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SANDRA LYON, ET AL.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AMERICA UNITES FOR KIDS, et al., Plaintiffs, vs. SANDRA LYON, et al., Defendants.	No. 2:15-CV-02124 **DISCOVERY MATTER** **JOINT STIPULATION REGARDING DEFENDANTS' SECOND MOTION TO COMPEL FURTHER RESPONSES IN DISCOVERY** Hearing Date: Feb. 29, 2016 Time: 10:00 am Place: 255 East Temple Street Dept. 690 Judge: Wistrich Complaint Filed: Mar. 23, 2015 Discovery Cutoff: Mar. 7, 2016 Pretrial Conf.: Apr. 15, 2016 Trial Date: May 17, 2016

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

- Request Nos. 2, 13, 23, 24, 25, 26, 27, 28, and 34 of Defendants' First Set of Requests for Production of Documents ("Requests" or "RFPs") to AU; and
- Request Nos. 2, 3, 7, 10, 19, 31, 32, 34, and 35 of Defendants' First Set of Requests for Production of Documents ("Requests" or "RFPs") to PEER.

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

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

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

I. DEFENDANTS' INTRODUCTORY STATEMENT

A. DISCOVERY REGARDING INJURY OR ILLNESS FROM PCBS AND COMMUNICATIONS REGARDING PCBS AT THE MALIBU SCHOOLS

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

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

In response to Defendants' Requests, Plaintiffs assert the following inappropriate objections:

1. Relevancy.

Communications and information regarding injury or illness allegedly

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

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

2. Vagueness, Ambiguity, Overbreadth, Oppressiveness, and Undue Burden.

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

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

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

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

4. First Amendment.

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

II. PLAINTIFFS' INTRODUCTORY STATEMENT

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

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

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

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

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

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

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

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

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

1. REQUEST FOR PRODUCTION NO. 2

a. REQUEST FOR PRODUCTION NO. 2.

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

b. RESPONSE TO RFP NO. 2.

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

communications, work product, common interest communications or other privileged information. Plaintiff further objects to this Request on the ground that it violates the First Amendment rights of association of Plaintiff and its members and supporters. Without waiving its objections, Plaintiff will produce the non-privileged documents responsive to this Request as Plaintiff reasonably interprets it.

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 2.

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

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

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

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

(a) Attorney-Client Privilege.

"The attorney-client privilege protects confidential communications between

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

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

(b) Attorney Work Product.

The work product doctrine prohibits discovery of documents and other

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

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

(c) Common Interest Doctrine.

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

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

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

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

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

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

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

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

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

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

d. AU'S CONTENTIONS REGARDING RFP NO. 2

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

2. REQUEST FOR PRODUCTION NO. 13.

a. REQUEST FOR PRODUCTION NO. 13.

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

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 13.

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

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 13.

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

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

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

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

(a) Attorney-Client Privilege.

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

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

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

(b) Attorney Work Product.

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

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

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

(c) Common Interest Doctrine.

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

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

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

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

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

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

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

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

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

to this information.

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

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

3. REQUEST FOR PRODUCTION NO. 23.

a. REQUEST FOR PRODUCTION NO. 23.

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

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 23.

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

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 23.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. REQUEST FOR PRODUCTION NO. 24.

a. REQUEST FOR PRODUCTION NO. 24.

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

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 24.

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

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 24.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) Attorney-Client Privilege.

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

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

the extent that they include correspondences that do not include Plaintiffs' attorneys. For example, communications among Plaintiffs and teachers, staff, parents of students, and other individuals would not be protected by attorney-client privilege. Furthermore, Plaintiffs have failed to indicate in their responses which communications they believe to be protected by the attorney-client privilege. *Richey*, 632 F.3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(b) Attorney Work Product.

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

Plaintiffs cannot claim work product immunity because they have made no showing that this protection applies to any of the information sought in Defendants' Requests. For example, Plaintiffs have not demonstrated how documents supporting Plaintiffs' allegation that there is a TSCA violation at the Malibu Schools, such as communications regarding illness or injury allegedly resulting from PCB exposure, bear any relation to Plaintiffs' efforts in preparation for trial. Furthermore, Defendants have good cause to request the information sought, because such information is essential for preparation of a defense against Plaintiffs' argument that TSCA should be subject to a different interpretation from that

advanced in EPA's policy and practice. This necessarily entails a complete knowledge of any underlying injury and its relation to PCB exposure, which can only be discovered through knowledge of any health complaints made to Plaintiff organizations. Plaintiffs have not met the burden of demonstrating the applicability of the work product doctrine, so their objection on this basis is not appropriate. Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(c) Common Interest Doctrine.

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

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

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

iv. First Amendment Privilege Is Not a Valid Objection to RFP No. 24.

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

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

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

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

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

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

The Request is objectionable for a number of reasons.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the content of the communication even if names are redacted.

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

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

Perry, 591 F.3d at 1161.

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

5. REQUEST FOR PRODUCTION NO. 25.

a. REQUEST FOR PRODUCTION NO. 25.

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

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 25.

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

further objects to this Request on the ground that it is vague and ambiguous, given that Defendants' response to Plaintiffs' discovery requests define PCBs as "PCBs in caulk or other building materials at the MALIBU SCHOOLS known to Defendants to contain PCBs at concentrations of 50 parts per million ('ppm') or greater." Plaintiff further objects to this Request to the extent that it calls for the production of privileged attorney-client communications, work product, common-interest communications or other privileged information. Plaintiff further objects to this Request on the ground that it violates the First Amendment rights of association of Plaintiff and its members and supporters. Without waiving its objections, Plaintiff will produce non-privileged documents responsive to this Request concerning PCBs in building materials at the Malibu Schools that violate TSCA or the regulations thereunder.

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 25.

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

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

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

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

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

(a) Attorney-Client Privilege.

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

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

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

(b) Attorney Work Product.

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

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

organizations. Plaintiffs have not met the burden of demonstrating the applicability of the work product doctrine, so their objection on this basis is not appropriate. Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(c) Common Interest Doctrine.

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

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

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

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

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

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

activities with regard to the subject matter of this very case on its website. *See* Decl. Elliott, Exs. F-H. The information sought in the above Request relates **only** to the illness allegedly caused by PCBs and PCB data, which form the basis for this lawsuit.

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

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

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

6. REQUEST FOR PRODUCTION NO. 26.

a. REQUEST FOR PRODUCTION NO. 26.

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

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 26.

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

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

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 26.

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

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

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

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

(a) Attorney-Client Privilege.

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

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

produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(b) Attorney Work Product.

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

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

produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(c) Common Interest Doctrine.

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

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

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

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

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

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

Additionally, there would be no "chilling" effect if Plaintiffs responded to Defendants' RFP, because AU is publicly vocal about its activities and its membership, listing members of its Advisory Board and Leadership Team on its website. *See* Decl. Elliott, Exs. I, J. In particular, Plaintiff frequently publicizes its activities with regard to the subject matter of this very case on its website. *See* Decl. Elliott, Exs. F-H. The information sought in the above Request relates **only** to the

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

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

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

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

7. REQUEST FOR PRODUCTION NO. 27.

a. REQUEST FOR PRODUCTION NO. 27.

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

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 27.

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

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

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 27.

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

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

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

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

(a) Attorney-Client Privilege.

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

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

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

(b) Attorney Work Product.

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

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

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

(c) Common Interest Doctrine.

In general, the attorney-client privilege is waived when communications between an attorney and client are disclosed to a third party. *Weil v. Inv/ Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir. 1981). There is a rare exception

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

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

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

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

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

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

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

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

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

d. AU'S CONTENTIONS REGARDING RFP NO. 27.

The Request is objectionable for a number of reasons.

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

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

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

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

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

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

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

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

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

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

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

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

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

> Federal Rule of Civil Procedure 26(b)(1). The request must also be carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable."

Perry, 591 F.3d at 1161.

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

8. REQUEST FOR PRODUCTION NO. 28.

a. REQUEST FOR PRODUCTION NO. 28.

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

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 28.

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

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 28.

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

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

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

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

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

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

The information requested is relevant to Plaintiffs' TSCA claim and to

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

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

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

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

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

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

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

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

(a) Attorney-Client Privilege.

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

advice. *Id.*

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

(b) Attorney Work Product.

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

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

from PCB exposure, bear any relation to Plaintiffs' efforts in preparation for trial. Furthermore, Defendants have good cause to request the information sought, because such information is essential for preparation of a defense against Plaintiffs' argument that TSCA should be subject to a different interpretation from that advanced in EPA's policy and practice. This necessarily entails a complete knowledge of any underlying injury and its relation to PCB exposure, which can only be discovered through knowledge of any health complaints made to Plaintiff organizations. Plaintiffs have not met the burden of demonstrating the applicability of the work product doctrine, so their objection on this basis is not appropriate. Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(c) Common Interest Doctrine.

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

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

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

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

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

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

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

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

d. AU'S CONTENTIONS REGARDING RFP NO. 28.

The Request is objectionable for a number of reasons. First, the Request is exceedingly overbroad. The Request seeks "all communications between AU and its Members regarding PCBs at the Malibu Schools." Defendants do not explain the relevance of communications between AU and its supporters.[2] The Request is also exceedingly burdensome as it potentially

[2] AU is not a membership organization and technically does not have "members."

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

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

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

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

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

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

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

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

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

> "The First Amendment privilege, however, has never been limited to the disclosure of identities of rank-and-file members. … The existence

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

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

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

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

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

Perry, 591 F.3d at 1161.

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

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

9. REQUEST FOR PRODUCTION NO. 34.

a. REQUEST FOR PRODUCTION NO. 34.

All presentation materials prepared by AMERICA UNITES regarding PCBs.

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 34.

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

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 34.

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

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

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

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

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

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

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

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

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

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

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

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

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

Plaintiff's objection that Requests for Production No. 34 is vague and ambiguous is unfounded. "The party who resists discovery has the burden to show discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." *Bible v. Rio Props., Inc.*, 246 F. R. D. 614 (C.D. Cal.

2007) (*citing Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975) and *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 655-56 (C.D. Cal. 2005)). There is no merit to "general or boilerplate objections such as 'overly broad' [or] 'vague and ambiguous.'" *Bible*, 246 F. R. D. at 619; *A. Farber & Partners, Inc. v. Garber*, 234 F. R. D. 186, 188 (C.D. Cal. 2006).

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

d. AU'S CONTENTIONS REGARDING RFP NO. 34.

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

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

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

1. REQUEST FOR PRODUCTION NO. 2.

a. REQUEST FOR PRODUCTION NO. 2.

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

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 2.

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

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

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 2.

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

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

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

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

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

(a) Attorney-Client Privilege.

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

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

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

(b) Attorney Work Product.

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

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

Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(c) Common Interest Doctrine.

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

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

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

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

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

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

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

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

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

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

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

2. REQUEST FOR PRODUCTION NO. 3.

a. REQUEST FOR PRODUCTION NO. 3.

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

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 3.

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

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

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 3.

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

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

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

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

(a) Attorney-Client Privilege.

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

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

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

(b) Attorney Work Product.

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

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

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

(c) Common Interest Doctrine.

In general, the attorney-client privilege is waived when communications between an attorney and client are disclosed to a third party. *Weil v. Inv/ Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir. 1981). There is a rare exception

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

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

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

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

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

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

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

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

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

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

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

3. REQUEST FOR PRODUCTION NO. 7.

a. REQUEST FOR PRODUCTION NO. 7.

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

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 7.

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

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 7.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) Attorney-Client Privilege.

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

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

produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(b) Attorney Work Product.

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

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

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

(c) Common Interest Doctrine.

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

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

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

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

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

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

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

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

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

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

Requests for these communications between PEER and the Concerned Malibu Cabrillo Teachers Group violate their First Amendment Right of Association.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. REQUEST FOR PRODUCTION NO. 10.

a. REQUEST FOR PRODUCTION NO. 10.

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

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 10.

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

communications, work product, common interest communications or other privileged information. Plaintiff further objects to this Request on the ground that it violates the First Amendment rights of association of Plaintiff and its members and supporters. Without waiving its objections, Plaintiff will produce the non-privileged documents responsive to this Request as Plaintiff reasonably interprets it. However, to the extent that co-Plaintiff America Unites for Kids produces these same documents, Plaintiff will not duplicate the production

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 10.

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

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

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

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

(a) Attorney-Client Privilege.

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

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

produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(b) Attorney Work Product.

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

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

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

(c) Common Interest Doctrine.

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

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

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

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

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

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

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

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

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

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

5. REQUEST FOR PRODUCTION NO. 19.

a. REQUEST FOR PRODUCTION NO. 19.

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

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 19.

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

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

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 19.

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

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

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

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

(a) Attorney-Client Privilege.

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

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

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

(b) Attorney Work Product.

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

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

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

(c) Common Interest Doctrine.

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

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

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

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

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

or 'chilling' of, the members' associational rights." *Brock*, 860 F.2d at 350.

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

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

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

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

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

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

6. REQUEST FOR PRODUCTION NO. 31.

a. REQUEST FOR PRODUCTION NO. 31.

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

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 31.

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

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 31.

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

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

51, 54-55, 67, and 108.

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

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

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

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

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

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

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

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

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

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

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

alleged TSCA violation. Without further explanation, Plaintiff's objection is without merit, and Plaintiff should produce documents in response to this Request.

iii. Attorney-Client, Attorney Work Product, and Common-Interest Communication Privileges Are Not Valid Objections to RFP No. 31.

(a) Attorney-Client Privilege.

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

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

communications they believe to be protected by the attorney-client privilege. *Richey*, 632 F.3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(b) Attorney Work Product.

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

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

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

(c) Common Interest Doctrine.

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

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

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

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

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

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

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

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

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

The Request is objectionable for a number of reasons.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Perry, 591 F.3d at 1161.

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

7. REQUEST FOR PRODUCTION NO. 32.

a. REQUEST FOR PRODUCTION NO. 32.

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

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 32.

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

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

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 32.

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

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

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

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

(a) Attorney-Client Privilege.

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

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

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

(b) Attorney Work Product.

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

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

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

(c) Common Interest Doctrine.

In general, the attorney-client privilege is waived when communications between an attorney and client are disclosed to a third party. *Weil v. Inv/ Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir. 1981). There is a rare exception

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

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

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

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

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

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

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

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

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

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

The Request is objectionable for a number of reasons.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Perry, 591 F.3d at 1161.

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

8. REQUEST FOR PRODUCTION NO. 34.

a. REQUEST FOR PRODUCTION NO. 34.

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

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 34.

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

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

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 34.

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

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

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

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

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

(a) Attorney-Client Privilege.

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

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

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

(b) Attorney Work Product.

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

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

Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(c) Common Interest Doctrine.

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

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

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

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

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

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

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

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

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

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

The Request is objectionable for a number of reasons.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Perry, 591 F.3d at 1161.

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

9. REQUEST FOR PRODUCTION NO. 35.

a. REQUEST FOR PRODUCTION NO. 35.

All COMMUNICATIONS between PEER and its members regarding PCBs.

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 35.

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

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 35.

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

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

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

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

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

(a) Attorney-Client Privilege.

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

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

the extent that they include correspondences that do not include Plaintiffs' attorneys. For example, communications among Plaintiffs and teachers, staff, parents of students, and other individuals would not be protected by attorney-client privilege. Furthermore, Plaintiffs have failed to indicate in their responses which communications they believe to be protected by the attorney-client privilege. *Richey*, 632 F.3d at 567 (9th Cir. 2011). Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(b) Attorney Work Product.

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

Plaintiffs cannot claim work product immunity because they have made no showing that this protection applies to any of the information sought in Defendants' Requests. For example, Plaintiffs have not demonstrated how documents supporting Plaintiffs' allegation that there is a TSCA violation at the Malibu Schools, such as communications regarding illness or injury allegedly resulting from PCB exposure, bear any relation to Plaintiffs' efforts in preparation for trial. Furthermore, Defendants have good cause to request the information sought, because such information is essential for preparation of a defense against Plaintiffs' argument that TSCA should be subject to a different interpretation from that

advanced in EPA's policy and practice. This necessarily entails a complete knowledge of any underlying injury and its relation to PCB exposure, which can only be discovered through knowledge of any health complaints made to Plaintiff organizations. Plaintiffs have not met the burden of demonstrating the applicability of the work product doctrine, so their objection on this basis is not appropriate. Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(c) Common Interest Doctrine.

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

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

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

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

Plaintiff objects to RFP No. 35 on the ground that this Request violates the First Amendment rights of association of Plaintiff and its members. A party objecting on the basis of a First Amendment privilege must satisfy a two-part test. The objecting party must first make a "prima facie showing of arguable first amendment infringement." *Perry v. Schwarzenegger*, 591 F.3d 1126, 1140 (9th Cir. 2010) (*quoting Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F.2d 346, 349-50 (9th Cir. 1988)). Plaintiffs are required to show that, if the discovery request is enforced, there will be "(1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Brock*, 860 F.2d at 350.

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

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

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

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

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

The Request is objectionable for a number of reasons.

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

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

thereto.)

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

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

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

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

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

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

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

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

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

"The First Amendment privilege, however, has never been limited to

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

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

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

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

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

Perry, 591 F.3d at 1161.

Here, Defendants cannot even show that this discovery meets the relevance requirements of Rule 26, much less the more demanding standard of relevance when First Amendment interests are implicated. Moreover, PEER disputes Defendants' claim that "Plaintiffs' entire case is premised on the health impacts or illness resulting from PCB exposure." The citizen suit provision under which Plaintiffs

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

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

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

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

1. REQUEST FOR PRODUCTION NO. 32.

a. REQUEST FOR PRODUCTION NO. 32.

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

b. RESPONSE TO REQUEST FOR PRODUCTION NO. 32.

Plaintiff objects to this Request on the ground that it is overbroad. Plaintiff further objects to this Request on the ground that it is vague and ambiguous, given that Defendants' response to Plaintiffs' discovery requests define PCBs as "PCBs in caulk or other building materials at the MALIBU SCHOOLS known to Defendants to contain PCBs at concentrations of 50 parts per million ('ppm') or greater." Plaintiff further objects to this Request to the extent that it calls for the production of privileged attorney-client communications, work product, common-interest communications or other privileged information. Plaintiff further objects to this Request to the extent that it requires the premature disclosure of expert information

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

c. DEFENDANTS' CONTENTIONS REGARDING RFP NO. 32.

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

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

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

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

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

(a) Attorney-Client Privilege.

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

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

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

(b) Attorney Work Product.

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

Plaintiffs cannot claim work product immunity because they have made no showing that this protection applies to any of the communications or documents sought in Defendants' Requests. For example, Plaintiffs have not demonstrated how correspondence with technical experts regarding PCBs at the Malibu Schools bears any relation to Plaintiffs' efforts in preparation for trial. Furthermore, Defendants have good cause to request the information sought, because such information will surely be used against Defendants in this litigation, and Defendants must be afforded the opportunity to confront the assumptions and methodologies used by Plaintiffs' experts. Plaintiffs have not met the burden of demonstrating the applicability of the work product doctrine, so their objection on this basis is not appropriate. Accordingly, Plaintiffs may not refuse to produce documents in response to Defendants' Requests on the basis of attorney-client privilege.

(c) Common Interest Doctrine.

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

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

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

d. AU'S CONTENTIONS REGARDING RFP NO. 32.

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

Dated: February 1, 2016

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Dated: February 8, 2016

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