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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 RECONSIDERATION

Hearing Date: September 21, 2015
Hearing Time: 1:30 p.m.
Judge: Hon. Percy Anderson
Courtroom: 15

Trial Date: 5/17/16
Final Pretrial Conference: 4/15/16
Motion Cut-off Date: 3/14/16
Discovery Cut-off Date: 3/7/16

I. Plaintiffs' Motion Satisfies The Standards For Reconsideration

Defendants' contention that Plaintiffs' motion does not meet the standards for reconsideration is wrong. Reconsideration is appropriate under Local Rule 7-18(a), allowing a motion for reconsideration to be made on the ground of "a material difference in fact of law from that presented to the Court before the initial decision that, in the exercise of reasonable diligence, could not have been known to the party moving for reconsideration at the time of the initial decision." This provision applies because the discovery issue was not before the Court on the motion to dismiss, and therefore no fact or law on that issue was presented before the Court's decision. Plaintiffs could not have known to present such facts or law in the exercise of reasonable diligence, because there was no indication that the issue of the type of sampling that would be allowed in discovery was before the Court when it considered Defendants' Motion to Dismiss. Thus, the Court did not consider material facts or law relating to the discovery issue, which, as demonstrated in Plaintiffs' memorandum of points and authorities, resulted in clear error. These highly unusual circumstances make reconsideration particularly appropriate here. *Cf. Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (including in the proper bases for reconsideration under Fed. R. Civ. P. 59(e) highly unusual circumstances and clear error).

Contrary to what Defendants suggest, whether or not the primary jurisdiction doctrine limits Plaintiffs' rights to discovery, and whether or not Plaintiffs' discovery should be initially limited to air and wipe samples, was never briefed by the parties before the Court's June 15, 2015 Order. Defendants' motion to dismiss argued that the primary jurisdiction doctrine barred Plaintiffs' claim altogether, but did not make the alternative argument that the doctrine limited Plaintiffs' right to obtain caulk samples for testing through discovery. Thus, neither Plaintiffs nor Defendants briefed the issue. The same is true of Plaintiffs' motion for preliminary injunction, where testing was not an issue, because the motion sought prompt

remediation in ten rooms in which caulk had already been tested and found to violate TSCA. Neither side briefed the issue of the type of testing that should be allowed in discovery, and the Court did not address that issue in its ruling on the motion.

Similarly, the Court treated Plaintiffs' ex parte application for expedited discovery as a "scheduling matter," (Dkt. 36 at 1) and ruled that Plaintiffs could not conduct sampling of building materials on the expedited schedule which they sought, but that discovery could commence before the Rule 26(f) scheduling conference. (*Id.* at 3) The Court's Order does not give any indication that primary jurisdiction would operate as a bar to Plaintiffs' discovery, or that the Court had any concern with the propriety of discovery involving testing caulk and other building materials. To the contrary, one of the factors that the Court found weighed in favor of allowing Plaintiffs to initiate discovery in advance of the Scheduling Conference was Plaintiffs' contention that "additional testing is likely to discover additional areas within the schools that should be remediated during the upcoming summer break." (*Id.* at 2) Moreover, the Court informed the parties that:

> Because the Ex Parte Application relates to a scheduling matter, this Court, rather than the assigned United States Magistrate Judge, will consider the Ex Parte Application. All other discovery matters are referred to the assigned United States Magistrate Judge.

(*Id.* at 1)

Because Plaintiffs did not reasonably expect that the Court would decide the discovery issue in connection with Defendants' motion to dismiss, Plaintiffs did not have the opportunity to present the Court with the following:

(a) Case law and legal argument that the primary jurisdiction doctrine does not limit discovery. (Dkt. 63-1 at 1-3)

(b) Facts and documents showing that there is no conflict between Plaintiffs' proposed sampling of caulk and other building material, and EPA policy or

expertise or considered judgment, and that EPA contemplated that further caulk testing would be performed. (*Id.* at 3-7)

(c) Legal argument that caulk and other building material testing is the only way to identify the TSCA violations alleged in Plaintiffs' FAC. (*Id.* at 8-9)

(d) Facts and documents demonstrating that caulk and building material sampling is not destructive or invasive. (*Id.* at 9)

Defendants contend that the documents submitted in support of Plaintiffs' motion for reconsideration "simply restate EPA's policy and the parameters of the investigation and removal activities that have been undertaken at the Malibu Campus to date, all of which were discussed at length in both the moving and opposing papers on Defendants' motion to dismiss." (Dkt. 65 at 3) This is not correct. The portions of these documents demonstrating that further caulk testing at the School is not inconsistent with EPA policy, expertise or judgment were not discussed at all, let alone at length, in the motion to dismiss papers because Plaintiffs' request for discovery to do caulk testing was not an issue on the motion to dismiss.[1]

II. The Court Should Reverse Its Limitation Of Plaintiffs' Discovery And Allow Sampling Of Caulk And Other Building Materials

Defendants argue that the discovery limitations imposed by the Court are merely an application of the Court's power to limit the frequency or extent discovery. However the Court did not limit discovery here for any of the reasons set

[1] Although Defendants had submitted two of these documents in support of their motion to dismiss, they never argued that anything in those documents prevented further caulk testing. Plaintiffs' opposition to the motion to dismiss did not show how these two documents supported Plaintiffs' position that further caulk testing was consistent with EPA policy because, as discussed above, Defendants' motion to dismiss did not argue that the primary jurisdiction doctrine barred Plaintiffs' right to use discovery to obtain caulk samples for testing.

out in Fed. R. Civ. P. 26(b)(2)(C),[2] but rather based on the primary jurisdiction doctrine. As Plaintiffs have shown in their opening memorandum, that doctrine was erroneously applied here. Defendants have failed to rebut that showing.

Defendants' opposition totally ignores Plaintiffs' legal authority and arguments demonstrating: (a) there is an inherent contradiction in the Court's apparent recognition that the primary jurisdiction doctrine does not apply here, and the Court's invocation of the same doctrine to limit Plaintiffs' discovery; (b) application of the primary jurisdiction doctrine to limit Plaintiffs' discovery frustrates Congressional intent to facilitate broad enforcement of the statute in citizen suits; and (c) in any event, the purpose of the primary jurisdiction doctrine has nothing to do with limiting discovery. Defendants are unable to cite any authority to support their contention that the doctrine limits a plaintiff's discovery rights.

Moreover, Defendants' attempt to show that caulk testing is inconsistent with EPA's policy, judgment or expertise is without merit. Although Defendants repeatedly state that the EPA does not "require" or "recommend" analysis of bulk samples when air and wipe sampling do not indicate PCB levels above EPA's guidelines, not even Defendants contend that EPA policy precludes or prevents such testing. Defendants do not dispute that caulk testing, not air and wipe sampling, is the only way to determine whether or not there are violations of TSCA.

In addition, Defendants have failed to address Plaintiffs' showing that the EPA contemplated further caulk testing on the Malibu Campus, irrespective of

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[2] The reasons that a court may limit the frequency or extent of discovery pursuant to Fed. R. Civ. P. 26(b)(2)(C) are that the discovery sought is unreasonably cumulative or duplicative or can be obtained from some other source that is more convenient, less burdensome, or less expensive; that the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; and that the burden or expense of the discovery outweighs the its likely benefit. None of these grounds are applicable here.

whether air and wipe test results exceeded EPA's guidelines. Thus, for example, Defendants are not able to explain how further caulk testing would be inconsistent with EPA policy when the EPA itself stated on April 17, 2015 that "nothing in the [October 2014] approval limits the District's ability to perform additional caulk sampling or removal provided the [removal] work is consistent with TSCA regulations at 40 C.F.R. §761.62(a) or (b)." (DeNicola Decl. Ex. A) The EPA's email does not state, and the EPA has never stated, that additional caulk sampling could be performed only if air and wipe test results exceed EPA's guidelines. Nor can Defendants explain how caulk testing by Plaintiffs in discovery would be inconsistent with any EPA policy or guidance, when EPA itself has stated that the District must remove caulk found to contain above 50 ppm PCBs in tests conducted by independent parties. (DeNicola Decl. Ex. B)

Nor have Defendants attempted to explain why they themselves did further caulk testing in March 2015, if caulk testing was inconsistent with or precluded by EPA policy. Defendants likewise do not address their own admission that removal of caulk above 50 ppm is required even where air and dust testing show results below EPA's guidelines. (Dkt. 34 at p. 20, Sec. VI.2.b-d) Defendants simply shift their positions when it suits them.

Furthermore, Defendants' opposition fails to address Plaintiffs' argument that the Court's June 15, 2015 limitation on discovery appears to be based on an erroneous reading of the EPA's October 31, 2014 letter as allowing PCB-containing materials to remain at the school so long as air and surface wipe testing does not reveal heightened levels of PCBs. As the Court noted in its ruling on Plaintiffs' motion for preliminary injunction, the October 2014 approval only addresses remediation wastes remaining in place after the removal of illegal caulk, not illegal caulk itself. (Dkt. 47 at p. 4) The October 2014 approval in no way authorizes caulk or other building materials with PCBs in excess of 50 ppm to remain in place based on the results of air or wipe testing. Defendants do not dispute this.

Defendants continue to argue that even though the Court found that the doctrine of primary jurisdiction does not apply here in denying their motion to dismiss, that EPA does have primary jurisdiction over "the ongoing PCB-related activities at the Malibu Campus," and that Plaintiffs' discovery should be limited to be consistent with "EPA's policy and actions with respect to the Malibu Campus." (Dkt. 65 at 5) This argument completely misapprehends the purpose and function of the TSCA citizen suit provision which governs this case. Citizens may bring suits to enforce TSCA and its implementing regulations as written, and need not defer in any way to EPA's primary jurisdiction, unless "the Administrator [of EPA] has commenced and is diligently prosecuting a proceeding for the issuance of an order under section 16(a)(2) [15 USCS § 2615(a)(2)] to require compliance with this Act . . ." 15 U.S.C. § 2619(b)(1)(B). There is no dispute that EPA has not commenced a formal enforcement proceeding under TSCA in Malibu, and that therefore the citizen suit provision allows Plaintiffs to enforce the law through this Court.

EPA has been aware of the PCBs at the Malibu Campus for nearly two years now, but has chosen not to take enforcement action, but instead to act only in an advisory role. Thus, EPA has determined not to preclude this citizen suit and take this matter out of the Court's hands. TSCA permits EPA to do so even now with this litigation pending, with only a provision that Plaintiffs could then intervene in EPA's enforcement proceeding. *Id.* Since EPA has not done so, EPA does not have primary jurisdiction here and the citizen suit provision of TSCA mandates that the Court enforce TSCA without regard to any EPA views of the matter.

The Defendants' "new" evidence -- the EPA's July 28, 2015 "Questions and Answers" document (hereinafter "Q & A") -- also fails to support their position. As Defendants note, this new document indicates only that the EPA does not "recommend" caulk testing. There is nothing in the Q &A that states that EPA policy precludes caulk testing. Furthermore, nothing in the document addresses a situation like Malibu, where PCBs above legal limits have already been found

throughout the campus. Indeed, it is the EPA's stated policy that once, as is the case here, a PCB problem has been identified, the extent of the contamination of the problem must be determined. See, e.g., EPA, "How to Test for PCBs and Characterize Suspect Materials," available online at www.epa.gov/pcbsincaulk/guide/guide-sect3.htm (last updated August 24, 2015) (attached hereto as Exhibit A), at p. 1 ("If you have identified a PCB problem, you will need to characterize it and determine the extent of PCB contamination. It is important to note that even if PCBs are not present in the air, they still may be present in building materials."). Thus, testing of the caulk here is completely consistent with the EPA's policy that the extent of PCB contamination be determined.

Most important, the EPA's Q & A cannot, and explicitly states that it does not, override the requirements of TSCA and its implementing regulations which this citizen suit seeks to enforce.[3] Certainly nothing in the document purports to limit the discovery that can occur in a citizen suit.

Defendants point out that the Q & A indicates that EPA is not likely to enforce the 50 ppm limit in TSCA when school districts follow its recommendations to reduce exposures through removal of light ballasts containing PCBs and use of "best management practices" ("BMPs," which are cleaning practices). (*See* Q & A at 18) The fact that EPA has stated an intention not to enforce TSCA in many instances, and that it is following that practice in Malibu, is exactly the situation that citizen suit provisions were intended to address, where the government "cannot or will not command compliance" with the law. *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 11 U.S. 49, 62 (1987) (emphasis added).

[3] The Q &A states (at 2): "This document is intended to be used as an informal reference and is not intended to be a summary of applicable PCB requirements. This documents does not replace nor supplant the requirements of the Toxic Substances Control Act (TSCA) PCB regulations. Please refer to the regulations 40 CFR part 761 for specific regulatory and legal requirements.... "

Nothing in the Q & A changes EPA's regulation which states that "PCB Items with PCB concentrations of 50 ppm or greater present an unreasonable risk of injury to health within the United States," and therefore continued use is forbidden. 40 C.F.R. 761.20. This is still the law, and it is still EPA's official finding about the dangers of PCBs, unless and until EPA changes it through proper rulemaking proceedings. It is the law which Plaintiffs may enforce in this suit.

Finally, Defendants do not dispute that caulk testing is not destructive or invasive, is cost effective, and is the only method approved by EPA to identify violations of TSCA's prohibition against the use of PCBs with concentrations over 50 ppm.

III. Conclusion

For the reasons set forth above and in Plaintiffs' opening memorandum, the Court should amend its July 15, 2015 Order to remove the limitation on Plaintiffs' discovery.

Respectfully submitted,

Dated: September 4, 2015

NAGLER & ASSOCIATES

By: _____
Charles Avrith
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Dated: September 4, 2015

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EXHIBIT A

http://www.epa.gov/pcbsincaulk/guide/guide-sect3.htm
Last updated on 8/24/2015

Polychlorinated Biphenyls (PCBs)

How to Test for PCBs and Characterize Suspect Materials

Table of Contents

This section applies if you would like to test for the presence of PCBs in a building. Once you have made the decision to test, EPA recommends that you first test the air to determine if building occupants may be exposed to PCBs in the building indoor. This initial step may help prioritize the steps and/or approaches for the renovation or repair work. If you have identified a PCB problem, you will need to characterize it and determine the extent of PCB contamination. It is important to note that even if PCBs are not present in the air, they still may be present in building materials.

- Building Characterization and Sampling Plan
- Sample Collection Procedures
- Sample Documentation

Building Characterization and Sampling Plan

A sampling plan should be developed to characterize the caulk and other potential building materials that might either contain PCBs or be contaminated through contact with PCB-containing caulk such as wood, masonry, or brick. The sampling plan should consider the following steps:

1. Test indoor air to determine if PCBs are present in building indoor air. If your building is a school you can compare the test results to the the Exposure Levels for Evaluating PCBs in Indoor School Air.

   If PCBs in indoor school air are above the exposure levels determine the extent of the problem by:

2. Testing suspect building material to determine PCB sources. Building material that is removed and contains 50 ppm PCBs or greater is regulated for disposal (see Abatement Step 3)
3. Evaluate building material sample results and determine if surrounding materials warrant testing.
4. Outline areas requiring corrective action and prioritize contaminated building materials for removal based on their PCB-concentration levels, potential accessibility, and building occupancy (see Abatement Step 1 for more details).

Sample Collection Procedures

The sampling plans may require the collection of any of the following sample types:

- Bulk solid samples (e.g., caulk, soil, sand)

- Porous surface samples (e.g., concrete, asphalt, wood surfaces)
- Non-porous surface wipe samples (e.g., unpainted metal window frames, polished granite)
- Indoor air samples

The following paragraphs describe the sample collection procedures for each of these sample types. For these various sample types, a sufficient size sample should be collected to ensure the laboratory can measure the concentrations of PCBs at levels required by the PCB cleanup and disposal regulations at 40 CFR part 761.61. It is recommended that you contact the analytical laboratory or your Regional PCB Coordinator to discuss the necessary requirements for each sample type.

... a sufficient size sample should be collected to ensure the laboratory can measure the concentrations of PCBs at levels required by the PCB cleanup and disposal regulations ...

Bulk solid samples -- Bulk solid samples include such materials as caulk, soil, and sand. Bulk solid sampling typically include removing a small portion of the potentially contaminated material for analytical testing. For example, a caulk sample would be the quantity of caulk needed by the laboratory for analytical testing, removed directly from the suspect area. Take care to ensure that only the caulk is included in the final sample and not other adjacent materials, such as wood or concrete that may skew the sample analysis results.

When soil or sand samples are collected, you should consider whether the PCBs are on the soil surface or if they could be located deeper in the soil. An example of when PCBs might be on the soil surface would be if fragments of weathered caulking were deposited on undisturbed soil surfaces. Alternatively, PCBs could be located deeper in the soil in locations such as landscaping areas where the soil surface has been disturbed or where new soil has been added.

Porous surface samples -- Because PCBs can migrate into porous surfaces (e.g., brick, masonry, concrete or wood) surface wipe sampling is not adequate to characterize the PCB concentration of porous surfaces. Instead, core samples should be collected on a bulk basis (i.e., mg/kg) to collect the top 0.5 to 2 cm of the porous surface.

For these porous surface samples, an adequate sample (as determined by the analytical laboratory) should be removed for analysis. Tools such as chisels, drills, and saws can be used to collect the sample, taking care to minimize dust generation. The samples should be collected from the top 0.5 to 2 cm of the surface closest to the likely source of PCB contamination.

Non-porous surface samples -- If the surface to be sampled is smooth and impervious (e.g., unpainted metal surfaces), a wipe sample can be collected to determine if the surface is contaminated with PCBs. A standard wipe test, as specified in 40 CFR 761.123, uses a 10 cm by 10 cm (or equivalent that equals100 cm2) template to outline the sample area and a gauze pad or glass wool that has been saturated with hexane to collect the sample. The hexane-saturated wipe is used to thoroughly swab the area inside the 100 cm2 template. Care must be taken to assure proper use of the sampling template, as the sample results will be based on the 100 cm2 sample area (i.e., µg per 100 cm2).

Indoor air samples -- You should collect indoor air samples in accordance with EPA Methods TO-10A (PDF) (37 pp, 288K, about PDF), TO-4A (PDF) (53 pp, 665K, about PDF), or equivalent. Sufficient sample volumes, as referenced in the EPA Methods, should be collected to prove a minimum laboratory reporting limit of less than 0.1 µg/m3. Consult with your PCB Regional Coordinator for the number of samples to be taken and the type of sampling method to be used.

Sample Documentation

You or your supervisor should maintain a field log book that contains all information pertinent to the site inspection and sampling activities. The person making the entry should sign and date all entries in the log book. Entries into the log book should include the following types of information:

- Site and location of the sample extraction
- Date on each page
- Exact times of sampling events or visual observations
- Types of samples collected and sample identification numbers
- Number of samples collected
- Specific description of sample locations
- Description of sampling methods
- Field observations
- Name of all field personnel

Previous page: Steps to Safe Renovation and Repair Activities

Next page: Steps to Safe PCB Abatement Activities