UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CALIFORNIANS FOR ALTERNATIVES TO TOXICS,

Plaintiff,

vs.

KERNEN CONSTRUCTION CO., ET AL.,

Defendants.

CASE NO. 16-cv-04007-YGR

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Re: Dkt. Nos. 73

Plaintiff Californians for Alternatives to Toxics brings this action against defendants Kernen Construction Company, Bedrock Investments LLC, Scott Farley, and Kurt Kernen for alleged violations of the Federal Water Pollution Control Act and California Health & Safety Code section 25249.5 ("Prop. 65 Claim"), in connection with the operation of their facility in McKinleyville, California.[1]

The parties filed cross-motions for summary judgment, and a hearing was held on such motions on May 16, 2017. (Dkt. No. 94.) Because of the nature of the claims and the parties' arguments, the Court referred this action to the California Attorney General for his position on certain issues. (Dkt. No. 95.) The California Attorney General responded on June 19, 2017, and confirmed that "compliance with a Water Board permit does not automatically satisfy the requirements of Proposition 65," but rather that defendants must demonstrate compliance on a case-by-case basis. (Dkt. No. 97 at 1–2.) In light of such response, defendants withdrew their cross-motion for summary judgment. (Dkt. No. 98.) Remaining before the Court is plaintiff's motion for summary judgment. Defendants continue to oppose the same.

[1] On April 10, 2017, the Court granted the parties' stipulation to dismiss plaintiff's Prop. 65 Claim against defendant Bedrock Investments, LLC only.

Having carefully reviewed the pleadings, the papers and exhibits submitted on such motion, and the parties' arguments on May 16, 2017, and for the reasons set forth more fully below, the Court **DENIES** plaintiff's motion for summary judgment.[2]

I. LEGAL FRAMEWORK

Summary judgment is appropriate when no genuine dispute as to any material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and of identifying those portions of the pleadings, depositions, discovery responses, and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Material facts are those that might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Id*. at 247–48 (dispute as to a material fact is "genuine" if sufficient evidence exists for a reasonable jury to return a verdict for the non-moving party) (emphases in original).

Where the moving party will have the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. *Soremekun*

[2] In connection with their briefs, each party has submitted requests for judicial notice ("RJN"): Plaintiff has sought notice of the following (Dkt. No. 79, "PRJN"; Dkt. No. 89, Second PRJN): (i) Exhibit A, excerpts from the California Interagency Watershed Map of 1999; (ii) Exhibit B, excerpts from Water Control Plan for the North Coast Region; and (iii) Exhibit C, Environmental Protection Agency Fact Sheet for the Multi-Sector General Permit. Defendants seek judicial notice of the following (Dkt. No. 67, "DRJN"; Dkt. No. 87, Supplemental DRJN): (a) Exhibit A, Public Health Goals of the California Office of Environmental Health Hazard Assessment; (b) Exhibit B, Compilation of Water Quality Goals, Office of Information Management and Analysis; (c) Exhibit C, Judgment, *Mateel Envt'l Justice Found. v. Office of Envt'l Health Hazard Assess.*, No. RG15754547 (Cal. Sup. Ct. May 2, 2016); and (d) Exhibit D, Docket Report, *Mateel Envt'l Justice Found. v. Office of Envt'l Health Hazard Assess.*, No. A-148711 (Cal. App. Div.). "Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1989). However, a court may take judicial notice of matters of public records and documents whose authenticity is not contested, including government documents. *Lee v. Los Angeles*, 250 F.3d 668, 688–89 (9th Cir. 2001), *overruled on other grounds by Galbraith v. Santa Clara*, 307 F.2d 1119, 1125 (9th Cir. 2002); *see also* Fed. R. Evid. 201(b)(2). The Court finds that such documents are appropriate for judicial notice, and **GRANTS** the parties requests at Docket Numbers 67, 79, 87, and 89.

v. Thrifty Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007). On an issue where the opposing party will bear the burden of proof at trial, the moving party can prevail merely by pointing out to the district court that the opposing party lacks evidence to support its case. *Id.* If the moving party meets its initial burden, the opposing party must then set out "specific facts" showing a genuine issue for trial in order to defeat the motion. *Id.* (quoting *Anderson*, 477 U.S. at 250). The opposing party's evidence must be more than "merely colorable" and must be "significantly probative." *Anderson*, 477 U.S. at 249–50. Further, that party may not rest upon mere allegations or denials of the adverse party's evidence, but instead must produce admissible evidence that shows a genuine issue of material fact exists for trial. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102–03 (9th Cir. 2000); *Nelson v. Pima Cmty. College Dist.*, 83 F.3d 1075, 1081–82 (9th Cir. 1996) ("mere allegation and speculation do not create a factual dispute"); *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 922 (9th Cir. 2001) ("conclusory allegations unsupported by factual data are insufficient to defeat [defendants'] summary judgment motion").

When deciding a summary judgment motion, a court must view the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in its favor. *Anderson*, 477 U.S. at 255; *Hunt v. City of Los Angeles*, 638 F.3d 703, 709 (9th Cir. 2011). However, in determining whether to grant or deny summary judgment, a court need not "scour the record in search of a genuine issue of triable fact." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (internal quotations omitted). Rather, a court is entitled to "rely on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment." *See id.*; *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001) ("The district court need not examine the entire file for evidence establishing a genuine issue of fact, where the evidence is not set forth in the opposing papers with adequate references so that it could conveniently be found."). Ultimately, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving-party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted).

II. DISCUSSION

"The Safe Drinking Water and Toxic Enforcement Act of 1986, more frequently referred to as Proposition 65, prohibits persons, in the course of business, from knowingly [discharging or] releasing certain chemicals 'known to the state to cause cancer or reproductive toxicity into water or onto or into land where such chemical passes or probably will pass into any source of drinking water.'" *California v. Kinder Morgan Energy Partners*, No. 07-CV-1883-MMA, 2010 WL 11463973, at *3 (S.D. Cal. June 8, 2010) (quoting Cal. Health & Safety Code § 25249.5). Put simply, plaintiff must demonstrate that: (1) defendants are "persons, in the course of business," (2) who knowingly discharge or release (3) certain prohibited chemicals (4) into water or land that does or may pass into any source of drinking water. Here, plaintiff claims that defendants are discharging a prohibited chemical, namely, lead, which eventually flows into a source of drinking water. The Court discusses each of the four elements outlined above.

With respect to the first and third elements, defendants concede that they are persons as defined by the statute and that lead is a prohibited chemical. The Court thus focuses on the remaining two elements of plaintiff's claim. With respect to whether a "discharge" or "release" occurred under California law, the California Code of Regulations provides:

> Stormwater runoff from a place of doing business containing a listed chemical, the presence of which is not the direct and immediate result of the business activities conducted at the place from which the runoff flows, is not a "discharge" or "release" within the meaning of the Act. For purposes of this subsection, "business activities" does not include parking lots.

27 Cal. Code Reg. § 25401(c).

Here, defendants aver that the lead detected in samples of stormwater runoff from their facility is "not the direct and immediate result of their business activities," and thus not a "discharge or release" as defined by Prop. 65. Rather, they claim the presence is due to naturally-occurring amounts of lead in the soil and from uses of the land by previous owners. (Dkt. No. 86 at 3–4.) Plaintiff challenges defendants' evidentiary showing as self-serving and inadmissible.

Plaintiff does not persuade.[3] First, the declarant, Ms. Yolynn St. John, describes herself as the safety and environmental supervisor for defendants. (Dkt. No. 86 at 1.) In such capacity, St. John avers that she is responsible for the following: facilitating safety in the field, inspections, and taking care of water sampling and reporting for defendants. (*Id.*) As such, she is aware that none of the activities defendants conduct on the facility in question deal with lead. (*Id.* at 2–3.) She asserts that the lead produced in the sampling data does not come from defendants' industrial processes, but rather from the soils in Northern California as a naturally occurring substance. (*Id.* at 3–4.) Such can constitute appropriate evidence to create a triable issue of material fact here.

Furthermore, plaintiff's evidence in this regard is insufficient to demonstrate that detectable levels of lead in defendants' stormwater runoff results from defendants' business activities. For instance, plaintiff cites the permit issued to defendants which describes defendants' operations at the facility thus: "Operations at the Glendale Yard facility consist of all activities required to store and manufacture rock aggregate products, temporarily store non-toxic materials (scrap roofing shingles), scrap metal and storage for soil and organic debris. [Specifically:] [1] 5093 Scrap and Waste Materials [and 2] 142—Crushed & Broken Stone Including Rip Rap." (Dkt. No. 81-1 at 23.)[4] On such bases, plaintiff argues that one could infer that defendants' discharge of lead is the direct and immediate result of their business activities. However, plaintiff does not demonstrate that any of the above activities has actually caused the discharge of any lead onto or outside of the facility at issue. The record before the Court lacks any evidence from which the Court could conclude that defendants' business activities cause discharges or releases of lead into a source of drinking water. Thus, plaintiff fails to meet its initial burden of production to

[3] Plaintiff has also offered evidence demonstrating that the waters into which defendants discharge may be sources of drinking water. Defendants assert that this is not so, yet offer no evidence to the contrary. As the Court finds that triable issues exist, it declines to make findings in this regard. Further factual development as to exactly what waterways defendants' stormwater runoffs affect and whether the same flow into a source of drinking water would be beneficial for any such findings.

[4] Defendants assert that they do not conduct any activities regarding organic debris, and are attempting to modify the permit to reflect such correction. It is listed only as a permitted use, not an actual use.

demonstrate affirmatively that no reasonable trier of fact could find for defendants. *See Celotex*, 477 U.S. at 323; *Soremekun*, 509 F.3d at 984.

Accordingly, the Court **DENIES** plaintiff's motion for summary judgment.

III. CONCLUSION

For the foregoing reasons, the Court **DENIES** plaintiff's motion for summary judgment.

The Court **SETS** a case management conference for **Monday, August 14, 2017** at **11:00 a.m.** in the Federal Building, 1301 Clay Street, Oakland, California, Courtroom 1. No later than **August 7, 2017**, the parties must file a joint case management conference statement, in accordance with the Civil Local Rules of the Northern District of California and this Court's Standing Order. Such statement should inform the Court of the status of plaintiff's Clean Water Act claims, and should focus on the next steps for this litigation, including a proposed schedule. Failure to comply may result in sanctions.

This Order terminates Docket Number 73.

IT IS SO ORDERED.

Dated: July 21, 2017

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

United States District Court
Northern District of California