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12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA

14 AMERICA UNITES FOR KIDS, et
15 al.,
16
17 Plaintiffs,
18
19 vs.
20 SANDRA LYON, et al.,
21
22 Defendants.
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No. 2:15-CV-02124 PA (AJWx)

**DEFENDANTS’
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT
PURSUANT TO F.R.C.P. 56**

[Separate Statement of
Uncontroverted Facts and
Conclusions of Law and
[Proposed] Order filed
concurrently herewith]

Date: March 14, 2016
Time: 1:30 p.m.
Dept. 15
Judge: Hon. Percy Anderson

Discovery Cutoff: 3/7/16
Motion Cutoff: 3/14/16
Trial Date: 5/17/16

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1 I. INTRODUCTION

2 Over the pendency of this action, Defendants Sandra Lyon, Jan Maez,
3 Laurie Lieberman, Dr. Jose Escarce, Craig Foster, Maria Leon-Vazquez, Richard
4 Tahvildaran-Jesswein, Oscar De La Torre, and Ralph Mechur (collectively,
5 “Defendants”), acting in their official capacities to direct the activities of the
6 Santa Monica-Malibu Unified School District (the “District”), have gone to great
7 lengths to ensure that the students and staff at Juan Cabrillo Elementary School
8 (“JCES”) and Malibu Middle and High School (“MHS”) (collectively, the
9 “Malibu Campus”) remain protected from potential exposures to polychlorinated
10 biphenyls (“PCBs”) present in certain building materials at the Malibu Campus.
11 Under the oversight of the United States Environmental Protection Agency,
12 Region 9 (“EPA”), the lead agency with jurisdiction over remediation of PCB
13 materials under the Toxic Substances Control Act (“TSCA”) 15 U.S.C. §§ 2601,
14 *et seq.*, the District has taken over 1,000 air and wipe samples in every regularly-
15 occupied room in a pre-1981 building at the Malibu Campus—the results of
16 which indicate that PCB exposures at the two schools have consistently remained
17 below EPA’s health-based thresholds for PCBs in school settings. Many of the
18 air samples did not even detect PCB levels above the detection limit of 70 ng/m³,
19 lower than EPA’s most health-protective threshold for children as young as one
20 year old.

21 Most critically, as documented in this memorandum and the
22 accompanying Statement of Uncontroverted Facts and Conclusions of Law, the
23 District acted over the Summer 2015 school break to remediate all known and
24 verified TSCA exceedances that had been identified on the Malibu Campus, as it
25 had previously committed to EPA and represented to this Court it would. Over
26 several weeks in June, July, and August of 2015, the District removed caulking
27 in *every* location where a verified concentration of PCBs in excess of the TSCA
28

1 threshold of 50 parts per million (“ppm”) had been detected; re-caulked the
2 affected windows and doors with new, PCB-free caulking; encapsulated
3 substrate that had come into contact with the old caulking pursuant to EPA-
4 approved plans; and undertook confirmatory air and wipe sampling to ensure that
5 PCB exposures remained below EPA’s threshold levels following the
6 remediation work. The District took the additional voluntary step of removing
7 caulk from all neighboring windows in a room where a detection of PCBs in
8 excess of 50 ppm had been verified when those windows were all similar in
9 construction to those containing the caulk exceedances.

10 The District documented its remediation activities extensively, and
11 presented that documentation, in addition to the results of air and wipe sampling
12 taken at the Malibu Campus during Summer 2015, to EPA for its review. Upon
13 consideration of this report, EPA concluded that the removal and sampling
14 activities were completed consistent with EPA policies and approvals, issued the
15 required TSCA approval allowing remediation waste to be managed in place, and
16 concluded that no further testing of source materials would be needed at the
17 Malibu Campus.

18 In this instance, TSCA and its implementing regulations require the
19 removal of known building or other materials with known PCB concentrations
20 that exceed 50 ppm, nothing more. 40 C.F.R 761.20(a), 761.50-761.62.
21 Following the Summer 2015 removal activities, any known caulk location
22 exceeding 50 ppm was in fact abated. Therefore, Plaintiffs cannot point to any
23 allegation in their First Amended Complaint supported by admissible evidence to
24 serve as the basis for their single cause of action under TSCA.¹ Every specific
25

26 ¹ In its Order on Defendants’ Motion for Sanctions (ECF No. 76), this Court
27 ordered evidentiary sanctions precluding Plaintiffs “from using in this action
28 the evidence obtained through their unauthorized testing. By ‘unauthorized
testing,’ the Court includes all testing conducted by Plaintiffs and those

(continued...)

1 TSCA violation identified by Plaintiffs with admissible evidence has been
2 abated. Any of Plaintiffs' remaining assertions of purported violations of TSCA
3 based upon undocumented exceedances of the regulatory standard are
4 speculative and unsupported by fact or admissible evidence. In short, the
5 District's removal activities obviate the need for any relief from this Court and
6 entitle Defendants to judgment as a matter of law.

7 *All* verified exceedances of the TSCA threshold at the Malibu Campus
8 have been removed under the oversight of EPA, and pursuant to TSCA
9 regulation and policy. EPA continues to reiterate that no further source testing is
10 needed at the Malibu Campus. Plaintiffs cannot support any allegation of
11 remaining unabated TSCA violations in their First Amended Complaint.
12 Accordingly, Defendants respectfully request that this Court grant them
13 summary judgment, and dismiss Plaintiffs' lone cause of action under TSCA.

14 II. UNCONTROVERTED MATERIAL FACTS

15 A. Identification of PCBs at the Malibu Campus

16 In November 2013, bulk samples of caulk and other building materials
17 were gathered at the Malibu Campus. Uncontroverted Material Fact ("UMF")
18 No. 1. At that time, tests identified materials with PCB concentrations in excess
19 of 50 ppm in four locations: a window in the MHS Library (Building C), and one
20 window in each of MHS Building E Rooms 1, 5, and 8. UMF No. 2. This
21 information was presented to EPA for review and direction as the exclusive
22 federal lead agency. On November 20, 2013, EPA Region 9 informed the District
23

24 _____
(...continued)

25 affiliated with them both before the initiation of this action and any testing that
26 has occurred since the commencement of this action that was conducted
27 without the permission of Defendants or authorized by this Court." ECF No.
28 76 at *12. Accordingly, Plaintiffs have no evidence to support the allegations
pertaining to their unauthorized testing in paragraphs 70, 80, 81, 82, 83, 84, 88,
96, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 119, 122, 123,
125, 128, and 132 of their First Amended Complaint.

1 that although air testing of the Malibu Campus indicated that PCB exposures at
2 the school were “well below the health-based thresholds established by EPA for
3 elementary & high school age children, and adult staff,” the District would need
4 to submit for EPA approval a PCB Cleanup Plan to address the four identified
5 TSCA exceedances. UMF No. 3.

6 In a January 27, 2014 letter, EPA Region 9, the lead agency with
7 jurisdiction over TSCA, clarified that the cleanup plan would need to address
8 removal of all caulk with known concentrations above 50 ppm PCBs in the
9 Library and in MHS Building E Rooms 1, 5, and 8, adding that the plan should
10 include post-removal air sampling and confirmatory wipe sampling around the
11 areas where caulk was removed. UMF No. 4. The District, through its
12 environmental consultant, Ramboll-Environ, subsequently submitted a Malibu
13 Site-Specific Plan (“Site-Specific Plan”) to address the removal of all caulk with
14 known concentrations above 50 ppm PCBs in the Library and in MHS Building
15 E Rooms 1, 5, and 8. UMF No. 5. The revised Site-Specific Plan was provided
16 to EPA Region 9 on July 3, 2014. UMF No. 6. On August 14, 2014, after the
17 revised Site-Specific Plan was provided to EPA Region 9, the District voluntarily
18 committed to remove the caulk from the four windows in the Library and MHS
19 Building E Rooms 1, 5, and 8 by June 30, 2015. UMF No. 7. On August 14,
20 2014, EPA Region 9 responded to the District, acknowledging the revised plan
21 and stating that “EPA concurs with this approach,” and that EPA did not
22 recommend “additional testing of caulk unless dust or air samples persistently
23 fail to meet EPA’s health-based guidelines.” UMF No. 8.

24 On June 9, 2014 the District, through Ramboll-Environ, also submitted a
25 plan to collect air and wipe samples at the Malibu Campus to assess potential
26 concentrations of PCBs in air and dust. UMF. No. 9. EPA Region 9 provided
27 comments and concurred with the revised plan dated June 13, 2014. *Id.* During
28

1 the school break of Summer 2014, Ramboll-Environ conducted the inspection
2 and testing work proposed by the sampling plan. *Id.* As EPA Region 9 noted in
3 an August 14, 2014 letter to the District, “EPA staff were on site in June at
4 Malibu High School to observe the inspection and testing work. Based on EPA’s
5 evaluation of the work conducted this summer, the Agency has determined that
6 the work was consistent with EPA’s national guidance.” *Id.* The standards and
7 procedures adhered to during the Summer 2014 inspection and testing have been
8 utilized for all subsequent investigation and testing work conducted at the Malibu
9 Campus. UMF No. 10.

10 During the Summer 2014 testing work, wipe samples in one classroom,
11 Building G Room 506 (Woodshop) did not meet EPA’s health-based threshold of
12 $10 \mu\text{g}/100 \text{ cm}^2$. UMF No. 11. To address this issue, on September 26, 2014, the
13 District, through Ramboll-Environ, sent EPA Region 9 Supplemental Removal
14 Information for the Library, Building E – Rooms 1, 5, and 8, and Building G,
15 Room 506 at Malibu High School (“Removal Supplement”). UMF No. 12. The
16 Removal Supplement committed to EPA Region 9 that the District would also
17 undertake caulk removal activities in an interior doorframe in Room 506
18 consistent with the June 30, 2015 timeframe for removal of exceedances
19 documented in the Library and MHS Rooms 1, 5, and 8. UMF No. 13. On
20 October 31, 2014, EPA Region 9 issued a letter acknowledging the District’s
21 plan to undertake the removal activities described in the Site-Specific Plan and
22 Removal Supplement, and, as provided for by TSCA, approving that PCB
23 remediation wastes will remain in place at the Malibu Campus subsequent to the
24 removal activities since the materials “will not pose an unreasonable risk of
25 injury to health or the environment” pursuant to 40 C.F.R. 761.61(c). UMF
26 No. 14.

1 During the Winter Break in December 2014 and January 2015, Ramboll-
2 Environ undertook a further round of air and wipe sampling according to the
3 procedures previously observed and concurred with by EPA. UMF No. 15.
4 None of the air or final post-BMP wipe samples collected at this time detected
5 PCB concentrations in excess of EPA’s health-based thresholds. UMF No. 16.

6 On February 28, 2015, after becoming aware of unauthorized testing by
7 Plaintiffs at the Malibu Campus, the District’s environmental consultant
8 undertook bulk sampling in the following locations: JCES Building F Rooms 18,
9 19, 22, and 23; MHS Building E Rooms 3 and 7; MHS Building G Room 505;
10 MHS Building I Room 401; and MHS Building J (Old Gym) Room 704
11 Hallway. UMF No. 17. This bulk sampling documented known and verified
12 concentrations of PCBs in building materials in excess of 50 ppm in specific
13 locations within each of these rooms. UMF No. 18. Accordingly, on March 20,
14 2015, the District, through Ramboll-Environ, submitted to EPA a Notification of
15 Additional Locations at Malibu High School and Juan Cabrillo Elementary
16 School to be Addressed in Accordance with October 2014 EPA Approved Plan
17 (“March 2015 Notification”). UMF No. 19. The March 2015 Notification
18 represented to EPA Region 9 that these additional locations would be remediated
19 within one year of the date upon which they were verified. UMF No. 20.

20 B. Summer 2015 Removal Work

21 During the Summer 2015 school break, the District undertook and
22 completed abatement activities (“Summer 2015 Removal Work”) to address the
23 locations of TSCA exceedances described in the Removal Supplement and the
24 March 2015 Notification:

- 25 • MHS Library;
- 26 • MHS Building E Rooms 1, 3, 5, 7, and 8;
- 27 • MHS Building G Rooms 505 and 506;

28

- 1 • MHS Building I Room 401;
- 2 • MHS Building J (Old Gym) Rooms 704 and 704 Hallway; and
- 3 • JCES Building F Rooms 18, 19, 22, and 23.

4 UMF No. 21.

5 As outlined in the Removal Supplement and in EPA's October 31, 2014
6 approval letter to the District, the PCB removal activities that occurred during
7 Summer 2015 included the physical removal of caulk identified and verified to
8 contain PCBs in excess of 50 ppm; decontamination of non-porous surface
9 materials adjacent to the PCB-impacted caulk and performance of post-
10 decontamination confirmatory wipe samples; preparation and encapsulation of
11 porous substrate that had previously been in contact with PCB-impacted caulk up
12 to 1 foot away from caulk/substrate contact; and post-removal confirmatory air
13 and wipe sampling to ensure that EPA's health-based thresholds were complied
14 with in the abated classrooms. UMF No. 22.

15 The caulk in which an excess of 50 ppm PCBs was identified and verified
16 as described in the Removal Supplement and the March 2015 Notification was
17 physically removed by the District's contractor, Castlerock Environmental, Inc.
18 UMF No. 23. This caulk was removed from interior doors in MHS Building G
19 Room 505, Building J Room 704 Hallway, as well as caulk on several window
20 units located in MHS Building A, Library; MHS Building E, Rooms 1, 3, 5, 7,
21 and 8; MHS Building I, Room 401; MHS Building J, Room 704; and JCES
22 Building F, Rooms 18, 19, 22, and 23. UMF No. 24. A similar caulk removal
23 procedure was completed for the caulk for two interior doors in MHS Building
24 G, Room 506. UMF No. 25. All removed PCB-containing materials were
25 properly disposed of at a permitted hazardous waste disposal facility. *Id.*

26 Although SMMUSD was only required to remove building materials with
27 verified PCB concentrations in excess of 50 ppm, the District voluntarily, and
28

1 without additional verification, removed caulk from neighboring windows in the
2 same room without verified PCB concentrations in excess of 50 ppm if similar in
3 construction to the windows with verified PCB concentrations in excess of 50
4 ppm, including in MHS Building E, Rooms 1,5, and 8; MHS Building I, Room
5 401; MHS Building J, Room 705; and JCES Building F, Room 22. UMF No. 26.
6 In MHS Building I, Room 401, the window was connected to the door, and as
7 such, both window and door underwent removal activities. UMF No. 27.

8 The final post-decontamination, post-encapsulation, and post-removal
9 confirmatory sampling in each room with caulk removal indicated that PCB
10 concentrations were below EPA's Malibu-specific threshold of 1 $\mu\text{g}/100\text{ cm}^2$ for
11 dust and below EPA's health-based thresholds for indoor school air, thus
12 indicating that caulk removal activities of all verified exceedances of the TSCA
13 standard were completed successfully. UMF No. 28. In addition, air and wipe
14 sampling was undertaken in all regularly-occupied rooms at MHS and JCES that
15 had not previously undergone air and wipe sampling; PCB exposure levels in
16 excess of the EPA thresholds were not detected in any of the rooms. UMF No.
17 29. These activities confirm that the locations identified in the Site-Specific
18 Plan, Removal Supplement, and March 2015 Notification have been entirely
19 abated, and that, therefore, no admissible evidence indicating exceedances of
20 TSCA at the Malibu Campus exists.

21 C. November 2015 EPA Approval

22 In an October 5, 2015 letter and attached report ("October 2015 Report"),
23 the District certified to EPA Region 9 that the Summer 2015 Removal Work was
24 completed. UMF No. 30. The October 2015 Report documented the over 1,000
25 air and wipe samples that have been taken at the Malibu Campus to date, as well
26 as the removal of the materials described in the Removal Supplement and March
27 2015 Notification. UMF No. 31.

28

1 In response to the October 2015 Report, EPA issued a letter to the District
2 on November 2, 2015 (“November 2 EPA Letter”) making several
3 determinations and conclusions, and granting certain approvals for the Malibu
4 Campus. UMF No. 32. The November 2 EPA Letter concluded that, upon
5 reviewing the information contained in the October 2015 Report, EPA Region 9
6 “determined that the removal work, BMPs, and air and wipe sampling were
7 performed consistent with EPA’s national guidelines to protect public health
8 from PCBs in schools and the terms and conditions of the [October 31, 2014]
9 Approval.” UMF No. 33. EPA also reiterated its prior conclusion that it “does
10 not believe that there is a need for additional testing of potential PCB source
11 materials until planned renovation or demolition” of the pre-1980 buildings at the
12 Malibu Campus. UMF No. 34. Additionally, based on the air and wipe data to
13 date from the Malibu Campus, EPA concluded that “PCB remediation wastes
14 remaining in place at MHS and JCES do not pose an unreasonable risk of injury
15 to health or the environment” and that “conditions at both schools continue to
16 meet EPA national guidelines to protect public health from PCBs in schools.”
17 UMF No. 35.

18 Plaintiffs have not alleged admissible evidence to support any specific
19 TSCA violations in building materials beyond those abated during the Summer
20 2015 Removal Work in their First Amended Complaint. UMF No. 36. Plaintiffs
21 generally allege, with no specific evidentiary support, that caulk from buildings
22 constructed around the same time and using similar building materials to caulk
23 from buildings where PCBs have been identified in excess of 50 ppm also has
24 PCBs. UMF No. 37. Plaintiffs also allege that the presence of any PCB
25 concentrations in air and wipe samples at all, even though those concentrations
26 are below EPA’s health-based thresholds, “evidences that there is a source of
27 PCBs in those rooms which could be above TSCA limits.” UMF No. 38.
28

1 However, Plaintiffs admit that “[i]t is impossible to determine from air and dust
2 tests whether PCBs in caulk or other materials exceed the regulatory threshold of
3 50 ppm.” UMF No. 39. Plaintiffs have no admissible evidence to suggest or
4 support that known PCB concentrations in excess of 50 ppm have been identified
5 or verified at any locations on the Malibu Campus that were not abated during
6 the Summer 2015 Removal Work; nor could they discover any such evidence.

7 III. SUMMARY JUDGMENT STANDARD

8 “A party may move for summary judgment, identifying each claim...on
9 which summary judgment is sought. The court shall grant summary judgment if
10 the movant shows that there is no genuine dispute as to any material fact and the
11 movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A
12 party is entitled to summary judgment if (1) there is no genuine issue as to any
13 material fact and (2) the moving party is entitled to judgment as a matter of law.
14 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). “Rule 56(c) mandates the
15 entry of summary judgment . . . against a party who fails to make a showing
16 sufficient to establish the existence of an element essential to that party’s case,
17 and on which that party will bear the burden of proof at trial.” *Id.* Inferences are
18 only drawn in favor of a non-movant when they are “reasonable” and based on
19 evidence in the record. *Id.* at 331. When ruling on a summary judgment motion,
20 a court may only consider admissible evidence. *Orr v. Bank of Am., NT & SA*,
21 285 F.3d 764, 773 (9th Cir. 2003). The court “may limit its review to the
22 documents submitted for the purposes of summary judgment and those parts of
23 the record specifically referenced therein.” *Carmen v. San Francisco Unified*
24 *School Dist.*, 237 F.3d 1026, 1030 (9th Cir. 2001); *see also Kennan v. Allan*, 91
25 F.3d 1275, 1279 (9th Cir. 1996) (internal citations omitted) (the court has no
26 obligation to “scour the record in search of a genuine issue of triable fact”).
27
28

1 As plaintiffs, America Unites and PEER bear the burden of proving that a
2 TSCA violation exists at the Malibu Campus such that they are entitled to
3 declaratory and injunctive relief pursuant to 15 U.S.C. § 2619. *See, e.g., Oregon*
4 *v. Legal Servs. Corp.*, 552 F.3d 965, 969 (9th Cir. 2009) (abrogated on other
5 grounds) (“The plaintiff bears the burden of proof to establish standing with the
6 manner and degree of evidence required at all successive stages of the
7 litigation.”) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).
8 When, as here, the nonmoving party has the burden of proof, the movant “need
9 not produce admissible evidence showing the absence of a genuine issue of
10 material fact,” but must only “point[] out that there is an absence of evidence to
11 support the nonmoving party’s case.” *Johnson v. Peralta Community College*
12 *Dist.*, 1997 WL 227903, at *2 (N.D. Cal. Apr. 28, 1997) (citing *Celotex*, 477
13 U.S. at 324-25). Because it is undisputable that the only TSCA violations at the
14 Malibu Campus that Plaintiffs can document with admissible evidence were
15 abated during the Summer 2015 Removal Work, Plaintiffs cannot meet their
16 burden of proof. Because the TSCA violations alleged in Plaintiffs’ First
17 Amended Complaint have been abated, Plaintiffs’ claims are mooted, and
18 declaratory and injunctive relief is not available to them as a matter of law.
19 Therefore, summary judgment disposing of Plaintiffs’ First Amended Complaint,
20 which rests upon a single cause of action alleging a violation of TSCA, is proper.

21 **IV. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT AS**
22 **A MATTER OF LAW**

23 A. The TSCA Violations that Form the Basis of Plaintiffs’ Complaint Have
24 Been Abated

25 As a matter of law, “federal courts have no jurisdiction to hear a case that
26 is moot, that is, where no actual or live controversy exists.” *Cook Inlet Treaty*
27 *Tribes v. Shalala*, 166 F.3d 986, 989 (9th Cir. 1999). “If there is no longer a
28

1 possibility that [a party] can obtain relief for his claim, that claim is moot and
2 must be dismissed for lack of jurisdiction.” *Ruvalcaba v. City of Los Angeles*,
3 167 F.3d 514, 521 (9th Cir. 1999). “The hallmark of a moot case or controversy
4 is that the relief sought can no longer be given or is no longer needed.” *Martin-*
5 *Trigona v. Shiff*, 702 F.2d 380, 386 (2d Cir. 1983). Plaintiffs bear the burden of
6 demonstrating that an exceedance of the 50 ppm TSCA threshold exists at the
7 Malibu Campus such that they are entitled to relief, and that the instant case is
8 not moot. *See Sopcak v. Northern Mountain Helicopter Serv.*, 52 F.3d 817, 818
9 (9th Cir. 1995). They have failed to meet their burden and cannot do so in the
10 future due to the absence of admissible evidence documenting an exceedance of
11 the TSCA regulatory threshold.

12 In the context of a TSCA citizen suit such as this one², as a matter of law, a
13 court may only grant the remedy of injunctive relief to halt existing TSCA
14 violations. *See* 15 U.S.C. § 2619(a); *Mair v. City of Albany*, 303 F.Supp. 2d 237,
15 243 (N.D.N.Y. 2004); *Oil Re-Refining Co., Inc. v. Pacific Recycling, Inc.*, 75
16 ERC 1315, at *2 (D. Or. 2012). This relief is not available to Plaintiffs in the
17 instant case for the simple reason that the District has, as documented in this
18 motion and the Statement of Uncontroverted Facts, abated all of the TSCA
19 violations that Plaintiffs can document through admissible evidence. Indeed,
20 courts generally recognize that remediation need only be underway to moot a
21 plaintiff’s plea for injunctive relief to abate the contamination—in this case, the
22 alleged TSCA exceedances have been entirely abated. *See, e.g., City of*
23 *Fresno v. U.S.*, 709 F. Supp. 2d 934, 937-38 (E.D. Cal. 2010); *West Coast Home*

24
25 ² TSCA provides for a citizen suit against any person alleged to be in violation of
26 TSCA or any rule promulgated pursuant to TSCA. 15 U.S.C. § 2619(a). The
27 lone cause of action pled in Plaintiffs’ First Amended Complaint is that
28 Defendants have failed to “remove and properly dispose of building materials
with PCBs at or above 50 ppm or with surface concentrations above 10 ug per
100 cm² at the Malibu Schools” in violation of 15 U.S.C. §§ 2605(e)(2) and
2614(l) and 40 C.F.R. § 761.20(a).

1 *Builders, Inc. v. Aventis Cropscience USA Inc.*, No. 04-2225-SI, 2009 WL
2 2612380 (N.D. Cal. Aug. 21, 2009); *Davis Bros. Inc. v. Thornton Oil Co.*, 12 F.
3 Supp. 2d 1333, 1338 (M.D. Ga. 1998) (plaintiffs were not entitled to relief when
4 remediation of contamination was already underway). Where remediation has
5 already been undertaken, a plaintiff “would have to identify some action that
6 defendant could be ordered to take that is not already in place...and that would
7 improve the situation in some way.” *3000 E. Imperial, LLC v. Robertshaw*
8 *Controls Co.*, 2010 WL 5464296, at *13, 73 ERC 1344 (C.D. Cal. Dec. 29,
9 2010) (citing *87th Street Owners Corp v. Carnegie Hill-87th Street Corp.*, 251 F.
10 Supp. 2d 1215, 1220 (S.D.N.Y. 2002)). Because the alleged TSCA violations
11 have been remediated, Plaintiffs can identify no such action here; as a matter of
12 law, Plaintiffs lack the admissible evidence necessary to establish a claim under
13 TSCA.

14 As discussed above, Plaintiffs alleged, and Defendants do not dispute, that
15 there *were* locations on the Malibu Campus—in the MHS Library; MHS
16 Building E Rooms 1, 3, 5, 7, and 8; MHS Building G Rooms 505 and 506; MHS
17 Building I Room 401; MHS Building J Rooms 704 and 704 Hallway; and JCES
18 Building F Rooms 18, 19, 22, and 23—where caulk was known and verified to
19 contain concentrations of PCBs in excess of the TSCA threshold of 50 ppm.
20 ECF No. 12, ¶¶ 59, 63, 74, 101, 102, 106, 107, 127, 128, 129; UMF Nos. 1-2, 4-
21 5, 11-13, 17-20. The District’s planned abatement of these locations was the
22 subject of no fewer than three submissions to EPA: the Site-Specific Plan, the
23 Removal Supplement, and the March 2015 Notification. UMF Nos. 5-8, 12-14,
24 19-20. EPA, the federal agency with exclusive jurisdiction to enforce TSCA,
25 provided the District with written acknowledgement of its plans to remove caulk
26 from the subject locations, and approved that any remediation waste remaining in
27 place following the removal activities would not pose an unreasonable risk of
28

1 injury to health or the environment, as required by the TSCA regulations at 40
2 C.F.R. 761.61(c). UMF No. 14. Thus, residual undocumented levels of PCBs, if
3 any, in building materials do not constitute a violation of TSCA or its regulatory
4 threshold.

5 Over Summer 2015, the District undertook the removal work discussed in
6 the Site-Specific Plan, Removal Supplement, and March 2015 Notification, as
7 well as another round of air and wipe sampling in regularly-occupied rooms at
8 the Malibu Campus, bringing the total of air and wipe samples taken at the two
9 schools to over 1,000, and ensuring that every regularly-occupied room on the
10 Malibu Campus had been air and wipe sampled. UMF Nos. 21-29, 31. In
11 addition, although the District was only required to remove caulk with verified
12 PCB concentrations exceeding 50 ppm, the District took the additional voluntary
13 step of removing caulk from the neighboring windows that were similar in
14 construction to those being abated—and, in one case, from a neighboring
15 doorframe that was in contact with a window where caulk with a PCB
16 concentration in excess of 50 ppm had been verified—in the rooms where
17 abatement activities were undertaken. UMF No. 26.

18 The Summer 2015 Removal Work was summarized in a report submitted
19 to EPA on October 5, 2015; that report included documentation, through data
20 and photographs, of all sampling undertaken during the Summer 2015 school
21 break, including the confirmatory post-removal sampling required by EPA.
22 UMF Nos. 30-31. The report also included a hazardous waste manifest
23 indicating that the removed PCB waste had been properly disposed of. *See* UMF
24 No. 25. EPA reviewed the October 2015 Report and determined that the
25 Summer 2015 Removal Work had been performed consistent with EPA TSCA
26 guidelines; EPA also reiterated its prior TSCA approval that PCB remediation
27
28

1 wastes remaining in place at the two schools do not pose a risk to human health
2 or the environment. UMF Nos. 33-35.

3 The TSCA violations alleged by Plaintiffs and supported by admissible
4 evidence have been wholly abated, and the “relief sought [by Plaintiffs] can no
5 longer be given or is no longer needed.” *Martin-Trigona* , 702 F.2d at 386.
6 Because the alleged violations that form the basis of Plaintiffs’ complaint and
7 single cause of action have been fully addressed, Plaintiffs’ complaint is moot,
8 and Defendants are entitled to judgment as a matter of law. *See United Public*
9 *Workers of America v. Mitchell*, 330 U.S. 75, 89 (1947) (declaratory judgment is
10 not available if a claim has become moot); *Darring v. Kincheloe*, 783 F.2d 874,
11 876 (9th Cir. 1986) (injunctive relief is not proper where a claim has become
12 moot); *Get Outdoors II, LLC v. City of Chula Vista*, 407 F. Supp. 2d 1172, 1176
13 (S.D. Cal. 2005).

14 B. Plaintiffs Lack, and Cannot Discover, Admissible Evidence to Support a
15 TSCA Claim

16 “A plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to
17 relief’ requires more than labels and conclusions...[f]actual allegations must be
18 enough to raise a right to relief above the speculative level on the assumption that
19 all of the complaint’s allegations are true.” *Bell Atlantic Corp. v. Twombly*, 550
20 U.S. 544, 555 (2007). Plaintiffs have only alleged specific TSCA violations
21 supported by admissible evidence in the locations abated by the Summer 2015
22 Removal Work, and have neither presented nor can obtain any other admissible
23 evidence to indicate a TSCA violation upon which their claim might rest.
24 Beyond the abated exceedances, Plaintiffs only offer purely speculative
25 allegations in support of their complaint. “[M]ere argument does not establish a
26 genuine issue of material fact to defeat summary judgment.” *MAI Sys. Corp. v.*
27 *Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993).

28

1 For example, even though air and wipe samples have consistently been
2 below EPA's health-based thresholds, and, in many cases, have not detected
3 PCB exposures above 70 ng/m³, lower than the most protective health-based
4 threshold for children under the age of three years³, Plaintiffs allege that the fact
5 that any PCB exposures at all have been detected in any room on the Malibu
6 Campus "evidences that there is a source of PCBs in those rooms which could be
7 above TSCA limits..." UMF No. 38. But Plaintiffs themselves admit and allege
8 as part of their First Amended Complaint that "[i]t is impossible to determine
9 from air and dust tests whether PCBs in caulk or other materials exceed the
10 regulatory threshold of 50 ppm..." UMF No. 39. Similarly, Plaintiffs conjecture
11 that because caulk in excess of 50 ppm has been found in more than one location
12 within buildings of a certain age at the Malibu Campus, the "likelihood" of a
13 TSCA violation "should be expected" elsewhere at the Malibu Campus. UMF
14 No. 37; ECF No. 12 ¶¶ 69, 91, 133. But Plaintiffs have alleged no admissible
15 evidence of a specific unabated TSCA violation on the Malibu Campus to
16 support this contention.⁴ UMF No. 36. Nor can Plaintiffs discover any such
17 evidence in the future, as all verified TSCA violations on the Malibu Campus
18 have been abated, and air and wipe sampling consistently demonstrate that there
19

20 ³ EPA's health-based threshold for children between the ages of 1 and 3 is 100
21 ng/m³. ECF No. 68-4, Exhs. A and E.

22 ⁴ In fact, Plaintiffs have never, throughout the pendency of this action, even
23 sought to conduct air testing at the Malibu Campus to attempt to demonstrate a
24 need for further testing of caulk, as this Court suggested. ECF No. 53 at *6.
25 However, Defendants themselves voluntarily conducted air and wipe sampling
26 in every single regularly-occupied room at the Malibu Campus. The results of
27 that sampling showed that PCBs were not detected in either air or wipe samples
28 in excess of the EPA's health-based thresholds. Based on the extensive air and
wipe sampling conducted at the Malibu Campus, EPA concluded that "air and
wipe sampling were performed consistent with EPA's national guidelines to
protect public health from PCBs in schools" and EPA "does not believe that
there is a need for additional testing of potential PCB source materials until
planned renovation or demolition" of the pre-1980 buildings at the Malibu
Campus. UMF Nos. 33 and 34.

1 is no justification for additional sampling of building materials, or even for
2 additional air and wipe sampling beyond that required by EPA pursuant to its
3 approvals. *See* ECF No. 34-1, Exh. C; Exh. 68-4, Exh. D. On its face TSCA
4 provides no remedy for a potential use of PCBs in excess of 50 ppm; the statute
5 and its implementing regulations simply require that if such a use is discovered,
6 it be abated, without any specified timeframe for such abatement. *See, e.g.*, 15
7 U.S.C. § 2605(e); 40 C.F.R 761.20(a), 761.50-761.62. Plaintiffs simply have no
8 admissible evidence, and cannot discover any evidence, to demonstrate a specific
9 and unabated use of PCBs in excess of 50 ppm at the Malibu Campus.

10 The relief Plaintiffs seek is not available to them based on the “mere
11 possibility” that a TSCA violation might one day be identified at the Malibu
12 Campus. *3000 E. Imperial, LLC*, 2010 WL 5464296, at *13; *87th Street Owners*
13 *Corp.*, 251 F. Supp. 2d at 1221. Indeed, even assuming the allegations in
14 Plaintiffs’ complaint to be true, “[w]here a complaint pleads facts that are
15 ‘merely consistent’ with a defendant’s liability, it ‘stops short of the line between
16 possibility and plausibility of entitlement to relief.’” *Ashcroft v. Iqbal*, 556 U.S.
17 662, 678 (2009) (citing *Twombly*, 550 U.S. at 557). “The mere existence of a
18 scintilla of evidence in support of [Plaintiffs’] position is not sufficient” either.
19 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Plaintiffs must
20 “designate specific facts showing that there is a genuine issue for trial.” *Celotex*,
21 477 U.S. at 324. Specific factual allegations and admissible evidence
22 establishing a remaining TSCA violation are necessary for Plaintiffs to establish
23 that they are entitled to any relief here, and no such allegations or admissible
24 evidence are present in their First Amended Complaint or otherwise. *See Levine*
25 *v. Vilsack*, 587 F.3d 986, 996-97 (9th Cir. 2009). Accordingly, Defendants are
26 entitled to judgment as a matter of law.

