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11 COMMUNITIES FOR A BETTER ENVIRONMENT

12 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**

13 **IN AND FOR THE COUNTY OF SAN FRANCISCO**

14 ENVIRONMENTAL LAW FOUNDATION; OUR  
15 CHILDREN'S EARTH FOUNDATION; and  
16 COMMUNITIES FOR A BETTER  
17 ENVIRONMENT, On Behalf of the General Public

18 Plaintiffs,

19 v.

20 LAIDLAW TRANSIT INC. dba LAIDLAW  
21 EDUCATION SERVICES; LAIDLAW TRANSIT  
22 SERVICES, INC.; DURHAM SCHOOL  
23 SERVICES, L.P.; and DOES 1 through 100,  
24 inclusive,

25 Respondents.

CASE NO.: CGC-06-451832

**PLAINTIFFS' MEMORANDUM  
OF POINTS AND AUTHORITIES  
IN SUPPORT OF MOTION FOR A  
PRELIMINARY INJUNCTION  
AGAINST LAIDLAW TRANSIT  
INC. DBA LAIDLAW  
EDUCATION SERVICES**

[CCP §§526, 527]

Date: June 8, 2007

Time: 1:30 p.m.

Court: Dept. 613

Judge: Hon. Ernest H. Goldsmith

Complaint filed: May 2, 2006

Trial Date: Nov. 26, 2007

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1 **I. INTRODUCTION**

2 Laidlaw Transit, Inc. (“Laidlaw”), the largest private school bus operator in the nation, is  
3 violating California’s Proposition 65 (§25249.6)<sup>1</sup> (“Prop. 65”) by knowingly exposing children on its  
4 buses to cancer-causing diesel engine exhaust without any warning. By this motion, plaintiffs  
5 Environmental Law Foundation, Our Children’s Earth Foundation and Communities for a Better  
6 Environment (collectively, “ELF”), three non-profits with decades of experience fighting for a better  
7 environment, seek a preliminary injunction to require Laidlaw to post warnings on its buses to warn  
8 students that they will be exposed to chemicals known to cause cancer while riding Laidlaw’s diesel  
9 buses. ELF requests that the Court order these warnings be in place prior to the next school year to  
prevent unwitting victims from suffering yet another year of dangerous and illegal exposures.

10 Several respected experts demonstrate the need for an injunction. Dr. Rajiv Bhatia, MD, MPH,  
11 Director of the Occupational and Environmental Health Section of the San Francisco Department of  
12 Public Health, and the author of a major peer-reviewed journal article on the carcinogenicity of diesel  
13 exhaust, has submitted a declaration in support of this motion. Dr. Bhatia notes that the California Air  
14 Resources Board (“CARB”) has concluded, “Diesel particulate matter is the largest contributor to health  
risk posed by toxic air pollutants, constituting approximately 70 percent of the total statewide risk.”<sup>2</sup>

15 Professor Eduardo Behrentz, one of the world’s leading experts on diesel school bus pollution,  
16 who has published numerous scientific journal articles on the subject, explains that some of the most  
17 significant exposures to diesel exhaust occur to children while riding school buses due to daily high  
18 levels of exposure over many years.<sup>3</sup> Studies conducted by CARB and numerous peer-reviewed journal  
19 articles from Yale University, the University of California and others verify that all diesel school buses  
20 “self-pollute,” meaning that the bus’s own exhaust contaminates the bus cabin, and “all passengers of  
school buses are exposed to diesel engine exhaust due to self-pollution.” (Behrentz Dec. ¶¶40, 41)

21 Diesel exhaust levels in school buses are up to 10-15 times higher than in ambient air due to  
22 self-pollution and other factors. (Behrentz Dec. ¶48) Diesel engine exhaust is a toxic brew of fine  
23 particulates, dioxin, arsenic, benzene, and other toxic chemicals. (Bhatia Dec. ¶13) California’s Office  
24 of Environmental Health Hazard Assessment recognized diesel engine exhaust as a chemical known to  
25 cause cancer in humans in 1990, and Prop. 65 warning requirements for diesel exhaust became effective  
in 1991. (*Id.* ¶17) Diesel exhaust is also linked to asthma and other respiratory illnesses. (*Id.* ¶20)

26  
27 <sup>1</sup> All citations are to the Health & Safety Code unless otherwise noted.

28 <sup>2</sup> Declaration of Dr. Rajiv Bhatia (“Bhatia Dec.”) ¶16.

<sup>3</sup> Declaration of Prof. Eduardo Behrentz (“Behrentz Dec.”) ¶14, 20.

1 Children are particularly susceptible to diesel exhaust due to their higher respiration rate, narrower  
2 airways, and less mature ability to metabolize and excrete toxins. (*Id.* ¶16)

3 Atmospheric scientist Camille Sears, MS, has calculated that the average child riding a Laidlaw  
4 school bus experiences an increased cancer risk from exposure to the bus's own diesel exhaust of  
5 between 33 and 433 per million, depending on the age of the bus and the method used to calculate risk.  
6 (Sears Dec. ¶54-55) The self-pollution levels of diesel engine exhaust on Laidlaw's school buses far  
7 exceed Prop. 65's 10 in a million no significant risk level. (*Id.* ¶56; 22 Cal.Code Regs. ("CCR")  
8 §12703(b))

9 For years, Laidlaw has known that it is exposing children to diesel exhaust, but it has refused  
10 either to take action to reduce the pollution by installing pollution controls, or to warn students of the  
11 cancer risks. In a 2003 letter, the Executive Officer of the Bay Area Air Quality Management District  
12 ("BAAQMD") informed Laidlaw's Vice-President:

13 The California Air Resources Board (CARB) has designated diesel particulate matter as a toxic  
14 air contaminant. According to an October 2003 CARB study, children riding in diesel-powered  
15 school buses breathe two to five times more air pollution than those traveling in new, cleaner  
16 school buses. Researchers from UC Riverside and UCLA have also found that diesel-related  
17 pollutants inside buses are at levels at least twice as high as the outside air. The U.S.  
18 Environmental Protection Agency has also concluded that diesel exhaust most likely triggers  
19 asthma and *causes cancer*. . . Given the voluminous evidence of the connection between diesel  
20 particulate and health effects, particularly in children, and the availability of funding to reduce  
21 these emissions from Laidlaw buses, we are very concerned about the lack of interest by Laidlaw  
22 in a retrofit program.<sup>4</sup>

23 A document produced by Laidlaw in discovery admits:

24 Diesel exhaust from idling school buses poses a health risk to both drivers and students. . .  
25 exhaust fumes . . . can enter . . . the passenger compartments of the buses . . . Numerous  
26 scientific studies indicate that exposure to diesel exhaust can cause lung damage, respiratory  
27 problems, premature death, *and lung cancer*. Although everyone can be affected by diesel  
28 exhaust, children are more susceptible to these health problems because their respiratory systems  
are not fully developed. (Ex. B to Drury Dec. (emphasis added))

29 Rather than accepting BAAQMD's offer of funding for bus retrofits to reduce diesel pollution  
30 by over 90%, or posting warnings to inform students of this risk, Laidlaw instead instructed its  
31 mechanics to falsify bus emission tests in an apparent attempt to cover up the problem. ELF has  
32 obtained sworn declarations from former Laidlaw mechanics stating that Laidlaw intentionally falsified  
33 evidence under the direction of Laidlaw's management, including critical emissions testing for school  
34

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35 <sup>4</sup> Ex. A to Declaration of Richard Drury ("Drury Dec.") (emphasis added). See also, Ex. I to Drury Dec.

1 buses (“opacity tests”), and presented this false evidence for this case.<sup>5</sup> Laidlaw supervisors routinely  
2 ordered the employees to falsify opacity test results so that no bus would fail the opacity tests. (Padilla  
3 Dec., ¶29-31) One employee explains that his managers ordered him “to make buses that were  
4 excessively smoking pass the opacity test by falsifying the test...” and “to make the buses that were not  
5 passing, pass the test anyway.” (*Id.*, Contreras Dec. ¶10) For hundreds of buses, Laidlaw simply placed  
6 a sheet of plastic into the opacity meter to produce false results as evidence in the case before this  
7 Court.<sup>6</sup> (Padilla Dec. ¶33-37)

8 Despite knowing that children were being exposed to a serious carcinogen, Laidlaw has  
9 steadfastly refused to provide any warnings. Such warnings would allow parents to make an educated  
10 choice of whether to subject their children to diesel exhaust on school buses, whether to drive their  
11 children to school, or whether to urge school boards to obtain cleaner buses, as has occurred in many  
12 jurisdictions. As a result, children are being unwittingly exposed to cancer-causing chemicals on a daily  
13 basis and have been for years.

14 The balance of hardships strongly favors requiring warnings on school buses. First, the statute  
15 expressly contemplates the need for injunctive relief and empowers courts to grant it to enforce the  
16 statute’s protective purposes. (§25249.7(a)) Second, warnings will serve an important public interest  
17 function by providing the public with notice of significant exposures to carcinogens occurring on  
18 Laidlaw buses, while vindicating the voters’ intent to create a community right-to-know embodied in  
19 Prop. 65. By contrast, Laidlaw will suffer almost no hardship from having to post warnings on its  
20 buses, other than a small cost related to temporary paper signs. More importantly, public funding is  
21 available to fund efforts to retrofit school buses with pollution controls. Retrofits could eliminate the  
22 need for warnings. Thus, the balance of harms tips entirely toward the public’s health, since Laidlaw  
23 would suffer little or no hardship.

## 24 **II. STATUTORY BACKGROUND**

### 25 **A. PROP. 65**

26 Prop. 65 provides: “No person in the course of doing business shall knowingly and intentionally  
27 expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without  
28 \_\_\_\_\_

25 <sup>5</sup> Declaration of William Padilla (“Padilla Dec.”); Declaration of Manuel Contreras (“Contreras  
26 Dec.”).

27 <sup>6</sup> As described in detail below, falsification of the opacity data for this case is part of a long-  
28 standing pattern, at least at the San Francisco bus yard. Laidlaw routinely falsifies opacity tests, as  
well as more extensive repair and maintenance reports, including those required by the California  
Highway Patrol to ensure the safety of buses. (Contreras Dec. ¶4, 7-25, 29-36; Padilla Dec. ¶9-39)

1 first giving a clear and reasonable warning to such individual . . .” (§25249.6) Prop. 65 is a “right-to-  
2 know” law passed by the voters in 1986 by a two-thirds majority. Like all right-to-know laws, Prop. 65  
3 neither directly prohibits nor directly regulates exposures. Instead, Prop. 65 provides the public with  
4 information that it needs to make educated decisions. Armed with this knowledge, the public can make  
5 informed decisions about whether to expose themselves to toxic chemicals, or demand that companies  
6 provide products and services and otherwise conduct their activities in ways that do not expose them to  
7 toxic chemicals. (See *Consumer Cause v. SmileCare* (2001) 91 Cal.App.4<sup>th</sup> 454, 461-62 (“*SmileCare*”);  
8 *Consumer Cause v. Weider Nutrition* (2001) 92 Cal.App.4<sup>th</sup> 363, 370 (“*Weider*”) (“Prop. 65 also tells  
9 businesses: Don’t expose us to any of the[se] . . . chemicals without first giving us a clear warning. We  
10 each have a right to know, and to make our own choices about being exposed to these chemicals.”)) By  
11 forcing companies to disclose the presence of toxic chemicals, Prop. 65 aims to deter the use of those  
12 chemicals. (*SmileCare*, 91 Cal.App.4<sup>th</sup> at 461). The Supreme Court has stated that because “Prop. 65  
13 is a remedial statute intended to protect the public . . . [w]e construe the statute broadly to accomplish  
14 that protective purpose.” (*People ex rel. v. Superior Court* (1996) 14 Cal.4<sup>th</sup> 294, 314)

15 Chemicals are added to the Prop. 65 list by the Governor if “in the opinion of the state’s  
16 qualified experts it has been clearly shown through scientifically valid testing according to generally  
17 accepted principles to cause cancer.” (§25249.8(b).) Diesel engine exhaust was added to the list in  
18 1990 due to overwhelming evidence that people exposed to the chemical had significantly elevated  
19 incidence of lung cancer. (Bhatia Dec. ¶17; Calif. OEHHA  
20 ([http://www.oehha.ca.gov/prop65/prop65\\_list/files/P65single120806.pdf](http://www.oehha.ca.gov/prop65/prop65_list/files/P65single120806.pdf)))

21 Under Prop. 65, the plaintiff bears the *prima facie* burden to show a knowing and intentional  
22 detectable exposure to a chemical known to the State to cause cancer without a clear and reasonable  
23 warning. (See §25249.6; *SmileCare*, 91 Cal.App.4<sup>th</sup> at 474) If the plaintiff carries its burden, the  
24 defendant is in violation of Prop. 65 unless it proves an affirmative defense. Chief among these is Prop.  
25 65’s exemption for an exposure that “poses no significant risk” of cancer. (§25249.10(c)) The  
26 regulations establish the “no significant risk” level to be a level of exposure that would result in less  
27 than 10 cases of cancer for every million people exposed (“ten in a million”). (22 CCR §12703(b)) The  
28 statute creates a health-protective standard, stating that a company can avoid posting warning only if it  
“can show that the exposure poses no significant risk assuming *lifetime exposure at the level in  
question.*” (§25249.10(c) (emphasis added)) The regulations define “lifetime exposure” to be “seventy  
years.” (22 CCR 12721(c))

1 The statute puts the burden squarely on defendants to prove the “no significant risk” affirmative  
2 defense. “In any action brought to enforce [Prop. 65], the *burden of showing that an exposure meets*  
3 *the criteria of this subdivision shall be on the defendant.*” (§25249.10(c) (emphasis added)) The  
4 *Smilecare* court explained that once plaintiffs make their *prima facie* case that defendant has exposed  
5 people to a listed chemical without warning, that:

6 put[s] the burden on defendants to make a prima facie showing that the level of exposure was  
7 within the limits set by the Act. . . [Plaintiff] did not have to fund scientific studies or collect  
8 medical data to establish the [no effect level] or to gauge the level of exposure at defendants’  
9 offices. Nor did it have to hazard a guess. Under the Act, *defendants*, not [plaintiff], *had to*  
10 *contend* that the exposure was at a specific level . . . (91 Cal.App.4<sup>th</sup> at 474). . . Defendants were  
11 required . . . to present evidence to prove the exposure . . . was below the [no effect level]. (*Id.*  
12 at 476) [emphasis in original]

13 As discussed below, ELF submits copious evidence to establish its *prima facie* case that Laidlaw  
14 has exposed passengers on all of its buses to diesel exhaust without warning. Moreover, ELF has gone  
15 beyond its burden and has submitted expert evidence to rebut Laidlaw’s affirmative defense, by proving  
16 that the exposures are far above the no significant risk level. In contrast, Laidlaw’s discovery responses  
17 show that it has no evidence whatsoever to establish the affirmative defense that these exposures are  
18 below the no significant risk level. Indeed, the only evidence produced on exposure levels on the  
19 individual buses consists of missing and falsified opacity tests.

## 15 B. PRELIMINARY INJUNCTION

16 Prop. 65 expressly provides for injunctive relief: “Any person that violates or threatens to  
17 violate Section . . . 25249.6 may be enjoined in any court of competent jurisdiction.” (§25249.7(a)) A  
18 court evaluates two interrelated questions when deciding whether to issue a preliminary injunction: (1)  
19 will plaintiffs suffer greater injury from denial of the injunction than defendants will from its granting;  
20 and (2) is there a reasonable probability that plaintiffs will prevail on the merits. (*IT Corp. v. County of*  
21 *Imperial* (1983) 35 Cal.3d 63, 69-70 (“*IT Corp.*”)) The stronger the showing on one prong, the less  
22 must be shown on the other. (*Butt v. State of Cal.* (1992) 4 Cal.4th 668, 677-78)

23 Where, as here, a statute expressly provides for injunctive relief, a court need not even balance  
24 harms, looking only to the likelihood of success, since the statute has already determined that the  
25 public’s interest in preventing the violation is stronger than the defendant’s interest in continuing its  
26 illegal activities. For example, where a public enforcer establishes that it is “reasonably probable that it  
27 will prevail on the merits, a rebuttable presumption arises that the potential harm to the public  
28 outweighs the potential harm to the defendant.” (*IT Corp.*, 35 Cal.3d at 72) Although ELF is not a  
governmental entity, it brings this action in the public interest, as a private attorney general and after

1 notice and review by the Attorney General, as provided in Prop. 65. (See §25249.7(d)(1), (2)) Since  
2 Prop. 65 provides for injunctive relief, it indicates: “(1) that significant public harm will result from the  
3 proscribed activity, and (2) that injunctive relief may be the most appropriate way to protect against that  
4 harm.” (*IT Corp.*, 35 Cal.3d at 70)

### 5 **III. ARGUMENT**

#### 6 **A. THERE IS A REASONABLE PROBABILITY THAT PLAINTIFFS WILL 7 PREVAIL ON THE MERITS**

##### 8 **1. Laidlaw is Exposing School Children to Cancer-Causing Chemicals Every Day**

9 Numerous peer-reviewed and governmental studies establish that all passengers of all diesel  
10 school buses are exposed to diesel engine exhaust. (Behrentz Dec. ¶41) Diesel engine exhaust is  
11 known to the State to cause cancer. (See 22 CCR §12000(b), (c))

12 In 2003 CARB conducted the most comprehensive analysis of diesel pollution on school buses  
13 to date (“CARB Study”). (Behrentz Dec. ¶21) Prof. Eduardo Behrentz was a lead researcher for that  
14 study. (*Id.* ¶21-22) CARB studied school buses operated by the Los Angeles Unified School District  
15 (“LAUSD”) on LAUSD bus routes. These buses ranged in age from brand new to several 4-7 year-old  
16 buses to one 25-year-old bus. The buses were equipped with 16 sophisticated sampling devices and  
17 were tested 22 separate times for various pollutants on various routes. (*Id.* ¶23-25) This study provides  
18 precisely the type of “real world” exposure data required by the court in *As You Sow v. Conbraco*  
19 *Industries* (2005) (135 Cal.App.4th 431, 446).

20 The CARB researchers injected a tracer gas (SF6) into the exhaust system to detect and quantify  
21 self-pollution. The CARB Study found that “self-pollution from the bus’s own exhaust was found to  
22 play a significant role in on-board bus concentrations, especially when the windows were closed,” and  
23 that “*intrusion was detected in all buses.*” (Behrentz Dec. ¶40) The CARB Study found that diesel  
24 exhaust levels on the buses were 4-10 times higher than background levels, (*Id.* ¶30) and that self-  
25 pollution levels were more than twice as high with windows closed than open, demonstrating the impact  
26 of self-pollution. (*Id.* ¶39) Prof. Behrentz concludes that diesel exhaust “*self-pollution occurs on all*  
27 *diesel school buses,*” and that “*all passengers of school buses are exposed to diesel engine exhaust*  
28 *due to self-pollution.*” (*Id.* ¶41)

Atmospheric Scientist Camille Sears analyzed Laidlaw’s California bus fleet and found that  
Laidlaw operates hundreds of buses that are identical or nearly identical to those tested by CARB.  
(Sears Dec. ¶19-20) Thus, she concludes that Laidlaw’s bus emissions would be similar to those found  
in the CARB Study. (Sears Dec. ¶20)

1 The CARB Study has been reaffirmed in numerous peer-reviewed studies using a variety of  
2 methodologies. A study conducted by the University of California at Berkeley and the Natural  
3 Resources Defense Council (UCB Study) reached nearly identical results. The UCB researchers  
4 equipped school buses with advanced monitoring equipment and tested the buses on typical bus routes.  
5 The same monitoring equipment was placed in a car immediately in front of each bus. The study found  
6 that a child riding the school bus is exposed to up to 4 times higher levels of diesel exhaust than a child  
7 riding the same route in an automobile immediately in front of the bus. The levels measured on the bus  
8 were nearly identical to those found in the CARB Study. Like the CARB Study, the UCB Study found  
9 that, due to self-pollution, diesel exhaust levels more than doubled when bus windows were closed.  
(Behrentz Dec. ¶47)

10 Prof. John Wargo of Yale University placed “backpack” monitors on children riding school  
11 buses to and from school, and monitored the children throughout their days (“Yale Study”). Larger  
12 monitors were mounted on the buses for accuracy. The Yale Study found that diesel exhaust levels on  
13 school buses were 5-10 times higher than ambient levels and that levels were much higher when bus  
14 windows were closed than open. The study also found that particulate matter levels increased  
15 dramatically immediately after the children boarded the buses and decreased immediately when the  
16 children left the buses. (Behrentz Dec. ¶48)

17 At least a dozen studies and articles, many published in leading peer-reviewed scientific  
18 journals, have confirmed the results of the CARB, Yale and UCB Studies. (*Id.* ¶51 and Exhibits  
19 thereto) It is rare to have such a massive body of evidence and expert opinion to support any case  
20 involving toxic chemicals. Based on this research, the United States Environmental Protection  
21 Agency’s (“US EPA”) Clean Air Act Advisory Committee has concluded: “*reducing emissions from  
22 the nation’s school bus fleet should be a first priority.*” (Behrentz Dec. ¶52)

23 Even Laidlaw’s own management admits the problem of self-pollution, stating, “Diesel exhaust  
24 from idling school buses poses a health risk to both drivers and students. . . *exhaust fumes . . . can  
25 enter . . . the passenger compartments of the buses.*” (Ex. B to Drury Dec. (emphasis added))

26 Given the overwhelming weight of scientific evidence, and Laidlaw’s own admission, there is  
27 no question that passengers on Laidlaw’s diesel school buses are being exposed to diesel exhaust every  
28 day that they commute to school. Thus, Plaintiffs have established their *prima facie* case.

## 2. Laidlaw is Exposing Children to Significant Levels of Diesel Exhaust

As discussed above, once plaintiffs have met their *prima facie* burden of establishing an  
exposure to a listed chemical, the burden shifts to the defendant to establish that the exposure posed no

1 significant risk assuming a lifetime exposure to the level in question. In this case, ELF has gone beyond  
2 the *prima facie* case to negate this affirmative defense.

3 Atmospheric Scientist Camille Sears, MS has conducted extensive air quality analysis and has  
4 determined that children riding Laidlaw school buses experience an elevated cancer risk of between 33  
5 and 433 in a million, depending on bus age. (Sears Dec. ¶54-55) This is far above the no significant  
6 risk level of 10 in a million. (*Id.* ¶56)

7 Sears calculated cancer risk in five different ways. First, she relied upon actual measurements of  
8 school bus self-pollution reported in three different published studies conducted by CARB, University  
9 of California Berkeley and Yale University. (*Id.* ¶22-25) Sears calculated that the diesel exhaust levels  
10 from self-pollution measured on school buses similar or identical to Laidlaw's would result in excess  
11 cancer risks of approximately 33 to 433 per million, depending on bus age. (*Id.* ¶55)

12 Sears also conducted air quality modeling of Laidlaw's bus fleet. Air quality models calculate  
13 the dispersion of pollutants in the atmosphere using complex regulatory-approved computer programs,  
14 taking into account bus emissions, bus size, bus speed, air exchange rates and many other factors. (*Id.*  
15 ¶4, 26-41; Ex. F to Sears Dec.) Modeling is generally considered more accurate than monitoring since  
16 it takes into account conditions that may vary from day-to-day and may not be reflected in monitoring.  
17 For example, environmental conditions may be unusual on the day that monitoring is conducted. (*Id.*  
18 ¶27-28; Ex. F to Sears Dec.)

19 Sears used numerous different emission rates to cross-check her results, including: (1) emission  
20 rates reported in the CARB Study (*Id.* ¶33); (2) emission limits established by US EPA (*Id.* ¶34); (3)  
21 emission rates measured by CARB for San Diego School District buses (*Id.* ¶39); and (4) emission rates  
22 calculated from Laidlaw's own opacity tests. (*Id.* ¶40)<sup>7</sup> Sears concludes that the diesel exhaust levels  
23 from self-pollution calculated by modeling would result in an excess cancer risk of 37 to 407 per  
24 million, depending on bus age (older buses are dirtier). (*Id.* ¶55) Thus, the monitoring and modeling  
25 results are nearly identical, indicating a high degree of accuracy. (*Id.* ¶38, 56; Ex. F to Sears Dec. ¶6.f)

26 Sears calculated the cancer-risk caused by diesel self-pollution for each of Laidlaw's buses by  
27 age, using US EPA emission limits: (1) 3,387 Laidlaw buses (model years 1994-2006) expose  
28 passengers to an excess cancer risk due to diesel self-pollution of 68 per million; (2) 164 Laidlaw buses  
(model years 1991-1993) expose passenger to an excess cancer risk of 169 per million; and (3)

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<sup>7</sup> As discussed in the Padilla and Contreras Declarations, Laidlaw's opacity tests are highly suspect. However, even these apparently falsified tests show that well over 600 Laidlaw buses are violating Prop. 65. (Sears Dec. ¶41)

1 226 Laidlaw buses (model years before 1991) expose passengers to an excess cancer risk of 407 per  
2 million. (Sears Dec. ¶54)

3 CARB has reached similar conclusions. Using extremely conservative assumptions, CARB  
4 calculated that a typical child riding one of the cleanest buses tested on a typical 45-minute route each  
5 day from kindergarten through twelfth grade would experience an increased cancer risk of 30 in a  
6 million due to their school bus exposure. (Ex. M to Behrentz Dec., p.8) This assumes a 13-year  
7 exposure rather than the 70-year lifetime exposure required under Prop. 65, and so substantially  
8 understates the risk.<sup>8</sup> Even using these assumptions, CARB concludes that the exposure exceeds Prop.  
9 65's no significant risk level by three times.

10 All of the studies and calculations indicate that diesel exhaust self-pollution on Laidlaw's school  
11 buses with model years of 2006 or earlier far exceeds Prop. 65's No Significant Risk level of 10 per  
12 million. (*Id.* ¶56) Laidlaw has produced no evidence in discovery to rebut these conclusions. Thus,  
13 Laidlaw's affirmative defense must fail.

### 14 **3. Laidlaw Is Knowingly and Intentionally Exposing Children to Diesel Exhaust**

#### 15 **a. Laidlaw Had Actual Knowledge that it was Exposing Children**

16 Within the meaning of Prop. 65, "knowingly" refers only to knowledge of the fact that a  
17 discharge, release, or exposure to a listed chemical has occurred. No knowledge is required that the  
18 exposure is unlawful. (22 CCR §12102(n); *SmileCare*, 91 Cal.App.4<sup>th</sup> at 463). "Intentionally" means  
19 only that there was some human conduct on the part of the defendant that caused the discharge or  
20 exposure. (*Nicolle-Wagner v. Deukmejian* (1991) 230 Cal.App.3d 652, 660 ("*Nicolle-Wagner*").

21 Laidlaw knew that it was exposing children to diesel engine exhaust. As discussed in the  
22 introduction, BAAQMD informed Laidlaw in 2003 that Laidlaw's buses were exposing children to  
23 cancer-causing diesel exhaust at hazardous levels. (Ex. A to Drury Dec.)

24 Laidlaw's own documents show that it is well aware that its buses are exposing children to  
25 cancer-causing diesel exhaust. As noted, a Laidlaw document stated that:

26 Diesel exhaust from idling school buses poses a health risk to both drivers and students. . .  
27 exhaust fumes . . . can enter . . . the passenger compartments of the buses . . . Numerous  
28 scientific studies indicate that exposure to diesel exhaust can cause lung damage, respiratory  
problems, premature death, **and lung cancer**. (Ex. B to Drury Dec.(emphasis added))

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26 <sup>8</sup> By using a 13-year exposure assumption instead of the 70 years required by the statute (as a safety  
27 factor, the statute requires a 70-year exposure assumption to determine whether a warning should be  
28 given), the CARB analysis assumed less than one-fifth of the exposure that would be used in an analysis  
under Prop. 65. Even eliminating over 80% of the exposure, the level *still* exceeds the Prop. 65 standard.

1 (See also, Laidlaw white paper, “The Diesel Debate: A Brief Review of the Scientific and Regulatory  
2 Landscape” (May 2003) (Ex. C to Drury Dec.).)

3 Laidlaw’s Vice-President and General Counsel, Beverly Wyckoff, knew that Laidlaw was  
4 violating Prop. 65 by failing to warn. On May 23, 2005, she wrote:

5 Prop 65 is a law in CA that requires that all manufacturers or operators of products that contain  
6 any one of more of about 700+ chemicals and which disperse or otherwise distribute those  
7 chemicals into the air or water label those products with a warning about the exposures. *Diesel  
8 fuel is definitely on the list and therefore we would have to label* in such a way to disclose  
9 where there was a “significant risk” of the exposures. For school buses, this labeling could  
10 range . . . from labeling each bus to posting signs [in] places where we idle. If we fail to  
11 respond, the AG generally feels compelled to issue fines and award attorneys fees to the private  
12 parties in addition to the labeling requirements. (Ex. D to Drury Dec. (emphasis added))

13 Despite this knowledge, Laidlaw continued to expose children to diesel exhaust without a warning.  
14 Thus, the exposure was “knowing” and “intentional.” (*Nicolle-Wagner*, 230 Cal.App.3d at 660)

15 **b. The Fact that Laidlaw Tried to Cover-Up its Diesel Exhaust Problem  
16 Is Evidence of Knowledge.**

17 Laidlaw created utterly false opacity tests as evidence to be put before this Court, at least at its  
18 San Francisco facility. (Padilla Dec. ¶25-38; Contreras Dec. ¶10) Plaintiffs present evidence that this is  
19 not a one-time or aberrant example. The testimony of former employees reveals that falsifying opacity  
20 tests was a routine method of doing business in the San Francisco facility. (*Id.*) Two former Laidlaw  
21 employees have submitted sworn declarations stating that management routinely ordered them to falsify  
22 test results so that no bus would fail the opacity tests. (Padilla Dec., ¶29; Contreras Dec. ¶10) Manuel  
23 Contreras states, “Opacity tests performed to monitor each bus’s exhaust were also routinely  
24 manipulated or falsified.” (Contreras Dec. ¶10) William Padilla explains his managers ordered him “to  
25 make buses that were excessively smoking pass the opacity test by falsifying the test...” and “to make  
26 the buses that were not passing, pass the test anyway.” (Padilla Dec. ¶29) For buses that failed the  
27 opacity test, the mechanic would simply move the meter farther away from the exhaust pipe. (*Id.* ¶31)  
28 For *hundreds* of buses, Laidlaw simply placed a sheet of plastic into the opacity meter to produce false  
results. (*Id.* ¶35) Laidlaw submitted the falsified tests expressly for this lawsuit, despite knowing that  
they had been falsified. (*Id.* ¶¶33, 36)

Falsification of records on it buses is not limited to diesel exhaust. The testimony reveals that  
maintenance and repair records are also routinely falsified, including those required for California  
Highway Patrol inspections and required repairs. (Contreras Dec. ¶4, 7-9, 12-25, 29-31; Padilla Dec.  
¶9-24) Mechanics in the shop were repeatedly ordered by management to sign off on repairs that were  
required but not performed. (Padilla Dec. ¶14-24; Contreras Dec. ¶4, 12-24) In addition, management

1 overrode mechanics' decisions to take unsafe buses out of service until needed repairs were performed.  
2 (*Id.*) By this expedient, buses that should not have remained in service to transport school children  
3 remained on the streets. (*Id.*) In one case a driver was injured trying to stop a bus that had no brakes.  
4 (Contreras Dec. ¶21) When the mechanics revolted and demanded a meeting, they were told by the  
5 head of the San Francisco operation, with Laidlaw's attorney present, that any mechanic refusing to sign  
6 a falsified inspection and repair report would be terminated. (*Id.* ¶19-20; Padilla Dec. ¶17, 24)

7 The fact that Laidlaw has routinely attempted to cover-up the severity of its diesel exhaust  
8 emissions by falsifying its opacity tests is evidence that it was aware of the problem.<sup>9</sup> For example, in  
9 *R.S. Creative v. Creative Cotton* (1999) (75 Cal.App.4th 486), the court held that a defendant who  
10 created a forged contract engaged in spoliation of evidence, and the court could infer that the contract,  
11 had it not been falsified, would have proven the plaintiff's case. In *Whiteley v. Philip Morris* (2004)  
12 (117 Cal.App.4th 635, 646), the court held that a cigarette company's destruction of evidence indicated  
13 its knowledge of the fact that cigarettes cause cancer. (See also *Cedars-Sinai Med. Center v. Super. Ct.*  
14 (1998) 18 Cal.4th 1 (destruction of medical records created adverse evidentiary presumption)) Every  
15 presumption is against a party that has intentionally engaged in spoliation. (*Tilton v. Iowa Oil* (1934)  
16 139 Cal.App. 93) The court may infer that evidence would have been unfavorable to party that falsified  
17 it. (*Thor v. Boska* (1974) 38 Cal.App.3d 558; *Willard v. Caterpillar* (1995) 40 Cal.App.4th 892.) The  
18 fact that Laidlaw actively covered up the extent and nature of its emissions is evidence that Laidlaw had  
19 knowledge of the problem, and that this evidence would have supported ELF's case.

#### 17 **4. Laidlaw Did Not Provide Warnings to Students to Inform Them of Their** 18 **Exposure to Diesel Exhaust**

19 Despite knowing of the health risks posed by school bus diesel exhaust, Laidlaw refused to warn  
20 its passengers. An electronic mail message to Laidlaw's Southwest Director Liz Sanchez states, "Our  
21 school buses are not labeled under Prop 65 . . ." (Ex. E to Drury Dec.) In response to a Supplemental  
22 Special Interrogatory (No. 59) asking, "Have you provided any warnings to passengers of your buses  
23 intended to comply with Prop. 65?" Laidlaw responded, "Defendant is unable to respond to this

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24 <sup>9</sup> In addition to falsification, Laidlaw has failed to take or retain hundreds of opacity tests required by  
25 law. Laidlaw is required to conduct opacity tests each year (13 CCR §§ 2193(c), 2194) and must  
26 maintain records of those tests for at least two years. (13 CCR 2192(a)(10)) In discovery, Laidlaw has  
27 been unable to produce opacity tests for at least 198 of its buses, indicating it either never performed the  
28 tests or discarded the results. In San Francisco, this gap was filled by performing opacity tests on a  
piece of plastic instead of bus tailpipes. In any case, given that such tests were routinely falsified "in  
order to make buses that couldn't pass, pass" (Padilla Dec., ¶29-31), even the results that have been  
produced are highly suspect.

1 Interrogatory.” (Ex. F to Drury Dec.) In response to Supplemental Requests for Production of  
2 Documents (No. 27, 28) seeking all warning issued to passengers and students riding Laidlaw buses,  
3 Laidlaw responded that it was “unable to respond to this Request.” (Ex. G to Drury Dec.)

4 **B. THE POTENTIAL HARM TO THE PUBLIC HEALTH FROM UNWITTING**  
5 **EXPOSURE TO CANCER-CAUSING CHEMICALS OUTWEIGHS THE**  
6 **POTENTIAL HARM TO LAIDLAW**

7 Since the statute provides for injunctive relief and ELF has established a reasonable probability  
8 of success on the merits “a rebuttable presumption arises that the potential harm to the public outweighs  
9 the potential harm to the defendant.” (*IT Corp*, 35 Cal.3d at 71) Thus, it is appropriate to issue an  
10 injunction similar to the one issued in *Mangini v. J.G. Durand Int’l* (1994) 31 Cal.App.4<sup>th</sup> 214  
11 (“*Mangini*”), where Justice Stuart Pollack issued a preliminary injunction requiring manufacturers of  
12 leaded crystal drinking glasses to post warnings on their glassware. Laidlaw will suffer no harm as a  
13 result of such a narrowly-tailored injunction. It will still be allowed to operate its buses and collect  
14 contract fees. The cost of temporary paper signs for each school bus will be negligible. (*Id.*)

15 By contrast, students risk significant unwitting exposures to cancer-causing chemicals while  
16 riding Laidlaw school buses. According to Atmospheric Scientist Camille Sears’ calculations, school  
17 children will suffer an increased risk of cancer of between 33 and 433 per million due to their exposure  
18 to diesel exhaust while riding Laidlaw’s buses. (Sears Dec. ¶55) Since one million California children  
19 ride diesel school buses, (Ex. B to Behrentz Dec. p.3), approximately 33 to 433 California children are  
20 likely to contract cancer due to their exposure on school buses. While it is impossible to determine  
21 which students will contract cancer, this is precisely the reason that Prop. 65 requires them all to be  
22 warned so that they can have the opportunity to avoid the exposure altogether. Laidlaw’s costs for  
23 paper signs pales in comparison to this risk to our children’s health.

24 The federal courts, which apply virtually the same standard for injunctions as the state courts  
25 (*Earth Island Inst. v. U.S. Forest Service*, (9th Cir. 2003) 351 F.3d 1291, 1298), have held it is  
26 undisputed that “environmental injury, by its nature, can seldom be remedied by money damages and is  
27 often permanent or at least of long duration, i.e. irreparable.” (*Amoco Production Co. v. Village of*  
28 *Gambell*, 480 U.S. 531, 545 (1987); *People v. Department of Navy* (N.D. Cal. 1977) 431 F. Supp. 1271,  
aff’d (9<sup>th</sup> Cir. 1980) 624 F. 2d 885 (pollution which violates environmental law “is, by definition,  
presumptively significant and irreparably harmful to health and welfare.”))

By exposing children to cancer-causing chemicals without their knowledge, Laidlaw inflicts  
substantial and irreparable harm. Prop. 65 confers upon the public a right to be informed of exposures  
to cancer-causing chemicals *before* they occur. (*Weider*, 92 Cal.App.4th at 370) Being deprived of

1 environmental information that is required by law is recognized as irreparable harm under both state and  
2 federal law. (See Pub. Resources Code §21005(a); *National Parks & Conservation Assn. v. Babbitt* (9<sup>th</sup>  
3 Cir. 2001) 241 F.3d 722, 738 n.18; *Atlantic States Legal Found. v. Buffalo Envelope* (WDNY 1993) 823  
4 F.Supp.1065, 1071 (plaintiff suffers harm under federal right-to-know law when defendant fails to  
5 report emissions)) Laidlaw’s failure to post warnings on its buses deprives members of the public of  
6 their right to know that they will be exposed to cancer-causing chemicals if they ride Laidlaw’s buses,  
and to make informed decisions.

7 The overwhelming weight of governmental opinion and scientific evidence establishes the  
8 severity of the health risk posed by diesel school buses. The US EPA’s Clean Air Act Advisory  
9 Committee has concluded: “*reducing emissions from the nation’s school bus fleet should be a first*  
10 *priority.*” (Ex. W to Behrentz Dec. pp. iv, 25) US EPA concluded:

11 “Diesel exhaust has health implications for everyone. Children are especially sensitive to air  
12 pollution because their respiratory systems are still developing and they have a faster breathing  
13 rate. Recent studies suggest that children’s school bus commutes potentially expose them to  
significantly higher concentrations of pollutants from various sources (e.g. tailpipe, crankcase,  
etc.) than what is measured in the community’s outdoor air.” (*Id.*)

14 CARB concludes:

15 Diesel particulate matter is the largest contributor to health risk posed by toxic air pollutants,  
16 constituting approximately 70 percent of the total statewide risk. . . Significant annual health  
17 effects attributed to diesel particulate matter include 2,900 premature deaths, 2,600 cases of  
chronic bronchitis, and 5,300 hospital admissions including asthma-related emergency room  
visits. (Ex. J to Behrentz Dec.)

18 CARB states, “Because children’s lungs are still developing and children are more susceptible to  
19 adverse health effects from air pollution, potentially high pollutant exposures during school bus  
20 commutes are of concern.” (Ex. B to Behrentz Dec. p.1) CARB states, “diesel buses can have  
21 significantly higher on-board [diesel particulate] concentrations than other vehicles, due to ‘self-  
22 pollution,’ or intrusion of the bus’s own exhaust into the bus cabin after leaving the bus’s exhaust pipe.”  
(Ex. M to Behrentz Dec. p.5)

23 Dr. Bhatia agrees with the conclusion of California’s Office of Environmental Health Hazard  
24 Assessment that there is “no safe level of exposure to diesel exhaust.” (Bhatia Dec. ¶31) Dr. Bhatia  
25 notes that CARB has identified the school bus microenvironment as one of the most significant sources  
26 of exposure to diesel exhaust due to high levels of “self-pollution.” (*Id.* ¶33) Prof. Behrentz and Dr.  
27 Bhatia conclude that exposure to diesel engine exhaust on school buses is a very significant health risk  
due to at least five factors:

1 (1) diesel exhaust is a highly potent human carcinogen; (2) high levels of diesel exhaust have  
2 been found to accumulate on school buses due largely to self-pollution; (3) children are exposed  
3 to diesel exhaust every day, for well over a decade; (4) children are much more susceptible to  
4 cancer due to their higher respiratory rates, developing respiratory systems, and other factors;  
5 and (5) exposure to constituents in diesel exhaust impair lung function development and cause or  
6 aggravate respiratory illness in children, in turn negatively affecting a child's growth and  
7 development. (*Id.* ¶34; Behrentz Dec. ¶20)

8 Even Laidlaw's own management admits this severity of the health risks posed by diesel engine  
9 exhaust. Laidlaw's Vice-President for Fleet Operations, Bob Pudlewski, writes:

10 Without debating the validity of each study clearly tailpipe emissions from any type of vehicle  
11 can have a negative effect on the health of anyone. No one will debate the need to breath[e] air  
12 that is as clean as possible. Clean air is especially important for our children as they are more  
13 susceptible to potential negative health impacts from air pollution. . . There is no doubt that  
14 extended idling produces additional exhaust emissions that contribute to air quality concerns  
15 where school children congregate. (Ex. H to Drury Dec.)

16 Due to the severity of this problem, CARB recommends retrofitting school buses with  
17 particulate traps capable of dramatically reducing emissions. (Ex. M to Behrentz Dec. p.9) This  
18 technology costs between \$1,000 and \$10,000 per bus, and can reduce emissions by over 90%.  
19 (Behrentz Dec. ¶55) US EPA, CARB, local air districts and the legislature have made bus retrofits a top  
20 priority, and have established numerous programs providing tens of millions of dollars to fund school  
21 bus retrofits. (Ex. Z to Behrentz Dec. p.8)

22 Thus, Laidlaw could avoid exposing children to diesel exhaust simply by installing retrofit  
23 controls on its buses, which could eliminate the need to post warnings. Moreover, Laidlaw could obtain  
24 government funding for these retrofits. In other words, the balance of hardships tips strongly in favor of  
25 children's health, since Laidlaw's financial hardship could be largely offset by public funds.  
26 Nevertheless, Laidlaw has repeatedly turned down offers of millions of dollars of government retrofit  
27 funding. (Ex. A and I to Drury Dec.)

28 As the highly respected Union of Concerned Scientists concludes in its 2006 report:

There's no warning sign on the back of diesel school buses that the black smoke coming out of  
the tailpipe could be hazardous to children's health – but there should be. Diesel fumes can  
cause or exacerbate asthma, lung disease, and cancer, and have even been linked to premature  
death. (Ex. V to Behrentz Dec. p.1)

That is precisely what this case is about.

### **C. THE COURT SHOULD WAIVE BOND OR IMPOSE A NOMINAL BOND**

ELF respectfully requests that this court waive the bond requirement or, in the alternative,  
require a nominal bond. In *Mangini*, 31 Cal.App.4th at 217, the court held that in granting an injunction  
under Prop. 65 it may be appropriate to follow federal cases allowing a bond waiver or nominal bond in

1 environmental cases, but only where plaintiffs are non-profit corporations and a bond would effectively  
2 “deny access to judicial review.” (*Id.* citing, *People v. Tahoe Reg. Pl. Agency* (9th Cir. 1985) 766 F.2d  
3 1319, 1325; see also *City of So. Pasadena v. Slater* (C.D.Cal. 1999) 56 F.Supp.2d 1106, 1148 (“courts  
4 routinely impose either no bond or a minimal bond in public environmental cases”).)

5 Here, anything other than a nominal bond would effectively deny access to judicial review.  
6 While in *Mangini* the court held that the plaintiff was a for-profit entity that had submitted no evidence  
7 of financial hardship, plaintiffs in this action are all recognized under state and federal law as non-profit  
8 corporations. All Plaintiffs have submitted declarations showing an inability to pay a substantial bond.  
(Ex. J to Drury Dec.)

9 Furthermore, even if a bond is required, the *Mangini* court held that since “the practical effect of  
10 the injunction was simply to require . . . a warning,” which requires little cost, the bond should be  
11 “modest.” (*Id.* at 218) Thus, we request that any bond be “modest.”

#### 11 IV. CONCLUSION

12 For the foregoing reasons, Plaintiffs respectfully request that this Court grant the motion for a  
13 preliminary injunction requiring Laidlaw to post warnings on its diesel school buses prior to the  
14 commencement of the next school year to inform students that they will be exposed to cancer-causing  
15 chemicals while riding Laidlaw’s buses.

16 Dated: May \_\_\_\_\_, 2007

Respectfully Submitted,

ADAMS BROADWELL JOSEPH & CARDOZO

19 \_\_\_\_\_  
20 Richard T. Drury  
21 Attorneys for Plaintiff

1 **Proof of Service**

2 I am employed in the County of San Mateo, California. I am over the age of 18 and  
3 not a party to this action. My business address is 601 Gateway Blvd., Suite 1000, South  
4 San Francisco, California, 94080.

5 On \_\_\_\_\_, 2007 I served the foregoing document described as:

6 **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**  
7 **MOTION FOR A PRELIMINARY INJUNCTION AGAINST LAIDLAW TRANSIT**  
8 **INC. DBA LAIDLAW EDUCATION SERVICES**

9 on the parties listed below by US First Class Mail or other method as noted:

10 Todd O. Maiden (By hand delivery)  
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12 Two Embarcadero Center, Suite 2000  
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I declare under penalty of perjury of the laws of the California that the foregoing is true and correct and that this was executed on \_\_\_\_\_, 2007 in South San Francisco, California.

\_\_\_\_\_  
Bonnie Heeley