Charles Avrith (State Bar No. 96804)
cavrith@bgrfirm.com
2121 Avenue of the Stars, Suite 2800
Los Angeles, California 90067
Telephone: (310) 274-7100
Facsimile: (310) 275-5697

Attorneys for Plaintiffs America Unites for Kids and Public Employees for Environmental Responsibility

Paula Dinerstein (admitted Pro Hac Vice)
Public Employees for Environmental Responsibility
962 Wayne Avenue, Suite 610
Silver Spring, MD 20910
Telephone: (202) 265-7337
Email: pdinerstein@peer.org

Attorneys for Attorneys for Public Employees for Environmental Responsibility

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

AMERICA UNITES FOR KIDS, and PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY,

Plaintiffs,

vs.

SANDRA LYON, JAN MAEZ, LAURIE LIEBERMAN, DR. JOSE ESCARCE, CRAIG FOSTER, MARIA LEON-VAZQUEZ, RICHARD TAHVILDARAN-JESSWEIN, AND OSCAR DE LA TORE,

Defendants.

Case No. 2:15-CV-02124-PA-AJW

The Hon. Percy Anderson

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR INDICATIVE RULING (DECLARATIONS IN SUPPORT SUBMITTED SEPARATELY)

Judge: Hon. Percy Anderson
Date: December 17, 2018
Time: 1:30 pm
Crtrm.: 9A

Trial Date: None Set

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

On September 1, 2016, the Court entered a Permanent Injunction sought by the Plaintiffs America Unites for Kids and Public Employees for Environmental Responsibility in this matter, which enjoined the Defendants (cumulatively, the "District") from "using any office, classroom, or other structure at [the Malibu Campus] constructed prior to 1979 in which students, teachers, administrators, or staff are regularly present after December 31, 2019, unless all window and door systems and surrounding caulk at any such location has been replaced." Dkt. 307 (emphasis added)

On November 19, 2018, the District filed its Notice of Motion and Motion for Indicative Ruling Pursuant to FRCP 62.1 Stating the Court Will Entertain or Grant Defendants' Motion for Partial Modification of Permanent Injunction Pursuant to FRCP 60(B)(5). Dkt. 317 (the "Motion"). The Motion requests a **five-year** extension of the Permanent Injunction entered by the Court, that is, until December 31, 2024. It also seeks to substantially change the Injunction so that the District can continue to use pre-1979 buildings without removing the windows, doors and caulk based on results of the District's own testing. The Motion, if successful, would add a full **five years** and possibly more to the current Permanent Injunction, thereby making it more than a decade of illegal use of PCBs and exposure of student, teachers, staff and others to PCB-contaminated rooms since PCBs were first found at the School.

Accompanying this Opposition are 51 declarations from Malibu teachers, staff, parents and voters attesting to their reliance on the Court's Injunction to provide an end date to their further PCB exposure and to ensure that remediation of the Malibu Campus continued to progress and would be completed by the end of 2019. The declarations express concerns about occupying contaminated buildings for an additional five years, teachers' preferences for portable classrooms over contaminated classrooms, the failure of the District to properly implement Best

Management Practices (BMP) cleaning, and the declarants' beliefs when they supported the new bond Measure M, which is the basis of the District's Motion, that it would mean no more PCB exposure rather than another five years of occupying unremediated rooms. Plaintiffs also submit a supplemental declaration from public health expert Dr. David Carpenter concerning the health threats inherent in continuing to occupy the unremediated buildings.

The Motion is an improper attempt to relitigate what the Court has already decided. The District has not set forth any valid reason to modify the Court's final ruling. Accordingly, the Court should deny the Motion.

II. BACKGROUND

A. Legal Background

Congress enacted the Toxic Substances Control Act (TSCA) in 1976, 15 U.S.C. §2601 *et seq.*, to "regulate chemical substances and mixtures which present an unreasonable risk of injury to health or the environment." 15 U.S.C. §2601(b)(2). PCBs are the only chemical that Congress specifically identified for regulation under TSCA, imposing a near-total ban because they posed a significant risk to public health and the environment. 15 U.S.C. §2605(e)(2)(A) states:

> Except as provided under subparagraph (B), effective one year after the effective date of this Act [January 1, 1977] no person may manufacture, process, or distribute in commerce or use any polychlorinated biphenyl in any manner other than in a totally enclosed manner.

In the rules implementing TSCA's PCB ban, the EPA Administrator found based on the documented scientific evidence that any use of items containing PCBs at concentrations of 50 parts per million (ppm) or greater posed an unreasonable risk of injury to health. The Administrator found that:

> the manufacture, processing, and distribution in commerce of PCBs at concentrations of 50 ppm or greater and PCB Items with PCB concentrations of 50 ppm or greater **present an unreasonable risk of**

> **injury to health within the United States. This finding is based upon the well-documented human health and environmental hazard of PCB exposure**, the high probability of human and environmental exposure to PCBs and PCB Items from manufacturing, processing, or distribution activities; the potential hazard of PCB exposure posed by the transportation of PCBs or PCB Items within the United States; and the evidence that contamination of the environment by PCBs is spread far beyond the areas where they are used.

40 C.F.R. 761.20 (emphasis added).

The regulations were designed to remove and properly dispose of existing materials containing PCBs above the legal limit. There is nothing in the regulations that permits leaving PCBs in place. There are no regulatory standards for PCB concentrations in indoor air. There are no exceptions to the statutory and regulatory prohibitions based on whether or not, or to what extent, PCB-containing materials are causing contamination of indoor air or dust, or whether indoor air meets EPA's non-regulatory guidelines. There is no regulatory authority for using measures such as BMPs that supposedly reduce exposures to PCBs in order to avoid the clear regulatory prohibition of continued use of any materials with 50 ppm or more PCBs. Moreover, no EPA informal communications such as those the District presented in this case can change TSCA's prohibitions. Nor can they be used to prove "safety," in contravention to the governing regulation, which directs that leaving PCBs over 50 ppm in place is illegal **because** Congress and the EPA found that it creates an unreasonable risk to health.

The only official EPA regulation regarding the use of building materials containing PCBs is 40 C.F.R. § 761.20, which prohibits continued use of materials with PCB concentrations at or above 50 ppm. The existence of a legal violation rests solely on whether materials containing PCBs above that limit are in use.

The Court's final Conclusions of Law and Injunction reflect and implement

TSCA's simple legal prohibition of the use of materials with concentrations at or above 50 ppm. The District repeatedly argued that there were no TSCA violations, or no need to act on them, because the results of air and dust tests or the use of BMPs supposedly assured safety -- despite the finding in the regulation that PCBs over 50 ppm "pose an unreasonable risk of injury to health" – and that EPA had somehow approved the District's failure to remove PCBs above 50 ppm. However, the Court did not find that any of these claims precluded a ruling that the District was in violation of TSCA and that those violations needed to be abated. The Court enjoined further use of PCB-containing materials after giving the District the generous amount of time that the District requested to remove them. *See* Findings of Fact and Conclusions of Law, Dkt. 306 at p. 18, ¶ 9 (finding that plaintiffs could prove their case by showing that building materials at or above 50 ppm were in ongoing use); *id.* at p. 19, ¶ 17 (finding that caulk with PCBs in excess of 50 ppm remained "in use" at the Malibu Campus); *id.* at p. 21, ¶22 (finding the appropriate remedy is to enjoin the District and Defendants from using offices, classrooms or other structures in pre-1979 buildings after December 31, 2019 unless the windows and door systems and surrounding caulk have been replaced); *id.* at 22 (discussing the appropriate remedy "for the TSCA violation"). *See also* Judgment and Permanent Injunction, Dkt. 307.

Because the District consistently refused to do any further testing beyond their initial testing in a limited number of rooms for PCBs in materials within their control, the Court based its ruling on the "common sense" conclusion that:

> it is highly likely that the same products were used to construct each of the buildings on the Malibu Campus. As a result, for the buildings completed at the Malibu Campus prior to 1979, and at which certain locations have been tested and found to contain caulk with PCBs in excess of 50 ppm, it is more likely than not that caulk containing PCBs in excess of 50 ppm remain in "use" at the Malibu Campus in areas that

have not been tested or repaired.

Dkt. 306, Conclusion of Law ¶ 17. Accordingly, the Court's Injunction applied to all windows and doors and surrounding caulk in all pre-1979 buildings.

In fashioning a remedy, the Court noted that the District had provided evidence of their plan to demolish and replace some of the pre-1979 buildings at the Malibu Campus and to replace the windows and doors and associated caulk in the remaining pre-1979 buildings. Conclusion of Law, ¶ 20. Thus, rather than require removal of caulk with illegal levels of PCBs in windows and doors that were already slated for replacement in the next three years, the Court accepted the District's schedule to remove all of the windows and doors and surrounding caulk in pre-1979 buildings by 2020. The Court also gave the District the flexibility to simply stop use of rooms in these buildings instead of replacing the windows and doors. *Id.* at ¶ 22; Judgment and Permanent Injunction, Dkt. 307. (Since TSCA's prohibition is on the "use" of materials with PCBs, TSCA compliance can be achieved by stopping use as well as by remediation).

B. History of the Litigation

Plaintiffs' Complaint sought declaratory and injunctive relief to abate TSCA violations, as well as comprehensive testing of caulk and other building materials for illegal levels of PCBs. Complaint, Dkt. 1, p. 29, Prayer for Relief Sec. B. Prior to and throughout the litigation, the District refused Plaintiffs' requests to engage in additional testing for PCBs and argued that additional testing was not required. For example, in 2014, America Unites submitted to the District a plan for full testing and remediation, and later reiterated a proposal to test all the caulk in the school. Parents even offered to pay for full testing of all of the caulk, but the District consistently refused to test. DeNicola Decl. in Support of Motion for Preliminary Injunction, Dkt. 16, ¶16.

The District's defense of its refusal to test continued throughout the litigation and beyond to the current Motion. *See e.g.* District Motion to Dismiss, Dkt. 48-1 at

2, lines 25-26 ("EPA has repeatedly confirmed comprehensive source testing is not necessary or recommended at the Malibu Campus under TSCA"); Court Order on Summary Judgment, Dkt. 168 at 3 (noting the District's argument that there was no need for additional testing); Defts. Post-Trial Brief, Dkt. 297 at 2, lines 25-27 (same). The District's current motion continues to advance this argument in the Declaration of Douglas Daugherty, Dkt. 317-5, ¶ 41, p. 21, stating that EPA did not request the District to conduct a further investigation of building materials at the Malibu Campus.

The District also repeatedly argued that illegal levels of PCBs could remain in place "so long as air and surface wipe testing does not reveal heightened levels of PCBs," Order on Summary Judgment, Dkt. 168 at 2, and that the schools were supposedly "safe" based on air and wipe testing and BMPs. *E.g.* Motion to Dismiss at 1, lines 15-16 ("there are no harmful PCB exposures at the Malibu Campus, and the schools are safe") (emphasis in original); Post-Trial Brief, Dkt. 297 at 4, lines 11-13 (the District has demonstrated through air and dust testing "that the classrooms at the Malibu Campus are safe"); *id.* at 11, lines 4-8 (claiming that BMPs are being properly implemented "to ensure that PCB exposures remain below EPA thresholds"). Finally, the District argued through its final filing in the case that its adherence to EPA informal guidance and policy precluded a remedy from the Court under the citizen suit provision. *Id.* at 31, lines 18-28, p. 32, lines 1-4.

The Court did not accept these arguments as precluding a finding of a TSCA violation or the need for injunctive relief to abate the violations. The District should not be permitted to re-litigate them now.

C. Remediation and Testing Since the Court's Injunction

Since the Court's injunction, the District has demolished three buildings at MHS (A, B/C and E). It has completed replacement of all doors and windows in only one of the remaining buildings (I). In the other five buildings, 87 interior door systems, 41 exterior door systems and 9 exterior window systems remain to be

remediated. Upton Decl., Dkt. 317-4, ¶ 53, p. 29, lines 3-5. In Juan Cabrillo Elementary School (JCES), removal of 14 door systems in Building A, five door systems in Building E, and nine door systems in Building F remain to be completed. *Id.* at ¶ 47, p. 27, lines 2-4; ¶ 51, p. 28.

In connection with its demolition and renovation activities and caulk removal in compliance with the Court's injunction, the District has engaged in the further testing for PCBs in building materials that it steadfastly refused to perform during the litigation. Extensive **additional** PCBs above 50 ppm were found in caulk and other building materials including paint, sealant, floor tiles and related adhesives, in all but one of the nine MHS buildings. In addition, PCBs in excess of EPA's levels for remediation waste (1ppm) were found in the concrete slabs and in painted brick in the buildings that were demolished, and also around the removed windows in remaining buildings. Upton Decl. at pp. 14-21; ¶ 33, p. 21; Daugherty Decl. at ¶ 51, pp. 26-27. Juan Cabrillo buildings A, B, C, D and E are still being evaluated, *id.* at 20, box 2, so there may well be additional PCBs there too.

The District totally ignores the implications of these new test results for the health and safety of Malibu students, teachers and staff during the extended period it now seeks to leave these materials in place while continuing to occupy these buildings. Moreover, the District conceals the full magnitude of these results by not providing information with its Motion about the extent of the contamination and the levels of PCBs found.[1] Test results on the District's website reveal that, for example, in MHS Building D, caulk was found at 2,170 ppm, and multiple samples of tile and mastic tested over 50 ppm and as high as 5,390 ppm. Most alarmingly, wall vents in eight classrooms and the teachers' lounge, which would be expected to circulate air, tested between 40,800 ppm and 239,000 ppm. Carpenter Decl. Ex. B at

[1] For example, the Upton Declaration vaguely states at ¶ 38 that "several" building materials in Buildings D, F, G, I and J "were identified by Alta [the District's contractor] as [above] 50 ppm," but does not name the materials or the levels.

Table 1.

While ignoring this new information about previously unknown severe and widespread PCB contamination throughout MHS, including in buildings the District seeks to use for another five years beyond the Court's injunction, the District attempts to hang its hat on "preliminary," "representative" sampling of caulk around doors and windows that it claims indicate that very few contain PCBs above 50 ppm. District Motion at 9. The District does not show how the "preliminary" "representative bulk sampling" is actually representative of the remaining unremediated caulk. It is not explained how test locations were chosen to be "representative." Moreover, the sampling was only reported in three buildings: D, H and J. Daugherty Decl. at ¶ 62, p. 31; ¶ 63, p. 32. There is no explanation as to why no caulk sampling results are reported for MHS Buildings F and G or for any building at JCES, even though remediation in those buildings is not complete.

Moreover, as discussed below, the District's request to continue to use unremediated buildings indefinitely, even after its requested five-year extension, if caulk in only some of their rooms tests over the legal limit, completely ignores the serious and pervasive contamination of these buildings that its own testing has found.

D. The District's Motion

The District's Motion seeks an extension of the current injunction for five years in addition to the three years that were already provided for the District to come into compliance with TSCA. The Motion is based on the purportedly changed circumstance that the remaining unremediated buildings are "likely," though not definitely, going to be demolished and rebuilt in the next six years. The District Superintendent attests that "a final plan for redevelopment will likely not be complete for the next 2-3 years." Drati Decl., Dkt. No. 371-3 at ¶ 22, p. 10, lines 20-21. While Dr. Drati provides no support for his claim that even the planning will take two to three years, it is clear that there is no existing plan and no immediate

prospect of one.[2] Thus, the District has no actual information as to how many pre-1979 buildings will be demolished.[3] Moreover, the "likely" demolition apparently applies only to MHS; the District has no intention of demolishing and rebuilding the buildings at JCES at all. The District states that it intends to use the bond money to create a separate middle school, reconstruct the high school, and combine JCES with another elementary school. Upton Decl. at ¶ 60, p. 31, lines 16-19. The District intends to relocate MHS classes to JCES, District Motion at 12; Upton Decl. at ¶ 62, p. 33, lines 3-5, even though remediation is not complete at JCES.

The District also seeks a modification for pre-1979 buildings that are not demolished, so that only caulk that tests over 50 ppm need be removed. Also, rooms with such caulk could be "sealed off," and the rest of those buildings could continue in use indefinitely. Motion. at 1-2, 5-6; Upton Decl. at ¶¶ 70-71, p. 35; ¶ 75, p. 37.

The Motion continues to rely heavily on arguments that have been presented throughout the case, but which the Court did not accept as reasons not to find violations of TSCA or not to order abatement. In essence, the District is returning to its oft-repeated but unsuccessful arguments in reliance on air and wipe testing, BMPs, and EPA guidance, that PCBs in excess of legal limits may remain in place while buildings continue to be used until a demolition or major renovation of the building. Therefore, the District claims, extending the injunction another five years

---

[2] Adding to the uncertainties about the District's plans, the schools still have not been re-opened since the Woolsey fire, and the District has not completed assessing the damage and necessary repairs to the school buildings.

[3] The District's declarant states: "it is unknown at this time whether *all* pre-1979 buildings at the Malibu Campus will be demolished. In the event that the Board of Education votes for any of the six remaining buildings to remain in place," the District has worked with its consultants to develop an alternative approach to use representative sampling to determine whether windows and doors need to be replaced. Upton Decl., ¶ 66, lines 16-21. *See also*, District Motion at 2: "It was the District's intent . . . to utilize the bond monies to demolish and replace *many* of the pre-1979 buildings at the Malibu Campus." (emphasis added).

still complies with TSCA. However, another five years of regulatory violations is not compliance.

For example, the District argues that continuation of the current injunction would be inequitable because it would require moving students and teachers "despite the fact that the presence of pre-1979 building materials in certain buildings does not place them at risk of injury." Motion at 3. This flawed argument could be used, and the District did so unsuccessfully earlier in the case, to justify never remediating the PCBs or vacating the buildings unless and until they are demolished. The 33-page Declaration of Douglas Dougherty, Dkt. 317-5, is largely a rehash of his trial testimony about the District's previous actions with regard to PCBs and its BMP and air and wipe sampling programs, offered to support his current opinion that allowing another five years of exposure to caulk above 50 ppm "is consistent with EPA policy, guidelines, and prior approvals of District activities and will not pose an unreasonable risk of injury to health or the environment . . . " Dougherty Decl. ¶4, p. 3, lines 14-20. Mr. Daugherty does not address the EPA regulation that finds that use of materials with 50 ppm or more PCBs "presents an unreasonable risk of injury."

These arguments did not convince the Court to rule in the District's favor or to eschew injunctive relief requiring abatement of the TSCA violations in the merits phase of the case, and should not be grounds for modifying that relief now. Moreover, as shown below, the District's arguments are also factually incorrect because the school is not "safe," EPA is not overseeing the District's actions, and BMPs are not being performed.

III. ARGUMENT: THE COURT SHOULD NOT MODIFY THE JUDGMENT

Rule 60 (b) (5) permits relief from a judgment on the grounds that "applying it prospectively is no longer equitable." However, this Rule does not allow relitigation of issues that have been resolved by the judgment. 11 Wright, Miller &

Kane, *Federal Practice and Procedure,* § 2863, at p.459 (3d ed. 2012)("*Wright & Miller*"). Moreover, when an injunction affects people beyond the immediate parties, the judge must consider "the benefits and burdens to the public," *i.e.* the public interest. *Duran v. Elrod*, 760 F.2d 756, 759 (7th Cir. 1985). This is especially true here where the purpose of a TSCA citizen suit is to further TSCA's goal of protecting health and the environment. Also, as the Ninth Circuit has explained, Rule 60(b) "attempts to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice should be done." *Delay v. Gordon*, 475 F.3d 1039, 1044 (9th Cir. 2007) (citing *Wright and Miller* § 2851).

The Rule requires the movant to prove the following two elements: (1) a significant change either in factual circumstances or in the law warranting a revision of the decree; and (2) the proposed modification is suitably tailored to resolve the problems created by the changed factual or legal conditions. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 – 385 (1992); *Bellevue Manor Assoc. v. United States*, 165 F3d 1249(9th Cir. 1999). This standard is an exacting one. See *Wright & Miller,* §2863, at p. 461 ("It is clear that a strong showing is required before an injunction or other prospective judgment will be modified.").

As demonstrated below, the District has not met its burden of proving either prong of this exacting burden, and the public interest, along with the interest in the finality of the judgment, far outweighs any equities asserted by the District.

A. <u>The Facts Show that the Public Interest Favors Plaintiffs</u>

1. <u>The District's Assertions of Safety are Wrong and Unreliable</u>

<u>Health Effects</u>: The public interest obviously would be disserved by exposing the roughly 1,000 total members of the Malibu Schools community to unnecessary risk of cancer and other diseases associated with PCB exposures. The fundamental danger to the students, teachers and staff inherent in the District's Motion is explained in the appended Second Expert Declaration of Dr. David Carpenter, a

global leader in PCB health risks who is a Professor at the University of Albany, New York. Dr. Carpenter's prior expert opinion and report were submitted to this Court in 2016 (those documents are re-appended with his Second Opinion, including his C.V.). He reiterates that there has been a cluster of thyroid cancer cases in the Malibu and that form of cancer has "strong association with PCBs". Second Carpenter Decl., ¶ 3.

Dr. Carpenter reviewed the Daugherty and Upton Declarations submitted by the District with its Motion and found that, rather than dispelling the health concerns associated with five more years of exposure, both Declarations underscore the risks. They do so by admitting to multiple PCB readings from samples in excess of 50 ppm. *Id.*, ¶¶ 9, 13. Further, Dr. Carpenter reviewed other test results from the schools prepared by the District's contractor and observed some astonishingly high levels "as high as 239,000 ppm – 4,780 times the legal limit – were found in the large air vent outside of room 206 in Building D last January!" *Id.*, ¶ 9. These indicate very high risk. Dr. Carpenter flatly contradicts the assertions of both Dr. Daugherty and Mr. Upton that the proposed five-year extension will not pose an unreasonable risk of injury to human health. *Id.*, ¶¶ 15, 16. He concludes (*id.*, ¶17):

> [I]it is my opinion, based on solid scientific evidence from my own research and that of others, that there are significant threats to the health of all persons, especially students, who occupy rooms within the Malibu school facilities that contain high levels of PCBs, and that extending that exposure for an additional five years is not acceptable.

Dr. Carpenter's opinion is bolstered by the medical experiences of the Malibu School community. A heart-rending example is that of former student Christian Pierce. He states (Pierce Decl., ¶ 2):

> I had to be homeschooled my Sophomore and Junior years, since I am a cancer survivor and my doctor (Suparna Jain, MD, Pediatric Endocrinology; Fellow of the American Academy of Pediatrics; 10th St

Pediatrics, Santa Monica), required me to do so because of the toxic levels of PCBs at MHS.

Christian's medical situation is reiterated in the appended Declaration from his mother, Beth Lucas. (Lucas Decl., ¶ 5) Continuing the PCB threat that forces medically-recommended homeschooling for vulnerable students cannot be reconciled with any concept of "public interest."

Lisa Marie Lambert is a long-time Malibu teacher (13 years) and the mother of a student as well. Her Declaration contains several alarming facts related to her own health (Lambert Decl., ¶ 10):

> As a teacher who had thyroid cancer and was pregnant and nursing in a contaminated classroom, and whose son now has epilepsy, it is of the upmost importance for me to be in a PCB-free environment. To date, the District has not taken responsibility or admitted that any of our health concerns are related to PCBs even though medical doctors disagree. To further expose myself and my child, a student at Juan Cabrillo Elementary who will soon matriculate to the Malibu High School campus, to more PCBs for five more years is completely unacceptable.

Failure to Follow Best Management Practices: The District's Motion continuously repeats its claim to follow BMP cleaning to reduce PCB exposures in the school rooms. Motion at 1, 5, 6, 7, 11, 17. Unfortunately, the District has failed to reliably do so since the Court's Permanent Injunction in 2016. This is most vividly shown by Ms. Lambert's Declaration and in the Carey Upton emails and associated photos in Exhibit A thereto, as well as in additional photos in Exhibit B thereto. These depict multiple situations of crumbling caulk and paint, brick dust, and other contamination in PCB-laden rooms. Lambert Decl., § 6. The Carey Upton email of March 13, 2018, in response to Ms. Lambert's complaints directs his custodial staff to instruct the janitors in proper "cleaning standards," which plainly

they had failed to follow. Ex. A. Ms. Lambert indicates that this was just one example of many similar BMP failures she had complained of to Mr. Upton over several years. *Id.*, ¶ 5.

Other teacher declarations hone in on this cleaning failure as well, *e.g.*, Gina Arnello Decl., ¶ 6; Didier Beauvoir Decl., ¶ 6; Caren Leib Decl., ¶ 5; Sarah Ryan Decl. Decl., ¶ 5 (detailed description) and numerous others. In view of its failed track record, neither the Malibu School community nor the Court can rely on the unenforceable assurances that the District will consistently comply with BMPs for the next six years. Therefore, public health will remain at risk.

2. Reasonable Alternatives Exist that Protect Human Safety and Conserve Funds

The facts do not support that a five-year extension is the only feasible alternative that can both protect human health and conserve District funds, which the District claims weighs more heavily than the public health factor. For example, Caren Leib is the chair of the Facilities District Advisory Committee (FDAC), a School Board-appointed committee tasked with making recommendations concerning the bond measures and building in the Malibu Schools. All of her committee's recommendations have been accepted by the Board. She was never told that the District planned to ask for a five-year extension of the Court's injunction and would have opposed it if she had known. Leib Decl. ¶ 9. She testifies that it is entirely feasible to comply with the Court's injunction by the end of 2019 by moving students and teachers to the new Building E, which has 12 brand new classrooms that will be ready in a few months, and by using additional portables. *Id.* at ¶ 10. She further states:

> As head of the FDAC, I am confident we will find alternative educational spaces that are safe, clean and perfectly suited for excellent education by the current judgment date of Dec 31, 2019. Additionally to protecting their health, having students and teachers in portable

classrooms will speed up the construction process, allow us to hire more crews to work simultaneously, and then get teachers, students, and staff back in new, clean, safe classrooms more timely.

Id. Jennifer DeNicola also sets forth alternatives that do not involve endangering the members of the Plaintiff group that she leads or the broader Malibu public. DeNicola Decl., § 11.[4]

3. Plaintiffs and the Malibu Community Have Relied on the 2019 Deadline

As Ms. DeNicola states, there has been a mass outpouring of opposition and anger from Malibu teachers and parents in response to the District's Motion. DeNicola Decl., § 6, 7. Despite the chaos of the Woolsey fire destruction in their community, and the extremely short time to prepare this opposition filing, she states that there are "at least 50 parents and 48 teachers who have offered to put in declarations on how the District's Motion will harm them personally." *Id.*, ¶ 7.

Due to the shortness of time to prepare this filing, Plaintiffs have not been able to file all of those, but a total of 51 such Declarations are filed herewith. These include 39 teacher Declarations, two staff declarations and ten parent/voter/taxpayer declarations.

These declarations all have a common theme. Everyone believes that the District's use of the Measure M funding as a reason to extend the Permanent Injunction for an additional five years amounts to a "breach of trust". All have been willing to continue teaching, or sending their children to be taught, in reliance on the Court's Injunction and its assurance that by the end of 2019 their PCB exposures would finally end. All of the declarations from a large swath of the affected

[4] Ms. DeNicola and District officials have had discussions in an attempt to resolve this dispute. After these discussions, the Superintendent sent her a letter purportedly reflecting an agreement; however, as set forth in Ms. DeNicola's Declaration, the letter does not accurately reflect their discussions and no agreement was ever reached.

community express their utter dismay at the District's willingness to ignore the strong public interest in ending this ongoing nightmare.

4. The District's Assertions that EPA is Overseeing their PCB Activities is Incorrect

Another claim made repeatedly in the District's papers is that EPA is overseeing the District's PCB activities in Malibu, and therefore the schools are safe and there would be no harm in extending the injunction. *See generally, e.g.* Daugherty Decl. However, this claim misses the point that in this citizen suit, the Court went beyond what EPA had been doing (or failing to do) to enforce TSCA and ordered relief to comply with the law. Since that time, while EPA has been overseeing some of the actual process of PCB removal conducted by the District, it has played no role in directing, or even advising, regarding compliance with Court's Injunction or with TSCA regarding removal of TSCA-violative materials. When Ms. DeNicola, the President of America Unites, contacted Amanda Cruz, EPA Region IX's PCBs in Schools Coordinator and EPA contact for the District (*see* Daugherty Decl. ¶ 17, p. 9, lines 6-8) concerning the District's PCB compliance for the remaining PCBs at the schools, Ms. Cruz replied that the matter "will be discussed with the Federal judge." Ex. A thereto.

In sum, the public interest clearly favors a denial of the Motion.

B. <u>Passage of Measure M Does Not Make the Judgment Inequitable</u>

The District argues that passage of Measure M is a changed circumstance that warrants modification of the Judgment. Where, as here, the movant cites a change in factual circumstances, "it must additionally show that the changed conditions make compliance with the [judgment] 'more onerous,' 'unworkable,' or 'detrimental to the public interest.'" *United States v. Asarco, Inc.*, 430 F.3d 972, 979 (9th Cir. 2005)(internal citations omitted).

The District does not, and cannot seriously, contend that passage of Measure M, providing them $195 million, makes compliance with the Judgment "more

onerous" or "unworkable." Measure M only serves to supply the District with **more** funds to achieve remediation and other projects at the schools. Rather, the District appears to contend that enforcement of the Judgment would be "detrimental to the public interest" because (1) under the Judgment, it will have to spend approximately $4-5 million to replace windows and doors in those pre-1979 buildings that it has not already remediated (the "Unremediated Buildings") by the end of 2019; and (2) with the passage of Measure M, it is "likely" to demolish and replace the Unremediated Buildings by the end of 2024. Put another way, the District argues that it is in the public interest to leave staff and students in illegal and toxic buildings for five more years because doing so may save $4-5 million, money that should have already been earmarked for this purpose given the availability of prior bond funds and the District's obligation to comply with the Judgment. The District's conclusory contentions do not satisfy its heavy burden of proving that modification is warranted for the following reasons.

First, this is a situation of the District's own making. In entering the Judgment, the Court relied on the District's representations that it would remove the illegal PCB-contaminated caulk when it replaced windows and doors in pre-1979 buildings using previous bond money set aside for that purpose. After replacing some of the doors and windows the pre-1979 buildings, the District changed its mind, and in July 2018 when the Board of Education voted to propose the bond measure, it "paused" its remediation work intended to comply with the Judgment. Drati Decl., ¶ 21, p. 9, lines 24-28. The District decided that it wanted to demolish at least some of the pre-1979 buildings and replace them with new ones. To get the money to do this, the District put Measure M on the ballot. The District's changing its mind does not give it the right to have the Judgment changed. A party is not entitled to relief from a judgment where, as here, it creates the change in circumstances. See *Valentine Sugars, Inc. v. Sudan,* 34 F.3d 320, 321(5th Cir. 1994) ("While the sale …is a change in circumstances, the change occurred entirely

through the actions of ..., the parties seeking relief from the judgment. This is not the kind of unforeseen change in circumstances that merits relief from a judgment.").

Second, the passage of Measure M did not create an unforeseen change in circumstances. See *Asarco Inc.*, 430 F.3d at 979 ("A court should ordinarily not modify a decree, however, where a party relies upon events that actually were anticipated at the time it entered into a decree.")(internal quotation marks and citation omitted). Well before the passage of Measure M, the District knew that it would it would need to replace the pre-1979 buildings at some point in the not-too-distant future. Indeed, the District's initial position to address the PCBs was that it would remove the illegal PCB-contaminated caulk when it renovated or replaced the pre-1979 buildings. Thus, when the District represented to the Court that it would fix the PCB problem at the school by removing doors and windows in pre-1979 buildings, it did so with full knowledge that those buildings would eventually be replaced. It was only a matter of time. Thus, the passage of Measure M, which the District itself initiated, is not an unforeseen change in circumstances that warrants modification of the Judgment.

Third, the District is not even fully or definitively committing to use Measure M money to demolish and replace the Unremediated Buildings, and has no current plan to do so. The District says only that it is "likely" that some of the buildings will be demolished and replaced, and as noted above, this "likelihood" does not even include the JCES buildings. Modification of the Judgment cannot be based on such a vague and uncertain possibility.

Fourth, contrary to what the District contends, the public interest is not served by modification of the Judgment. *See* Sec. 3A above. Although the District asserts that "financial constraints" are a legitimate concern of government defendants, this is not a case of "financial constraints." The District clearly has the money to replace the doors and windows that it was ordered to replace. The District says it can use

the money for other projects, but fails to identify a single, concrete educational objective it will not be able to fulfill if it replaces the doors and windows in the Unremediated Buildings or invests in portables so that those buildings are no longer occupied.[5]

More importantly, the public's interest is not limited to saving money. The public has a strong interest in the enforcement of our laws, including TSCA. The requested modification would harm the public interest because it would allow the District to avoid TSCA's prohibition against the use of PCB-contaminated buildings for at least five more years. Cf. *Rufo, supra*, 502 U.S. at 392("[f]inancial constraints may not be used to ... justify the perpetuation of constitutional violations").

In addition, the District's misguided focus on dollars and cents completely ignores the public's significant interest in protecting staff and teachers against the undisputed poisonous effects of PCBs. The District's request would force teachers and pupils to teach and learn in PCB-contaminated buildings for at least five more years, all so that they can "save" approximately $1 million a year, a sum which is an inconsequential amount when compared to, among other things, the money for lawyers' and consultants' fees that the District has already spent fighting against compliance with TSCA.

The District claims, as it has throughout the litigation, that its BMPs will protect teachers and pupils against PCBs. The District argued the same thing at the trial. However, the Court rejected this argument, and ruled that the District had to remediate the illegal PCBs, BMPs or no BMPs. The Court should reject the District's current attempt to relitigate the issue. Moreover, as explained above, Sec. 3.A.1 and in the attached declarations, the District's BMPs are just words, not realities. The school remains filthy.

Finally, the District's motion glosses over the fact that the Court's judgment

[5] The bond monies must be used for capital improvements and cannot be used for other educational objectives.

gives the District an alternative if it doesn't want to replace the doors and windows in the Unremediated Buildings, *i.e.*, it can simply stop using those classrooms. While the District has claimed that ending use of the contaminated classrooms before 2024 is infeasible, it has not presented concrete evidence that this is the case. The District's claim that "portables would cost the District multiple millions of dollars," Upton Decl., ¶63, p. 33, lines 15-16, has no factual support in terms of the number of additional portables that would be needed or the cost of purchasing or renting them. The "multiple millions" is not even a precise estimate or one within a numerical range like the District's estimates of the costs of replacing the unremediated doors and windows.

Nor has the District shown that they could not efficiently and effectively accomplish their educational mission without using the classrooms in question. To the contrary, it is completely feasible to adhere to the Court's Injunction and stop using PCB-contaminated buildings by December 31, 2019, by moving students and staff into the newly built building E, portable classrooms already on campus, renting new ones and placing them on blacktop areas, and utilizing the Juan Cabrillo campus scheduled to be vacated in August 2019.

The District's additional request for modification of the Judgment to allow for continued use of pre-1979 rooms in buildings that are not demolished which their own testing shows do not contain PCBs over 50 ppm, is, if possible, even less justified. The passage of Measure M – the changed circumstance claimed to justify modification of the injunction -- has nothing to do with such a request. Indeed, by definition, this additional request pertains only to buildings which would not be demolished and replaced under Measure M.

Thus, the only "changed" circumstance is that, according to the District, their testing shows PCBs in caulk in some rooms at less than TSCA's 50 ppm limit. However, this is not an unforeseen circumstance which would warrant modification of the Judgment. The Court will recall that Plaintiffs wanted to have comprehensive

testing of PCBs in caulk and other materials, but the District refused. The District made a calculated decision to refuse testing because it knew that the test results would show illegal levels of PCBs throughout the campus. But even without comprehensive testing, based on the evidence Plaintiffs did present, the Court found that it was reasonable to infer that all pre-1979 buildings contain PCBs in caulk over the legal limits. The District cannot seek to relitigate the Court's finding at this late date by presenting evidence that was always within their power to present to the Court before the Court ruled. See *Halliburton Energy Services, Inc. v. NL Industries*, 618 F.Supp.2d 614, 651(S.D. Tex. 2009) (denying party's request for modification of award under Rule 60(b)(5) because request was based on documents which party could have discovered prior to the award).

In addition, the District's additional request for modification would result in pre-1979 buildings continuing to be occupied indefinitely if only some rooms are found to have caulk above legal limits and those rooms are "closed off." Upton Decl., at ¶¶ 70-71, p. 35; ¶ 75, p. 37. The District even touts as an advantage of its plan that these contaminated buildings would continue to be used. *Id.* at ¶ 75. In contrast, under the Court's injunction, no pre-1979 buildings could continue to be used after the end of 2019 unless the whole building was fully remediated. As confirmed by Plaintiffs' public health expert, Dr. Carpenter, the District's request to continue to occupy buildings even for five more years, much less indefinitely, will create additional threats to public health, particularly from PCBs in air from the caulk and other materials in those buildings. Carpenter Decl. at ¶¶ 13, 15, 16. The existing injunction is far more protective of public health.

C. The Proposed Modification Is Not Suitably Tailored to The Alleged Changed Circumstances

As noted above, in addition to showing that unforeseen circumstances make continued enforcement of the Judgment inequitable, the District must also show that the requested modification is narrowly tailored to the changed circumstances. The

District has failed to satisfy this requirement as well.

The District contends that the proposed modification is "narrowly tailored" because: (1) according to the District, it will take at least five years to demolish and replace the pre-1979 buildings; and (2) they are "only" seeking a five –year extension of the Judgment's deadline. However, the District's five-year figure is taken out of thin air. The only support for it is conclusory contentions in the declarations of Carey Upton and Ben Drati, who did not provide a foundation for making these contentions. As noted above, the District Superintendent, Dr. Drati, has testified that there is currently no plan for redevelopment and none on the horizon. Drati Decl., at ¶ 22, p. 10, lines 20-21. How can the District purport to know how long it will take to implement a non-existent plan? The District provides absolutely no specific facts or evidence supporting its contention that replacement of the pre-1979 buildings will take five years or anywhere near that length of time. It has not submitted testimony from any construction expert, permitting department, or anyone else who would be in a position to know how long the planning and construction will take.

In any case, there is no need to extend the deadline for any length of time because, as noted above, if the District does not want to spend money replacing doors and windows, it can step simply stop using the buildings.

Furthermore, if and when the District eventually gets around to replacing the Unremediated Buildings, EPA regulations will require it to remove the PCB-containing caulk from the pre-1979 doors and windows because such caulk must be disposed of separately. *See* District's Motion at 3 and n. 3, stating that when buildings are demolished, "the TSCA regulated materials [i.e. the caulk that violates TSCA] will be removed along with any lead paint and asbestos as part of pre-demolition activities." Thus, either removal will occur now or when the building is demolished. If it is not done now, the District will have to spend money to remove the PCB-containing caulk when the pre-1979 buildings are demolished. The District

has provided no estimates as to how much this will cost, or how that cost would compare with abiding by the Court's injunction by either remediating or vacating the buildings. Thus, it must be assumed that the District will not save any significant amount of money by putting its employees and students' health at risk and delaying its obligations under TSCA.

IV. CONCLUSION

For the reasons set forth above, the Court should deny the District's Motion.

DATED: December 3, 2018

BROWNE GEORGE ROSS LLP
Charles Avrith

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

EXHIBIT A

Paula Dinerstein

Subject: FW: Malibu update

From: "Cruz, Amanda" <cruz.amandaPepa.gov>
Date: November 20, 2018 at 11:05:52 AM PST
To: Jennifer deNicola <jd18@me.com>
Subject: RE: Malibu update

Jennifer-

The timeline for the removal of the PCBs will be discussed with the Federal judge as a result of the changed conditions for the Bond. I was under the impression the Bond did pass, didn't it?

Amanda

----Original Message----
From: Jennifer deNicola <id18@me.com>
Sent: Tuesday, November 20, 2018 11:04 AM
To: Cruz, Amanda <cruz.amanda(epa.gov>
Subject: Re: Malibu update

Hi. What about all the PCBs that were found In the concrete slabs and the wood paneling and the brick outside of the buildings? What is the plan for those PCBs?

In addition what is the Epa required plan for the caulking and other pCBs that still remain in campus right now ?

Thank you?

Warm Regards,
Jennifer deNicola

On Nov 20, 2018, at 10:58 AM, Cruz, Amanda <cruz.amanda@epa.eov> wrote:

Good afternoon Jennifer -

I received your voicemail, but I was unable to return your call. Could you please be a bit more specific about the question? Point Dume has completed their removal efforts and submitted the LUC language that is in review with our lawyer. Malibu completed the removal action for the demolition of the building with no follow up needed. There is still a pending approval for the removal of the mastic, but I believe that was pending a decision by a judge.

Hope that answers your questions. If not lets set up a time next week to talk (I am on a timeline to get a work product delivered that got delayed when I had to take my son to Tahoe for clean air!)

Amanda

----Original Message -----

From: Jennifer deNicola <id18@me.com>

Sent: Tuesday, November 20, 2018 10:26 AM

To: Cruz, Amanda <cruz.amandaPepa.gov>

Subject: Malibu update

Dear Amanda:

I haven't heard from you in a while in regards to the Malibu High Campus Pcb compliance issue. Can you please give me an update as to where things stand as of today.

Thank you.

Jennifer deNicola

Warm Regards,

Jennifer deNicola