UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES - GENERAL

Case No.	CV 15-2124 PA (AJWx)	Date	March 28, 2016
Title	America Unites for Kids, et al. v. Sandra Lyon, et al.		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE	
Stephen Montes Kerr	Not Reported	N/A
Deputy Clerk	Court Reporter	Tape No.
Attorneys Present for Plaintiff:	Attorneys Present for Defendants:	
None	None	

Proceedings: IN CHAMBERS — COURT ORDER

Before the Court is a Motion for Summary Judgment filed by defendants Sandra Lyon, Jan Maez, Laurie Lieberman, Jose Escarce, Craig Foster, Maria Leon-Vazquez, Richard Tahvildaran-Jesswein, Oscar de la Torre, and Ralph Mechur (collectively "Defendants") (Docket No. 102). Defendants seek summary judgment on the claim brought by plaintiffs America Unites for Kids ("America Unites") and Public Employees for Environmental Responsibility ("PEER") (collectively "Plaintiffs"). Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument. The hearing calendared for March 14, 2016, is vacated, and the matter taken off calendar.

Plaintiffs' commenced this action on March 23, 2015. The operative First Amended Complaint ("FAC"), which Plaintiffs filed as a matter of right, alleges a claim against Defendants, who are administrators and members of the Board of Education of the Santa Monica-Malibu Unified School District (the "District"), pursuant to the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2601-2695d. According to the FAC, testing in 2009 and 2010 revealed elevated levels of polychlorinated biphenyls ("PCBs") in air and soil samples at Malibu Middle and High School ("MHS") and Juan Cabrillo Elementary School ("JCES") (collectively the "Malibu Campus"). Additional testing undertaken since then has revealed that caulk and other building materials used at MHS and JCES contain levels of PCBs in excess of standards adopted by the Environmental Protection Agency ("EPA"). The FAC alleges that although the District has, in consultation with the EPA, agreed to remove the PCB-containing materials from certain areas within the schools, Defendants have refused or been slow to test additional areas within MHS and JCES that are also likely to contain building materials with levels of PCBs in excess of those allowed by the EPA.

Pursuant to the TSCA, beginning in 1978, "no person may . . . use any polychlorinated biphenyl in any manner other than in a totally enclosed manner." 15 U.S.C. § 2605(e)(2)(A). The TSCA also authorizes the EPA Administrator to promulgate rules authorizing the use of PCBs "other than in a totally enclosed manner . . . if the Administrator finds that such . . . use . . . will not present an unreasonable risk of injury to health or the environment." 15 U.S.C. § 2605(e)(2)(B). The EPA has concluded that items "with PCB at concentrations of 50 ppm or greater present an unreasonable risk of injury to health within the United States." 40 C.F.R. § 761.20. As a result, "[n]o persons may use any

PCB, or any PCB item regardless of concentration, in any manner other than in a totally enclosed manner . . . ." 40 C.F.R. § 761.20(a).

Defendants do not dispute that caulk containing PCBs is not use of PCBs in "a totally enclosed manner." Moreover, Defendants appear to acknowledge that the TSCA requires the removal of PCB-containing building materials when testing indicates that those materials contain PCBs in excess of 50 ppm. Specifically, Defendants have committed to removing the PCB-containing caulk in the specific locations identified in their testing because that caulk contains concentrations of PCBs in excess of 50 ppm.

However, according to Defendants, and consistent with the EPA's nationwide "PCBs in Schools" policy, EPA has authorized the District to allow PCB-containing materials to remain at the Malibu Campus so long as air and surface wipe testing does not reveal heightened levels of PCBs. For instance, in August 2014, EPA informed the District that "EPA does not recommend additional testing of caulk unless dust or air samples persistently fail to meet EPA's health-based guidelines." (Docket No. 43, Defendant's Request for Judicial Notice, Ex. C.) Additionally, in October 2014, EPA approved certain provisions of the District's "Site-Specific PCB-Related Building Materials Management, Characterization and Remediation Plan for the Library and Building E Rooms 1, 5, and 8 at Malibu High School." (Id., Ex. D.) Among other approvals, EPA approved:

- Best Management Practices (BMPs), including proper maintenance of the ventilation system at the schools, increased cleaning of the classrooms to reduce dust and residue buildup, and use of cleaning equipment that does not cause dust to become airborne. . . .

- Periodic air and surface wipe samples shall be collected to monitor the efficacy of the above remediation and BMP measures until major renovation or demolition occurs that results in removal of PCB-contaminated material. The District shall undertake monitoring, as identified in the Application, through July 1, 2015. Based upon data collected during this initial monitoring period, the District will propose for EPA approval a supplement to the Application to include a new monitoring plan for the period after July 1, 2015. The plan shall include an evaluation of monitoring data collected to date and a description of how the monitoring plan will continue to ensure the effectiveness of the remediation and BMP measures as evaluated against the levels identified in the following bullet. . . .

- All air samples gathered by the District shall be evaluated against the applicable EPA public health levels of PCBs in air . . . (those levels range from 70 to 600 ng/m^3 based on the age of the children and the duration of exposure), and all surface wipe samples shall be evaluated against the district's proposed goal of 1 $ug/100cm^2$. These air and surface wipe concentrations are health-based screening levels that, pursuant to this

> approval, will be used to evaluate the effectiveness of the remediation and BMP measures at ensuring that PCBs remain at levels protective of human health. If any samples exceed these levels, within thirty (30) days of receipt of the laboratory results, the District shall conduct an evaluation of the exceedances. . . .

(Id.)

In their Motion for Summary Judgment, Defendants contend that because the District remediated all known and verified locations where PCBs in excess of 50 ppm have been identified at the Malibu Campus during the 2015 summer break, and the EPA does not believe that there is a need for additional testing of potential PCB source materials until planned renovation or demolition" of buildings on the Malibu Campus built prior to 1980, Plaintiff's sole claim for injunctive relief under the TSCA is moot and Defendants are entitled to judgment as a matter of law. Plaintiffs, on the other hand, assert that they have evidence that creates triable issues of fact concerning the existence of PCBs in other areas of the Malibu Campus and that the District has failed to implement and consistently employ the BMPs approved by the EPA.

According to Plaintiffs, sufficient circumstantial evidence exists to create a triable issue of fact that additional TSCA violations exist at the Malibu Campus. See California v. Campbell, 319 F.3d 1161, 1166 (9th Cir. 2003) (concluding that circumstantial evidence supporting inference of existence of environmental contamination precluded granting of summary judgment). Specifically, Plaintiffs rely on the facts that the District's own testing has shown PCBs in excess of 50 ppm in multiple rooms in six different buildings on the Malibu Campus, 70% of the rooms tested by the District contained PCBs in excess of 50 ppm, 28 out of 32 samples taken by the district contained PCBs above 50 ppm, with most above 100,000 ppm, many of the buildings on the Malibu Campus were built prior to 1979, and caulk and other materials containing PBCs were used in schools built from the 1950s through the 1970s. Plaintiffs also rely on purported admissions by defendants and School Board members Oscar de la Torre and Ralph Mechur that there is widespread PCB contamination at the Malibu Campus.[1/] Plaintiffs' contention that the District has not performed the BMPs outlined in the EPA's October 31, 2014 approval of the District's remediation plan is supported by declarations of members of the janitorial staff employed by the District at the Malibu Campus who state that they ran out of cleaning supplies required for the BMPs during the spring of 2015, and that despite requests that those supplies be replenished, the District has not done so.[2/]

[1/] The Court preliminarily concludes that these purported admissions are admissible under Federal Rule of Evidence 801(d)(2)(A).

[2/] Defendants objected to the declarations submitted by the janitors because they were not directly cited in either Plaintiffs' Opposition or Plaintiffs' Separate Statement of Disputed Facts. Although Plaintiffs should have properly cited to the evidence they rely on to oppose Defendants' Motion for Summary Judgment, because Defendants have suffered no prejudice from its submission, the Court will consider the evidence.

In reviewing the admissible evidence, and drawing reasonable inferences from that evidence,[3/] the Court concludes that triable issues of fact exist concerning the continued "use" of PCBs at the Malibu Campus despite the remediation work performed to date by the District. The Court additionally concludes that evidence suggesting that the District has failed to implement and consistently employ BMPs as contemplated by the EPA's approvals calls into question the amount of deference the Court should give to the District's purported compliance with the EPA's guidelines and approvals.

For all of the foregoing reasons, the Court denies Defendants' Motion for Summary Judgment. Because the Court has denied the Motion for Summary Judgment, Plaintiffs' Ex Parte Application for Leave to File a Supplemental Opposition (Docket No. 162) is denied as moot.

IT IS SO ORDERED.

[3/] See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.").