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

Case No.	CV 15-2124 PA (AJWx)	Date	June 15, 2015
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 to Dismiss (Docket No. 48) 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"). Defendants challenge the sufficiency of the First Amended Complaint ("FAC") filed by plaintiffs America Unites for Kids and Public Employees for Environmental Responsibility (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 June 8, 2015, is vacated, and the matter taken off calendar.

I. Factual and Procedural Background

Plaintiffs filed their Complaint on March 23, 2015, and then filed the operative FAC as a matter of right on April 1, 2015. Plaintiffs' FAC 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"). 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 school 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." (Defendant's Request for Judicial Notice, Ex. C.)[1/] 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." (Request for Judicial Notice, 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

[1/] Defendants have submitted a Request for Judicial Notice (Docket No. 43) in which they ask the Court to take judicial notice of various letters between EPA and the District and EPA policies concerning PCBs in schools. Plaintiff's object to the Request for Judicial Notice to the extent Defendants seek to have the Court take judicial notice of the truth of the EPA's statements. The Court does not take judicial notice of the factual accuracy of the information contained within the EPA documents, but does take judicial notice of the fact of the EPA's policies and positions.

> 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.)

II. Legal Standard

Generally, plaintiffs in federal court are required to give only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). While the Federal Rules allow a court to dismiss a cause of action for "failure to state a claim upon which relief can be granted," they also require all pleadings to be "construed so as to do justice." Fed. R. Civ. P. 12(b)(6), 8(e). The purpose of Rule 8(a)(2) is to "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80 (1957)). The Ninth Circuit is particularly hostile to motions to dismiss under Rule 12(b)(6). See, e.g., Gilligan v. Jamco Dev. Corp. , 108 F.3d 246, 248–49 (9th Cir. 1997) ("The Rule 8 standard contains a powerful presumption against rejecting pleadings for failure to state a claim.") (internal quotation omitted).

However, in Twombly, the Supreme Court rejected the notion that "a wholly conclusory statement of a claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery." Twombly, 550 U.S. at 561, 127 S. Ct. at 1968 (internal quotation omitted). Instead, the Court adopted a "plausibility standard," in which the complaint must "raise a reasonable expectation that discovery will reveal evidence of [the alleged infraction]." Id. at 556, 127 S. Ct. at 1965. For a complaint to meet this standard, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." Id. at 555, 127 S. Ct. at 1965 (citing 5 C. Wright & A. Miller, Federal Practice and Procedure §1216, pp. 235–36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action") (alteration in original)); Daniel

v. County of Santa Barbara, 288 F.3d 375, 380 (9th Cir. 2002) ("'All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party.'") (quoting Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000)). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555, 127 S. Ct. at 1964–65 (internal quotations omitted). In construing the Twombly standard, the Supreme Court has advised that "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009).

III. Analysis

In their Motion to Dismiss, Defendants assert that the FAC should be dismissed, or, in the alternative, that the action be stayed because the EPA has primary jurisdiction over the testing requirements and removal of PCBs in schools. Defendants additionally contend that this action is moot because the District has already committed to removing the PCB-containing caulk that contains PCBs in excess of 50 ppm that has been identified in previous rounds of testing. Finally, Defendants seek dismissal of the action based on what they contend is a deficient Notice of Intent to File Suit.

A. Primary Jurisdiction

Defendants contend that because the EPA has the authority and expertise to oversee issues related to PCBs at the schools, and is in fact exercising that authority, the Court's involvement would interfere with the EPA's primary jurisdiction. The primary jurisdiction doctrine "is applicable whenever the enforcement of a claim subject to a specific regulatory scheme requires resolution of issues that are 'within the special competence of an administrative body.'" Farley Transp. Co. v. Santa Fe Trail Transp. Co., 778 F.2d 1365, 1370 (9th Cir. 1985) (quoting United States v. W. Pac. R.R., 352 U.S. 59, 64, 77 S. Ct. 161, 165, 1 L. Ed. 2d 126 (1956)). When the primary jurisdiction doctrine applies, "the judicial process should be suspended and the issues referred to the appropriate administrative body for its views." Id. "No fixed formula . . . exists for applying the doctrine, and each case must be examined on its own facts to determine if 'the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.'" Id. (quoting W. Pac. R.R., 352 U.S. at 64, 77 S. Ct. at 165).

Plaintiffs assert that the primary jurisdiction doctrine is inapplicable where, as here, the statutory scheme includes a citizen suit provision. See 15 U.S.C. § 2619; see also N.Y. Cmtys. for Change v. N.Y. City Dept. of Educ., No. 11CV3494 (SJ)(CLP), 2013 WL 1232244, at *6 (E.D.N.Y. Mar. 26, 2013); Ass'n of Irritated Residents v. Fred Schakel Dairy, No. 1:05-CV-00707 OWW SMS, 2008 WL 850136, at *12 (E.D. Cal. Mar. 28, 2008) ("Like the majority of these courts, I find that applying the doctrine of primary jurisdiction to citizen suits would frustrate Congress's intent, as evidenced by its

provisions for citizen suits, to facilitate broad enforcement of environmental-protections laws and regulations.'") (quoting Sierra Club v. Tri-State Generation & Transmission Ass'n, Inc., 173 F.R.D. 275, 284 (D. Colo. 1997)).

As the Court concluded when it denied Plaintiffs' Motion for Preliminary Injunction despite finding that Plaintiffs had established a likelihood of success, Defendants have overstated the degree to which the relief Plaintiffs seek conflicts with EPA's expertise and considered judgment. In ruling on the Motion for Preliminary Injunction, the Court stated that "nothing in the record to date suggests that an order requiring the removal of PCB-containing caulk would be contrary to or interfere with the EPA's expertise." Similarly, nothing alleged in the FAC, or that is the subject of judicial notice, suggests that, at a minimum, air and surface wipe sampling at the subject schools would be inconsistent with the EPA's analysis, policies, or considered judgment. At least according to the FAC's allegations, "since December 2013, the District has tested only air and dust in selected rooms throughout the Malibu Schools." (FAC ¶ 70.)

The Court concludes that the FAC has alleged sufficient facts to satisfy the Twombly plausibility standard that there are locations within the subject schools that have not been subject to air and surface wipe sampling that may exceed the EPA's thresholds for PCBs and trigger the need for BMPs, thorough cleanings, and potential further testing, including of caulk, within such locations. Such air and surface wipe testing would be consistent with the EPA's regulatory authority and the prior approvals it has issued to the District. If those tests revealed circumstances requiring additional testing or other measures consistent with the EPA's approvals, those additional measures would also not interfere with the EPA's expertise or primary jurisdiction. There is only a possibility of interference with the EPA's primary jurisdiction if the Court were to allow testing in excess of that deemed prudent by the EPA. At least at this stage of the proceedings, the Court can eliminate the possibility of such interference by limiting the testing that Plaintiffs are allowed to undertake through the discovery process to the air and surface wipe testing that the EPA has determined is sufficient to measure "health-based screening levels that, pursuant to [the EPA's October 2014] 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." By phasing discovery in this way, and only allowing the testing of caulk or other more invasive discovery should the initial air and surface wipe testing establish its necessity, the Court can balance the EPA's expertise in such matters against Plaintiffs' rights to pursue a TSCA claim as contemplated by the TSCA's citizen suit provisions.[2/] The Court therefore will not dismiss this action based on the primary jurisdiction doctrine.

[2/] The Court understands that Plaintiffs have filed a Motion to Compel that seeks an order from the assigned United States Magistrate Judge to allow destructive testing of caulk throughout the subject schools. The parties shall immediately notify the assigned United States Magistrate Judge of this Order.

B. **Mootness**

Defendants contend that Plaintiffs' claim is moot because they are already taking action to remove the PCB-containing caulk that they have identified, and the TSCA requires that they remove any additional PCB-containing caulk they may identify in the future. At least at this stage, Defendants have not completed the removal of the identified PCB-containing caulk. Moreover, Plaintiffs have plausibly alleged the existence of additional PCB-containing caulk at the subject schools. As the Court has already concluded, those plausible allegations justify allowing this action to continue past the pleading stage to permit Plaintiffs, at a minimum, to conduct air and surface wipe testing at additional locations to determine if additional destructive testing is warranted under the EPA's policies. The Court therefore concludes that this action is not moot under the current circumstances.

C. **Adequacy of Notice of Intent to File Suit**

The regulations implementing the TSCA include a requirement that before a plaintiff may commence an action under the TSCA, the plaintiff must give notice to the defendant and the EPA of the intent to file suit. See 40 C.F.R. § 702.61. Although Plaintiffs' Notice of Intent to File Suit identifies the rooms at the campus in which testing has shown caulk containing concentrations of PCBs in excess of 50 ppm, and information concerning suspicions that caulk installed in other locations at MHS and JCES built at the same time prior to 1980, and presumably using the same types of materials that testing has shown contain concentrations of PCBs in excess of 50 ppm, Defendants nevertheless assert that the Notice of Intent to File Suit must identify the precise location on each window where the caulk contains PCBs in excess of 50 ppm. Nothing in the TSCA's statutory or regulatory language requires that level of specificity. Cf. Ctr. for Biological Diversity v. Marina Point Dev. Co., 566 F.3d 794, 800-01 (9th Cir. 2008) (construing the Clean Water Act's similar notice provision and noting that the Ninth Circuit has "sometimes been slightly forgiving to plaintiffs in this area, but even at our most lenient we have never abandoned the requirement that there be a true notice that tells a target precisely what it allegedly did wrong, and when. The target is not required to play a guessing game in that respect."). Here, Defendants have been provided notice that caulk used on the windows of buildings at MHS and JCES constructed prior to 1980 may contain PCBs in concentrations that exceed the levels allowed by EPA. The Court concludes that this notice is sufficiently specific to satisfy the applicable notice provisions. See N.Y. Cmtys. for Change v. N.Y. City Dept. of Educ., No. 11CV3494 (SJ)(CLP), 2012 WL 7807955, at *11 (E.D.N.Y. Aug. 29, 2012). As a result, the Court denies the Motion to Dismiss on this ground.

Conclusion

For all of the foregoing reasons, the Court denies Defendants' Motion to Dismiss. Defendants shall Answer the FAC no later than June 29, 2015.

IT IS SO ORDERED.