

1 2PILLSBURY WINTHROP SHAW PITTMAN LLP
 2 MARK E. ELLIOTT (SBN 157759)
 3 mark.elliott@pillsburylaw.com
 4 JULIA E. STEIN (SBN 269518)
 5 julia.stein@pillsburylaw.com
 6 CAROLINE L. PLANT (SBN 247358)
 7 corrie.plant@pillsburylaw.com
 8 725 South Figueroa Street, Suite 2800
 Los Angeles, CA 90017-5406
 Telephone: (213) 488-7100
 Facsimile No.: (213) 629-1033

9 Attorneys for Defendants
 10 SANDRA LYON, ET AL.

11 UNITED STATES DISTRICT COURT

12 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		)	REGARDING DEFENDANTS'
18	vs.	)	SECOND MOTION TO
19		)	COMPEL FURTHER
20	SANDRA LYON, et al.,	)	RESPONSES IN DISCOVERY
21)	
22	Defendants.	)	Hearing Date: Feb. 29, 2016
23		)	Time: 10:00 am
24		)	Place: 255 East Temple Street
25		)	Dept. 690
26		)	Judge: Wistrich
27)	
28		)	Complaint Filed: Mar. 23, 2015
)	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 • Request Nos. 2, 13, 23, 24, 25, 26, 27, 28, and 34 of Defendants’ First Set
8 of Requests for Production of Documents (“Requests” or “RFPs”) to AU;
9 and
- 10 • Request Nos. 2, 3, 7, 10, 19, 31, 32, 34, and 35 of Defendants’ First Set of
11 Requests for Production of Documents (“Requests” or “RFPs”) to PEER.

12 In accordance with Local Rule 37-1, on December 22, 2015, Defendants
13 served a meet and confer letter on counsel for America Unites and PEER which
14 identified each issue and discovery request in dispute, and stated Defendants’
15 position briefly with respect to each request. A true and correct copy of this
16 correspondence is attached as Exhibit B to the Declaration of Mark E. Elliott
17 (“Decl. Elliott”), which is being filed concurrently herewith.

18 On December 23, 2015, counsel for the parties met and conferred
19 telephonically in good faith to resolve this dispute, but were unable to do so. At
20 Plaintiffs’ request, Defendants allowed Plaintiffs the option of responding via
21 written correspondence to Defendants’ meet and confer letter of December 22,
22 2015. Decl. Elliott ¶ 4. Plaintiffs served a response letter on January 11, 2016.
23 Decl. Elliott, Ex. C. Defendants sent a second letter on January 15, 2016 in
24 response to Plaintiffs’ correspondence. This letter described with more specificity
25 specific documents sought in Defendants’ Requests. Decl. Elliott, Ex. D.

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 Mark E. Elliott filed
concurrently herewith.

1 **I. DEFENDANTS’ INTRODUCTORY STATEMENT**

2 **A. DISCOVERY REGARDING INJURY OR ILLNESS FROM PCBS AND**
3 **COMMUNICATIONS REGARDING PCBS AT THE MALIBU**
4 **SCHOOLS**

5 Plaintiffs’ complaint asserts one cause of action against Defendants, violation
6 of the Toxic Substances Control Act (15 U.S.C. §§ 2601–2692) (“TSCA”) based on
7 the presence of PCBs in caulk and building materials at Malibu High School,
8 Middle School, and Juan Cabrillo Elementary School (“Malibu Schools”). *See* Decl
9 Elliott, Ex. E; ¶ 2. This claim is premised on an interpretation of TSCA requiring
10 stricter implementation than that of the Environmental Protection Agency (“EPA”),
11 which regulates TSCA. In discovery, Defendants seek information and
12 communications regarding injury caused by an alleged TSCA violation at the
13 Malibu Schools—information that is critical to preparation of a defense against this
14 claim. Defendants also seek communications between AU and its technical experts
15 regarding PCBs at the Malibu Schools.

16 In response to Defendants’ 36 Requests to AU, Plaintiffs produced
17 approximately 450 documents. In response to Defendants’ 42 Requests to PEER,
18 Plaintiffs produced fewer than 120 documents. In total, Plaintiffs have produced
19 fewer than 600 documents. Further, the documents produced consist primarily of
20 documents that are already in possession of Defendants or publicly available. In
21 comparison, to date, in response to Plaintiffs’ requests for documents, Defendants
22 have produced over 70,000 pages of documents. On February 1, 2016, Defendants
23 are producing close to 9,000 additional documents to Plaintiffs as part of its rolling
24 production of responsive documents.

25 In response to Defendants’ Requests, Plaintiffs assert the following
26 inappropriate objections:

27 **1. Relevancy.**

28 Communications and information regarding injury or illness allegedly

1 resulting from PCB exposure at the Malibu Schools is relevant to both Plaintiffs’
2 claim and Defendants’ defenses. Specifically, this information is necessary so that
3 Defendants can challenge any causal links between exposure to PCBs resulting from
4 an alleged TSCA violation and illness. This will aid in Defendants’ preparation of a
5 defense in this litigation on the interpretation of TSCA. Plaintiffs are the sole party
6 with access to this information and there is no burden on Plaintiffs in its production.

7 Communications between Plaintiff America Unites and its technical experts is
8 relevant to both Plaintiffs’ claim and Defendants’ defenses. Information and data
9 regarding PCBs and PCB testing and analysis at the Malibu Schools will likely be
10 used against Defendants in this litigation. Plaintiff is the sole party with access to
11 AU’s communications with technical experts, and there is no burden on Plaintiff in
12 producing such non-privileged communications.

13 **2. Vagueness, Ambiguity, Overbreadth, Oppressiveness, and Undue**
14 **Burden.**

15 Plaintiffs assert these boilerplate objections without any showing that
16 Defendants’ requests are vague, ambiguous, overbroad, oppressive or unduly
17 burdensome. Accordingly, these objections are without merit. *Bible v. Rio Props.,*
18 *Inc.*, 246 F.R.D. 614 , 619 (C.D. Cal. 2007).

19 **3. Attorney-Client, Attorney Work Product, and Common Interest**
20 **Privileges.**

21 Similarly, Plaintiffs assert boilerplate objections and make no showing
22 that any materials regarding injury or illness allegedly caused by PCBs is protected
23 by any privilege. “The attorney-client privilege protects confidential
24 communications between attorneys and clients, which are made for the purpose of
25 giving legal advice.” *United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011).
26 The work product doctrine protects materials “prepared by a party or his
27 representative in anticipation of litigation.” *Richey* 632 F.3d at 567. And the
28 common interest doctrine is relevant only if the communication at issue is privileged

1 in the first place. *Nidec Corp. v. Victor Co.*, 249 F.R.D. 575, 578 (N.D. Cal. 2007).
2 Accordingly, this material cannot be withheld based on any privilege.

3 **4. First Amendment.**

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

11
12 **II. PLAINTIFFS’ INTRODUCTORY STATEMENT**

13 Plaintiffs served their responses to Defendants’ document request on
14 November 23, 2015. Plaintiffs objected to certain of Defendants’ requests and
15 produced documents in response to the others.

16 Defendants filed a motion to compel responses to certain of the requests to
17 which Plaintiffs had objected, which motion was heard on January 11, 2016.
18 Defendants’ current motion raises issues that Defendants apparently did not deem
19 important enough to raise in their first motion. The primary purpose of this motion
20 appears to be to harass Plaintiffs.

21 Defendants’ motion seeks two (2) categories of information: (1)
22 communications and information regarding injury or illness allegedly resulting from
23 PCB exposure at the Malibu Schools; and (2) communications between AU and its
24 technical experts.

25 Plaintiffs have already produced non-privileged documents responsive to
26 Defendants’ requests. Although Defendants complain that they have produced
27 many more documents than Plaintiffs, that is hardly surprising given that it is
28 Defendants’ school which is contaminated with PCBs, and it is Defendants who are

1 responsible for its remediation. In any case, Plaintiffs are in the process of
2 searching for additional responsive documents, and will produce any non-privileged
3 documents relating to the two categories described above not previously produced.

4 Moreover, while Defendants' claim that documents concerning injury
5 caused by the TSCA violations at the Malibu Schools is critical to preparation of
6 their defense, this is not the case. The citizen suit provision under which Plaintiffs
7 proceed provides for restraint of ongoing violations of TSCA, which violations are
8 established solely by the existence and ongoing use of building materials containing
9 50 ppm or more PCBs at the Malibu Schools. The Court should deny Defendants'
10 motion.

11 **III. DISCOVERY REGARDING INJURY OR ILLNESS ALLEGEDLY**
12 **RESULTING FROM PCB EXPOSURE AT THE MALIBU SCHOOLS**

13 Defendants move to compel further responses to the following discovery
14 requests which seek communications and information regarding injury or illness
15 allegedly resulting from PCB exposure at the Malibu Schools. Defendants request
16 that AU produce further documents in response to Defendants' Requests for
17 Production Nos. 2, 13, 23, 24, 25, 26, 27, 28, and 34 to AU.

18 **A. REQUESTS FOR PRODUCTION TO AU REGARDING INJURY OR**
19 **ILLNESS ALLEGEDLY RESULTING FROM PCB EXPOSURE AT**
20 **THE MALIBU SCHOOLS.**

21 **1. REQUEST FOR PRODUCTION NO. 2**

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

23 All DOCUMENTS that SUPPORT, REFER, or RELATE to Plaintiff's
24 allegation that there are ongoing TSCA violations at the MALIBU SCHOOLS.

25 **b. RESPONSE TO RFP NO. 2.**

26 Plaintiff objects to this Request on the ground that it is vague and ambiguous
27 and unduly burdensome and oppressive. Plaintiff further objects to this Request to
28 the extent that it calls for the production of privileged attorney-client

1 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. Without waiving its objections, Plaintiff will produce the non-privileged
5 documents responsive to this Request as Plaintiff reasonably interprets it.

6 c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 2.

7 i. Vagueness, Ambiguity, and Overbreadth Are Not Valid Objections to RFP
8 No. 2.

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

18 AU has not met its burden of demonstrating that discovery of the information
19 sought in this Request should not be allowed, because it has not supported or
20 explained its objections on the basis of the requests being vague, ambiguous, or
21 overbroad. Defendants have requested communications and information regarding
22 illness or injury resulting from exposure to PCBs due to an alleged TSCA violation.
23 Without further explanation, Plaintiff's objection is without merit, and Plaintiff
24 should produce documents in response to this Request.

25 ii. Attorney-Client, Attorney Work Product, and Common-Interest
26 Communication Privileges Are Not Valid Objections to RFP No. 2.

27 (a) Attorney-Client Privilege.

28 "The attorney-client privilege protects confidential communications between

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

16 Documents supporting Plaintiffs’ allegation that there is a TSCA violation at
17 the Malibu Schools, including communications regarding illness or injury allegedly
18 resulting from PCB exposure, are not protected by the attorney-client privilege to
19 the extent that they include correspondences that do not include Plaintiffs’ attorneys.
20 For example, communications among Plaintiffs and teachers, staff, parents of
21 students, and other individuals would not be protected by attorney-client privilege.
22 Furthermore, Plaintiffs have failed to indicate in their responses which
23 communications they believe to be protected by the attorney-client privilege.
24 *Richey*, 632 F.3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to
25 produce documents in response to Defendants’ Requests on the basis of attorney-
26 client privilege.

27 (b) Attorney Work Product.

28 The work product doctrine prohibits discovery of documents and other

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

10 Plaintiffs cannot claim work product immunity because they have made no
11 showing that this protection applies to any of the information sought in Defendants’
12 Requests. For example, Plaintiffs have not demonstrated how documents
13 supporting Plaintiffs’ allegation that there is a TSCA violation at the Malibu
14 Schools, such as communications regarding illness or injury allegedly resulting
15 from PCB exposure, bear any relation to Plaintiffs’ efforts in preparation for trial.
16 Furthermore, Defendants have good cause to request the information sought,
17 because such information is essential for preparation of a defense against Plaintiffs’
18 argument that TSCA should be subject to a different interpretation from that
19 advanced in EPA’s policy and practice. This necessarily entails a complete
20 knowledge of any underlying injury and its relation to PCB exposure, which can
21 only be discovered through knowledge of any health complaints made to Plaintiff
22 organizations. Plaintiffs have not met the burden of demonstrating the applicability
23 of the work product doctrine, so their objection on this basis is not appropriate.
24 Accordingly, Plaintiffs may not refuse to produce documents in response to
25 Defendants’ Requests on the basis of attorney-client privilege.

26 (c) Common Interest Doctrine.

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

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

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

22 iii. First Amendment Privilege Is Not a Valid Objection to RFP No. 2.

23 Plaintiff objects to RFP No. 2 on the ground that this Request violates the
24 First Amendment rights of association of Plaintiff and its members. A party
25 objecting on the basis of a First Amendment privilege must satisfy a two-part test.
26 The objecting party must first make a “prima facie showing of arguable first
27 amendment infringement.” *Perry v. Schwarzenegger*, 591 F.3d 1126, 1140 (9th Cir.
28 2010) (quoting *Brock v. Local 375, Plumbers Int’l Union of Am.*, 860 F.2d 346, 349-

1 50 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is
2 enforced, there will be “(1) harassment, membership withdrawal, or discouragement
3 of new members, or (2) other consequences which objectively suggest an impact on,
4 or ‘chilling’ of, the members’ associational rights.” *Brock*, 860 F.2d at 350.

5 Here, Plaintiff has made no such showing that disclosure of the documents
6 requested would lead to “harassment, membership withdrawal, or discouragement
7 of new members,” or that it would result in other consequences that could “chill”
8 members’ associational rights. The Request for documents supporting Plaintiffs’
9 claim of an alleged TSCA violation calls for documents and communications
10 regarding illness or injury allegedly resulting from PCB exposure. The Request
11 propounded by Defendants is not seeking personal information, does nothing to
12 harass members of Plaintiff organizations, and would not have a deterrent effect on
13 membership. Moreover, the documents requested by Defendants are necessary so
14 that Defendants can defend themselves in this litigation and fairness justifies their
15 production. Defendants will not be afforded a fair discovery if they are precluded
16 from accessing information regarding alleged PCB exposure, which will surely be
17 used against Defendants in trial.

18 Additionally, there would be no “chilling” effect if Plaintiffs responded to
19 Defendants’ RFP, because AU is publicly vocal about its activities and its
20 membership, listing members of its Advisory Board and Leadership Team on its
21 website. *See Decl. Elliott, Exs. I, J.* In particular, Plaintiff frequently publicizes its
22 activities with regard to the subject matter of this very case on its website. *See Decl.*
23 *Elliott, Exs. F-H.* The information sought in the above Request relates **only** to the
24 illness allegedly caused by PCBs and PCB data, which form the basis for this
25 lawsuit.

26 The documents and information requested are necessary and relevant to
27 Defendants’ preparation for trial, and the names and email addresses of those
28 members who would like their membership in America Unites to remain private

1 could be redacted so as to balance any associational issues with the Court's strong
2 interest in ensuring Defendants' ability to fairly defend their case. Plaintiffs' entire
3 case is premised on the health impacts or illness resulting from PCB exposure, and
4 the proper application of TSCA regardless of EPA's application of the statute and
5 its regulations. Accordingly, it is imperative that Defendants are granted full access
6 to this information.

7 d. AU'S CONTENTIONS REGARDING RFP NO. 2

8 AU has agreed to produce non-privileged documents responsive to this
9 Request. To the extent that it has not already done so, AU will produce any non-
10 privileged documents responsive to this Request regarding injury or illness allegedly
11 resulting from PCB exposure at the Malibu Schools, although proving injury or
12 illness is not necessary to proving Plaintiffs' allegation that that there are ongoing
13 TSCA violations at the Malibu Schools.

14 **2. REQUEST FOR PRODUCTION NO. 13.**

15 a. REQUEST FOR PRODUCTION NO. 13.

16 All DOCUMENTS that SUPPORT, REFER, or RELATE to Plaintiff's
17 allegation that "teachers were threatened with firing if they did not re-occupy rooms
18 in which caulk or wipe samples had tested above regulatory limits," as alleged in
19 paragraph 99 of the FAC.

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

21 Plaintiff objects to this Request on the ground that it is overbroad and vague
22 and ambiguous. Plaintiff further objects to this Request to the extent that it seeks
23 privileged attorney-client communications, work product, common-interest
24 communications or other privileged information. Plaintiff further objects to this
25 Request on the ground that it violates the First Amendment rights of association of
26 Plaintiff and its members and supporters. Without waiving its objections, Plaintiff
27 will produce the non-privileged documents responsive to this Request as it
28 reasonably interprets it.

1 c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 13.

2 i. Vagueness, Ambiguity, and Overbreadth Are Not Valid Objections to RFP
3 No. 13.

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

13 AU has not met its burden of demonstrating that discovery of the information
14 sought in this Request should not be allowed, because it has not supported or
15 explained its objections on the basis of the requests being vague, ambiguous, or
16 overbroad. Defendants have requested communications and information regarding
17 illness or injury resulting from exposure to PCBs due to an alleged TSCA violation.
18 Without further explanation, Plaintiff's objection is without merit, and Plaintiff
19 should produce documents in response to this Request.

20 ii. Attorney-Client, Attorney Work Product, and Common-Interest
21 Communication Privileges Are Not Valid Objections to RFP No. 13.

22 (a) Attorney-Client Privilege.

23 "The attorney-client privilege protects confidential communications between
24 attorneys and clients, which are made for the purpose of giving legal advice."
25 *United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011). The party asserting this
26 privilege bears the burden of showing that there is an attorney-client relationship
27 and the privileged nature of the communication. *Id.*; *United States v. Bauer*, 132
28 F.3d 504, 507 (9th Cir. 1997). There is an attorney-client privilege where: "(1) []

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

11 Documents supporting Plaintiffs’ allegation that there is a TSCA violation at
12 the Malibu Schools, including communications regarding illness or injury allegedly
13 resulting from PCB exposure, are not protected by the attorney-client privilege to
14 the extent that they include correspondences that do not include Plaintiffs’ attorneys.
15 For example, communications among Plaintiffs and teachers, staff, parents of
16 students, and other individuals would not be protected by attorney-client privilege.
17 Furthermore, Plaintiffs have failed to indicate in their responses which
18 communications they believe to be protected by the attorney-client privilege.
19 *Richey*, 632 F.3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to
20 produce documents in response to Defendants’ Requests on the basis of attorney-
21 client privilege.

22 (b) Attorney Work Product.

23 The work product doctrine prohibits discovery of documents and other
24 materials “prepared by a party or his representative in anticipation of litigation.”
25 *United States v. Richey* 632 F.3d 559, 567 (9th Cir. 2011) (quoting *Admiral Ins. Co.*
26 *v. U.S. Dist. Ct.*, 881 F.2d 1486, 1494 (9th Cir. 1989); Fed. R. Civ. P. 26(b)(3). The
27 work product doctrine is a qualified immunity rather than a privilege, and a showing
28 of good cause for the information desired is sufficient to overcome the qualified

1 immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D. Cal.
2 2006); *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1494 (9th Cir.
3 1989). “The party claiming work product immunity has the burden of proving the
4 applicability of the doctrine.” *A. Farbers & Ptnrs., Inc.*, 234 F.R.D. at 192.

5 Plaintiffs cannot claim work product immunity because they have made no
6 showing that this protection applies to any of the information sought in Defendants’
7 Requests. For example, Plaintiffs have not demonstrated how documents
8 supporting Plaintiffs’ allegation that there is a TSCA violation at the Malibu
9 Schools, such as communications regarding illness or injury allegedly resulting
10 from PCB exposure, bear any relation to Plaintiffs’ efforts in preparation for trial.
11 Furthermore, Defendants have good cause to request the information sought,
12 because such information is essential for preparation of a defense against Plaintiffs’
13 argument that TSCA should be subject to a different interpretation from that
14 advanced in EPA’s policy and practice. This necessarily entails a complete
15 knowledge of any underlying injury and its relation to PCB exposure, which can
16 only be discovered through knowledge of any health complaints made to Plaintiff
17 organizations. Plaintiffs have not met the burden of demonstrating the applicability
18 of the work product doctrine, so their objection on this basis is not appropriate.
19 Accordingly, Plaintiffs may not refuse to produce documents in response to
20 Defendants’ Requests on the basis of attorney-client privilege.

21 (c) Common Interest Doctrine.

22 In general, the attorney-client privilege is waived when communications
23 between an attorney and client are disclosed to a third party. *Weil v. Inv/ Indicators,*
24 *Research & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir. 1981). There is a rare exception
25 to this waiver rule where individuals with a common interest in a legal matter may
26 “communicate among themselves and with the separate attorneys on matters of
27 common legal interest, for the purpose of preparing a joint strategy, and the
28 attorney-client privilege will protect these communications to the same extent as it

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 interest
5 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 iii. First Amendment Privilege Is Not a Valid Objection to RFP No. 13.

18 Plaintiff objects to RFP No. 2 on the ground that this Request violates the
19 First Amendment rights of association of Plaintiff and its members. A party
20 objecting on the basis of a First Amendment privilege must satisfy a two-part test.
21 The objecting party must first make a “prima facie showing of arguable first
22 amendment infringement.” *Perry v. Schwarzenegger*, 591 F.3d 1126, 1140 (9th Cir.
23 2010) (*quoting Brock v. Local 375, Plumbers Int’l Union of Am.*, 860 F.2d 346, 349-
24 50 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is
25 enforced, there will be “(1) harassment, membership withdrawal, or discouragement
26 of new members, or (2) other consequences which objectively suggest an impact on,
27 or ‘chilling’ of, the members’ associational rights.” *Brock*, 860 F.2d at 350.

28 Here, Plaintiff has made no such showing that disclosure of the documents

1 requested would lead to “harassment, membership withdrawal, or discouragement
2 of new members,” or that it would result in other consequences that could “chill”
3 members’ associational rights. The Request for documents supporting Plaintiffs’
4 claim of an alleged TSCA violation calls for documents and communications
5 regarding illness or injury allegedly resulting from PCB exposure. The Request
6 propounded by Defendants is not seeking personal information, does nothing to
7 harass members of Plaintiff organizations, and would not have a deterrent effect on
8 membership. Moreover, the documents requested by Defendants are necessary so
9 that Defendants can defend themselves in this litigation and fairness justifies their
10 production. Defendants will not be afforded a fair discovery if they are precluded
11 from accessing information regarding alleged PCB exposure, which will surely be
12 used against Defendants in trial.

13 Additionally, there would be no “chilling” effect if Plaintiffs responded to
14 Defendants’ RFP, because AU is publicly vocal about its activities and its
15 membership, listing members of its Advisory Board and Leadership Team on its
16 website. *See Decl. Elliott, Exs. I, J.* In particular, Plaintiff frequently publicizes its
17 activities with regard to the subject matter of this very case on its website. *See Decl.*
18 *Elliott, Exs. F-H.* The information sought in the above Request relates **only** to the
19 illness allegedly caused by PCBs and PCB data, which form the basis for this
20 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 America Unites to remain private
24 could be redacted so as to balance any associational issues with the Court’s strong
25 interest in ensuring Defendants’ ability to fairly defend their case. Plaintiffs’ entire
26 case is premised on the health impacts or illness resulting from PCB exposure, and
27 the proper application of TSCA regardless of EPA’s application of the statute and
28 its regulations. Accordingly, it is imperative that Defendants are granted full access

1 to this information.

2 d. AU'S CONTENTIONS REGARDING RFP NO. 13.

3 It is not apparent how this request regarding Plaintiff's allegation that
4 "teachers were threatened with firing if they did not re-occupy rooms in which caulk
5 or wipe samples had tested above regulatory limits," has anything to do with the
6 asserted subjects of this portion of the motion to compel, information and
7 communications regarding injury caused by an alleged TSCA violation at the
8 Malibu Schools. In any event, AU has agreed to produce non-privileged documents
9 responsive to this Request. To the extent that such documents exist and it has not
10 already done so, AU will produce any non-privileged documents responsive to this
11 Request regarding injury or illness allegedly resulting from PCB exposure at the
12 Malibu Schools.

13 **3. REQUEST FOR PRODUCTION NO. 23.**

14 a. REQUEST FOR PRODUCTION NO. 23.

15 All COMMUNICATIONS between AMERICA UNITES and the
16 ADVISORY BOARD concerning PCBs.

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

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 overbroad.
21 Plaintiff further objects to this Request on the ground that it is vague and
22 ambiguous, given that Defendants' response to Plaintiffs' discovery requests define
23 PCBs as "PCBs in caulk or other building materials at the MALIBU SCHOOLS
24 known to Defendants to contain PCBs at concentrations of 50 parts per million
25 ('ppm') or greater." Without waiving its objections, Plaintiff will produce non-
26 privileged documents responsive to this Request concerning PCBs in building
27 materials that violate TSCA or the regulations thereunder.

28

1 c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 23.

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

3 In numerous instances, Plaintiffs' First Amended Complaint ("FAC") alleges
4 that PCBs have resulted in negative health impacts to teachers and students at the
5 Malibu Schools, or in general. *See* Decl. Elliott, Ex. E; ¶¶ 7-8, 13, 16, 29, 41-48,
6 51, 54-55, 67, and 108.

7 In light of these allegations, Defendants served multiple Requests, including
8 this RFP, seeking delivery of the information upon which Plaintiffs intend to rely to
9 support their claims regarding the health effects allegedly caused by PCBs. An
10 example of the materials sought in this Request is communications regarding health
11 complaints by teachers or parents with students in classrooms Plaintiffs believe to
12 contain PCBs. Such communications also include Jennifer DeNicola's task force
13 correspondence and any PCB-related correspondence to the media.

14 Plaintiffs have produced an inadequate, scant sampling of documents, or
15 produced nothing at all after asserting a boilerplate relevancy objection. In response
16 to the Request at issue, Plaintiffs have taken the specious position that the
17 communications requested are not relevant. Relevancy is not a valid objection to
18 this Request. Under Rule 26(b)(1), parties may obtain discovery regarding:

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

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

25 The information requested is relevant to Plaintiffs' TSCA claim and to
26 Defendants' preparation of its defense against this claim. Communications
27 documenting health impacts or illness resulting from an alleged TSCA violation are
28 relevant to Plaintiffs' argument regarding the proper application of TSCA regardless

1 of EPA's application of the statute and its regulations. Defendants are entitled to
2 discovery of information and witnesses that might illuminate any causal links
3 between exposure to PCBs resulting from an alleged TSCA violation and certain
4 health symptoms or illness experienced by individuals at the Malibu Schools.
5 Challenging the causal link between Plaintiffs' claim that there are PCB
6 exceedances and actual injury to Plaintiffs or their members is important to
7 Defendants' preparation of a defense in this litigation on the interpretation of TSCA.

8 Additionally, the issues at stake are significant, because Defendant could be
9 held liable for millions of dollars of unnecessary remediation and renovation if they
10 are denied access to discoverable information regarding a link between PCB
11 exposure resulting from an alleged TSCA violation and health effects experienced
12 by individuals at the Malibu Schools. Plaintiffs are the sole source of this
13 information and there is no burden on Plaintiffs in producing the requested
14 information.

15 For all of the foregoing reasons, Plaintiffs should be required to produce the
16 communications sought in this Request.

17 ii. Vagueness, Ambiguity, and Overbreadth Are Not Valid Objections to RFP
18 No. 23.

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

28 AU has not met its burden of demonstrating that discovery of the information

1 sought in this Request should not be allowed, because it has not supported or
2 explained its objections on the basis of the requests being vague, ambiguous, or
3 overbroad. Defendants have requested communications and information regarding
4 illness or injury resulting from exposure to PCBs due to an alleged TSCA violation.
5 Without further explanation, Plaintiff's objection is without merit, and Plaintiff
6 should produce documents in response to this Request.

7 d. AU'S CONTENTIONS REGARDING RFP NO. 23.

8 AU has agreed to produce non-privileged documents responsive to this
9 Request. To the extent that it has not already done so, AU will produce any non-
10 privileged documents responsive to this Request regarding injury or illness allegedly
11 resulting from PCB exposure at the Malibu Schools.

12 **4. REQUEST FOR PRODUCTION NO. 24.**

13 a. REQUEST FOR PRODUCTION NO. 24.

14 All COMMUNICATIONS between AMERICA UNITES and PEER
15 regarding PCBs at the MALIBU SCHOOLS.

16 b. RESPONSE TO REQUEST FOR PRODUCTION NO. 24.

17 Plaintiff objects to this Request on the ground that it seeks information that is
18 not relevant to the parties' claims or defenses or the subject matter of the instant
19 action and is overbroad and unduly burdensome and oppressive. Plaintiff further
20 objects to this Request on the ground that it is vague and ambiguous, given that
21 Defendants' response to Plaintiffs' discovery requests define PCBs as "PCBs in
22 caulk or other building materials at the MALIBU SCHOOLS known to Defendants
23 to contain PCBs at concentrations of 50 parts per million ('ppm') or greater."
24 Plaintiff further objects to this Request to the extent that it calls for the production
25 of privileged attorney-client communications, work product, common-interest
26 communications or other privileged information. Plaintiff further objects to this
27 Request on the ground that it violates the First Amendment rights of association of
28 Plaintiff and its members and supporters.

1 c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 24.

2 i. Relevancy Is Not a Valid Objection to RFP No. 24.

3 In numerous instances, Plaintiffs' First Amended Complaint ("FAC") alleges
4 that PCBs have resulted in negative health impacts to teachers and students at the
5 Malibu Schools, or in general. See Decl. Elliott, Ex. E; ¶¶ 7-8, 13, 16, 29, 41-48,
6 51, 54-55, 67, and 108.

7 In light of these allegations, Defendants served multiple Requests, including
8 this RFP, seeking delivery of the information upon which Plaintiffs intend to rely to
9 support their claims regarding the health effects allegedly caused by PCBs. An
10 example of the materials sought in this Request is communications regarding health
11 complaints by teachers or parents with students in classrooms Plaintiffs believe to
12 contain PCBs. Such communications also include Jennifer DeNicola's task force
13 correspondence and any PCB-related correspondence to the media.

14 Plaintiffs have produced an inadequate, scant sampling of documents, or
15 produced nothing at all after asserting a boilerplate relevancy objection. In response
16 to the Request at issue, Plaintiffs have taken the specious position that the
17 communications requested are not relevant. Relevancy is not a valid objection to
18 this Request. Under Rule 26(b)(1), parties may obtain discovery regarding:

19 [A]ny nonprivileged matter that is relevant to any party's claim or
20 defense and proportional to the needs of the case, considering the
21 importance of the issues at stake in the action, the amount in
22 controversy, the parties' relative access to relevant information, the
23 parties' resources, the importance of the discovery in resolving the
24 issues, and whether the burden or expense of the proposed discovery
25 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 The information requested is relevant to Plaintiffs' TSCA claim and to
29 Defendants' preparation of its defense against this claim. Communications
30 documenting health impacts or illness resulting from an alleged TSCA violation are
31 relevant to Plaintiffs' argument regarding the proper application of TSCA regardless

1 of EPA's application of the statute and its regulations. Defendants are entitled to
2 discovery of information and witnesses that might illuminate any causal links
3 between exposure to PCBs resulting from an alleged TSCA violation and certain
4 health symptoms or illness experienced by individuals at the Malibu Schools.
5 Challenging the causal link between Plaintiffs' claim that there are PCB
6 exceedances and actual injury to Plaintiffs or their members is important to
7 Defendants' preparation of a defense in this litigation on the interpretation of TSCA.

8 Additionally, the issues at stake are significant, because Defendant could be
9 held liable for millions of dollars of unnecessary remediation and renovation if they
10 are denied access to discoverable information regarding a link between PCB
11 exposure resulting from an alleged TSCA violation and health effects experienced
12 by individuals at the Malibu Schools. Plaintiffs are the sole source of this
13 information and there is no burden on Plaintiffs in producing the requested
14 information.

15 For all of the foregoing reasons, Plaintiffs should be required to produce the
16 communications sought in this Request.

17 ii. Vagueness, Ambiguity, and Overbreadth Are Not Valid Objections to RFP
18 No. 24.

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

28 AU has not met its burden of demonstrating that discovery of the information

1 sought in this Request should not be allowed, because it has not supported or
2 explained its objections on the basis of the requests being vague, ambiguous, or
3 overbroad. Defendants have requested communications and information regarding
4 illness or injury resulting from exposure to PCBs due to an alleged TSCA violation.
5 Without further explanation, Plaintiff's objection is without merit, and Plaintiff
6 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. 24.

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
15 F.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 the
23 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 supporting Plaintiffs' allegation that there is a TSCA violation at
27 the Malibu Schools, including communications regarding illness or injury allegedly
28 resulting from PCB exposure, are not protected by the attorney-client privilege to

1 the extent that they include correspondences that do not include Plaintiffs' attorneys.
2 For example, communications among Plaintiffs and teachers, staff, parents of
3 students, and other individuals would not be protected by attorney-client privilege.
4 Furthermore, Plaintiffs have failed to indicate in their responses which
5 communications they believe to be protected by the attorney-client privilege.
6 *Richey*, 632 F.3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to
7 produce documents in response to Defendants' Requests on the basis of attorney-
8 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). The
14 work product doctrine is a qualified immunity rather than a privilege, and a showing
15 of good cause for the information desired is sufficient to overcome the qualified
16 immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D. Cal.
17 2006); *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1494 (9th Cir.
18 1989). "The party claiming work product immunity has the burden of proving the
19 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 supporting Plaintiffs' allegation that there is a TSCA violation at the Malibu
24 Schools, such as communications regarding illness or injury allegedly resulting
25 from PCB exposure, bear any relation to Plaintiffs' efforts in preparation for trial.
26 Furthermore, Defendants have good cause to request the information sought,
27 because such information is essential for preparation of a defense against Plaintiffs'
28 argument that TSCA should be subject to a different interpretation from that

1 advanced in EPA's policy and practice. This necessarily entails a complete
2 knowledge of any underlying injury and its relation to PCB exposure, which can
3 only be discovered through knowledge of any health complaints made to Plaintiff
4 organizations. Plaintiffs have not met the burden of demonstrating the applicability
5 of the work product doctrine, so their objection on this basis is not appropriate.
6 Accordingly, Plaintiffs may not refuse to produce documents in response to
7 Defendants' Requests on the basis of attorney-client 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." *Nidex 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 interest
20 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. at 692. For
22 this reason, the common interest doctrine comes into play only if the
23 communication at issue is privileged in the first place. *Nidex 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
28 Unites and PEER are protected. Defendants request that Plaintiff produce

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. 24.

5 Plaintiff objects to RFP No. 24 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 Cir.
10 2010) (quoting *Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F.2d 346, 349-
11 50 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is
12 enforced, there will be "(1) harassment, membership withdrawal, or discouragement
13 of new members, or (2) other consequences which objectively suggest an impact on,
14 or 'chilling' of, the members' associational rights." *Brock*, 860 F.2d at 350.

15 Here, Plaintiff has made no such showing that disclosure of the documents
16 requested would lead to "harassment, membership withdrawal, or discouragement
17 of new members," or that it would result in other consequences that could "chill"
18 members' associational rights. The Request for documents supporting Plaintiffs'
19 claim of an alleged TSCA violation calls for documents and communications
20 regarding illness or injury allegedly resulting from PCB exposure. The Request
21 propounded by Defendants is not seeking personal information, does nothing to
22 harass members of Plaintiff organizations, and would not have a deterrent effect on
23 membership. Moreover, the documents requested by Defendants are necessary so
24 that Defendants can defend themselves in this litigation and fairness justifies their
25 production. Defendants will not be afforded a fair discovery if they are precluded
26 from accessing information regarding alleged PCB exposure, which will surely be
27 used against Defendants in trial.

28 Additionally, there would be no "chilling" effect if Plaintiffs responded to

1 Defendants' RFP, because AU is publicly vocal about its activities and its
2 membership, listing members of its Advisory Board and Leadership Team on its
3 website. *See* Decl. Elliott, Exs. I, J. In particular, Plaintiff frequently publicizes its
4 activities with regard to the subject matter of this very case on its website. *See* Decl.
5 Elliott, Exs. F-H. The information sought in the above Request relates **only** to the
6 illness allegedly caused by PCBs and PCB data, which form the basis for this
7 lawsuit.

8 The documents and information requested are necessary and relevant to
9 Defendants' preparation for trial, and the names and email addresses of those
10 members who would like their membership in America Unites to remain private
11 could be redacted so as to balance any associational issues with the Court's strong
12 interest in ensuring Defendants' ability to fairly defend their case. Plaintiffs' entire
13 case is premised on the health impacts or illness resulting from PCB exposure, and
14 the proper application of TSCA regardless of EPA's application of the statute and
15 its regulations. Accordingly, it is imperative that Defendants are granted full access
16 to this information.

17 d. AU'S CONTENTIONS REGARDING RFP NO. 24.

18 The Request is objectionable for a number of reasons.

19 First, the Request is exceedingly overbroad. The Request seeks "all
20 communications between AU and PEER regarding PCBs at the Malibu Schools."
21 AU and PEER are co-plaintiffs in the case and share counsel. Literally interpreted,
22 the Request would require Plaintiffs to identify every written communication
23 between the two entities regarding this matter, including matters having nothing to
24 do with the subject matter of the case, e.g., litigation and non-litigation strategy.

25 Despite the exceedingly broad language of the Request, Defendants state in
26 their portion of the Joint Stipulation that the Request "calls for documents and
27 communications regarding illness or injury allegedly resulting from PCB exposure"
28 and that "[t]he information sought in the above Request relates only to the illness

1 allegedly caused by PCBs and PCB data, which form the basis for this lawsuit.”
2 (emphasis in original) However, this information about illness caused by PCBs is
3 the same information that Defendants are seeking through their other requests.
4 Defendants do not need all communications between AU and PEER to obtain
5 information about illness caused by PCBs.

6 Second, the request seeks privileged information. All communications
7 between PEER and AU regarding PCBs at the Malibu Schools would involve PEER
8 counsel, as no one else at PEER communicated with AU concerning PCBs at the
9 Malibu Schools in the United States. (Accompanying Declaration of Paula
10 Dinerstein (“Dinerstein Decl.”) ¶6.) Therefore, all such communications sought in
11 this request would be privileged.

12 Furthermore, requests for communications between PEER and AU violate
13 their First Amendment Right of Association.

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

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

21 The same would hold for PEER and AU, which has thus made a “prima facie
22 showing of arguable first amendment infringement.” *Perry v. Schwarzenegger*, 591
23 F.3d 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695
24 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of communications
25 between AU and PEER is likely to result in discouraging such communications
26 because PEER and AU are unable to protect their confidentiality, thereby severely
27 hampering their organizational missions. It could also result in harassment of
28 individuals who are parties to these communications. Defendants have already filed

1 a false criminal complaint against the President of America Unites, Ms. DeNicola,
2 and her husband, seeking to subject them to felony charges punishable by fines and
3 imprisonment, for allegedly taking caulk samples. (Dinerstein Decl. ¶12.) It is
4 difficult to imagine a more “chilling” action against those who advocate for PCB
5 testing and remediation at the Malibu Schools.

6 It is more than understandable that persons who communicate with AU or
7 PEER on this subject would not want their communications disclosed. In fact,
8 given the marginal, if any, relevance to this litigation of the communications sought
9 here, one cannot help but suspect that this discovery is being sought for the purpose
10 of harassing people who have communicated with Plaintiffs about PCBs at the
11 Malibu Schools.

12 Defendants suggest that names and email addresses of those individuals who
13 would like their support of, or communication with AU to remain private could be
14 redacted. However, while persons who communicate with AU certainly have First
15 Amendment protection against revealing the fact of their membership and their
16 personal contact information, *NAACP v. State of Alabama*, 357 U.S. 449 (1958), the
17 First Amendment also protects the confidentiality of the fact that they have
18 communicated with AU, whether or not they are members or supporters of AU, and
19 protects the content of their communications. The Ninth Circuit in *Perry* ordered
20 protection of communications, not only the identities of members, emphasizing 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 on
24 whether disclosure of the information will have a deterrent effect on the
25 exercise of protected activities.”

26 591 F.3d at 1162 (citations omitted).

27 In addition, given the relatively small size of the community at the Malibu
28 Schools, it is likely that the identity of those communicating could be deduced from

1 the content of the communication even if names are redacted.

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

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

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

16 Here, Defendants cannot even show that this discovery meets the relevance
17 requirements of Rule 26, much less the more demanding standard of relevance when
18 First Amendment interests are implicated. Defendants’ claim that “Plaintiffs’ entire
19 case is premised on the health impacts or illness resulting from PCB exposure” is
20 incorrect as TSCA’s citizen suit provision only requires proof of an ongoing
21 violation of TSCA, *i.e.* the presence of PCBs at concentrations of 50 ppm or more at
22 the Malibu Schools.

23 **5. REQUEST FOR PRODUCTION NO. 25.**

24 a. REQUEST FOR PRODUCTION NO. 25.

25 All COMMUNICATIONS between AMERICA UNITES, any teachers,
26 and/or school staff at the MALIBU SCHOOLS concerning PCBs.

27 b. RESPONSE TO REQUEST FOR PRODUCTION NO. 25.

28 Plaintiff objects to this Request on the ground that it is overbroad. Plaintiff

1 further objects to this Request on the ground that it is vague and ambiguous, given
2 that Defendants' response to Plaintiffs' discovery requests define PCBs as "PCBs in
3 caulk or other building materials at the MALIBU SCHOOLS known to Defendants
4 to contain PCBs at concentrations of 50 parts per million ('ppm') or greater."
5 Plaintiff further objects to this Request to the extent that it calls for the production
6 of 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. Without waiving its objections, Plaintiff
10 will produce non-privileged documents responsive to this Request concerning PCBs
11 in building materials at the Malibu Schools that violate TSCA or the regulations
12 thereunder.

13 c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 25.

14 i. Vagueness, Ambiguity, and Overbreadth Are Not Valid Objections to RFP
15 No. 25.

16 Plaintiff's objection that Requests for Production No. 25 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. Cal.
20 2007) (citing *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975) and
21 *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
28 overbroad. Defendants have requested communications and information regarding

1 illness or injury resulting from exposure to PCBs due to an alleged TSCA violation.
2 Without further explanation, Plaintiff’s objection is without merit, and Plaintiff
3 should produce documents in response to this Request.

4 ii. Attorney-Client, Attorney Work Product, and Common-Interest
5 Communication Privileges Are Not Valid Objections to RFP No. 25.

6 (a) Attorney-Client Privilege.

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

23 Documents supporting Plaintiffs’ allegation that there is a TSCA violation at
24 the Malibu Schools, including communications regarding illness or injury allegedly
25 resulting from PCB exposure, are not protected by the attorney-client privilege to
26 the extent that they include correspondences that do not include Plaintiffs’ attorneys.
27 For example, communications among Plaintiffs and teachers, staff, parents of
28 students, and other individuals would not be protected by attorney-client privilege.

1 Furthermore, Plaintiffs have failed to indicate in their responses which
2 communications they believe to be protected by the attorney-client privilege.
3 *Richey*, 632 F.3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to
4 produce documents in response to Defendants’ Requests on the basis of attorney-
5 client privilege.

6 (b) Attorney Work Product.

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

17 Plaintiffs cannot claim work product immunity because they have made no
18 showing that this protection applies to any of the information sought in Defendants’
19 Requests. For example, Plaintiffs have not demonstrated how documents
20 supporting Plaintiffs’ allegation that there is a TSCA violation at the Malibu
21 Schools, such as communications regarding illness or injury allegedly resulting
22 from PCB exposure, bear any relation to Plaintiffs’ efforts in preparation for trial.
23 Furthermore, Defendants have good cause to request the information sought,
24 because such information is essential for preparation of a defense against Plaintiffs’
25 argument that TSCA should be subject to a different interpretation from that
26 advanced in EPA’s policy and practice. This necessarily entails a complete
27 knowledge of any underlying injury and its relation to PCB exposure, which can
28 only be discovered through knowledge of any health complaints made to Plaintiff

1 organizations. Plaintiffs have not met the burden of demonstrating the applicability
2 of the work product doctrine, so their objection on this basis is not appropriate.
3 Accordingly, Plaintiffs may not refuse to produce documents in response to
4 Defendants' Requests on the basis of attorney-client 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." *Nidec 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 interest
17 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. *Nidec 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
27 responsive materials that are not protected as either Plaintiffs' attorney-client
28 communications.

1 iii. First Amendment Privilege Is Not a Valid Objection to RFP No. 25.

2 Plaintiff objects to RFP No. 25 on the ground that this Request violates the
3 First Amendment rights of association of Plaintiff and its members. A party
4 objecting on the basis of a First Amendment privilege must satisfy a two-part test.
5 The objecting party must first make a “prima facie showing of arguable first
6 amendment infringement.” *Perry v. Schwarzenegger*, 591 F.3d 1126, 1140 (9th Cir.
7 2010) (quoting *Brock v. Local 375, Plumbers Int’l Union of Am.*, 860 F.2d 346, 349-
8 50 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is
9 enforced, there will be “(1) harassment, membership withdrawal, or discouragement
10 of new members, or (2) other consequences which objectively suggest an impact on,
11 or ‘chilling’ of, the members’ associational rights.” *Brock*, 860 F.2d at 350.

12 Here, Plaintiff has made no such showing that disclosure of the documents
13 requested would lead to “harassment, membership withdrawal, or discouragement
14 of new members,” or that it would result in other consequences that could “chill”
15 members’ associational rights. The Request for documents supporting Plaintiffs’
16 claim of an alleged TSCA violation calls for documents and communications
17 regarding illness or injury allegedly resulting from PCB exposure. The Request
18 propounded by Defendants is not seeking personal information, does nothing to
19 harass members of Plaintiff organizations, and would not have a deterrent effect on
20 membership. Moreover, the documents requested by Defendants are necessary so
21 that Defendants can defend themselves in this litigation and fairness justifies their
22 production. Defendants will not be afforded a fair discovery if they are precluded
23 from accessing information regarding alleged PCB exposure, which will surely be
24 used against Defendants in trial.

25 Additionally, there would be no “chilling” effect if Plaintiffs responded to
26 Defendants’ RFP, because AU is publicly vocal about its activities and its
27 membership, listing members of its Advisory Board and Leadership Team on its
28 website. *See Decl. Elliott, Exs. I, J.* In particular, Plaintiff frequently publicizes its

1 activities with regard to the subject matter of this very case on its website. *See Decl.*
2 Elliott, Exs. F-H. The information sought in the above Request relates **only** to the
3 illness allegedly caused by PCBs and PCB data, which form the basis for this
4 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 the health impacts or illness resulting from PCB exposure, and
11 the proper application of TSCA regardless of EPA's application of the statute and
12 its regulations. Accordingly, it is imperative that Defendants are granted full access
13 to this information.

14 d. AU'S CONTENTIONS REGARDING RFP NO. 25.

15 AU has agreed to produce non-privileged documents responsive to this
16 Request. To the extent that it has not already done so, AU will produce any non-
17 privileged documents responsive to this Request regarding injury or illness allegedly
18 resulting from PCB exposure at the Malibu Schools.

19 **6. REQUEST FOR PRODUCTION NO. 26.**

20 a. REQUEST FOR PRODUCTION NO. 26.

21 All COMMUNICATIONS between AMERICA UNITES and any current or
22 former MEMBERS of the Santa Monica Board of Education concerning PCBs.

23 b. RESPONSE TO REQUEST FOR PRODUCTION NO. 26.

24 Plaintiff objects to this Request on the ground that it is overbroad. Plaintiff
25 further objects to this Request on the ground that it is vague and ambiguous, given
26 that Defendants' response to Plaintiffs' discovery requests define PCBs as "PCBs in
27 caulk or other building materials at the MALIBU SCHOOLS known to Defendants
28 to contain PCBs at concentrations of 50 parts per million ('ppm') or greater."

1 Plaintiff further objects to this Request to the extent that it calls for the production
2 of privileged attorney-client communications, work product, common-interest
3 communications or other privileged information. Without waiving its objections,
4 Plaintiff will produce non-privileged documents responsive to this Request
5 concerning PCBs in building materials at the Malibu Schools that violate TSCA or
6 the regulations thereunder.

7 c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 26.

8 i. Vagueness, Ambiguity, and Overbreadth Are Not Valid Objections to RFP
9 No. 26.

10 Plaintiff's objection that Requests for Production No. 26 is vague, ambiguous
11 and overbroad is unfounded. "The party who resists discovery has the burden to
12 show discovery should not be allowed, and has the burden of clarifying, explaining,
13 and supporting its objections." *Bible v. Rio Props., Inc.*, 246 F. R. D. 614 (C.D. Cal.
14 2007) (citing *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975) and
15 *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 655-56 (C.D. Cal.
16 2005)). There is no merit to "general or boilerplate objections such as 'overly
17 broad' [or] 'vague and ambiguous.'" *Bible*, 246 F. R. D. at 619; *A. Farber &*
18 *Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal. 2006).

19 AU has not met its burden of demonstrating that discovery of the information
20 sought in this Request should not be allowed, because it has not supported or
21 explained its objections on the basis of the requests being vague, ambiguous, or
22 overbroad. Defendants have requested communications and information regarding
23 illness or injury resulting from exposure to PCBs due to an alleged TSCA violation.
24 Without further explanation, Plaintiff's objection is without merit, and Plaintiff
25 should produce documents in response to this Request.

26
27
28

1 ii. Attorney-Client, Attorney Work Product, and Common-Interest
2 Communication Privileges Are Not Valid Objections to RFP No. 26.

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
9 F.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 the
17 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 Documents supporting Plaintiffs’ allegation that there is a TSCA violation at
21 the Malibu Schools, including communications regarding illness or injury allegedly
22 resulting from PCB exposure, are not protected by the attorney-client privilege to
23 the extent that they include correspondences that do not include Plaintiffs’ attorneys.
24 For example, communications among Plaintiffs and board members, teachers, staff,
25 parents of students, and other individuals would not be protected by attorney-client
26 privilege. Furthermore, Plaintiffs have failed to indicate in their responses which
27 communications they believe to be protected by the attorney-client privilege.
28 *Richey*, 632 F.3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to

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). The
8 work product doctrine is a qualified immunity rather than a privilege, and a showing
9 of good cause for the information desired is sufficient to overcome the qualified
10 immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D. Cal.
11 2006); *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1494 (9th Cir.
12 1989). “The party claiming work product immunity has the burden of proving the
13 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 sought in Defendants’
16 Requests. For example, Plaintiffs have not demonstrated how documents
17 supporting Plaintiffs’ allegation that there is a TSCA violation at the Malibu
18 Schools, such as communications regarding illness or injury allegedly resulting
19 from PCB exposure, bear any relation to Plaintiffs’ efforts in preparation for trial.
20 Furthermore, Defendants have good cause to request the information sought,
21 because such information is essential for preparation of a defense against Plaintiffs’
22 argument that TSCA should be subject to a different interpretation from that
23 advanced in EPA’s policy and practice. This necessarily entails a complete
24 knowledge of any underlying injury and its relation to PCB exposure, which can
25 only be discovered through knowledge of any health complaints made to Plaintiff
26 organizations or the school district or its governing board. Plaintiffs have not met
27 the burden of demonstrating the applicability of the work product doctrine, so their
28 objection on this basis is not appropriate. Accordingly, Plaintiffs may not refuse to

1 produce documents in response to Defendants' Requests on the basis of attorney-
2 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 interest
15 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.

27 iii. First Amendment Privilege Is Not a Valid Objection to RFP No. 26.

28 Plaintiff objects to RFP No. 26 on the ground that this Request violates the

1 First Amendment rights of association of Plaintiff and its members. A party
2 objecting on the basis of a First Amendment privilege must satisfy a two-part test.
3 The objecting party must first make a “prima facie showing of arguable first
4 amendment infringement.” *Perry v. Schwarzenegger*, 591 F.3d 1126, 1140 (9th Cir.
5 2010) (quoting *Brock v. Local 375, Plumbers Int’l Union of Am.*, 860 F.2d 346, 349-
6 50 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is
7 enforced, there will be “(1) harassment, membership withdrawal, or discouragement
8 of new members, or (2) other consequences which objectively suggest an impact on,
9 or ‘chilling’ of, the members’ associational rights.” *Brock*, 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 supporting Plaintiffs’
14 claim of an alleged TSCA violation calls for documents and communications
15 regarding illness or injury allegedly resulting from PCB exposure. The Request
16 propounded by Defendants is not seeking personal information, does nothing to
17 harass members of Plaintiff organizations, and would not have a deterrent effect on
18 membership. Moreover, the documents requested by Defendants are necessary so
19 that Defendants can defend themselves in this litigation and fairness justifies their
20 production. Defendants will not be afforded a fair discovery if they are precluded
21 from accessing information regarding alleged PCB exposure, which will surely be
22 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. Elliott, Exs. I, J.* In particular, Plaintiff frequently publicizes its
27 activities with regard to the subject matter of this very case on its website. *See Decl.*
28 *Elliott, Exs. F-H.* The information sought in the above Request relates **only** to the

1 illness allegedly caused by PCBs and PCB data, which form the basis for this
2 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 America Unites to remain private
6 could be redacted so as to balance any associational issues with the Court's strong
7 interest in ensuring Defendants' ability to fairly defend their case. Plaintiffs' entire
8 case is premised on the health impacts or illness resulting from PCB exposure, and
9 the proper application of TSCA regardless of EPA's application of the statute and
10 its regulations. Accordingly, it is imperative that Defendants are granted full access
11 to this information.

12 d. AU'S CONTENTIONS REGARDING RFP NO. 26.

13 AU has agreed to produce non-privileged documents responsive to this
14 Request. To the extent that it has not already done so, AU will produce any non-
15 privileged documents responsive to this Request regarding injury or illness allegedly
16 resulting from PCB exposure at the Malibu Schools.

17 **7. REQUEST FOR PRODUCTION NO. 27.**

18 a. REQUEST FOR PRODUCTION NO. 27.

19 All COMMUNICATIONS between AMERICA UNITES and any parents of
20 students at the MALIBU SCHOOLS concerning PCBs.

21 b. RESPONSE TO REQUEST FOR PRODUCTION NO. 27.

22 Plaintiff objects to this Request on the ground that it is overbroad and unduly
23 burdensome and oppressive. Plaintiff further objects to this Request on the ground
24 that it is vague and ambiguous, given that Defendants' response to Plaintiffs'
25 discovery requests define PCBs as "PCBs in caulk or other building materials at the
26 MALIBU SCHOOLS known to Defendants to contain PCBs at concentrations of 50
27 parts per million ('ppm') or greater." Plaintiff further objects to this Request to the
28 extent that it calls for the production of privileged attorney-client communications,

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

4 c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 27.

5 i. Vagueness, Ambiguity, Overbreadth, and Undue Burden and Oppression Are
6 Not Valid Objections to RFP No. 27.

7 Plaintiff's objection that Requests for Production No. 27 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, or
20 overbroad. Defendants have requested communications and information regarding
21 illness or injury resulting from exposure to PCBs due to an alleged TSCA violation.
22 Without further explanation, Plaintiff's objection is without merit, and Plaintiff
23 should produce documents in response to this Request.

24 ii. Attorney-Client, Attorney Work Product, and Common-Interest
25 Communication Privileges Are Not Valid Objections to RFP No. 27.

26 (a) Attorney-Client Privilege.

27 "The attorney-client privilege protects confidential communications between
28 attorneys and clients, which are made for the purpose of giving legal advice."

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

15 Documents supporting Plaintiffs’ allegation that there is a TSCA violation at
16 the Malibu Schools, including communications regarding illness or injury allegedly
17 resulting from PCB exposure, are not protected by the attorney-client privilege to
18 the extent that they include correspondences that do not include Plaintiffs’ attorneys.
19 For example, communications among Plaintiffs and teachers, staff, parents of
20 students, and other individuals would not be protected by attorney-client privilege.
21 Furthermore, Plaintiffs have failed to indicate in their responses which
22 communications they believe to be protected by the attorney-client privilege.
23 *Richey*, 632 F.3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to
24 produce documents in response to Defendants’ Requests on the basis of attorney-
25 client privilege.

26 (b) Attorney Work Product.

27 The work product doctrine prohibits discovery of documents and other
28 materials “prepared by a party or his representative in anticipation of litigation.”

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

9 Plaintiffs cannot claim work product immunity because they have made no
10 showing that this protection applies to any of the information sought in Defendants’
11 Requests. For example, Plaintiffs have not demonstrated how documents
12 supporting Plaintiffs’ allegation that there is a TSCA violation at the Malibu
13 Schools, such as communications regarding illness or injury allegedly resulting
14 from PCB exposure, bear any relation to Plaintiffs’ efforts in preparation for trial.
15 Furthermore, Defendants have good cause to request the information sought,
16 because such information is essential for preparation of a defense against Plaintiffs’
17 argument that TSCA should be subject to a different interpretation from that
18 advanced in EPA’s policy and practice. This necessarily entails a complete
19 knowledge of any underlying injury and its relation to PCB exposure, which can
20 only be discovered through knowledge of any health complaints made to Plaintiff
21 organizations. Plaintiffs have not met the burden of demonstrating the applicability
22 of the work product doctrine, so their objection on this basis is not appropriate.
23 Accordingly, Plaintiffs may not refuse to produce documents in response to
24 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,*
28 *Research & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir. 1981). There is a rare exception

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

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

21 iii. First Amendment Privilege Is Not a Valid Objection to RFP No. 27.

22 Plaintiff objects to RFP No. 27 on the ground that this Request violates the
23 First Amendment rights of association of Plaintiff and its members. A party
24 objecting on the basis of a First Amendment privilege must satisfy a two-part test.
25 The objecting party must first make a “prima facie showing of arguable first
26 amendment infringement.” *Perry v. Schwarzenegger*, 591 F.3d 1126, 1140 (9th Cir.
27 2010) (quoting *Brock v. Local 375, Plumbers Int’l Union of Am.*, 860 F.2d 346, 349-
28 50 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is

1 enforced, there will be “(1) harassment, membership withdrawal, or discouragement
2 of new members, or (2) other consequences which objectively suggest an impact on,
3 or ‘chilling’ of, the members’ associational rights.” *Brock*, 860 F.2d at 350.

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

17 Additionally, there would be no “chilling” effect if Plaintiffs responded to
18 Defendants’ RFP, because AU is publicly vocal about its activities and its
19 membership, listing members of its Advisory Board and Leadership Team on its
20 website. *See Decl. Elliott, Exs. I, J.* In particular, Plaintiff frequently publicizes its
21 activities with regard to the subject matter of this very case on its website. *See Decl.*
22 *Elliott, Exs. F-H.* The information sought in the above Request relates **only** to the
23 illness allegedly caused by PCBs and PCB data, which form the basis for this
24 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 America Unites to remain private
28 could be redacted so as to balance any associational issues with the Court’s strong

1 interest in ensuring Defendants’ ability to fairly defend their case. Plaintiffs’ entire
2 case is premised on the health impacts or illness resulting from PCB exposure, and
3 the proper application of TSCA regardless of EPA’s application of the statute and
4 its regulations. Accordingly, it is imperative that Defendants are granted full access
5 to this information.

6 d. AU’S CONTENTIONS REGARDING RFP NO. 27.

7 The Request is objectionable for a number of reasons.

8 First, the Request is exceedingly overbroad. The Request seeks “all
9 communications between AU and any parents of students at the Malibu Schools
10 concerning PCBs.” Defendants never explain the relevance of such information.
11 The Request is also exceedingly burdensome, because it could conceivably require
12 Plaintiffs’ officials to search through all communications they may have had with
13 parents at the Malibu Schools to see if any mention PCBs. Moreover, Defendants
14 themselves have defined “PCBs” to mean only "PCBs in caulk or other building
15 materials at the MALIBU SCHOOLS known to Defendants to contain PCBs at
16 concentrations of 50 parts per million ('ppm') or greater" making it difficult or
17 impossible for Plaintiffs’ to determine which communications concerning PCBs
18 more broadly are actually responsive to this request in accordance with Defendants’
19 definition. (Accompanying Declaration of Charles Avrith (“Avrith Decl.”) ¶2 and
20 Exhibit A thereto.)

21 Although the language of the Request is not so limited, Defendants represent
22 that the Request “calls for documents and communications regarding illness or
23 injury allegedly resulting from PCB exposure” and that “[t]he information sought in
24 the above Request relates only to the illness allegedly caused by PCBs and PCB
25 data, [sic] which form the basis of this lawsuit.” (emphasis in original) However,
26 information regarding illness from PCB exposure at the Malibu Schools is the same
27 information that Defendants are seeking through their other requests. Defendants do
28 not need all communications between AU and parents to obtain this information.

1 In addition, requests for communications between AU and parents violate
2 their First Amendment Right of Association.

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

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

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

23 It is more than understandable that persons who communicate with AU on
24 this subject would not want their communications disclosed. In fact, given the
25 marginal, if any, relevance to this litigation of the communications sought here, one
26 cannot help but suspect that this discovery is being sought for the purpose of
27 harassing people who have communicated with Plaintiffs about PCBs at the Malibu
28 Schools.

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

10 “The First Amendment privilege, however, has never been limited to
11 the disclosure of identities of rank-and-file members. . . . The existence
12 of a prima facie case turns not on the type of information sought, but on
13 whether disclosure of the information will have a deterrent effect on the
14 exercise of protected activities.”

15 591 F.3d at 1162 (citations omitted).

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

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.*, 860 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 “Importantly, the party seeking the discovery must show that the
27 information sought is highly relevant to the claims or defenses in the
28 litigation -- a more demanding standard of relevance than that under

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.”

4 *Perry*, 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. Defendants’ claim that “Plaintiffs’ entire
8 case is premised on the health impacts or illness resulting from PCB exposure” is
9 incorrect as TSCA’s citizen suit provision only requires proof of an ongoing
10 violation of TSCA, *i.e.* the presence of PCBs at concentrations of 50 ppm or more at
11 the Malibu Schools.

12 **8. REQUEST FOR PRODUCTION NO. 28.**

13 a. REQUEST FOR PRODUCTION NO. 28.

14 All COMMUNICATIONS between AMERICA UNITES and its MEMBERS
15 regarding PCBs at the Malibu Schools.

16 b. RESPONSE TO REQUEST FOR PRODUCTION NO. 28.

17 Plaintiff objects to this Request on the ground that it seeks information that is
18 not relevant to the parties' claims or defenses or the subject matter of the instant
19 action and is overbroad and unduly burdensome and oppressive. Plaintiff further
20 objects to this Request on the ground that it is vague and ambiguous, given that
21 Defendants' response to Plaintiffs' discovery requests define PCBs as "PCBs in
22 caulk or other building materials at the MALIBU SCHOOLS known to Defendants
23 to contain PCBs at concentrations of 50 parts per million ('ppm') or greater."
24 Plaintiff further objects to this Request to the extent that it calls for the production
25 of privileged attorney-client communications, work product, common-interest
26 communications or other privileged information. Plaintiff further objects to this
27 Request on the ground that it violates the First Amendment rights of association of
28 Plaintiff and its members and supporters.

1 c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 28.

2 i. Relevancy Is Not a Valid Objection to RFP No. 28.

3 In numerous instances, Plaintiffs' First Amended Complaint ("FAC") alleges
4 that PCBs have resulted in negative health impacts to teachers and students at the
5 Malibu Schools, or in general. *See* Decl. Elliott, Ex. E; ¶¶ 7-8, 13, 16, 29, 41-48,
6 51, 54-55, 67, and 108.

7 In light of these allegations, Defendants served multiple Requests, including
8 this RFP, seeking delivery of the information upon which Plaintiffs intend to rely to
9 support their claims regarding the health effects allegedly caused by PCBs. An
10 example of the materials sought in this Request is communications regarding health
11 complaints by teachers or parents with students in classrooms Plaintiffs believe to
12 contain PCBs. Such communications should also include any correspondence of
13 Matt DeNicola and / or Hope Edelman, Treasurer and Secretary of AU respectively,
14 regarding PCBs at the Malibu Schools or other schools in the United States. Such
15 communications also include Jennifer DeNicola's task force correspondence and
16 any PCB-related correspondence to the media.

17 Plaintiffs have produced an inadequate, scant sampling of documents, or
18 produced nothing at all after asserting a boilerplate relevancy objection. In response
19 to the Request at issue, Plaintiffs have taken the specious position that the
20 communications requested are not relevant. Relevancy is not a valid objection to
21 this Request. Under Rule 26(b)(1), 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
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 The information requested is relevant to Plaintiffs' TSCA claim and to

1 Defendants' preparation of its defense against this claim. Communications
2 documenting health impacts or illness resulting from an alleged TSCA violation are
3 relevant to Plaintiffs' argument regarding the proper application of TSCA regardless
4 of EPA's application of the statute and its regulations. Defendants are entitled to
5 discovery of information and witnesses that might illuminate any causal links
6 between exposure to PCBs resulting from an alleged TSCA violation and certain
7 health symptoms or illness experienced by individuals at the Malibu Schools.
8 Challenging the causal link between Plaintiffs' claim that there are PCB
9 exceedances and actual injury to Plaintiffs or their members is important to
10 Defendants' preparation of a defense in this litigation on the interpretation of TSCA.

11 Additionally, the issues at stake are significant, because Defendant could be
12 held liable for millions of dollars of unnecessary remediation and renovation if they
13 are denied access to discoverable information regarding a link between PCB
14 exposure resulting from an alleged TSCA violation and health effects experienced
15 by individuals at the Malibu Schools. Plaintiffs are the sole source of this
16 information and there is no burden on Plaintiffs in producing the requested
17 information.

18 For all of the foregoing reasons, Plaintiffs should be required to produce the
19 communications sought in this Request.

20 ii. Vagueness, Ambiguity, Overbreadth, and Undue Burden and Oppression Are
21 Not Valid Objections to RFP No. 28.

22 Plaintiff's objection that Requests for Production No. 28 is vague, ambiguous,
23 overbroad, and unduly burdensome and oppressive is unfounded. "The party who
24 resists discovery has the burden to show discovery should not be allowed, and has
25 the burden of clarifying, explaining, and supporting its objections." *Bible v. Rio*
26 *Props., Inc.*, 246 F. R. D. 614 (C.D. Cal. 2007) (citing *Blankenship v. Hearst Corp.*,
27 519 F.2d 418, 429 (9th Cir. 1975) and *Keith H. v. Long Beach Unified Sch. Dist.*,
28 228 F.R.D. 652, 655-56 (C.D. Cal. 2005)). There is no merit to "general or

1 boilerplate objections such as ‘overly broad’ [or] ‘vague and ambiguous.’” *Bible*,
2 246 F. R. D. at 619; *A. Farber & Partners, Inc. v. Garber*, 234 F. R. D. 186, 188
3 (C.D. Cal. 2006).

4 AU has not met its burden of demonstrating that discovery of the information
5 sought in this Request should not be allowed, because it has not supported or
6 explained its objections on the basis of the requests being vague, ambiguous, or
7 overbroad. Defendants have requested communications and information regarding
8 illness or injury resulting from exposure to PCBs due to an alleged TSCA violation.
9 Without further explanation, Plaintiff’s objection is without merit, and Plaintiff
10 should produce documents in response to this Request.

11 iii. Attorney-Client, Attorney Work Product, and Common-Interest
12 Communication Privileges Are Not Valid Objections to RFP No. 28.

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
19 F.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 the
27 privilege may extend to those communications with third parties assisting the
28 attorney in legal advice, it does not extend where the advice sought is not legal

1 advice. *Id.*

2 Documents supporting Plaintiffs' allegation that there is a TSCA violation at
3 the Malibu Schools, including communications regarding illness or injury allegedly
4 resulting from PCB exposure, are not protected by the attorney-client privilege to
5 the extent that they include correspondences that do not include Plaintiffs' attorneys.
6 For example, communications among Plaintiffs and teachers, staff, parents of
7 students, and other individuals would not be protected by attorney-client privilege.
8 Furthermore, 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). The
18 work product doctrine is a qualified immunity rather than a privilege, and a showing
19 of good cause for the information desired is sufficient to overcome the qualified
20 immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D. Cal.
21 2006); *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1494 (9th Cir.
22 1989). "The party claiming work product immunity has the burden of proving the
23 applicability of the doctrine." *A. Farbers & Ptnrs., Inc.*, 234 F.R.D. at 192.

24 Plaintiffs cannot claim work product immunity because they have made no
25 showing that this protection applies to any of the information sought in Defendants'
26 Requests. For example, Plaintiffs have not demonstrated how documents
27 supporting Plaintiffs' allegation that there is a TSCA violation at the Malibu
28 Schools, such as communications regarding illness or injury allegedly resulting

1 from PCB exposure, bear any relation to Plaintiffs' efforts in preparation for trial.
2 Furthermore, Defendants have good cause to request the information sought,
3 because such information is essential for preparation of a defense against Plaintiffs'
4 argument that TSCA should be subject to a different interpretation from that
5 advanced in EPA's policy and practice. This necessarily entails a complete
6 knowledge of any underlying injury and its relation to PCB exposure, which can
7 only be discovered through knowledge of any health complaints made to Plaintiff
8 organizations. Plaintiffs have not met the burden of demonstrating the applicability
9 of the work product doctrine, so their objection on this basis is not appropriate.
10 Accordingly, Plaintiffs may not refuse to produce documents in response to
11 Defendants' Requests 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 interest
24 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
27 communication at issue is privileged in the first place. *Nidex Corp*, 249 F.R.D. at
28 578.

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

8 iv. First Amendment Privilege Is Not a Valid Objection to RFP No. 28.

9 Plaintiff objects to RFP No. 28 on the ground that this Request violates the
10 First Amendment rights of association of Plaintiff and its members. A party
11 objecting on the basis of a First Amendment privilege must satisfy a two-part test.
12 The objecting party must first make a "prima facie showing of arguable first
13 amendment infringement." *Perry v. Schwarzenegger*, 591 F.3d 1126, 1140 (9th Cir.
14 2010) (quoting *Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F.2d 346, 349-
15 50 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is
16 enforced, there will be "(1) harassment, membership withdrawal, or discouragement
17 of new members, or (2) other consequences which objectively suggest an impact on,
18 or 'chilling' of, the members' associational rights." *Brock*, 860 F.2d at 350.

19 Here, Plaintiff has made no such showing that disclosure of the documents
20 requested would lead to "harassment, membership withdrawal, or discouragement
21 of new members," or that it would result in other consequences that could "chill"
22 members' associational rights. The Request for documents supporting Plaintiffs'
23 claim of an alleged TSCA violation calls for documents and communications
24 regarding illness or injury allegedly resulting from PCB exposure. The Request
25 propounded by Defendants is not seeking personal information, does nothing to
26 harass members of Plaintiff organizations, and would not have a deterrent effect on
27 membership. Moreover, the documents requested by Defendants are necessary so
28 that Defendants can defend themselves in this litigation and fairness justifies their

1 production. Defendants will not be afforded a fair discovery if they are precluded
2 from accessing information regarding alleged PCB exposure, which will surely be
3 used against Defendants in trial.

4 Additionally, there would be no “chilling” effect if Plaintiffs responded to
5 Defendants’ RFP, because AU is publicly vocal about its activities and its
6 membership, listing members of its Advisory Board and Leadership Team on its
7 website. *See Decl. Elliott, Exs. I, J.* In particular, Plaintiff frequently publicizes its
8 activities with regard to the subject matter of this very case on its website. *See Decl.*
9 *Elliott, Exs. F-H.* The information sought in the above Request relates **only** to the
10 illness allegedly caused by PCBs and PCB data, which form the basis for this
11 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 the health impacts or illness resulting from PCB exposure, and
18 the proper application of TSCA regardless of EPA’s application of the statute and
19 its regulations. Accordingly, it is imperative that Defendants are granted full access
20 to this information.

21 d. AU’S CONTENTIONS REGARDING RFP NO. 28.

22 The Request is objectionable for a number of reasons.
23 First, the Request is exceedingly overbroad. The Request seeks “all
24 communications between AU and its Members regarding PCBs at the Malibu
25 Schools.” Defendants do not explain the relevance of communications between AU
26 and its supporters.² The Request is also exceedingly burdensome as it potentially
27

28 ² AU is not a membership organization and technically does not have “members.”

1 requires AU officials to search through their communications with anybody who
2 happens to be an AU supporter to see if it mentions PCBs. Moreover, Defendants
3 themselves have defined “PCBs” to mean only "PCBs in caulk or other building
4 materials at the MALIBU SCHOOLS known to Defendants to contain PCBs at
5 concentrations of 50 parts per million ('ppm') or greater" making it difficult or
6 impossible for Plaintiffs’ to determine which communications concerning PCBs
7 more broadly are actually responsive to this request in accordance with Defendants’
8 definition. (Avrith Decl. ¶2 and Ex. A thereto.)

9 Although the language of the Request is not so limited, Defendants represent
10 that the Request “calls for documents and communications regarding illness or
11 injury allegedly resulting from PCB exposure” and that “[t]he information sought in
12 the above Request relates only to the illness allegedly caused by PCBs and PCB
13 data, [sic] which form the basis of this lawsuit.” (emphasis in original) However,
14 information regarding illness from PCB exposure at the Malibu Schools is the same
15 information that Defendants are seeking through their other requests. Defendants do
16 not need all communications between AU and its supporters to obtain this
17 information.

18 Furthermore, requests for communications between AU and its supporters
19 violate their First Amendment Right of Association.

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

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

27 The same would hold for AU, which has thus made a “prima facie showing of
28 arguable first amendment infringement.” *Perry v. Schwarzenegger*, 591 F.3d 1126,

1 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132,
2 1133 (9th Cir. 1983) (per curiam)). Disclosure of communications between AU and
3 its supporters is likely to result in discouraging such communications because AU is
4 unable to protect their confidentiality, thereby severely hampering their
5 organizational missions. It could also result in harassment of individuals who are
6 parties to these communications. Defendants have already filed a false criminal
7 complaint against the President of America Unites, Ms. DeNicola, and her husband,
8 seeking to subject them to felony charges punishable by fines and imprisonment, for
9 allegedly taking caulk samples. (Dinerstein Decl. ¶12.) It is difficult to imagine a
10 more “chilling” action against those who advocate for PCB testing and remediation
11 at the Malibu Schools.

12 It is more than understandable that persons who communicate with AU on
13 this subject would not want their communications disclosed. In fact, given the
14 marginal, if any, relevance to this litigation of the communications sought here, one
15 cannot help but suspect that this discovery is being sought for the purpose of
16 harassing people who have communicated with Plaintiffs about PCBs at other
17 schools.

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

27 “The First Amendment privilege, however, has never been limited to
28 the disclosure of identities of rank-and-file members. ... The existence

1 of a prima facie case turns not on the type of information sought, but on
2 whether disclosure of the information will have a deterrent effect on the
3 exercise of protected activities.”

4 591 F.3d at 1162 (citations omitted).

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

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.*, 860 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.”

21 *Perry*, 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. Defendants’ claim that “Plaintiffs’ entire
25 case is premised on the health impacts or illness resulting from PCB exposure” is
26 incorrect as TSCA’s citizen suit provision only requires proof of an ongoing
27 violation of TSCA, *i.e.* the presence of PCBs at concentrations of 50 ppm or more at
28 the Malibu Schools.

1 Finally, AU has already produced its communications about PCBs at the
2 Malibu Schools to its supporters as a group as opposed to communications with
3 individual supporters, for which the above privileges and objections would apply.

4 **9. REQUEST FOR PRODUCTION NO. 34.**

5 a. REQUEST FOR PRODUCTION NO. 34.

6 All presentation materials prepared by AMERICA UNITES regarding PCBs.

7 b. RESPONSE TO REQUEST FOR PRODUCTION NO. 34.

8 Plaintiff objects to this Request on the ground that it seeks information that is
9 not relevant to the parties' claims or defenses or the subject matter of the instant
10 action and is overbroad. Plaintiff further objects to this Request on the ground that it
11 is vague and ambiguous, given that Defendants' response to Plaintiffs' discovery
12 requests define PCBs as "PCBs in caulk or other building materials at the MALIBU
13 SCHOOLS known to Defendants to contain PCBs at concentrations of 50 parts per
14 million ('ppm') or greater." Without waiving its objections, Plaintiff will produce
15 non-privileged documents responsive to this Request as Plaintiff reasonably
16 interprets it concerning PCBs in building materials at the Malibu Schools that
17 violate TSCA or the regulations thereunder.

18 c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 34.

19 i. Relevancy Is Not a Valid Objection to RFP No. 34.

20 In numerous instances, Plaintiffs' First Amended Complaint ("FAC") alleges
21 that PCBs have resulted in negative health impacts to teachers and students at the
22 Malibu Schools, or in general. *See* Decl. Elliott, Ex. E; ¶¶ 7-8, 13, 16, 29, 41-48,
23 51, 54-55, 67, and 108.

24 In light of these allegations, Defendants served multiple Requests, including
25 this RFP, seeking delivery of the information upon which Plaintiffs intend to rely to
26 support their claims regarding the health effects allegedly caused by PCBs. An
27 example of the materials sought in this Request are presentation materials
28 elucidating facts about PCBs and their health impacts, and health complaints by

1 teachers or parents with students in classrooms Plaintiffs believe to contain PCBs.
2 In particular, Defendants are aware that Jennifer DeNicola, President of AU, gave
3 presentations at a Research Seminar “brown bag” lunch talk at Harvard’s School of
4 Public Health, Department of Environmental Health, in October 2015 and at the
5 Eighth International PCB Workshop at Woods Hole Oceanographic Institute in
6 Massachusetts, in October 2014. *See, e.g.*, Decl. Elliott, Ex. K.

7 Plaintiffs have produced an inadequate, scant sampling of materials, or
8 produced nothing at all after asserting a boilerplate relevancy objection. In response
9 to the Request at issue, Plaintiffs have taken the specious position that the
10 communications requested are not relevant. Relevancy is not a valid objection to
11 this Request. Under Rule 26(b)(1), parties may obtain discovery regarding:

12 [A]ny nonprivileged matter that is relevant to any party’s claim or
13 defense and proportional to the needs of the case, considering the
14 importance of the issues at stake in the action, the amount in
15 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.

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

18 The information requested is relevant to Plaintiffs’ TSCA claim and to
19 Defendants’ preparation of its defense against this claim. Materials documenting
20 PCB data or health impacts or illness resulting from an alleged TSCA violation are
21 relevant to Plaintiffs’ argument regarding the proper application of TSCA regardless
22 of EPA’s application of the statute and its regulations. Defendants are entitled to
23 discovery of information and witnesses that might illuminate any causal links
24 between exposure to PCBs resulting from an alleged TSCA violation and certain
25 health symptoms or illness experienced by individuals at the Malibu Schools. Such
26 information includes any information regarding PCBs that Plaintiffs will rely upon
27 in their attempt to prove that there is a TSCA violation at the Malibu Schools.
28 Challenging the causal link between Plaintiffs’ claim that there are PCB

1 exceedances and actual injury to Plaintiffs or their members is important to
2 Defendants' preparation of a defense in this litigation on the interpretation of TSCA.

3 Furthermore, any information regarding PCBs at other schools contained in
4 the requested presentation materials is relevant and must be produced. In press
5 releases, Plaintiffs draw comparisons between the PCB remediation conducted at
6 the Malibu Schools and that which has been conducted by other schools. Plaintiffs
7 referenced PCBs in New York schools twice in their FAC. Decl. Elliott, Ex. E; ¶¶
8 62, 95. Plaintiffs regularly post information regarding PCB cases and remediation
9 activities at schools around the United States, so as to draw comparisons between
10 these schools and the Malibu Schools. *See* Decl. Elliott, Exs. F-H. Even though
11 they will rely on this information and data, Plaintiffs have taken the specious
12 position that information regarding PCBs at schools in the United States not
13 relevant. The information requested is highly relevant, because it will serve as a
14 foundation from which Plaintiffs will attempt to prove their claim.

15 Additionally, the issues at stake are significant, because Defendant could be
16 held liable for millions of dollars of unnecessary remediation and renovation if they
17 are denied access to discoverable information regarding a link between PCB
18 exposure resulting from an alleged TSCA violation and health effects experienced
19 by individuals at the Malibu Schools. Plaintiffs are the sole source of this
20 information and there is no burden on Plaintiffs in producing the requested
21 information.

22 For all of the foregoing reasons, Plaintiffs should be required to produce the
23 communications sought in this Request.

24 ii. Vagueness and Ambiguity Are Not Valid Objections to RFP No. 34.

25 Plaintiff's objection that Requests for Production No. 34 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
28 supporting its objections." *Bible v. Rio Props., Inc.*, 246 F. R. D. 614 (C.D. Cal.

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 not met its burden of demonstrating that discovery of the
7 information sought in this Request should not be allowed, because it has not
8 supported or explained its objections on the basis of the requests being vague,
9 ambiguous, or overbroad. Defendants have requested communications and
10 information regarding illness or injury resulting from exposure to PCBs due to an
11 alleged TSCA violation. Without further explanation, Plaintiff’s objection is
12 without merit, and Plaintiff should produce documents in response to this Request.

13 d. AU’S CONTENTIONS REGARDING RFP NO. 34.

14 AU has agreed to produce non-privileged documents responsive to this
15 Request. To the extent that it has not already done so, AU will produce any non-
16 privileged documents responsive to this Request.

17 **B. REQUESTS FOR PRODUCTION TO PEER REGARDING INJURY**
18 **OR ILLNESS ALLEGEDLY RESULTING FROM PCB EXPOSURE**
19 **AT THE MALIBU SCHOOLS.**

20 Requests for Production No. 2, 3, 7, 10, 19, 31, 32, 34, and 35 to PEER seek
21 information regarding injury or illness allegedly resulting from PCB exposure at the
22 Malibu Schools.

23 **1. REQUEST FOR PRODUCTION NO. 2.**

24 a. REQUEST FOR PRODUCTION NO. 2.

25 All DOCUMENTS that SUPPORT, REFER, or RELATE to Plaintiffs
26 allegation that there are ongoing TSCA violations at the MALIBU SCHOOLS.

27 b. RESPONSE TO REQUEST FOR PRODUCTION NO. 2.

28 Plaintiff objects to this Request on the ground that it is vague and ambiguous

1 and unduly burdensome and oppressive. Plaintiff further objects to this Request to
2 the extent that it calls for the production of privileged attorney-client
3 communications, work product, common interest communications or other
4 privileged information. Plaintiff further objects to this Request on the ground that it
5 violates the First Amendment rights of association of Plaintiff and its members and
6 supporters. Without waiving its objections, Plaintiff will produce the non-privileged
7 documents responsive to this Request as Plaintiff reasonably interprets it. However,
8 to the extent that co-Plaintiff America Unites for Kids produces these same
9 documents, Plaintiff will not duplicate the production.

10 c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 2.

11 i. Vagueness, Ambiguity, and Undue Burden and Oppression Are Not Valid
12 Objections to RFP No. 2.

13 Plaintiff's objection that Requests for Production No. 28 is vague, ambiguous,
14 and unduly burdensome and oppressive is unfounded. "The party who resists
15 discovery has the burden to show discovery should not be allowed, and has the
16 burden of clarifying, explaining, and supporting its objections." *Bible v. Rio Props.,*
17 *Inc.*, 246 F. R. D. 614 (C.D. Cal. 2007) (citing *Blankenship v. Hearst Corp.*, 519
18 F.2d 418, 429 (9th Cir. 1975) and *Keith H. v. Long Beach Unified Sch. Dist.*, 228
19 F.R.D. 652, 655-56 (C.D. Cal. 2005)). There is no merit to "general or boilerplate
20 objections such as 'overly broad' [or] 'vague and ambiguous.'" *Bible*, 246 F. R. D.
21 at 619; *A. Farber & Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal.
22 2006).

23 PEER has not met its burden of demonstrating that discovery of the
24 information sought in this Request should not be allowed, because it has not
25 supported or explained its objections on the basis of the requests being vague,
26 ambiguous, or overbroad. Defendants have requested communications and
27 information regarding illness or injury resulting from exposure to PCBs due to an
28 alleged TSCA violation. Without further explanation, Plaintiff's objection is

1 without merit, and Plaintiff should produce documents in response to this Request.

2 ii. Attorney-Client, Attorney Work Product, and Common-Interest

3 Communication Privileges Are Not Valid Objections to RFP No. 2.

4 (a) Attorney-Client Privilege.

5 “The attorney-client privilege protects confidential communications between
6 attorneys and clients, which are made for the purpose of giving legal advice.”

7 *United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011). The party asserting this
8 privilege bears the burden of showing that there is an attorney-client relationship

9 and the privileged nature of the communication. *Id.*; *United States v. Bauer*, 132

10 F.3d 504, 507 (9th Cir. 1997). There is an attorney-client privilege where: “(1) []

11 legal advice of any kind is sought (2) from a professional legal advisor in his

12 capacity as such, (3) the communications relating to that purpose, (4) made in

13 confidence (5) by the client, (6) are at his instance permanently protected (7) from

14 disclosure by himself or by the legal advisor, (8) unless the protection be waved.”

15 *Id.* (quoting *United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010)). The

16 privilege is waived when privileged communications are disclosed. *Weil v.*

17 *Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir. 1981). While the

18 privilege may extend to those communications with third parties assisting the

19 attorney in legal advice, it does not extend where the advice sought is not legal

20 advice. *Id.*

21 Documents supporting Plaintiffs’ allegation that there is a TSCA violation at

22 the Malibu Schools, including communications regarding illness or injury allegedly

23 resulting from PCB exposure, are not protected by the attorney-client privilege to

24 the extent that they include correspondences that do not include Plaintiffs’ attorneys.

25 For example, communications among Plaintiffs and teachers, staff, parents of

26 students, and other individuals would not be protected by attorney-client privilege.

27 Furthermore, Plaintiffs have failed to indicate in their responses which

28 communications they believe to be protected by the attorney-client privilege.

1 *Richey*, 632 F.3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to
2 produce documents in response to Defendants’ Requests on the basis of attorney-
3 client privilege.

4 (b) Attorney Work Product.

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

15 Plaintiffs cannot claim work product immunity because they have made no
16 showing that this protection applies to any of the information sought in Defendants’
17 Requests. For example, Plaintiffs have not demonstrated how documents
18 supporting Plaintiffs’ allegation that there is a TSCA violation at the Malibu
19 Schools, such as communications regarding illness or injury allegedly resulting
20 from PCB exposure, bear any relation to Plaintiffs’ efforts in preparation for trial.
21 Furthermore, Defendants have good cause to request the information sought,
22 because such information is essential for preparation of a defense against Plaintiffs’
23 argument that TSCA should be subject to a different interpretation from that
24 advanced in EPA’s policy and practice. This necessarily entails a complete
25 knowledge of any underlying injury and its relation to PCB exposure, which can
26 only be discovered through knowledge of any health complaints made to Plaintiff
27 organizations. Plaintiffs have not met the burden of demonstrating the applicability
28 of the work product doctrine, so their objection on this basis is not appropriate.

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 interest
15 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.

27 iii. First Amendment Privilege Is Not a Valid Objection to RFP No. 2.

28 Plaintiff objects to RFP No. 2 on the ground that this Request violates the

1 First Amendment rights of association of Plaintiff and its members. A party
2 objecting on the basis of a First Amendment privilege must satisfy a two-part test.
3 The objecting party must first make a “prima facie showing of arguable first
4 amendment infringement.” *Perry v. Schwarzenegger*, 591 F.3d 1126, 1140 (9th Cir.
5 2010) (quoting *Brock v. Local 375, Plumbers Int’l Union of Am.*, 860 F.2d 346, 349-
6 50 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is
7 enforced, there will be “(1) harassment, membership withdrawal, or discouragement
8 of new members, or (2) other consequences which objectively suggest an impact on,
9 or ‘chilling’ of, the members’ associational rights.” *Brock*, 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 supporting Plaintiffs’
14 claim of an alleged TSCA violation calls for documents and communications
15 regarding illness or injury allegedly resulting from PCB exposure. The Request
16 propounded by Defendants is not seeking personal information, does nothing to
17 harass members of Plaintiff organizations, and would not have a deterrent effect on
18 membership. Moreover, the documents requested by Defendants are necessary so
19 that Defendants can defend themselves in this litigation and fairness justifies their
20 production. Defendants will not be afforded a fair discovery if they are precluded
21 from accessing information regarding alleged PCB exposure, which will surely be
22 used against Defendants in trial.

23 Additionally, there would be no “chilling” effect if Plaintiffs responded to
24 Defendants’ RFP, because PEER is publicly vocal about its activities and its
25 membership, listing members of its DC Staff and Board on its website. *See* Decl.
26 Elliott, Exs. L, M. In particular, Plaintiff frequently publicizes its activities with
27 regard to the subject matter of this very case on its website. *See, e.g.*, Decl. Elliott,
28 Ex. N. The information sought in the above Request relates **only** to the illness

1 allegedly caused by PCBs and PCB data, which form the basis for this lawsuit.

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 PEER to remain private could be
5 redacted so as to balance any associational issues with the Court's strong interest in
6 ensuring Defendants' ability to fairly defend their case. Plaintiffs' entire case is
7 premised on the health impacts or illness resulting from PCB exposure, and the
8 proper application of TSCA regardless of EPA's application of the statute and its
9 regulations. Accordingly, it is imperative that Defendants are granted full access to
10 this information.

11 d. PEER'S CONTENTIONS REGARDING RFP NO. 2.

12 PEER has agreed to produce non-privileged documents responsive to this
13 Request and has done so. To the extent that it has not already done so, PEER will
14 produce any non-privileged documents responsive to this Request regarding injury
15 or illness allegedly resulting from PCB exposure at the Malibu Schools, although
16 proving injury or illness is not necessary to proving Plaintiffs' allegation that there
17 are ongoing TSCA violations at the Malibu Schools.

18 **2. REQUEST FOR PRODUCTION NO. 3.**

19 a. REQUEST FOR PRODUCTION NO. 3.

20 All DOCUMENTS that SUPPORT, REFER or RELATE to Plaintiffs
21 allegation that it has suffered injury from ongoing TSCA violations at the MALIBU
22 SCHOOLS.

23 b. RESPONSE TO REQUEST FOR PRODUCTION NO. 3.

24 Plaintiff objects to this Request on the ground that it is vague and ambiguous
25 and unduly burdensome and oppressive. Plaintiff further objects to this Request to
26 the extent that it calls for the production of privileged attorney-client
27 communications, work product, common interest communications or other
28 privileged information. Plaintiff further objects to this Request on the ground that it

1 violates the First Amendment rights of association of Plaintiff and its members and
2 supporters. Without waiving its objections, Plaintiff will produce the non-privileged
3 documents responsive to this Request as Plaintiff reasonably interprets it.

4 c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 3.

5 i. Vagueness, Ambiguity, and Undue Burden and Oppression Are Not Valid
6 Objections to RFP No. 3.

7 Plaintiff's objection that Requests for Production No. 3 is vague, ambiguous,
8 and unduly burdensome and oppressive is unfounded. "The party who resists
9 discovery has the burden to show discovery should not be allowed, and has the
10 burden of clarifying, explaining, and supporting its objections." *Bible v. Rio Props.,*
11 *Inc.*, 246 F. R. D. 614 (C.D. Cal. 2007) (citing *Blankenship v. Hearst Corp.*, 519
12 F.2d 418, 429 (9th Cir. 1975) and *Keith H. v. Long Beach Unified Sch. Dist.*, 228
13 F.R.D. 652, 655-56 (C.D. Cal. 2005)). There is no merit to "general or boilerplate
14 objections such as 'overly broad' [or] 'vague and ambiguous.'" *Bible*, 246 F. R. D.
15 at 619; *A. Farber & Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal.
16 2006).

17 PEER has not met its burden of demonstrating that discovery of the
18 information sought in this Request should not be allowed, because it has not
19 supported or explained its objections on the basis of the requests being vague,
20 ambiguous, or overbroad. Defendants have requested communications and
21 information regarding illness or injury resulting from exposure to PCBs due to an
22 alleged TSCA violation. Without further explanation, Plaintiff's objection is
23 without merit, and Plaintiff should produce documents in response to this Request.

24 ii. Attorney-Client, Attorney Work Product, and Common-Interest
25 Communication Privileges Are Not Valid Objections to RFP No. 3.

26 (a) Attorney-Client Privilege.

27 "The attorney-client privilege protects confidential communications between
28 attorneys and clients, which are made for the purpose of giving legal advice."

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

15 Documents supporting Plaintiffs’ allegation that there is a TSCA violation at
16 the Malibu Schools, including communications regarding illness or injury allegedly
17 resulting from PCB exposure, are not protected by the attorney-client privilege to
18 the extent that they include correspondences that do not include Plaintiffs’ attorneys.
19 For example, communications among Plaintiffs and teachers, staff, parents of
20 students, and other individuals would not be protected by attorney-client privilege.
21 Furthermore, Plaintiffs have failed to indicate in their responses which
22 communications they believe to be protected by the attorney-client privilege.
23 *Richey*, 632 F.3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to
24 produce documents in response to Defendants’ Requests on the basis of attorney-
25 client privilege.

26 (b) Attorney Work Product.

27 The work product doctrine prohibits discovery of documents and other
28 materials “prepared by a party or his representative in anticipation of litigation.”

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

9 Plaintiffs cannot claim work product immunity because they have made no
10 showing that this protection applies to any of the information sought in Defendants’
11 Requests. For example, Plaintiffs have not demonstrated how documents
12 supporting Plaintiffs’ allegation that there is a TSCA violation at the Malibu
13 Schools, such as communications regarding illness or injury allegedly resulting
14 from PCB exposure, bear any relation to Plaintiffs’ efforts in preparation for trial.
15 Furthermore, Defendants have good cause to request the information sought,
16 because such information is essential for preparation of a defense against Plaintiffs’
17 argument that TSCA should be subject to a different interpretation from that
18 advanced in EPA’s policy and practice. This necessarily entails a complete
19 knowledge of any underlying injury and its relation to PCB exposure, which can
20 only be discovered through knowledge of any health complaints made to Plaintiff
21 organizations. Plaintiffs have not met the burden of demonstrating the applicability
22 of the work product doctrine, so their objection on this basis is not appropriate.
23 Accordingly, Plaintiffs may not refuse to produce documents in response to
24 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,*
28 *Research & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir. 1981). There is a rare exception

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

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

21 iii. First Amendment Privilege Is Not a Valid Objection to RFP No. 3.

22 Plaintiff objects to RFP No. 3 on the ground that this Request violates the
23 First Amendment rights of association of Plaintiff and its members. A party
24 objecting on the basis of a First Amendment privilege must satisfy a two-part test.
25 The objecting party must first make a “prima facie showing of arguable first
26 amendment infringement.” *Perry v. Schwarzenegger*, 591 F.3d 1126, 1140 (9th Cir.
27 2010) (quoting *Brock v. Local 375, Plumbers Int’l Union of Am.*, 860 F.2d 346, 349-
28 50 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is

1 enforced, there will be “(1) harassment, membership withdrawal, or discouragement
2 of new members, or (2) other consequences which objectively suggest an impact on,
3 or ‘chilling’ of, the members’ associational rights.” *Brock*, 860 F.2d at 350.

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

17 Additionally, there would be no “chilling” effect if Plaintiffs responded to
18 Defendants’ RFP, because PEER is publicly vocal about its activities and its
19 membership, listing members of its DC Staff and Board on its website. *See Decl.*
20 *Elliott*, Exs. L, M. In particular, Plaintiff frequently publicizes its activities with
21 regard to the subject matter of this very case on its website. *See Decl. Elliott*, N.
22 The information sought in the above Request relates **only** to the illness allegedly
23 caused by PCBs and PCB data, which form the basis for 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
28 ensuring Defendants’ ability to fairly defend their case. Plaintiffs’ entire case is

1 premised on the health impacts or illness resulting from PCB exposure, and the
2 proper application of TSCA regardless of EPA's application of the statute and its
3 regulations. Accordingly, it is imperative that Defendants are granted full access to
4 this information.

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

6 PEER has agreed to produce non-privileged documents responsive to this
7 Request and has done so. To the extent that it has not already done so, PEER will
8 produce any non-privileged documents responsive to this Request.

9 **3. REQUEST FOR PRODUCTION NO. 7.**

10 a. REQUEST FOR PRODUCTION NO. 7.

11 All COMMUNICATIONS by and between PEER and the "CONCERNED
12 MALIBU/CABRILLO TEACHERS" group.

13 b. RESPONSE TO REQUEST FOR PRODUCTION NO. 7.

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. 7.

23 i. Relevancy Is Not a Valid Objection to RFP No. 7.

24 In numerous instances, Plaintiffs' First Amended Complaint ("FAC") alleges
25 that PCBs have resulted in negative health impacts to teachers and students at the
26 Malibu Schools, or in general. *See* Decl. Elliott, Ex. E; ¶¶ 7-8, 13, 16, 29, 41-48,
27 51, 54-55, 67, and 108.

28 In light of these allegations, Defendants served multiple Requests, including

1 this RFP, seeking delivery of the information upon which Plaintiffs intend to rely to
2 support their claims regarding the health effects allegedly caused by PCBs. An
3 example of the materials sought in this Request is communications regarding health
4 complaints by teachers or parents with students in classrooms Plaintiffs believe to
5 contain PCBs. Such communications also include Jennifer DeNicola's task force
6 correspondence and any PCB-related correspondence to the media.

7 Plaintiffs have produced an inadequate, scant sampling of documents, or
8 produced nothing at all after asserting a boilerplate relevancy objection. In response
9 to the Request at issue, Plaintiffs have taken the specious position that the
10 communications requested are not relevant. Relevancy is not a valid objection to
11 this Request. Under Rule 26(b)(1), parties may obtain discovery regarding:

12 [A]ny nonprivileged matter that is relevant to any party's claim or
13 defense and proportional to the needs of the case, considering the
14 importance of the issues at stake in the action, the amount in
15 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.

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

18 The information requested is relevant to Plaintiffs' TSCA claim and to
19 Defendants' preparation of its defense against this claim. Communications
20 documenting health impacts or illness resulting from an alleged TSCA violation are
21 relevant to Plaintiffs' argument regarding the proper application of TSCA regardless
22 of EPA's application of the statute and its regulations. Defendants are entitled to
23 discovery of information and witnesses that might illuminate any causal links
24 between exposure to PCBs resulting from an alleged TSCA violation and certain
25 health symptoms or illness experienced by individuals at the Malibu Schools.
26 Challenging the causal link between Plaintiffs' claim that there are PCB
27 exceedances and actual injury to Plaintiffs or their members is important to
28 Defendants' preparation of a defense in this litigation on the interpretation of TSCA.

1 Additionally, the issues at stake are significant, because Defendant could be
2 held liable for millions of dollars of unnecessary remediation and renovation if they
3 are denied access to discoverable information regarding a link between PCB
4 exposure resulting from an alleged TSCA violation and health effects experienced
5 by individuals at the Malibu Schools. Plaintiffs are the sole source of this
6 information and there is no burden on Plaintiffs in producing the requested
7 information.

8 For all of the foregoing reasons, Plaintiffs should be required to produce the
9 communications sought in this Request.

10 ii. Vagueness, Ambiguity, and Overbreadth Are Not Valid Objections to RFP
11 No. 7.

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

21 PEER has not met its burden of demonstrating that discovery of the
22 information sought in this Request should not be allowed, because it has not
23 supported or explained its objections on the basis of the requests being vague,
24 ambiguous, or overbroad. Defendants have requested communications and
25 information regarding illness or injury resulting from exposure to PCBs due to an
26 alleged TSCA violation. Without further explanation, Plaintiff’s objection is
27 without merit, and Plaintiff should produce documents in response to this Request.
28

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

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
9 F.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 the
17 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 Documents supporting Plaintiffs’ allegation that there is a TSCA violation at
21 the Malibu Schools, including communications regarding illness or injury allegedly
22 resulting from PCB exposure, are not protected by the attorney-client privilege to
23 the extent that they include correspondences that do not include Plaintiffs’ attorneys.
24 For example, communications among Plaintiffs and teachers, staff, parents of
25 students, and other individuals would not be protected by attorney-client privilege.
26 Furthermore, Plaintiffs have failed to indicate in their responses which
27 communications they believe to be protected by the attorney-client privilege.
28 *Richey*, 632 F.3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to

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). The
8 work product doctrine is a qualified immunity rather than a privilege, and a showing
9 of good cause for the information desired is sufficient to overcome the qualified
10 immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D. Cal.
11 2006); *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1494 (9th Cir.
12 1989). "The party claiming work product immunity has the burden of proving the
13 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 sought in Defendants'
16 Requests. For example, Plaintiffs have not demonstrated how documents
17 supporting Plaintiffs' allegation that there is a TSCA violation at the Malibu
18 Schools, such as communications regarding illness or injury allegedly resulting
19 from PCB exposure, bear any relation to Plaintiffs' efforts in preparation for trial.
20 Furthermore, Defendants have good cause to request the information sought,
21 because such information is essential for preparation of a defense against Plaintiffs'
22 argument that TSCA should be subject to a different interpretation from that
23 advanced in EPA's policy and practice. This necessarily entails a complete
24 knowledge of any underlying injury and its relation to PCB exposure, which can
25 only be discovered through knowledge of any health complaints made to Plaintiff
26 organizations. Plaintiffs have not met the burden of demonstrating the applicability
27 of the work product doctrine, so their objection on this basis is not appropriate.
28 Accordingly, Plaintiffs may not refuse to produce documents in response to

1 Defendants' Requests on the basis of attorney-client privilege.

2 (c) Common Interest Doctrine.

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

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

26 iv. First Amendment Privilege Is Not a Valid Objection to RFP No. 7.

27 Plaintiff objects to RFP No. 7 on the ground that this Request violates the
28 First Amendment rights of association of Plaintiff and its members. A party

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 Cir.
4 2010) (quoting *Brock v. Local 375, Plumbers Int’l Union of Am.*, 860 F.2d 346, 349-
5 50 (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 documents
10 requested would lead to “harassment, membership withdrawal, or discouragement
11 of new members,” or that it would result in other consequences that could “chill”
12 members’ associational rights. The Request for documents supporting Plaintiffs’
13 claim of an alleged TSCA violation calls for documents and communications
14 regarding illness or injury allegedly resulting from PCB exposure. The Request
15 propounded by Defendants is not seeking personal information, does nothing to
16 harass members of Plaintiff organizations, and would not have a deterrent effect on
17 membership. Moreover, the documents requested by Defendants are necessary so
18 that Defendants can defend themselves in this litigation and fairness justifies their
19 production. Defendants will not be afforded a fair discovery if they are precluded
20 from accessing information regarding alleged PCB exposure, which will surely be
21 used against Defendants in trial.

22 Additionally, there would be no “chilling” effect if Plaintiffs responded to
23 Defendants’ RFP, because PEER is publicly vocal about its activities and its
24 membership, listing members of its DC Staff and Board on its website. *See Decl.*
25 *Elliott*, Exs. L, M. In particular, Plaintiff frequently publicizes its activities with
26 regard to the subject matter of this very case on its website. *See Decl. Elliott*, N.
27 The information sought in the above Request relates **only** to the illness allegedly
28 caused by PCBs and PCB data, which form the basis for this lawsuit.

1 The documents and information requested are necessary and relevant to
2 Defendants' preparation for trial, and the names and email addresses of those
3 members who would like their membership in PEER to remain private could be
4 redacted so as to balance any associational issues with the Court's strong interest in
5 ensuring Defendants' ability to fairly defend their case. Plaintiffs' entire case is
6 premised on the health impacts or illness resulting from PCB exposure, and the
7 proper application of TSCA regardless of EPA's application of the statute and its
8 regulations. Accordingly, it is imperative that Defendants are granted full access to
9 this information.

10 d. PEER'S CONTENTIONS REGARDING RFP NO. 7.

11 This Request concerning PEER's communications with the "Concerned
12 Malibu Cabrillo Teachers" Group is objectionable on attorney-client and First
13 Amendment grounds, as this is the group on whose behalf PEER advocates in this
14 litigation, and the group which sought PEER's assistance as a whistleblower
15 organization regarding PCBs in the Malibu Schools. PEER promised
16 confidentiality in all of its communications with the Concerned Malibu Cabrillo
17 Teachers Group, both as to the membership of the group and the content of the
18 communications. (Dinerstein Decl. ¶¶ 3, 5 & 6 and Ex. 1 thereto.)

19 Requests for these communications between PEER and the Concerned
20 Malibu Cabrillo Teachers Group violate their First Amendment Right of
21 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 *United States v. Garde*, 673 F. Supp. 604, 607 (D.D.C. 1987).

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

15 It is more than understandable that persons who communicate with PEER or
16 receive communications from PEER on this subject would not want these
17 communications disclosed. In fact, given the marginal, if any, relevance to this
18 litigation of the communications sought here, one cannot help but suspect that this
19 discovery is being sought for the purpose of harassing members of the Concerned
20 Malibu Cabrillo Teachers Group.

21 Defendants suggest that names and email addresses of those individuals who
22 would like their membership in PEER to remain private could be redacted.
23 However, while persons who are members of the Concerned Malibu Cabrillo
24 Teachers Group certainly have First Amendment protection against revealing the
25 fact of their membership and their personal contact information, *NAACP v. State of*
26 *Alabama*, 357 U.S. 449 (1958), the First Amendment also protects the
27 confidentiality of the fact that they have communicated with PEER whether or not
28 they are members or supporters of PEER and protects the content of their

1 communications. The Ninth Circuit in *Perry* ordered protection of communications,
2 not only the identities of members, emphasizing that:

3 “The First Amendment privilege, however, has never been limited to
4 the disclosure of identities of rank-and-file members. . . . The existence
5 of a prima facie case turns not on the type of information sought, but on
6 whether disclosure of the information will have a deterrent effect on the
7 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. Moreover, PEER disputes Defendants’

1 claim that “Plaintiffs’ entire case is premised on the health impacts or illness
2 resulting from PCB exposure.” The citizen suit provision under which Plaintiffs
3 proceed provides for restraint of ongoing violations of TSCA, which violations are
4 established solely by the existence and ongoing use of building materials containing
5 50 ppm or more PCBs at the Malibu Schools.

6 Moreover, regarding the attorney-client privilege, there are no
7 communications between PEER and the Concerned Malibu Cabrillo Teachers
8 Group that are not with PEER attorneys, and thus all are privileged. (Dinerstein
9 Decl. ¶6.)

10 Despite the exceedingly broad language of the Request, Defendants state in
11 their portion of the Joint Stipulation that the Request “calls for documents and
12 communications regarding illness or injury allegedly resulting from PCB exposure”
13 and that “[t]he information sought in the above Request relates only to the illness
14 allegedly caused by PCBs and PCB data, [sic] which form the basis for this
15 lawsuit.” (emphasis in original) However, this information about illness caused by
16 PCBs is the same information that Defendants are seeking through their other
17 requests. Defendants do not need all communications between PEER and the
18 Concerned Malibu Cabrillo Teachers Group to obtain information about illness
19 caused by PCBs.

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

21 a. REQUEST FOR PRODUCTION NO. 10.

22 All DOCUMENTS that SUPPORT, REFER, or RELATE to Plaintiffs
23 allegation that Plaintiff is "injured by the ongoing violations of TSCA at the
24 MALIBU SCHOOLS ... ," AS ALLEGED IN PARAGRAPH 8 OF THE FAC.

25 b. RESPONSE TO REQUEST FOR PRODUCTION NO. 10.

26 Plaintiff objects to this Request on the ground that it is vague and ambiguous
27 and unduly burdensome and oppressive. Plaintiff further objects to this Request to
28 the extent that it calls for the production of privileged attorney-client

1 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. Without waiving its objections, Plaintiff will produce the non-privileged
5 documents responsive to this Request as Plaintiff reasonably interprets it. However,
6 to the extent that co-Plaintiff America Unites for Kids produces these same
7 documents, Plaintiff will not duplicate the production

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

9 i. Vagueness, Ambiguity, and Undue Burden and Oppression Are Not Valid
10 Objections to RFP No. 10.

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

21 PEER has not met its burden of demonstrating that discovery of the
22 information sought in this Request should not be allowed, because it has not
23 supported or explained its objections on the basis of the requests being vague,
24 ambiguous, or overbroad. Defendants have requested communications and
25 information regarding illness or injury resulting from exposure to PCBs due to an
26 alleged TSCA violation. Without further explanation, Plaintiff's objection is
27 without merit, and Plaintiff should produce documents in response to this Request.
28

1 ii. Attorney-Client, Attorney Work Product, and Common-Interest
2 Communication Privileges Are Not Valid Objections to RFP No. 10.

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
9 F.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 the
17 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 Documents supporting Plaintiffs’ allegation that there is a TSCA violation at
21 the Malibu Schools, including communications regarding illness or injury allegedly
22 resulting from PCB exposure, are not protected by the attorney-client privilege to
23 the extent that they include correspondences that do not include Plaintiffs’ attorneys.
24 For example, communications among Plaintiffs and teachers, staff, parents of
25 students, and other individuals would not be protected by attorney-client privilege.
26 Furthermore, Plaintiffs have failed to indicate in their responses which
27 communications they believe to be protected by the attorney-client privilege.
28 *Richey*, 632 F.3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to

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). The
8 work product doctrine is a qualified immunity rather than a privilege, and a showing
9 of good cause for the information desired is sufficient to overcome the qualified
10 immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D. Cal.
11 2006); *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1494 (9th Cir.
12 1989). "The party claiming work product immunity has the burden of proving the
13 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 sought in Defendants'
16 Requests. For example, Plaintiffs have not demonstrated how documents
17 supporting Plaintiffs' allegation that there is a TSCA violation at the Malibu
18 Schools, such as communications regarding illness or injury allegedly resulting
19 from PCB exposure, bear any relation to Plaintiffs' efforts in preparation for trial.
20 Furthermore, Defendants have good cause to request the information sought,
21 because such information is essential for preparation of a defense against Plaintiffs'
22 argument that TSCA should be subject to a different interpretation from that
23 advanced in EPA's policy and practice. This necessarily entails a complete
24 knowledge of any underlying injury and its relation to PCB exposure, which can
25 only be discovered through knowledge of any health complaints made to Plaintiff
26 organizations. Plaintiffs have not met the burden of demonstrating the applicability
27 of the work product doctrine, so their objection on this basis is not appropriate.
28 Accordingly, Plaintiffs may not refuse to produce documents in response to

1 Defendants' Requests on the basis of attorney-client privilege.

2 (c) Common Interest Doctrine.

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

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

26 iii. First Amendment Privilege Is Not a Valid Objection to RFP No. 10.

27 Plaintiff objects to RFP No. 10 on the ground that this Request violates the
28 First Amendment rights of association of Plaintiff and its members. A party

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 Cir.
4 2010) (quoting *Brock v. Local 375, Plumbers Int’l Union of Am.*, 860 F.2d 346, 349-
5 50 (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 documents
10 requested would lead to “harassment, membership withdrawal, or discouragement
11 of new members,” or that it would result in other consequences that could “chill”
12 members’ associational rights. The Request for documents supporting Plaintiffs’
13 claim of an alleged TSCA violation calls for documents and communications
14 regarding illness or injury allegedly resulting from PCB exposure. The Request
15 propounded by Defendants is not seeking personal information, does nothing to
16 harass members of Plaintiff organizations, and would not have a deterrent effect on
17 membership. Moreover, the documents requested by Defendants are necessary so
18 that Defendants can defend themselves in this litigation and fairness justifies their
19 production. Defendants will not be afforded a fair discovery if they are precluded
20 from accessing information regarding alleged PCB exposure, which will surely be
21 used against Defendants in trial.

22 Additionally, there would be no “chilling” effect if Plaintiffs responded to
23 Defendants’ RFP, because PEER is publicly vocal about its activities and its
24 membership, listing members of its DC Staff and Board on its website. *See Decl.*
25 *Elliott*, Exs. L, M. In particular, Plaintiff frequently publicizes its activities with
26 regard to the subject matter of this very case on its website. *See Decl. Elliott*, N.
27 The information sought in the above Request relates **only** to the illness allegedly
28 caused by PCBs and PCB data, which form the basis for this lawsuit.

1 The documents and information requested are necessary and relevant to
2 Defendants' preparation for trial, and the names and email addresses of those
3 members who would like their membership in PEER to remain private could be
4 redacted so as to balance any associational issues with the Court's strong interest in
5 ensuring Defendants' ability to fairly defend their case. Plaintiffs' entire case is
6 premised on the health impacts or illness resulting from PCB exposure, and the
7 proper application of TSCA regardless of EPA's application of the statute and its
8 regulations. Accordingly, it is imperative that Defendants are granted full access to
9 this information.

10 d. PEER'S CONTENTIONS REGARDING RFP NO. 10.

11 PEER has agreed to produce non-privileged documents responsive to this
12 Request and has done so. To the extent that it has not already done so, PEER will
13 produce any non-privileged documents responsive to this Request.

14 **5. REQUEST FOR PRODUCTION NO. 19.**

15 a. REQUEST FOR PRODUCTION NO. 19.

16 All DOCUMENTS that SUPPORT, REFER, or RELATE to Plaintiffs
17 allegation that "teachers were threatened with firing if they did not re-occupy rooms
18 in which caulk or wipe samples had tested above regulatory limits," as alleged in
19 paragraph 99 of the FAC.

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

21 Plaintiff objects to this Request on the ground that it is overbroad and vague
22 and ambiguous. Plaintiff further objects to this Request to the extent that it seeks
23 privileged attorney-client communications, work product, common-interest
24 communications or other privileged information. Plaintiff further objects to this
25 Request on the ground that it violates the First Amendment rights of association of
26 Plaintiff and its members and supporters. Without waiving its objections, Plaintiff
27 will produce the non-privileged documents responsive to this Request as it
28 reasonably interprets it. However, to the extent that co-Plaintiff America Unites for

1 Kids produces these same documents, Plaintiff will not duplicate the production.

2 c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 19.

3 i. Vagueness, Ambiguity, and Overbreadth Are Not Valid Objections to RFP
4 No. 19.

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

15 PEER has not met its burden of demonstrating that discovery of the
16 information sought in this Request should not be allowed, because it has not
17 supported or explained its objections on the basis of the requests being vague,
18 ambiguous, or overbroad. Defendants have requested communications and
19 information regarding illness or injury resulting from exposure to PCBs due to an
20 alleged TSCA violation. Without further explanation, Plaintiff's objection is
21 without merit, and Plaintiff should produce documents in response to this Request.

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

24 (a) Attorney-Client Privilege.

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

1 and the privileged nature of the communication. *Id.*; *United States v. Bauer*, 132
2 F.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 the
10 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 supporting Plaintiffs’ allegation that there is a TSCA violation at
14 the Malibu Schools, including communications regarding illness or injury allegedly
15 resulting from PCB exposure, are not protected by the attorney-client privilege to
16 the extent that they include correspondences that do not include Plaintiffs’ attorneys.
17 For example, communications among Plaintiffs and teachers, staff, parents of
18 students, and other individuals would not be protected by attorney-client privilege.
19 Furthermore, Plaintiffs have failed to indicate in their responses which
20 communications they believe to be protected by the attorney-client privilege.
21 *Richey*, 632 F.3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to
22 produce documents in response to Defendants’ Requests on the basis of attorney-
23 client privilege.

24 (b) Attorney Work Product.

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

1 work product doctrine is a qualified immunity rather than a privilege, and a showing
2 of good cause for the information desired is sufficient to overcome the qualified
3 immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D. Cal.
4 2006); *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1494 (9th Cir.
5 1989). “The party claiming work product immunity has the burden of proving the
6 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 sought in Defendants’
9 Requests. For example, Plaintiffs have not demonstrated how documents
10 supporting Plaintiffs’ allegation that there is a TSCA violation at the Malibu
11 Schools, such as communications regarding illness or injury allegedly resulting
12 from PCB exposure, bear any relation to Plaintiffs’ efforts in preparation for trial.
13 Furthermore, Defendants have good cause to request the information sought,
14 because such information is essential for preparation of a defense against Plaintiffs’
15 argument that TSCA should be subject to a different interpretation from that
16 advanced in EPA’s policy and practice. This necessarily entails a complete
17 knowledge of any underlying injury and its relation to PCB exposure, which can
18 only be discovered through knowledge of any health complaints made to Plaintiff
19 organizations. Plaintiffs have not met the burden of demonstrating the applicability
20 of the work product doctrine, so their objection on this basis is not appropriate.
21 Accordingly, Plaintiffs may not refuse to produce documents in response to
22 Defendants’ Requests on the basis of attorney-client privilege.

23 (c) Common Interest Doctrine.

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

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 interest
7 doctrine is not a privilege, but an exception to the rule on waiver where
8 communications are disclosed to third parties. *See Griffith*, 161 F.R.D. at 692. For
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 iii. First Amendment Privilege Is Not a Valid Objection to RFP No. 19.

20 Plaintiff objects to RFP No. 19 on the ground that this Request violates the
21 First Amendment rights of association of Plaintiff and its members. A party
22 objecting on the basis of a First Amendment privilege must satisfy a two-part test.
23 The objecting party must first make a “prima facie showing of arguable first
24 amendment infringement.” *Perry v. Schwarzenegger*, 591 F.3d 1126, 1140 (9th Cir.
25 2010) (*quoting Brock v. Local 375, Plumbers Int’l Union of Am.*, 860 F.2d 346, 349-
26 50 (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 of new members, or (2) other consequences which objectively suggest an impact on,

1 or ‘chilling’ of, the members’ associational rights.” *Brock*, 860 F.2d at 350.

2 Here, Plaintiff has made no such showing that disclosure of the documents
3 requested would lead to “harassment, membership withdrawal, or discouragement
4 of new members,” or that it would result in other consequences that could “chill”
5 members’ associational rights. The Request for documents supporting Plaintiffs’
6 claim of an alleged TSCA violation calls for documents and communications
7 regarding illness or injury allegedly resulting from PCB exposure. The Request
8 propounded by Defendants is not seeking personal information, does nothing to
9 harass members of Plaintiff organizations, and would not have a deterrent effect on
10 membership. Moreover, the documents requested by Defendants are necessary so
11 that Defendants can defend themselves in this litigation and fairness justifies their
12 production. Defendants will not be afforded a fair discovery if they are precluded
13 from accessing information regarding alleged PCB exposure, which will surely be
14 used against Defendants in trial.

15 Additionally, there would be no “chilling” effect if Plaintiffs responded to
16 Defendants’ RFP, because PEER is publicly vocal about its activities and its
17 membership, listing members of its DC Staff and Board on its website. *See Decl.*
18 *Elliott, Exs. L, M.* In particular, Plaintiff frequently publicizes its activities with
19 regard to the subject matter of this very case on its website. *See Decl. Elliott, N.*
20 The information sought in the above Request relates **only** to the illness allegedly
21 caused by PCBs and PCB data, which form the basis for this lawsuit.

22 The documents and information requested are necessary and relevant to
23 Defendants’ preparation for trial, and the names and email addresses of those
24 members who would like their membership in PEER to remain private could be
25 redacted so as to balance any associational issues with the Court’s strong interest in
26 ensuring Defendants’ ability to fairly defend their case. Plaintiffs’ entire case is
27 premised on the health impacts or illness resulting from PCB exposure, and the
28 proper application of TSCA regardless of EPA’s application of the statute and its

1 regulations. Accordingly, it is imperative that Defendants are granted full access to
2 this information.

3 d. PEER'S CONTENTIONS REGARDING RFP NO. 19.

4 PEER has agreed to produce non-privileged documents responsive to this
5 Request and has done so. To the extent that it has not already done so, PEER will
6 produce any non-privileged documents responsive to this Request.

7 **6. REQUEST FOR PRODUCTION NO. 31.**

8 a. REQUEST FOR PRODUCTION NO. 31.

9 All COMMUNICATIONS between AMERICA UNITES and PEER
10 concerning PCBs at the Malibu Schools.

11 b. RESPONSE TO REQUEST FOR PRODUCTION NO. 31.

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 and is overbroad and unduly burdensome and oppressive. Plaintiff further
15 objects to this Request on the ground that it is vague and ambiguous, given that
16 Defendants' response to Plaintiffs' discovery requests define PCBs as "PCBs in
17 caulk or other building materials at the MALIBU SCHOOLS known to Defendants
18 to contain PCBs at concentrations of 50 parts per million ('ppm') or greater."

19 Plaintiff further objects to this Request to the extent that it calls for the production
20 of 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. 31.

25 i. Relevancy Is Not a Valid Objection to RFP No. 31.

26 In numerous instances, Plaintiffs' First Amended Complaint ("FAC") alleges
27 that PCBs have resulted in negative health impacts to teachers and students at the
28 Malibu Schools, or in general. *See* Decl. Elliott, Ex. E; ¶¶ 7-8, 13, 16, 29, 41-48,

1 51, 54-55, 67, and 108.

2 In light of these allegations, Defendants served multiple Requests, including
3 this RFP, seeking delivery of the information upon which Plaintiffs intend to rely to
4 support their claims regarding the health effects allegedly caused by PCBs. An
5 example of the materials sought in this Request is communications regarding health
6 complaints by teachers or parents with students in classrooms Plaintiffs believe to
7 contain PCBs. Such communications also include Jennifer DeNicola's task force
8 correspondence and any PCB-related correspondence to the media.

9 Plaintiffs have produced an inadequate, scant sampling of documents, or
10 produced nothing at all after asserting a boilerplate relevancy objection. In response
11 to the Request at issue, Plaintiffs have taken the specious position that the
12 communications requested are not relevant. Relevancy is not a valid objection to
13 this Request. Under Rule 26(b)(1), 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
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.

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

20 The information requested is relevant to Plaintiffs' TSCA claim and to
21 Defendants' preparation of its defense against this claim. Communications
22 documenting health impacts or illness resulting from an alleged TSCA violation are
23 relevant to Plaintiffs' argument regarding the proper application of TSCA regardless
24 of EPA's application of the statute and its regulations. Defendants are entitled to
25 discovery of information and witnesses that might illuminate any causal links
26 between exposure to PCBs resulting from an alleged TSCA violation and certain
27 health symptoms or illness experienced by individuals at the Malibu Schools.
28 Challenging the causal link between Plaintiffs' claim that there are PCB

1 exceedances and actual injury to Plaintiffs or their members is important to
2 Defendants' preparation of a defense in this litigation on the interpretation of TSCA.

3 Additionally, the issues at stake are significant, because Defendant could be
4 held liable for millions of dollars of unnecessary remediation and renovation if they
5 are denied access to discoverable information regarding a link between PCB
6 exposure resulting from an alleged TSCA violation and health effects experienced
7 by individuals at the Malibu Schools. Plaintiffs are the sole source of this
8 information and there is no burden on Plaintiffs in producing the requested
9 information.

10 For all of the foregoing reasons, Plaintiffs should be required to produce the
11 communications sought in this Request.

12 ii. Vagueness, Ambiguity, Overbreadth, and Undue Burden and Oppression Are
13 Not Valid Objections to RFP No. 31.

14 Plaintiff's objection that Requests for Production No. 31 is vague, ambiguous,
15 and unduly burdensome and oppressive is unfounded. "The party who resists
16 discovery has the burden to show discovery should not be allowed, and has the
17 burden of clarifying, explaining, and supporting its objections." *Bible v. Rio Props.,*
18 *Inc.*, 246 F. R. D. 614 (C.D. Cal. 2007) (citing *Blankenship v. Hearst Corp.*, 519
19 F.2d 418, 429 (9th Cir. 1975) and *Keith H. v. Long Beach Unified Sch. Dist.*, 228
20 F.R.D. 652, 655-56 (C.D. Cal. 2005)). There is no merit to "general or boilerplate
21 objections such as 'overly broad' [or] 'vague and ambiguous.'" *Bible*, 246 F. R. D.
22 at 619; *A. Farber & Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal.
23 2006).

24 PEER has not met its burden of demonstrating that discovery of the
25 information sought in this Request should not be allowed, because it has not
26 supported or explained its objections on the basis of the requests being vague,
27 ambiguous, or overbroad. Defendants have requested communications and
28 information regarding illness or injury resulting from exposure to PCBs due to an

1 alleged TSCA violation. Without further explanation, Plaintiff's objection is
2 without merit, and Plaintiff should produce 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. 31.

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
11 F.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 the
19 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 supporting Plaintiffs' allegation that there is a TSCA violation at
23 the Malibu Schools, including communications regarding illness or injury allegedly
24 resulting from PCB exposure, are not protected by the attorney-client privilege to
25 the extent that they include correspondences that do not include Plaintiffs' attorneys.
26 For example, communications among Plaintiffs and teachers, staff, parents of
27 students, and other individuals would not be protected by attorney-client privilege.
28 Furthermore, Plaintiffs have failed to indicate in their responses which

1 communications they believe to be protected by the attorney-client privilege.
2 *Richey*, 632 F.3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to
3 produce documents in response to Defendants’ Requests on the basis of attorney-
4 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). The
10 work product doctrine is a qualified immunity rather than a privilege, and a showing
11 of good cause for the information desired is sufficient to overcome the qualified
12 immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D. Cal.
13 2006); *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1494 (9th Cir.
14 1989). “The party claiming work product immunity has the burden of proving the
15 applicability of the doctrine.” *A. Farbers & Ptnrs., Inc.*, 234 F.R.D. at 192.

16 Plaintiffs cannot claim work product immunity because they have made no
17 showing that this protection applies to any of the information sought in Defendants’
18 Requests. For example, Plaintiffs have not demonstrated how documents
19 supporting Plaintiffs’ allegation that there is a TSCA violation at the Malibu
20 Schools, such as communications regarding illness or injury allegedly resulting
21 from PCB exposure, bear any relation to Plaintiffs’ efforts in preparation for trial.
22 Furthermore, Defendants have good cause to request the information sought,
23 because such information is essential for preparation of a defense against Plaintiffs’
24 argument that TSCA should be subject to a different interpretation from that
25 advanced in EPA’s policy and practice. This necessarily entails a complete
26 knowledge of any underlying injury and its relation to PCB exposure, which can
27 only be discovered through knowledge of any health complaints made to Plaintiff
28 organizations. Plaintiffs have not met the burden of demonstrating the applicability

1 of the work product doctrine, so their objection on this basis is not appropriate.
2 Accordingly, Plaintiffs may not refuse to produce documents in response to
3 Defendants' Requests on the basis of attorney-client privilege.

4 (c) Common Interest Doctrine.

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

21 As the common interest doctrine applies only to those materials protected by
22 the attorney-client privilege with regard to America Unites and PEER, the parties
23 with a common legal interest in this case, not all communications between America
24 Unites and PEER are protected. Defendants request that Plaintiff produce
25 documents in response to this request to the extent that Plaintiff possesses
26 responsive materials that are not protected as either Plaintiffs' attorney-client
27 communications.
28

1 iv. First Amendment Privilege Is Not a Valid Objection to RFP No. 31.

2 Plaintiff objects to RFP No. 31 on the ground that this Request violates the
3 First Amendment rights of association of Plaintiff and its members. A party
4 objecting on the basis of a First Amendment privilege must satisfy a two-part test.
5 The objecting party must first make a “prima facie showing of arguable first
6 amendment infringement.” *Perry v. Schwarzenegger*, 591 F.3d 1126, 1140 (9th Cir.
7 2010) (quoting *Brock v. Local 375, Plumbers Int’l Union of Am.*, 860 F.2d 346, 349-
8 50 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is
9 enforced, there will be “(1) harassment, membership withdrawal, or discouragement
10 of new members, or (2) other consequences which objectively suggest an impact on,
11 or ‘chilling’ of, the members’ associational rights.” *Brock*, 860 F.2d at 350.

12 Here, Plaintiff has made no such showing that disclosure of the documents
13 requested would lead to “harassment, membership withdrawal, or discouragement
14 of new members,” or that it would result in other consequences that could “chill”
15 members’ associational rights. The Request for documents supporting Plaintiffs’
16 claim of an alleged TSCA violation calls for documents and communications
17 regarding illness or injury allegedly resulting from PCB exposure. The Request
18 propounded by Defendants is not seeking personal information, does nothing to
19 harass members of Plaintiff organizations, and would not have a deterrent effect on
20 membership. Moreover, the documents requested by Defendants are necessary so
21 that Defendants can defend themselves in this litigation and fairness justifies their
22 production. Defendants will not be afforded a fair discovery if they are precluded
23 from accessing information regarding alleged PCB exposure, which will surely be
24 used against Defendants in trial.

25 Additionally, there would be no “chilling” effect if Plaintiffs responded to
26 Defendants’ RFP, because PEER is publicly vocal about its activities and its
27 membership, listing members of its DC Staff and Board on its website. *See Decl.*
28 *Elliott, Exs. L, M.* In particular, Plaintiff frequently publicizes its activities with

1 regard to the subject matter of this very case on its website. *See* Decl. Elliott, N.
2 The information sought in the above Request relates **only** to the illness allegedly
3 caused by PCBs and PCB data, which form the basis for this lawsuit.

4 The documents and information requested are necessary and relevant to
5 Defendants' preparation for trial, and the names and email addresses of those
6 members who would like their membership in PEER to remain private could be
7 redacted so as to balance any associational issues with the Court's strong interest in
8 ensuring Defendants' ability to fairly defend their case. Plaintiffs' entire case is
9 premised on the health impacts or illness resulting from PCB exposure, and the
10 proper application of TSCA regardless of EPA's application of the statute and its
11 regulations. Accordingly, it is imperative that Defendants are granted full access to
12 this information.

13 d. PEER'S CONTENTIONS REGARDING RFP NO. 31.

14 The Request is objectionable for a number of reasons.

15 First, the Request is exceedingly overbroad. The Request seeks "all
16 communications between America Unites and PEER regarding PCBs at the Malibu
17 Schools." AU and PEER are co-plaintiffs in the case and share counsel. Literally
18 interpreted, the Request would require Plaintiffs to identify every written
19 communication between the two entities regarding this matter, including matters
20 having nothing to do with the subject matter of the case, e.g., litigation and non-
21 litigation strategy.

22 Despite the exceedingly broad language of the Request, Defendants state in
23 their portion of the Joint Stipulation that the Request "calls for documents and
24 communications regarding illness or injury allegedly resulting from PCB exposure"
25 and that "[t]he information sought in the above Request relates only to the illness
26 allegedly caused by PCBs and PCB data, which form the basis for this lawsuit."
27 (emphasis in original) However, this information about illness caused by PCBs is
28 the same information that Defendants are seeking through their other requests.

1 Defendants do not need all communications between AU and PEER to obtain
2 information about illness caused by PCBs.

3 Second, the request seeks privileged information. All communications
4 between PEER and AU regarding PCBs at the Malibu Schools would involve PEER
5 counsel, as no one else at PEER communicated with AU concerning PCBs at the
6 Malibu Schools in the United States. (Dinerstein Decl. ¶6.) Therefore, all such
7 communications sought in this request would be privileged.

8 Furthermore, requests for communications between PEER and AU violate
9 their First Amendment Right of Association.

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

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

17 The same would hold for PEER and AU, which has thus made a “prima facie
18 showing of arguable first amendment infringement.” *Perry v. Schwarzenegger*, 591
19 F.3d 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695
20 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of communications
21 between AU and PEER is likely to result in discouraging such communications
22 because PEER and AU are unable to protect their confidentiality, thereby severely
23 hampering their organizational missions. (Dinerstein Decl. ¶¶4-12 and Ex. 1
24 thereto.) It could also result in harassment of individuals who are parties to these
25 communications. Defendants have already filed a false criminal complaint against
26 the President of America Unites, Ms. DeNicola, and her husband, seeking to subject
27 them to felony charges punishable by fines and imprisonment, for allegedly taking
28 caulk samples. (Dinerstein Decl. ¶12.) It is difficult to imagine a more “chilling”

1 action against those who advocate for PCB testing and remediation at the Malibu
2 Schools.

3 It is more than understandable that persons at AU or PEER who have
4 communicated on this subject would not want their communications disclosed. In
5 fact, given the marginal, if any, relevance to this litigation of the communications
6 sought here, one cannot help but suspect that this discovery is being sought for the
7 purpose of harassing people at AU or PEER who have communicated about PCBs at
8 the Malibu Schools.

9 Defendants suggest that names and email addresses of those individuals who
10 would like their membership in PEER to remain private could be redacted.
11 However, while persons associated with PEER who communicate with AU (and
12 vice versa) certainly have First Amendment protection against revealing the fact of
13 their membership and their personal contact information, *NAACP v. State of*
14 *Alabama*, 357 U.S. 449 (1958), the First Amendment also protects the
15 confidentiality of the fact that they have communicated with PEER or AU, whether
16 or not they are members or supporters of PEER or AU, and protects the content of
17 their communications. The Ninth Circuit in *Perry* ordered protection of
18 communications, not only the identities of members, emphasizing that:

19 “The First Amendment privilege, however, has never been limited to
20 the disclosure of identities of rank-and-file members. ... The existence
21 of a prima facie case turns not on the type of information sought, but on
22 whether disclosure of the information will have a deterrent effect on the
23 exercise of protected activities.”

24 591 F.3d at 1162 (citations omitted).

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

28

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

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

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

15 Here, Defendants cannot even show that this discovery meets the relevance
16 requirements of Rule 26, much less the more demanding standard of relevance when
17 First Amendment interests are implicated.

18 **7. REQUEST FOR PRODUCTION NO. 32.**

19 a. **REQUEST FOR PRODUCTION NO. 32.**

20 All COMMUNICATIONS between PEER, any teachers, and/or school staff
21 at the MALIBU SCHOOLS concerning PCBs.

22 b. **RESPONSE TO REQUEST FOR PRODUCTION NO. 32.**

23 Plaintiff objects to this Request on the ground that it is overbroad. Plaintiff
24 further objects to this Request on the ground that it is vague and ambiguous, given
25 that Defendants' response to Plaintiffs' discovery requests define PCBs as "PCBs in
26 caulk or other building materials at the MALIBU SCHOOLS known to Defendants
27 to contain PCBs at concentrations of 50 parts per million ('ppm') or greater."

28 Plaintiff further objects to this Request to the extent that it calls for the production

1 of 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. 32.

6 i. Vagueness, Ambiguity, and Overbreadth Are Not Valid Objections to RFP
7 No. 32.

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

17 PEER has not met its burden of demonstrating that discovery of the
18 information sought in this Request should not be allowed, because it has not
19 supported or explained its objections on the basis of the requests being vague,
20 ambiguous, or overbroad. Defendants have requested communications and
21 information regarding illness or injury resulting from exposure to PCBs due to an
22 alleged TSCA violation. Without further explanation, Plaintiff's objection is
23 without merit, and Plaintiff should produce documents in response to this Request.

24 ii. Attorney-Client, Attorney Work Product, and Common-Interest
25 Communication Privileges Are Not Valid Objections to RFP No. 32.

26 (a) Attorney-Client Privilege.

27 "The attorney-client privilege protects confidential communications between
28 attorneys and clients, which are made for the purpose of giving legal advice."

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

15 Documents supporting Plaintiffs’ allegation that there is a TSCA violation at
16 the Malibu Schools, including communications regarding illness or injury allegedly
17 resulting from PCB exposure, are not protected by the attorney-client privilege to
18 the extent that they include correspondences that do not include Plaintiffs’ attorneys.
19 For example, communications among Plaintiffs and teachers, staff, parents of
20 students, and other individuals would not be protected by attorney-client privilege.
21 Furthermore, Plaintiffs have failed to indicate in their responses which
22 communications they believe to be protected by the attorney-client privilege.
23 *Richey*, 632 F.3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to
24 produce documents in response to Defendants’ Requests on the basis of attorney-
25 client privilege.

26 (b) Attorney Work Product.

27 The work product doctrine prohibits discovery of documents and other
28 materials “prepared by a party or his representative in anticipation of litigation.”

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

9 Plaintiffs cannot claim work product immunity because they have made no
10 showing that this protection applies to any of the information sought in Defendants’
11 Requests. For example, Plaintiffs have not demonstrated how documents
12 supporting Plaintiffs’ allegation that there is a TSCA violation at the Malibu
13 Schools, such as communications regarding illness or injury allegedly resulting
14 from PCB exposure, bear any relation to Plaintiffs’ efforts in preparation for trial.
15 Furthermore, Defendants have good cause to request the information sought,
16 because such information is essential for preparation of a defense against Plaintiffs’
17 argument that TSCA should be subject to a different interpretation from that
18 advanced in EPA’s policy and practice. This necessarily entails a complete
19 knowledge of any underlying injury and its relation to PCB exposure, which can
20 only be discovered through knowledge of any health complaints made to Plaintiff
21 organizations. Plaintiffs have not met the burden of demonstrating the applicability
22 of the work product doctrine, so their objection on this basis is not appropriate.
23 Accordingly, Plaintiffs may not refuse to produce documents in response to
24 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,*
28 *Research & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir. 1981). There is a rare exception

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

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

21 iii. First Amendment Privilege Is Not a Valid Objection to RFP No. 32.

22 Plaintiff objects to RFP No. 32 on the ground that this Request violates the
23 First Amendment rights of association of Plaintiff and its members. A party
24 objecting on the basis of a First Amendment privilege must satisfy a two-part test.
25 The objecting party must first make a “prima facie showing of arguable first
26 amendment infringement.” *Perry v. Schwarzenegger*, 591 F.3d 1126, 1140 (9th Cir.
27 2010) (quoting *Brock v. Local 375, Plumbers Int’l Union of Am.*, 860 F.2d 346, 349-
28 50 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is

1 enforced, there will be “(1) harassment, membership withdrawal, or discouragement
2 of new members, or (2) other consequences which objectively suggest an impact on,
3 or ‘chilling’ of, the members’ associational rights.” *Brock*, 860 F.2d at 350.

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

17 Additionally, there would be no “chilling” effect if Plaintiffs responded to
18 Defendants’ RFP, because PEER is publicly vocal about its activities and its
19 membership, listing members of its DC Staff and Board on its website. *See Decl.*
20 *Elliott*, Exs. L, M. In particular, Plaintiff frequently publicizes its activities with
21 regard to the subject matter of this very case on its website. *See Decl. Elliott*, N.
22 The information sought in the above Request relates **only** to the illness allegedly
23 caused by PCBs and PCB data, which form the basis for 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
28 ensuring Defendants’ ability to fairly defend their case. Plaintiffs’ entire case is

1 premised on the health impacts or illness resulting from PCB exposure, and the
2 proper application of TSCA regardless of EPA's application of the statute and its
3 regulations. Accordingly, it is imperative that Defendants are granted full access to
4 this information.

5 d. PEER'S CONTENTIONS REGARDING RFP NO. 32.

6 The Request is objectionable for a number of reasons.

7 First, the Request is exceedingly overbroad. The Request seeks "all
8 communications between PEER, any teachers, and/or school staff at the Malibu
9 Schools concerning PCBs." This request could include many communications
10 which are not relevant to the issues in this case. In addition, Defendants themselves
11 have defined "PCBs" to mean only "PCBs in caulk or other building materials at the
12 MALIBU SCHOOLS known to Defendants to contain PCBs at concentrations of 50
13 parts per million ('ppm') or greater," making it difficult or impossible for Plaintiffs'
14 to determine which communications concerning PCBs more broadly are actually
15 responsive to this request in accordance with Defendants' definition. (Avrith Decl.
16 ¶2 and Ex. A thereto.)

17 Despite the exceedingly broad language of the Request, Defendants state in
18 their portion of the Joint Stipulation that the Request "calls for documents and
19 communications regarding illness or injury allegedly resulting from PCB exposure"
20 and that "[t]he information sought in the above Request relates only to the illness
21 allegedly caused by PCBs and PCB data, [sic] which form the basis for this
22 lawsuit." (emphasis in original) However, this information about illness caused by
23 PCBs is the same information that Defendants are seeking through their other
24 requests. Defendants do not need all communications between PEER and all
25 teachers and school staff at the Malibu Schools to obtain information about illness
26 caused by PCBs.

27 Second, the request seeks information protected by the attorney-client
28 privilege. All communications between PEER and teachers or staff at the Malibu

1 Schools regarding PCBs at the Malibu Schools would involve PEER counsel, as no
2 one else at PEER communicated with teachers or staff at the Malibu Schools
3 concerning PCBs at the Malibu Schools. (Dinerstein Decl. ¶6.) PEER considers all
4 persons who contact PEER to be seeking legal advice or representation and holds
5 their communications in confidence. (Dinerstein Decl. ¶6 and Ex. 1 thereto.)
6 Therefore, all such communications sought in this request would be privileged.

7 Furthermore, requests for communications between PEER and teachers or
8 staff at the Malibu Schools violate their First Amendment Right of Association.

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

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

16 The same would hold for PEER, which has thus made a “prima facie showing
17 of arguable first amendment infringement.” *Perry v. Schwarzenegger*, 591 F.3d
18 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d
19 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of communications between
20 PEER and teachers or staff at the Malibu Schools is likely to result in discouraging
21 such communications because PEER is unable to protect their confidentiality,
22 thereby severely hampering its organizational mission. It could also result in
23 harassment of individuals who are parties to these communications. Defendants
24 have already filed a false criminal complaint against the President of America
25 Unites, Ms. DeNicola, and her husband, seeking to subject them to felony charges
26 punishable by fines and imprisonment, for allegedly taking caulk samples.
27 (Dinerstein Decl. ¶¶ 4-12.) It is difficult to imagine a more “chilling” action against
28 those who advocate for PCB testing and remediation at the Malibu Schools.

1 It is more than understandable that teachers and staff who have
2 communicated with PEER on this subject would not want their communications
3 disclosed. Teachers and staff are particularly vulnerable to retaliation because they
4 are employed by Defendants. PEER could not perform its mission as a service
5 organization for employees with environmental problems if it could not protect their
6 identities and the content of their communications. In fact, given the marginal, if
7 any, relevance to this litigation of the communications sought here, one cannot help
8 but suspect that this discovery is being sought for the purpose of harassing teachers
9 and staff who have communicated with PEER about PCBs at the Malibu Schools.

10 Defendants suggest that names and email addresses of those individuals who
11 would like their membership in PEER to remain private could be redacted.
12 However, while teachers and staff at the Malibu Schools who communicate with
13 PEER certainly have First Amendment protection against revealing the fact of their
14 membership and their personal contact information, *NAACP v. State of Alabama*,
15 357 U.. 449 (1958), the First Amendment also protects the confidentiality of the fact
16 that they have communicated with PEER, whether or not they are members or
17 supporters of PEER or AU, and protects the content of their communications. The
18 Ninth Circuit in *Perry* ordered protection of communications, not only the identities
19 of members, emphasizing that:

20 “The First Amendment privilege, however, has never been limited to
21 the disclosure of identities of rank-and-file members. ... The existence
22 of a prima facie case turns not on the type of information sought, but on
23 whether disclosure of the information will have a deterrent effect on the
24 exercise of protected activities.”

25 591 F.3d at 1162 (citations omitted).

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

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

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

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

15 Here, Defendants cannot even show that this discovery meets the relevance
16 requirements of Rule 26, much less the more demanding standard of relevance when
17 First Amendment interests are implicated. Moreover, PEER disputes Defendants’
18 claim that “Plaintiffs’ entire case is premised on the health impacts or illness
19 resulting from PCB exposure.” The citizen suit provision under which Plaintiffs
20 proceed provides for restraint of ongoing violations of TSCA, which violations are
21 established solely by the existence and ongoing use of building materials containing
22 50 ppm or more PCBs at the Malibu Schools.

23 **8. REQUEST FOR PRODUCTION NO. 34.**

24 a. REQUEST FOR PRODUCTION NO. 34.

25 All COMMUNICATIONS between PEER and any parents of students at the
26 MALIBU SCHOOLS concerning PCBs.

27 b. RESPONSE TO REQUEST FOR PRODUCTION NO. 34.

28 Plaintiff objects to this Request on the ground that it is overbroad and unduly

1 burdensome and oppressive. Plaintiff further objects to this Request on the ground
2 that it is vague and ambiguous, given that Defendants' response to Plaintiffs'
3 discovery requests define PCBs as "PCBs in caulk or other building materials at the
4 MALIBU SCHOOLS known to Defendants to contain PCBs at concentrations of 50
5 parts per million ('ppm') or greater." Plaintiff further objects to this Request to the
6 extent that it calls for the production of privileged attorney-client communications,
7 work product, common-interest communications or other privileged information.
8 Plaintiff further objects to this Request on the ground that it violates the First
9 Amendment rights of association of Plaintiff and its members and supporters.

10 c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 34.

11 i. Vagueness, Ambiguity, Overbreadth, and Undue Burden and Oppression Are
12 Not Valid Objections to RFP No. 34.

13 Plaintiff's objection that Requests for Production No. 34 is vague, ambiguous,
14 and unduly burdensome and oppressive is unfounded. "The party who resists
15 discovery has the burden to show discovery should not be allowed, and has the
16 burden of clarifying, explaining, and supporting its objections." *Bible v. Rio Props.,*
17 *Inc.*, 246 F. R. D. 614 (C.D. Cal. 2007) (citing *Blankenship v. Hearst Corp.*, 519
18 F.2d 418, 429 (9th Cir. 1975) and *Keith H. v. Long Beach Unified Sch. Dist.*, 228
19 F.R.D. 652, 655-56 (C.D. Cal. 2005)). There is no merit to "general or boilerplate
20 objections such as 'overly broad' [or] 'vague and ambiguous.'" *Bible*, 246 F. R. D.
21 at 619; *A. Farber & Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal.
22 2006).

23 PEER has not met its burden of demonstrating that discovery of the
24 information sought in this Request should not be allowed, because it has not
25 supported or explained its objections on the basis of the requests being vague,
26 ambiguous, or overbroad. Defendants have requested communications and
27 information regarding illness or injury resulting from exposure to PCBs due to an
28 alleged TSCA violation. Without further explanation, Plaintiff's objection is

1 without merit, and Plaintiff should produce documents in response to this Request.

2 ii. Attorney-Client, Attorney Work Product, and Common-Interest
3 Communication Privileges Are Not Valid Objections to RFP No. 34.

4 (a) Attorney-Client Privilege.

5 “The attorney-client privilege protects confidential communications between
6 attorneys and clients, which are made for the purpose of giving legal advice.”

7 *United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011). The party asserting this
8 privilege bears the burden of showing that there is an attorney-client relationship

9 and the privileged nature of the communication. *Id.*; *United States v. Bauer*, 132
10 F.3d 504, 507 (9th Cir. 1997). There is an attorney-client privilege where: “(1) []

11 legal advice of any kind is sought (2) from a professional legal advisor in his
12 capacity as such, (3) the communications relating to that purpose, (4) made in

13 confidence (5) by the client, (6) are at his instance permanently protected (7) from
14 disclosure by himself or by the legal advisor, (8) unless the protection be waved.”

15 *Id.* (quoting *United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010)). The
16 privilege is waived when privileged communications are disclosed. *Weil v.*

17 *Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir. 1981). While the
18 privilege may extend to those communications with third parties assisting the

19 attorney in legal advice, it does not extend where the advice sought is not legal
20 advice. *Id.*

21 Documents supporting Plaintiffs’ allegation that there is a TSCA violation at
22 the Malibu Schools, including communications regarding illness or injury allegedly
23 resulting from PCB exposure, are not protected by the attorney-client privilege to
24 the extent that they include correspondences that do not include Plaintiffs’ attorneys.

25 For example, communications among Plaintiffs and teachers, staff, parents of
26 students, and other individuals would not be protected by attorney-client privilege.

27 Furthermore, Plaintiffs have failed to indicate in their responses which
28 communications they believe to be protected by the attorney-client privilege.

1 *Richey*, 632 F.3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to
2 produce documents in response to Defendants’ Requests on the basis of attorney-
3 client privilege.

4 (b) Attorney Work Product.

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

15 Plaintiffs cannot claim work product immunity because they have made no
16 showing that this protection applies to any of the information sought in Defendants’
17 Requests. For example, Plaintiffs have not demonstrated how documents
18 supporting Plaintiffs’ allegation that there is a TSCA violation at the Malibu
19 Schools, such as communications regarding illness or injury allegedly resulting
20 from PCB exposure, bear any relation to Plaintiffs’ efforts in preparation for trial.
21 Furthermore, Defendants have good cause to request the information sought,
22 because such information is essential for preparation of a defense against Plaintiffs’
23 argument that TSCA should be subject to a different interpretation from that
24 advanced in EPA’s policy and practice. This necessarily entails a complete
25 knowledge of any underlying injury and its relation to PCB exposure, which can
26 only be discovered through knowledge of any health complaints made to Plaintiff
27 organizations. Plaintiffs have not met the burden of demonstrating the applicability
28 of the work product doctrine, so their objection on this basis is not appropriate.

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 interest
15 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.

27 iii. First Amendment Privilege Is Not a Valid Objection to RFP No. 34.

28 Plaintiff objects to RFP No. 34 on the ground that this Request violates the

1 First Amendment rights of association of Plaintiff and its members. A party
2 objecting on the basis of a First Amendment privilege must satisfy a two-part test.
3 The objecting party must first make a “prima facie showing of arguable first
4 amendment infringement.” *Perry v. Schwarzenegger*, 591 F.3d 1126, 1140 (9th Cir.
5 2010) (quoting *Brock v. Local 375, Plumbers Int’l Union of Am.*, 860 F.2d 346, 349-
6 50 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is
7 enforced, there will be “(1) harassment, membership withdrawal, or discouragement
8 of new members, or (2) other consequences which objectively suggest an impact on,
9 or ‘chilling’ of, the members’ associational rights.” *Brock*, 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 supporting Plaintiffs’
14 claim of an alleged TSCA violation calls for documents and communications
15 regarding illness or injury allegedly resulting from PCB exposure. The Request
16 propounded by Defendants is not seeking personal information, does nothing to
17 harass members of Plaintiff organizations, and would not have a deterrent effect on
18 membership. Moreover, the documents requested by Defendants are necessary so
19 that Defendants can defend themselves in this litigation and fairness justifies their
20 production. Defendants will not be afforded a fair discovery if they are precluded
21 from accessing information regarding alleged PCB exposure, which will surely be
22 used against Defendants in trial.

23 Additionally, there would be no “chilling” effect if Plaintiffs responded to
24 Defendants’ RFP, because PEER is publicly vocal about its activities and its
25 membership, listing members of its DC Staff and Board on its website. *See Decl.*
26 *Elliott*, Exs. L, M. In particular, Plaintiff frequently publicizes its activities with
27 regard to the subject matter of this very case on its website. *See Decl. Elliott*, N.
28 The information sought in the above Request relates **only** to the illness allegedly

1 caused by PCBs and PCB data, which form the basis for this lawsuit.

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 PEER to remain private could be
5 redacted so as to balance any associational issues with the Court's strong interest in
6 ensuring Defendants' ability to fairly defend their case. Plaintiffs' entire case is
7 premised on the health impacts or illness resulting from PCB exposure, and the
8 proper application of TSCA regardless of EPA's application of the statute and its
9 regulations. Accordingly, it is imperative that Defendants are granted full access to
10 this information.

11 d. PEER'S CONTENTIONS REGARDING RFP NO. 34.

12 The Request is objectionable for a number of reasons.

13 First, the Request is exceedingly overbroad. The Request seeks "all
14 communications between PEER and any parents of students at the Malibu Schools
15 concerning PCBs." This request could include many communications which are not
16 relevant to the issues in this case. In addition, Defendants themselves have defined
17 "PCBs" to mean only "PCBs in caulk or other building materials at the MALIBU
18 SCHOOLS known to Defendants to contain PCBs at concentrations of 50 parts per
19 million ('ppm') or greater," making it difficult or impossible for Plaintiffs' to
20 determine which communications concerning PCBs more broadly are actually
21 responsive to this request in accordance with Defendants' definition. (Avrith Decl.
22 ¶2 and Ex. A thereto.)

23 Despite the exceedingly broad language of the Request, Defendants state in
24 their portion of the Joint Stipulation that the Request "calls for documents and
25 communications regarding illness or injury allegedly resulting from PCB exposure"
26 and that "[t]he information sought in the above Request relates only to the illness
27 allegedly caused by PCBs and PCB data, [sic] which form the basis for this
28 lawsuit." (emphasis in original) However, this information about illness caused by

1 PCBs is the same information that Defendants are seeking through their other
2 requests. Defendants do not need all communications between PEER and any
3 parents of students at the Malibu Schools to obtain information about illness caused
4 by PCBs.

5 Second, the request seeks information protected by the attorney-client
6 privilege. All communications between PEER and any parents of students at the
7 Malibu Schools regarding PCBs at the Malibu Schools would involve PEER
8 counsel, as no one else at PEER communicated with parents at the Malibu Schools
9 concerning PCBs at the Malibu Schools. (Dinerstein Decl. ¶6.) PEER considers all
10 persons who contact PEER to be seeking legal advice or representation and holds
11 their communications in confidence. Therefore, all such communications sought in
12 this request would be privileged. (Dinerstein Decl. ¶6 and Ex. 1 thereto.)

13 Furthermore, requests for communications between PEER and any parents of
14 students at the Malibu Schools violate their First Amendment Right of Association.

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

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

22 The same would hold for PEER, which has thus made a “prima facie showing
23 of arguable first amendment infringement.” *Perry v. Schwarzenegger*, 591 F.3d
24 1126, 1140 (9th Cir. 2010) (quoting *United States v. Trader's State Bank*, 695 F.2d
25 1132, 1133 (9th Cir. 1983) (per curiam)). Disclosure of communications between
26 PEER and parents of students at the Malibu Schools is likely to result in
27 discouraging such communications because PEER is unable to protect their
28 confidentiality, thereby severely hampering its organizational mission. It could also

1 result in harassment of individuals who are parties to these communications.
2 Defendants have already filed a false criminal complaint against the President of
3 America Unites, Ms. DeNicola, and her husband, both parents at the Malibu
4 Schools, seeking to subject them to felony charges punishable by fines and
5 imprisonment, for allegedly taking caulk samples. (Dinerstein Decl. ¶¶ 4-12.) It is
6 difficult to imagine a more “chilling” action against those who advocate for PCB
7 testing and remediation at the Malibu Schools.

8 It is more than understandable that parents who have communicated with
9 PEER on this subject would not want their communications disclosed. In fact,
10 given the marginal, if any, relevance to this litigation of the communications sought
11 here, one cannot help but suspect that this discovery is being sought for the purpose
12 of harassing parents who have communicated with PEER about PCBs at the Malibu
13 Schools.

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

24 “The First Amendment privilege, however, has never been limited to
25 the disclosure of identities of rank-and-file members. ... The existence
26 of a prima facie case turns not on the type of information sought, but on
27 whether disclosure of the information will have a deterrent effect on the
28 exercise of protected activities.”

1 591 F.3d at 1162 (citations omitted).

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

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

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

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

19 Here, Defendants cannot even show that this discovery meets the relevance
20 requirements of Rule 26, much less the more demanding standard of relevance when
21 First Amendment interests are implicated. Moreover, PEER disputes Defendants’
22 claim that “Plaintiffs’ entire case is premised on the health impacts or illness
23 resulting from PCB exposure.” The citizen suit provision under which Plaintiffs
24 proceed provides for restraint of ongoing violations of TSCA, which violations are
25 established solely by the existence and ongoing use of building materials containing
26 50 ppm or more PCBs at the Malibu Schools.

1 **9. REQUEST FOR PRODUCTION NO. 35.**

2 a. REQUEST FOR PRODUCTION NO. 35.

3 All COMMUNICATIONS between PEER and its members regarding PCBs.

4 b. RESPONSE TO REQUEST FOR PRODUCTION NO. 35.

5 Plaintiff objects to this Request on the ground that it is overbroad and unduly
6 burdensome and oppressive. Plaintiff further objects to this Request on the ground
7 that it is vague and ambiguous, given that Defendants' response to Plaintiffs'
8 discovery requests define PCBs as "PCBs in caulk or other building materials at the
9 MALIBU SCHOOLS known to Defendants to contain PCBs at concentrations of 50
10 parts per million ('ppm') or greater." Plaintiff further objects to this Request to the
11 extent that it calls for the production of privileged attorney-client communications,
12 work product, common-interest communications or other privileged information.
13 Plaintiff further objects to this Request on the ground that it violates the First
14 Amendment rights of association of Plaintiff and its members and supporters.

15 c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 35.

16 i. Vagueness, Ambiguity, Overbreadth, and Undue Burden and Oppression Are
17 Not Valid Objections to RFP No. 35.

18 Plaintiff's objection that Requests for Production No. 35 is vague, ambiguous,
19 and unduly burdensome and oppressive is unfounded. "The party who resists
20 discovery has the burden to show discovery should not be allowed, and has the
21 burden of clarifying, explaining, and supporting its objections." *Bible v. Rio Props.,*
22 *Inc.*, 246 F. R. D. 614 (C.D. Cal. 2007) (citing *Blankenship v. Hearst Corp.*, 519
23 F.2d 418, 429 (9th Cir. 1975) and *Keith H. v. Long Beach Unified Sch. Dist.*, 228
24 F.R.D. 652, 655-56 (C.D. Cal. 2005)). There is no merit to "general or boilerplate
25 objections such as 'overly broad' [or] 'vague and ambiguous.'" *Bible*, 246 F. R. D.
26 at 619; *A. Farber & Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal.
27 2006).

28 PEER has not met its burden of demonstrating that discovery of the

1 information sought in this Request should not be allowed, because it has not
2 supported or explained its objections on the basis of the requests being vague,
3 ambiguous, or overbroad. Defendants have requested communications and
4 information regarding illness or injury resulting from exposure to PCBs due to an
5 alleged TSCA violation. Without further explanation, Plaintiff's objection is
6 without merit, and Plaintiff should produce documents in response to this Request.

7 ii. Attorney-Client, Attorney Work Product, and Common-Interest
8 Communication Privileges Are Not Valid Objections to RFP No. 35.

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
15 F.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 the
23 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 supporting Plaintiffs' allegation that there is a TSCA violation at
27 the Malibu Schools, including communications regarding illness or injury allegedly
28 resulting from PCB exposure, are not protected by the attorney-client privilege to

1 the extent that they include correspondences that do not include Plaintiffs' attorneys.
2 For example, communications among Plaintiffs and teachers, staff, parents of
3 students, and other individuals would not be protected by attorney-client privilege.
4 Furthermore, Plaintiffs have failed to indicate in their responses which
5 communications they believe to be protected by the attorney-client privilege.
6 *Richey*, 632 F.3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to
7 produce documents in response to Defendants' Requests on the basis of attorney-
8 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). The
14 work product doctrine is a qualified immunity rather than a privilege, and a showing
15 of good cause for the information desired is sufficient to overcome the qualified
16 immunity. *A. Farbers & Ptnrs., Inc. v. Garber*, 234 F.R.D. 186, 192 (C.D. Cal.
17 2006); *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1494 (9th Cir.
18 1989). "The party claiming work product immunity has the burden of proving the
19 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 supporting Plaintiffs' allegation that there is a TSCA violation at the Malibu
24 Schools, such as communications regarding illness or injury allegedly resulting
25 from PCB exposure, bear any relation to Plaintiffs' efforts in preparation for trial.
26 Furthermore, Defendants have good cause to request the information sought,
27 because such information is essential for preparation of a defense against Plaintiffs'
28 argument that TSCA should be subject to a different interpretation from that

1 advanced in EPA's policy and practice. This necessarily entails a complete
2 knowledge of any underlying injury and its relation to PCB exposure, which can
3 only be discovered through knowledge of any health complaints made to Plaintiff
4 organizations. Plaintiffs have not met the burden of demonstrating the applicability
5 of the work product doctrine, so their objection on this basis is not appropriate.
6 Accordingly, Plaintiffs may not refuse to produce documents in response to
7 Defendants' Requests on the basis of attorney-client 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." *Nidex 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 interest
20 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. at 692. For
22 this reason, the common interest doctrine comes into play only if the
23 communication at issue is privileged in the first place. *Nidex 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
28 Unites and PEER are protected. Defendants request that Plaintiff produce

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 iii. First Amendment Privilege Is Not a Valid Objection to RFP No. 35.

5 Plaintiff objects to RFP No. 35 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 Cir.
10 2010) (quoting *Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F.2d 346, 349-
11 50 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is
12 enforced, there will be "(1) harassment, membership withdrawal, or discouragement
13 of new members, or (2) other consequences which objectively suggest an impact on,
14 or 'chilling' of, the members' associational rights." *Brock*, 860 F.2d at 350.

15 Here, Plaintiff has made no such showing that disclosure of the documents
16 requested would lead to "harassment, membership withdrawal, or discouragement
17 of new members," or that it would result in other consequences that could "chill"
18 members' associational rights. The Request for documents supporting Plaintiffs'
19 claim of an alleged TSCA violation calls for documents and communications
20 regarding illness or injury allegedly resulting from PCB exposure. The Request
21 propounded by Defendants is not seeking personal information, does nothing to
22 harass members of Plaintiff organizations, and would not have a deterrent effect on
23 membership. Moreover, the documents requested by Defendants are necessary so
24 that Defendants can defend themselves in this litigation and fairness justifies their
25 production. Defendants will not be afforded a fair discovery if they are precluded
26 from accessing information regarding alleged PCB exposure, which will surely be
27 used against Defendants in trial.

28 Additionally, there would be no "chilling" effect if Plaintiffs responded to

1 Defendants' RFP, because PEER is publicly vocal about its activities and its
2 membership, listing members of its DC Staff and Board on its website. *See Decl.*
3 *Elliott, Exs. L, M.* In particular, Plaintiff frequently publicizes its activities with
4 regard to the subject matter of this very case on its website. *See Decl. Elliott, N.*
5 The information sought in the above Request relates **only** to the illness allegedly
6 caused by PCBs and PCB data, which form the basis for this lawsuit.

7 The documents and information requested are necessary and relevant to
8 Defendants' preparation for trial, and the names and email addresses of those
9 members who would like their membership in PEER to remain private could be
10 redacted so as to balance any associational issues with the Court's strong interest in
11 ensuring Defendants' ability to fairly defend their case. Plaintiffs' entire case is
12 premised on the health impacts or illness resulting from PCB exposure, and the
13 proper application of TSCA regardless of EPA's application of the statute and its
14 regulations. Accordingly, it is imperative that Defendants are granted full access to
15 this information.

16 d. PEER'S CONTENTIONS REGARDING RFP NO. 35.

17 The Request is objectionable for a number of reasons.

18 First, the Request is exceedingly overbroad. The Request seeks "all
19 communications between PEER and its members regarding PCBs."³ This request
20 could include many communications which are not relevant to the issues in this
21 case. In addition, Defendants themselves have defined "PCBs" to mean only "PCBs
22 in caulk or other building materials at the MALIBU SCHOOLS known to
23 Defendants to contain PCBs at concentrations of 50 parts per million ('ppm') or
24 greater," making it difficult or impossible for Plaintiffs' to determine which
25 communications concerning PCBs more broadly are actually responsive to this
26 request in accordance with Defendants' definition. (*Avrith Decl.* ¶2 and *Ex. A*

27
28 ³ PEER is not a membership organization and so does not technically have members.
PEER will interpret the request to refer to its supporters.

1 thereto.)

2 Despite the exceedingly broad language of the Request, Defendants state in
3 their portion of the Joint Stipulation that the Request “calls for documents and
4 communications regarding illness or injury allegedly resulting from PCB exposure”
5 and that “[t]he information sought in the above Request relates only to the illness
6 allegedly caused by PCBs and PCB data, [sic] which form the basis for this
7 lawsuit.” (emphasis in original) However, this information about illness caused by
8 PCBs is the same information that Defendants are seeking through their other
9 requests. Defendants do not need all communications between PEER and its
10 members to obtain information about illness caused by PCBs.

11 Second, the request seeks information protected by the attorney-client
12 privilege. All communications between PEER and its supporters regarding PCBs
13 would involve PEER counsel, as no one else at PEER communicated its supporters
14 concerning PCBs. PEER considers all of its supporters and all persons who contact
15 PEER to be seeking legal advice or representation and holds their communications
16 in confidence. (Dinerstein Decl. ¶6.) Therefore, all such communications sought in
17 this request would be privileged. (Dinerstein Decl. ¶6 and Ex. 1 thereto.)

18 Furthermore, requests for communications between PEER and its supporters
19 violate their First Amendment Right of Association.

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

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

27 The same would hold for PEER, which has thus made a “prima facie showing
28 of arguable first amendment infringement.” *Perry v. Schwarzenegger*, 591 F.3d

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

12 It is more than understandable that PEER’s supporters who have
13 communicated with PEER on this subject would not want their communications
14 disclosed. In fact, given the marginal, if any, relevance to this litigation of the
15 communications sought here, one cannot help but suspect that this discovery is
16 being sought for the purpose of harassing PEER’s supporters who have
17 communicated with PEER about PCBs at the Malibu Schools.

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

28 “The First Amendment privilege, however, has never been limited to

1 the disclosure of identities of rank-and-file members. . . . The existence
2 of a prima facie case turns not on the type of information sought, but on
3 whether disclosure of the information will have a deterrent effect on the
4 exercise of protected activities.”

5 591 F.3d at 1162 (citations omitted).

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

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.*, 860 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. Moreover, PEER disputes Defendants’
27 claim that “Plaintiffs’ entire case is premised on the health impacts or illness
28 resulting from PCB exposure.” The citizen suit provision under which Plaintiffs

1 proceed provides for restraint of ongoing violations of TSCA, which violations are
2 established solely by the existence and ongoing use of building materials containing
3 50 ppm or more PCBs at the Malibu Schools.

4 Finally, PEER has already produced its communications about PCBs with its
5 supporters as a group, as opposed to communications with individual supporters, for
6 which the above privileges and protections would apply.

7
8 **IV. DISCOVERY TO PLAINTIFFS REGARDING PCB DATA AND**
9 **ANALYSES OF DATA FROM THE MALIBU SCHOOLS THAT**
10 **PLAINTIFFS INTEND TO RELY UPON AT TRIAL.**

11 **A. REQUEST FOR COMMUNICATIONS BETWEEN AU AND**
12 **TECHNICAL EXPERTS REGARDING PCBS AT THE MALIBU**
13 **SCHOOLS.**

14 **1. REQUEST FOR PRODUCTION NO. 32.**

15 **a. REQUEST FOR PRODUCTION NO. 32.**

16 All COMMUNICATIONS between AMERICA UNITES and any of its
17 technical experts, including but not limited to Jill Ryer-Powder, regarding PCBs at
18 the MALIBU SCHOOLS.

19 **b. RESPONSE TO REQUEST FOR PRODUCTION NO. 32.**

20 Plaintiff objects to this Request on the ground that it is overbroad. Plaintiff
21 further objects to this Request on the ground that it is vague and ambiguous, given
22 that Defendants' response to Plaintiffs' discovery requests define PCBs as "PCBs in
23 caulk or other building materials at the MALIBU SCHOOLS known to Defendants
24 to contain PCBs at concentrations of 50 parts per million ('ppm') or greater."

25 Plaintiff further objects to this Request to the extent that it calls for the production
26 of privileged attorney-client communications, work product, common-interest
27 communications or other privileged information. Plaintiff further objects to this
28 Request to the extent that it requires the premature disclosure of expert information

1 or information, opinion or reports prepared by consultants which are not subject to
2 discovery and are privileged under Rule 26 of the Federal Rules of Civil Procedure.
3 Without waiving its objections, Plaintiff will produce non-privileged documents
4 responsive to this Request concerning PCBs in building materials at the Malibu
5 Schools that violate TSCA or the regulations thereunder.

6 c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 32.

7 i. Vagueness, Ambiguity, and Overbreadth Are Not Valid Objections to RFP
8 No. 32.

9 Plaintiff's objection that Requests for Production No. 32 is vague, ambiguous
10 and overbroad is unfounded. "The party who resists discovery has the burden to
11 show discovery should not be allowed, and has the burden of clarifying, explaining,
12 and supporting its objections." *Bible v. Rio Props., Inc.*, 246 F. R. D. 614 (C.D. Cal.
13 2007) (citing *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975) and
14 *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 655-56 (C.D. Cal.
15 2005)). There is no merit to "general or boilerplate objections such as 'overly
16 broad' [or] 'vague and ambiguous.'" *Bible*, 246 F. R. D. at 619; *A. Farber &*
17 *Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal. 2006).

18 Plaintiff has not met its burden of demonstrating that discovery of the
19 information sought in this Request should not be allowed, because it has not
20 supported or explained its objections on the basis of the requests being vague,
21 ambiguous, or overbroad. Defendants have requested communications between AU
22 and its technical experts. Plaintiff need only search its correspondences for the
23 names of any technical experts with which it has communicated regarding PCBs at
24 the Malibu Schools. Such technical experts include laboratories used by Plaintiffs
25 to conduct PCB testing, such as BC Laboratories, Inc., Frontier Analytical
26 Laboratory, Eurofins CalScience, and Positive Lab Service, including
27 communications with laboratory employees and with consultants Brad Silverbush,
28 Paul Rosenfeld, and Kurt Fehling. Without further explanation, Plaintiff's objection

1 is without merit, and Plaintiff should produce documents in response to this
2 Request.

3 ii. Attorney-Client, Attorney Work Product, and Common-Interest
4 Communication Privileges Are Not Valid Objections to RFP No. 32.

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
11 F.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 the
19 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 Communications between AU and its technical experts not protected by the
23 attorney-client privilege to the extent that they include communications regarding
24 the data, methodology, or chain of custody of Plaintiffs’ independent tests,
25 information regarding PCBs at the Malibu Schools, or information regarding health
26 impacts of PCBs at the Malibu Schools. Defendants’ request is not asking for
27 communications between Plaintiffs and their counsel. Plaintiffs have failed to
28 indicate in their responses which communications they believe to be protected by

1 the attorney-client privilege. *Richey*, 632 F.3d at 567 (9th Cir. 2011). Accordingly,
2 Plaintiffs may not refuse to produce documents in response to Defendants’ Requests
3 on the basis of attorney-client privilege.

4 (b) Attorney Work Product.

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

15 Plaintiffs cannot claim work product immunity because they have made no
16 showing that this protection applies to any of the communications or documents
17 sought in Defendants’ Requests. For example, Plaintiffs have not demonstrated
18 how correspondence with technical experts regarding PCBs at the Malibu Schools
19 bears any relation to Plaintiffs’ efforts in preparation for trial. Furthermore,
20 Defendants have good cause to request the information sought, because such
21 information will surely be used against Defendants in this litigation, and Defendants
22 must be afforded the opportunity to confront the assumptions and methodologies
23 used by Plaintiffs’ experts. 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 (c) Common Interest Doctrine.

28 In general, the attorney-client privilege is waived when communications

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

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

23 d. AU’S CONTENTIONS REGARDING RFP NO. 32.

24 AU has agreed to produce non-privileged documents responsive to this
25 Request. To the extent that it has not already done so, AU will produce any non-
26 privileged documents responsive to this Request.

27
28

1 Dated: February 1, 2016

PILLSBURY WINTHROP SHAW
PITTMAN LLP

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By: /s/ Mark E. Elliott
Mark E. Elliott
*Attorneys for Defendants Sandra Lyon,
Jan Maez, Laurie Lieberman, Dr. Jose
Escarce, Craig Foster, Maria Leon-
Vazquez, Richard Tahvildaran-
Jesswein, Oscar De La Torre, and
Ralph Mechur*

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Dated: February 8, 2016

NAGLER & ASSOCIATES

10

11

By: /s/ Charles Avrith
Charles Avrith
*Attorneys for Plaintiffs America Unites
for Kids and Public Employees for
Environmental Responsibility*

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14

15

Dated: February 8, 2016

PAULA DINERSTEIN

16

By: /s/ Paula Dinerstein
Paula Dinerstein
*Attorneys for Plaintiff Public
Employees for Environmental
Responsibility*

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