Dismantlers,* No. C 07–02648, 2007 WL 4259404, at *4 (N.D. Cal. Dec. 3, 2007) (finding that plaintiffs' identification of defendants' "facilities" was sufficient even though the notice did not identify the location of each point source from which pollutants may have been discharged)."

Plaintiffs' Notice here clearly provided Defendants with notice "sufficient to provide (them) with information so that they can identify the problems." Based on the information in the Notice, Defendants took 24 samples in the PI Rooms and

found illegal levels of PCBs in all 24 samples.

Moreover, Defendants' argument is based on an untenable interpretation of TSCA and the PCB regulations, i.e., that remediation is required only at the "exact" location from which the sample was taken. Defendants cannot reasonably contend that every square inch of caulk has to be tested to determine where remediation is required. It is reasonable and customary to infer that if a particular caulk sample has PCBs over 50 ppm, then all the caulk of like-kind and like-age also has PCBs over 50 ppm. Indeed, Defendants' own sampling plan (unfortunately only to be applied at the time of demolition or renovation) states that they will take "representative" samples, with a "minimum frequency of one sample per material per room." (Exhibit 13 to Supplemental DeNicola Decl., at p. E-2)

B. Irreparable Harm

Defendants contend that Plaintiffs have not satisfied the irreparable harm requirement because they have not proved that leaving PCBs up to 11,000 times over the legal limit in place for another year will cause irreparable damage.

Defendants are wrong. First, Defendants ignore the cases cited in Plaintiffs' opening brief showing that a violation of TSCA itself satisfies the irreparable harm requirement. (Dkt. 14, at 19:8-20) Defendants cite no authority to the contrary.

Second, it is not necessary for plaintiffs to supply data demonstrating how much PCBs have accumulated in the School's students and staff, or what harm they will do, because Congress and EPA have already determined that PCBs above 50 ppm pose an unreasonable risk of injury to human health. 40 C.F.R. §761.20; *United States v. Commonwealth Edison Co.*, 620 F. Supp. 1404, 1408 (N.D. Ill. 1985).

Third, Defendants do not, and cannot, dispute that the extremely high levels of illegal PCB contamination at the School--up to 11,000 times the legal limit--increases the amount of toxic PCBs in children and teachers' bodies. (*See* Dkt. 14, at 19:24-20:10) Because PCBs bioaccumulate, and do not degrade, this is immediate, irreparable harm which increases the chances of contracting cancer or other serious

diseases that PCBs cause.

Finally, it should be noted that Defendants' allegations that the School is safe are based on air and dust testing alone, which have no regulatory authority, and have not taken into account exposure through contact with contaminated caulk in window and door frames. Defendants cannot in good faith dispute that children and teachers are frequently coming into contact with this hazardous material.

C. Balance Of The Equities

Defendants have not shown any cognizable burden that the granting of the requested relief would impose on them. Defendants do not explain how it would be burdensome to remediate these rooms over the summer, as opposed to later, as they say they will do. Defendants have already committed to remediating five other rooms by June 30, 2015. If Defendants can remediate five rooms between the end of school and June 30, 2015, they can remediate the 10 PI Rooms by July 31, 2015.

Defendants contend that removing students from classrooms immediately would result in great expense and significant disruptions to students and staff. They offer no specifics, let alone evidence, to support this contention. Defendants have not explained, for example, why they could not use portable classrooms for the final weeks of school, as the parents have been requesting over the past year, and as the District did for some rooms in 2013. Defendants have known about the PCB contamination at the School for 20 months and have done nothing to remove it as required by law. Instead, they have spent over $5 million on consultants, lawyers and PR firms to avoid remediation. They cannot now be heard to complain that compliance with the law would impose a substantial burden on them.

The balance of hardship tips decidedly in Plaintiffs' favor. If Defendants' contention that the School is "safe" turns out to be wrong, they will have caused serious and irreparable health problems for innocent children and teachers. On the other hand, if Defendants' contention turns out to be correct and the School is safe, the granting of the requested relief will have, at most, required a modest outlay of

money to hold classrooms in portables for a few weeks. That Defendants are even willing to take the gamble is shocking. The Court should not allow Defendants to act so recklessly with children's lives and should issue the requested relief.

D. The Public Interest

Granting the requested relief supports the public interest in enforcement of the law and remediation of toxic contamination. (Pl. Mem., Dkt. 14, at 21:19-27) Defendants do not dispute this. Instead, they only repeat their meritless primary jurisdiction and financial burden arguments.

V. A Mandatory Injunction Is Appropriate Here

Defendants contend that mandatory preliminary injunctions are disfavored. However, the courts grant mandatory preliminary injunctions where prohibitory orders are ineffective or inadequate. *See, e.g., Katie A., ex rel. Lundin v. Los Angeles County*, 481 F.3d 1150, 1156-57 (9th Cir. 2007); *Franco-Gonzales v. Holder*, 767 F.Supp.2d 1034, 1061 (C.D. Cal. 2010). The Court should issue the requested injunction because Plaintiffs have demonstrated a clear basis for it, and because a prohibitory order maintaining the status quo would be inadequate to prevent Defendants from continuing to violate TSCA and would endanger students' and teachers' health.

VI. Conclusion

For the reasons set forth above and in Plaintiffs' Opening Memorandum, the Court should grant Plaintiffs' motion.

Respectfully submitted,

Dated: April 20, 2015

NAGLER & ASSOCIATES

By: /s/ Charles Avrith
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