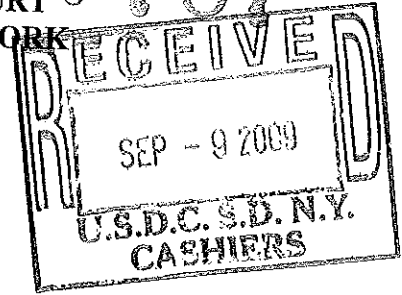


JUDGE McMAHON

09 CV 7787

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



NAOMI GONZALEZ,

Plaintiff,

v.

NEW YORK CITY DEPARTMENT OF
EDUCATION and NEW YORK CITY
SCHOOL CONSTRUCTION AUTHORITY,

Defendants.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

Case No.

Hon.

MIRANDA MASSIE (MM-7721)
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New York, NY 10001
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INTRODUCTION

By this citizen's action under the Toxic Substances Control Act, 15 USC §§2601, *et seq.*, (TSCA), plaintiff Naomi Gonzalez seeks the removal of poly-chlorinated biphenyls (PCBs) from the Bronx elementary school attended by her daughter Emelina, New York City (NYC) Public School 178 (PS 178). The caulk at the school is contaminated with PCBs, highly toxic man-made compounds that damage the nervous, immune, and endocrine systems and cause cancer. PCBs in caulk volatilize into air and are ingested through breathing; they are also ingested through touch. The NYC Department of Education (DOE), though it has known about the PCBs at PS 178 and other schools for at least 17 months, and despite the entreaties of parents and advocates, has failed to take action to protect the health of children.

JURISDICTION, VENUE, and NOTICE

1. This Court has subject matter jurisdiction under 28 USC §1331 because the instant claim is brought pursuant to TSCA, a federal statute.
2. Venue is appropriate in this district under 28 USC §1391(b)(2) and 15 USC §2619(a) because the violation to be remedied is located within it.
3. On March 26, 2009, as required by 15 USC §2619(b)(1)(A), plaintiff gave notice to the United States Environmental Protection Agency (EPA) and to the defendants, DOE and the School Construction Authority (SCA), of her intent to sue to end defendants' violations of TSCA, 15 USC §2695(e)(2)(A), in her children's school.

4. The statutorily mandated notice period of 60 days has passed, and neither EPA nor the Department of Justice has commenced any proceeding that would affect plaintiff's right to initiate litigation under 15 USC §2619(b)(1)(B).

PARTIES

5. Plaintiff Naomi Gonzalez is a teacher's assistant who lives in Co-Op City in the Bronx, NY with her husband Henry Del Valle and their two children, Devin and Emelina. Both children attended elementary school at PS 178, one of a number of NYC schools known to have PCB-contaminated caulk, through last June. While Devin is now enrolled in the sixth grade at a magnet school, Emelina will continue as a first-grader at PS 178.
6. Defendant DOE is a city-wide agency responsible for managing NYC's public schools.
7. Defendant SCA is a city-wide agency responsible for managing NYC school construction and renovation projects.

LEGAL BACKGROUND

8. TSCA was passed in 1977 to regulate hazardous chemicals.
9. In recognition of the exceptional toxicity of PCB compounds, TSCA bans all manufacture and sale of PCBs as of January 1, 1978. PCBs are the only chemicals that TSCA bans outright.
10. As to the ongoing use of PCBs already in existence in 1978, TSCA is also uncompromising. These uses are banned except in two narrow categories: (1)

those explicitly identified by EPA in TSCA's implementing regulations as permissible because they "will not present an unreasonable risk of injury to health or the environment" and (2) those that are "totally enclosed." 15 USC §2605(e)(3)(A); 15 USC §§2605(e)(2)(A) and (B).

11. The first exception does not apply to the use of PCBs in caulk because the implementing regulations do not specify this use as permissible. *See* 40 CFR §§761.30 *et seq.*
12. The second exception also does not apply to the use of PCBs in caulk because the implementing regulations define a totally enclosed use of PCBs as one "which results in no exposure [of] humans or the environment to PCBs." 40 CFR §761.20. It is not rationally disputable that the use of PCBs in caulk results in exposure of humans and the environment to PCBs.¹ *See* ¶¶ 23-26, *infra*.
13. The use of PCBs in caulk, because it falls outside both categories of exception, violates TSCA.
14. In TSCA's implementing regulations, EPA emphasized the dangerousness of PCBs:

[T]he manufacture, processing, and distribution in commerce of PCBs at concentrations of 50 [parts per million (ppm)] or greater present an *unreasonable risk of injury to health*... This finding is based on the well-documented human health and environmental hazard of PCB exposure... In addition...*any exposure* of human beings or the environment to PCBs, as measured or detected by any scientifically acceptable analytical method, may be significant...

¹ Totally enclosed uses of PCBs sometimes occur in electrical equipment.

40 CFR §761.20 (emphases added).

15. EPA has declared that caulk containing PCBs in amounts greater than 50ppm is not authorized and must be removed:

<http://www.epa.gov/osw/hazard/tsd/pCBS/pubs/caulkremoval.htm>

FACTUAL BACKGROUND

A. The toxicity of PCBs

16. PCBs are potent endocrine disruptors and are toxic to the immune and nervous systems. They have been declared to be probable human carcinogens by numerous agencies, including the National Toxicology Program of the National Institutes of Health.
17. In particular, PCBs are developmental toxins that pose disproportionately high risks to children's physical and cognitive health.
18. PCBs accumulate in the human body. Chronic exposure to even low levels of PCBs thus increases body burdens of the toxic compounds over time.

B. The presence of PCBs in caulk in NYC schools

19. Before PCBs were banned in 1978, they were routinely used in the caulk placed around window and door frames and in expansion joints to make it more elastic and durable.
20. Many NYC schools were constructed before the ban, some of them with PCB-contaminated caulk.

D. The disclosure of the problem and defendants' inaction

27. In early 2008, the *New York Daily News* sent caulk samples from nine NYC schools to a state-certified laboratory. In April 2008 it reported that the sample from Emelina Del Valle's school, PS 178, was contaminated with PCBs. Five other samples were also contaminated.
28. The PS 178 sample contained more than 100,000 ppm PCBs. This is more than 2,000 times the 50 ppm threshold level at which EPA has determined PCBs categorically pose an unreasonable risk to health.
29. A true copy of the laboratory analysis of the caulk sample from PS 178 is attached as Exhibit 1.
30. Since the *Daily News* study was released, defendants have belatedly begun complying with a protocol issued in 2007 by the New York State Education Department that requires PCB testing prior to school window renovations. In following the protocol, defendants have discovered 13 additional PCB-contaminated NYC schools, yet to be publicly identified, for a total of 19 schools citywide.
31. Before plaintiff filed her notice of intent to sue, in a series of meetings with parents and at a hearing at the New York City Council, defendants denied the existence of any significant exposure pathway or risk and made no systematic attempt to investigate or address the problem of PCB-contaminated caulk.
32. Since plaintiff filed the notice, defendants have attended meetings with EPA to discuss the problem of PCB-contaminated caulk, but have neither taken action to

eliminate PCBs from any school, including PS 178, nor announced any plan to do so.

33. Defendants' failure to respond to this critical situation has left parents across the city, including Naomi Gonzalez, in a state of anxiety about their children's continuing exposure to this potent toxin.

CAUSE OF ACTION

34. TSCA and its implementing regulations prohibit the use of PCBs in caulk. 15 USC §2605(e)(2)(A); 15 USC §2614(1); 40 CFR §761.20; 40 CFR §§761.30 *et seq.*
35. The defendants have failed to address the known and undisputed presence of substantial levels of PCBs in caulk at PS 178.
36. The defendants are therefore operating PS 178 in violation of TSCA and its implementing regulations.

RELIEF REQUESTED

37. Plaintiff Naomi Gonzalez requests that the Court grant the following relief:
- a. A declaration that defendants are in violation of TSCA and its implementing regulations;
 - b. An order compelling the defendants (1) safely to remove and dispose of any caulk contaminated with PCBs at PS 178; (2) safely to remove and dispose of any other PCB-contaminated substances or materials such as brick, masonry, dust, and soil; and (3) to confirm the absence of PCB air

contamination following the clean-up, using appropriate tests and standards;

- c. An award of costs and fees pursuant to 15 USC §2605(c)(2); and
- d. An award of any other relief the Court deems appropriate.

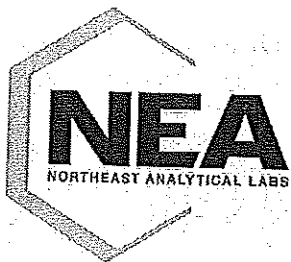
Respectfully submitted,



Miranda Massie
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Floor 11
New York, NY 10001

September 9, 2009

EXHIBIT A



CERTIFICATE OF ANALYSIS
04/06/2007
GEORGE WEYMOUTH
6 AGAWAM CIR
BILLERICA, MA 01821
CONTACT: GEORGE WEYMOUTH

CUSTOMER ID: P.S. 178 WINDOW CAULK
MATRIX: SOLID
DATE RECEIVED: 03/23/2007 TIME: 14:00
SAMPLED BY: G. WEYMOUTH
CUSTOMER PO: N/A

NEA ID: AK02155 NEA LRF: 07030108-01
DATE SAMPLED: 02/11/2007 TIME: 12:45
PROJECT: P.S 178 - SELMAN WAXMAN
LOCATION: BRONX, NY
LAB ELAP#: 11078

PARAMETER PERFORMED	RESULTS	PQL	UNITS	DATE ANALYZED	FLAGS
SW-846 8082 (PCB)					
Aroclor 1016	ND	3900	ug/g	04/05/2007	U
Aroclor 1221	ND	3900	ug/g	04/05/2007	U
Aroclor 1232	ND	3900	ug/g	04/05/2007	U
Aroclor 1242	ND	3900	ug/g	04/05/2007	U
Aroclor 1248	ND	3900	ug/g	04/05/2007	U
Aroclor 1254	111000	3900	ug/g	04/05/2007	U
Aroclor 1260	ND	3900	ug/g	04/05/2007	U
Total PCB Amount > Reporting Limit	111000				

Notes: ND (Not Detected). Denotes analyte not detected at a concentration greater than the PQL.
PQL (Practical Quantitation Limit). Denotes lowest analyte concentration reportable for the sample.

AUTHORIZED SIGNATURE:

William A. Kotas
Quality Assurance Officer
Robert E. Wagner
Laboratory Director