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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN JOSE DIVISION**

11 TYCO THERMAL CONTROLS LLC,
12 Plaintiff,
13 v.
14 REDWOOD INDUSTRIALS, *et al.*,
15 Defendants.
16 ROWE INDUSTRIES, INC.,
17 Counter-Claimant,
18 v.
19 TYCO THERMAL CONTROLS, LLC,
20 Counter-Defendant

Case No. 5:06-cv-07164 JF (PSG)

**ORDER¹ RE CROSS MOTIONS FOR
PARTIAL SUMMARY ADJUDICATION**
[Re: Docket Nos. 311, 323, 324]

21

TYCO THERMAL CONTROLS LLC,
22 Plaintiff,
23 v.
24 ROWE INDUSTRIES, INC.,
25 Defendant.

Related Case No. 5:10-cv-01606 JF (PSG)

26 Plaintiff Tyco Thermal Controls LLC (“Tyco”) and Defendant Rowe Industries, Inc.
27 (“Rowe”) have filed cross-motions for summary judgment. Having considered the parties’
28 submissions and the oral arguments of counsel presented at the hearing on July 29, 2011, the
Court will dispose of the motions as follows.

¹ This disposition is not designated for publication in the official reports.

I. BACKGROUND

A. Factual History

Tyco filed suit against Redwood Industries (“Redwood”), *et al.*² on November 17, 2006, seeking recovery of remediation costs in connection with a contaminated property now owned by Tyco located at 2201 Bay Road in Redwood City, California (“the Property”). FAC ¶ 1. Redwood owned the Property until 1973, when it was sold to Tyco’s predecessor-in-interest Raychem Corporation (“Raychem”). *Id.* at ¶ 2. During Redwood’s ownership, sublessor Hill Industries, Inc. (“Hill”) manufactured electrical transformers on the Property. *Id.* at ¶ 8. Tyco asserts that the transformer manufacturing process resulted in the release of polychlorinated biphenyls (“PCBs”) at the Property, and that Rowe is responsible for this contamination as a successor-in-interest to Hill. *See Id.* at ¶¶ 8, 13.

B. Procedural History

Tyco filed the FAC on January 15, 2007, seeking: (1) response costs and contribution pursuant to §§ 107(a)(1-4)(B) and 113(f) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. § 9601, *et seq.* (“CERCLA”); (2) injunctive relief pursuant to the Resources Conservation and Recovery Act (“RCRA”), 42 U.S.C. §§ 6901, *et seq.*, 6972; (3) declaratory relief; and (4) relief pursuant to related state law claims not at issue here. On October 29, 2009, Tyco moved for leave to file a second amended complaint (“SAC”) adding claims against Rowe under California law for continuing nuisance and continuing trespass and dismissing without prejudice its claim for relief under RCRA based upon its failure to comply with RCRA’s pre-suit notice requirement. On December 14, 2009, the Court granted Tyco’s motion to withdraw the RCRA claim without prejudice and determined that the FAC,

² Rowe was added as a defendant in Tyco’s first amended complaint (“FAC”).

1 absent the RCRA claim, would remain the operative pleading.³ Order Granting in Part and
2 Denying in Part Motion for Leave to Amend Complaint and File Second Amended Complaint,
3 Dkt. 101.⁴

4 On March 2, 2010, Tyco again moved to amend its pleading to allege a RCRA claim
5 against Rowe. The Court denied that motion, concluding that the proposed amendment would
6 not cure Tyco's failure to comply with RCRA's jurisdictional notice requirement. Order Re
7 Pending Motions, Dkt. 180. Tyco subsequently filed Case No. 10-cv-01606 (the "RCRA
8 Action") in order to assert the RCRA claim against Rowe in accordance with the proper statutory
9 procedure.⁵ As a result of the Court's approval of settlements between Tyco and all other
10 defendants, Tyco and Rowe are the only remaining parties in the related actions. Order Granting
11 Motions for Approval of Settlement and to Dismiss, Dkt. 233

12 With respect to its CERCLA claim, Tyco seeks summary judgment as to Rowe's status as
13 an operator at the Property at the time of the PCB discharge, as well as Rowe's liability for
14 response costs. As to its RCRA claim, Tyco seeks summary judgment regarding Rowe's
15 contribution to the use and disposal of PCBs at the Property, as well as Tyco's right to injunctive
16 relief.

17 By its cross-motions, Rowe seeks determinations that as a matter of law: (1) Tyco has
18 failed to show that Rowe is a covered person under CERCLA; (2) if Rowe is found liable under
19 CERCLA, Redwood must assume Rowe's share of liability because of a mutual release executed
20 between Redwood and Rowe's predecessor-in-interest; and (3) Tyco's RCRA claim is subject to
21 dismissal because a remedial action plan was substantially in place before suit was filed;

23
24 ³ The motion was denied with respect to Tyco's proposed nuisance and trespass claims.
Dkt. 101 at 6.

25 ⁴ All citations to the docket refer to Case No. 06-cv-07164 unless otherwise indicated.

26 ⁵ On April 26, 2010, the Court related Case No. 06-cv-07164 and Case No. 10-cv-01606.
27 Order Granting Administrative Motion to Relate Cases, Dkt. 185.

II. STANDARD OF REVIEW

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2 A motion for summary judgment should be granted if there is no genuine issue of
3 material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.
4 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party bears
5 the initial burden of informing the Court of the basis for the motion and identifying the portions
6 of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that
7 demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S.
8 317, 323 (1986). “[T]he burden on the moving party may be discharged by ‘showing’-that is,
9 pointing out to the district court-that there is an absence of evidence to support the nonmoving
10 party’s case.” *Id.* at 325.

11 If the moving party meets this initial burden, the burden shifts to the non-moving party to
12 present specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e);
13 *Celotex*, 477 U.S. at 324. A genuine issue for trial exists if the non-moving party presents
14 evidence from which a reasonable jury, viewing the evidence in the light most favorable to that
15 party, could resolve the material issue in his or her favor. *Anderson*, 477 U.S. 242, 248-49;
16 *Barlow v. Ground*, 943 F.2d 1132, 1134-36 (9th Cir. 1991). However, “[a] non-movant’s bald
17 assertions or a mere scintilla of evidence in his favor are both insufficient to withstand summary
18 judgment.” *F.T.C. v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009).

III. ANALYSIS

A. CERCLA

1. Liability

22 To prevail on its CERCLA claim, Tyco must prove: (1) that the site in question is a
23 “facility”; (2) that Rowe is a “responsible person”; (3) that a release or threatened release of
24 hazardous substance has occurred; and (4) that the release or threatened release has caused Tyco
25 to incur response costs. *See* 42 U.S.C. § 9607. Courts have interpreted these elements as
26 requiring proof that the defendant owned or operated the facility *at the time of the disposal*. *See,*
27 *e.g., United States v. Burlington Northern & Santa Fe Ry Co.*, 520 F.3d 918, 938 (9th Cir. 2008),

1 *rev'd on other grounds*, 129 S.Ct. 1870 (2009) (“CERCLA requires a *connection . . .* that the
2 [potentially responsible party (“PRP”)] be a landowner ‘at the time of disposal’”) (emphasis in
3 original)(citing 42 U.S.C § 9607(a)(2)); *City of Wichita v. Trs. of the Apco Oil Corp. Liquidating*
4 *Trust*, 306 F. Supp. 2d 1040, 1054-55 (D. Kan. 2003).

5 The parties dispute whether Rowe may be considered a PRP. Tyco asserts that Rowe
6 must be a responsible party because: (1) it is undisputed that Hill manufactured transformers at
7 the Property between 1965 and 1971; (2) PCB fluids historically have been used to manufacture
8 transformers; (3) shipping records indicate that 400,000 pounds of PCB transformer fluids
9 containing chlorinated benzenes were shipped by the Monsanto Company to Hill between 1965
10 and 1971; (4) sampling studies show that chlorinated benzenes are present in the paint and
11 concrete at the Property; and (5) Tyco’s experts have opined that the chlorinated benzenes could
12 have come only from the PCB transformer fluids shipped by Monsanto, and that the distribution
13 of PCB concentration in the soil is consistent with the loading dock area being a primary point of
14 release. Delfino Decl. ISO Opp. to Rowe Mot. for Summary Judgment at ¶ 3, Dkt. 318.

15 Rowe argues that Tyco’s cumulative evidence is too attenuated to prove that a release
16 occurred, let alone that a release occurred on Rowe’s watch. However, although Rowe asserts
17 that CERCLA liability generally must be proved by direct evidence, there is persuasive authority
18 that CERCLA claims can be resolved by the type of circumstantial evidence produced by Tyco
19 here. *See, e.g., Tosco Corp. v. Koch Indus.*, 216 F.3d 886, 892 (10th Cir. 2000) (finding
20 circumstantial evidence of contamination occurring during defendant’s ownership or operation
21 sufficient to prove liability); *Franklin County Convention Facilities Auth. v. Am. Premier*
22 *Underwriters, Inc.*, 240 F.3d 534, 547 (6th Cir. 2001) (“there is nothing objectionable in basing
23 findings solely on circumstantial evidence, especially where the passage of time has made direct
24 evidence difficult or impossible to obtain.”).

25 **a. Monsanto Shipping Records**

26 Rowe contests the admissibility of the Monsanto records, arguing that the records have
27 not been authenticated by an individual with personal knowledge of the documents in question.

1 See Fed. R. Evid. 803(6). Although Tyco attempts to establish a foundation through the
2 deposition testimony of former Monsanto employee Sharon Locke, Rowe claims that this
3 testimony is insufficient because Locke was not the custodian of records, but instead worked
4 with invoices similar to those offered as evidence. Ex. A. to Boone Decl. ISO Rowe December
5 2010 Mot. for Summary Judgment (“Locke Depo.”) at 63:11-64:11, Dkt. 284. Rowe also points
6 out that Locke is unable to confirm who actually authored the records. *Id.* at 62:19-63:20, 80:15-
7 23.

8 The Ninth Circuit has held that business records may be authenticated by the custodian
9 of records *or* another qualified witness. *United States v. Ray*, 930 F.2d 1368, 1370 (9th Cir.
10 1990) (“The phrase ‘other qualified witness’ is broadly interpreted to require only that the
11 witness understand the record-keeping system.”). Although it indicated in a previous order that
12 the records *could* be authenticated by Monsanto’s custodian of records, the Court did not
13 preclude Tyco from using another qualified witness. Order Re Pending Motions, Dkt. 180 at 7-8
14 (“authenticity of the records still may be established going forward by way of a deposition of
15 Monsanto’s custodian of records.”). Rowe argues alternatively that there is no way of knowing
16 that the records are complete because Locke cannot explain the lack of shipping information and
17 delivery methods in certain documents. Locke Depo. at 74:20-75:23, 85:6-86:18. However, this
18 argument goes to the weight that should be attributed to the records, not to their admissibility.

19 **b. Alternative Contamination Theories**

20 Through sworn affidavits and deposition testimony, Rowe’s experts Dr. Richard Richter
21 and Dr. Gabriel Sabadell have indicated that the subject contamination likely is the result of three
22 contributing factors: (1) Tyco’s manufacture at the Property of a product known as “44 wire”; (2)
23 historical railroad operations; and (3) surface paint at the Property. See Richter Decl. ISO Opp.
24 to Tyco Mot. for Partial Summary Judgment (“Richter Decl.”), Dkt. 332; Ex. G to Boone Decl.
25 ISO Opp. to Tyco Motions for Partial Summary Judgment (“Sabadell Depo.”), Dkt. 336.

26 Tyco admits that it formulated a PCB-containing compound known as “Viscol” in order
27 to manufacture “44 wire” at the Property between 1975 and 1976. Shell Decl. ISO Tyco Motions

1 for Partial Summary Judgment at ¶¶ 14, 23, Dkt. 325. According to Tyco employee Kenneth
2 Shell, plastic pellets were manufactured using liquid “Viscol” at a Menlo Park facility owned by
3 Tyco. *Id.* at ¶ 18. The pellets then were shipped to the Property, where they were melted and
4 extruded onto wire to create “44 wire.” *Id.* at ¶ 19. After the extrusion process, the wire was
5 subjected to radiation to destroy the PCBs. *Id.* at ¶ 20. Although Tyco argues that the use of
6 non-liquid PCBs could not have contributed to contamination at the Property, Dr. Richter opines
7 that PCBs easily could have been released into the atmosphere during the extrusion process.
8 Richter Decl. at ¶ 4. He goes on to conclude that such a release could have resulted in PCB
9 settlements on surfaces throughout the building. *Id.*

10 Dr. Sabadell also suggests that railroad activities adjacent to the Property are responsible
11 for much of the contamination, as evidenced by the comparatively high levels of PCBs found
12 along the rail spur. Ex. A to Boone Decl. ISO Opp. to Tyco December 2009 Mot. for Summary
13 Judgment (“Sabadell Decl.”), Dkt. 121. Rowe argues that this theory is bolstered by a report
14 submitted by Tyco to the California Environmental Protection Agency, admitting that the railroad
15 industry has used and disposed of “significant quantities of PCBs over time.” Ex. B to Boone
16 Decl. ISO Opp. to Tyco Motions for Summary Judgment (April 2, 2004 Soil Sampling Plan:
17 Railroad Right-of-way South of the Tyco Facility, at 8), Dkt. 333. Tyco challenges Dr.
18 Sabadell’s opinion, arguing that it lacks supporting facts and is entirely speculative. Specifically,
19 Tyco contends that there is an analytical gap connecting historical railroad operations, which
20 have involved the use of PCBs, with the use of PCBs in the railroad operations at the Property.
21 However, if PCB use within the railroad industry was as prevalent as Dr. Sabadell and Tyco
22 seem to acknowledge, then it does not defy logic to infer that the railroad operations adjacent to
23 the Property also may have involved the use of materials containing PCBs.

24 Even without Dr. Sabadell’s opinion, there is at the very least an issue of fact as to
25 whether railroad operations on the Property led to the contamination in question. Tyco’s former
26 environmental consultant, Roy Litzenberg, testified during his deposition that PCB releases along
27 the railroad right-of-way occurred at some point between 1961 and 1969 based upon aerial

1 photographs showing staining along the right-of-way. *Id.* at Ex. D (“Litzenberg Depo.”) at 86:3-
2 21, Dkt. 336. Although Tyco highlights that this time period is consistent with Hill’s ownership
3 of the Property, it does not follow that the contamination necessarily must have resulted from
4 Hill’s use of PCBs. Tyco has not shown why it would be unreasonable to conclude that railroad
5 operations unrelated to Hill’s use of the Property could have caused the contamination.

6 Litzenberg also testified that he received reports of flooding at the Property from rain
7 water collected near the railroad easement. *Id.* at 67:13-17. Tyco argues correctly that this
8 evidence constitutes inadmissible hearsay because Litzenberg had no direct knowledge of the
9 alleged flooding. However, even if Litzenberg’s testimony is inadmissible, Rowe has produced
10 independent evidence from the owner of a facility neighboring the Property who testified that
11 Tyco eventually installed a catch basin and pump to process accumulating rain water. *Id.* at Ex. E
12 (“Andrus Depo.”) at 22:14-25, Dkt. 336.

13 Finally, Rowe points to evidence that Tyco’s predecessor-in-interest painted the facility
14 shortly after taking ownership in 1973. *Id.* at Ex. A (Letters dated Apr. 3, 1973 and Apr. 14,
15 1973, announcing Raychem’s plans to paint the building “inside and out” immediately after
16 taking possession of the Property), Dkt. 333. Rowe asserts that the high levels of PCBs
17 contained in paint during the 1970s could account for the current presence of PCBs on the
18 building’s surfaces. Richter Decl. at ¶ 7.

19 Taken together, the evidence produced by the parties demonstrates that there are issues of
20 fact still to be resolved. Although Tyco theoretically could prove that Rowe is a responsible
21 party based on the circumstantial evidence Tyco has provided, Rowe has rebutted that evidence
22 with credible facts and expert opinion. Accordingly, the issue of Rowe’s CERCLA liability is
23 not appropriate for summary adjudication and must proceed to trial.

24 **2. Damages**

25 Rowe contends alternatively that in the event it is found liable under CERCLA, Tyco
26 must absorb Rowe’s share of liability. Rowe points out that Redwood indemnified it from all
27 future claims in a sublet termination contract executed in 1973 between Redwood and Rowe’s

1 predecessor-in-interest, sub-lessor Coleman Cable & Wire Company (“Coleman”);⁶ that the
2 Court has concluded that the proportionate share method applies to the CERCLA claims brought
3 under § 113(f) in the instant case;⁷ and that the Court already has determined that Tyco is a PRP
4 and that Tyco bears the risk of Redwood’s responsibility beyond the dollar amount of the
5 Redwood settlement.⁸

6 Tyco argues that Rowe’s analysis is based on a false assumption, claiming that the
7 Redwood contract in fact was never signed. Ex. F to Boone Decl. ISO Rowe December 2010
8 Mot. for Summary Judgment, Dkt. 253. Rowe does not dispute that the only copy of the contract
9 that it has produced is unsigned. However, it contends that there is ample evidence that the
10 contract was executed, including a \$90,000 payment made by Coleman to Raychem in order to
11 compensate Raychem for the repair, modification, and restoration of the Property. *See Id.* at Exs.
12 D-G. Rowe asserts that this payment not only evidences the indemnity agreement but also
13 demonstrates that Rowe has paid its fair share toward remediation of the Property.

14 It appears that there may be a triable issue of fact as to the effect of the indemnity
15 agreement. However, because Rowe’s liability under CERCLA remains unresolved, it would be
16 premature for the Court to determine Rowe’s responsibility, if any, for statutory damages.

17 **B. RCRA**

18 Damages are not available under RCRA. As the Court has noted previously, RCRA “is
19 not principally designed to effectuate the cleanup of toxic waste sites or to compensate those who
20 have attended to the remediation of environmental hazards.” Order Granting Motions for
21 Approval of Settlement and to Dismiss at 19, Dkt. 233 (quoting *Meghrig v. KFC Western, Inc.*,
22 516 U.S. 479, 483 (1996)). *Express Car Wash v. Irinaga Bros.*, 967 F.Supp. 1188, 1193 (D. Or.

24 ⁶ Ex. F to Boone Decl. ISO Rowe December 2010 Mot. for Summary Judgment, Dkt.
25 253.

26 ⁷ Order Granting Motions for Approval of Settlement and to Dismiss, Dkt. 233.

27 ⁸ *Id.* n. 7.

1 1997) held that as interpreted in *Meghrig*, “RCRA does not allow a plaintiff to recover any costs
2 for remediation *substantially in place* at the time of suit.” (emphasis added), citing *Meghrig*, 615
3 U.S. at 487 (holding that the difference in language between RCRA and CERCLA’s costs
4 recovery provisions “amply demonstrate[s] that Congress did not intend for a private citizen to
5 be able to undertake a cleanup and then proceed to recover its costs under RCRA.”). Unlike the
6 relief provisions contained in CERCLA, “[t]he primary relief available to a private party under
7 RCRA is a mandatory injunction, i.e., one that orders a responsible party to ‘take action’ by
8 attending to the cleanup and proper disposal of toxic waste, or a prohibitory injunction, i.e., one
9 that ‘restrains’ a responsible party from further violating RCRA.” *Gilroy Canning Company,*
10 *Inc. v. California Cannery and Growers*, 15 F. Supp. 2d 943, 945 (N.D. Cal. 1998), quoting
11 *Meghrig*, 516 U.S. at 484. Here, Tyco seeks injunctive relief to compel Rowe to pay for future
12 cleanup costs at the Property. Alternatively, Tyco requests an injunction ordering Rowe to take
13 over the remediation in its entirety.⁹

14 Relying upon *Express Car Wash*, Rowe contends that neither form of relief is proper as a
15 matter of law because a remediation plan already was in place at the time suit was filed. The
16 California Regional Water Quality Control Board (“CRWQCB”) approved a Remedial Action
17 Plan and a Remedial Design/Remedial Action Work Plan for the Property on October 9, 2009
18 and January 20, 2010, respectively. Request for Judicial Notice ISO Rowe Mot. to Dismiss, Exs.
19 A-B, Case No. 10-cv-01606 Dkt. 8. Tyco did not file its RCRA Action until April 14, 2010.
20 Following adoption of the remedial action plan by the CRWQCB, Tyco sought approval of the
21 plan from the Environmental Protection Agency (“EPA”).¹⁰ The EPA granted conditional
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23 ⁹ Tyco sought damages in its original RCRA complaint, and the Court granted Rowe’s
24 motion to dismiss, with leave to amend. Order Granting Motions for Approval of Settlement and
25 to Dismiss, Case No. 10-cv-01606 Dkt. 17. Tyco then filed an amended complaint requesting
only injunctive relief. Case No. 10-cv-01606, Dkt. 18.

26 ¹⁰ While the plan was under review, Rowe moved to dismiss Tyco’s first amended
27 complaint in the RCRA Action. The Court denied Rowe’s motion without prejudice, indicating
that without an EPA ruling, it would not be possible to determine whether Tyco’s remedial plan

1 approval of the plan on January 4, 2011. Ex. I to Boone Decl. ISO Rowe Mot. for Summary
2 Judgment (Letter dated January 4, 2011, from the EPA to Tyco Re Conditional Approval (“EPA
3 Approval Letter”)), Dkt. 312.

4 Tyco argues that the CRWQCB plan cannot be considered “substantially in place” at the
5 time of suit because the plan was subject to EPA approval pursuant to the Toxic Substances
6 Control Act, 15 U.S.C. § 2601, *et seq.* (“TSCA”) and 40 CFR § 761.61 promulgated thereunder.
7 However, this argument contradicts previous assertions made by Tyco itself. In a brief submitted
8 after it sought approval from the EPA, Tyco made several references to the fact that the
9 CRWQCB “has approved a plan of remediation,” and acknowledged that “Tyco is proceeding
10 under an approved plan.” Opp. Br. to Rowe Mot. to Dismiss at 3, Case No. 10-cv-01606 Dkt.
11 10.

12 Under the TSCA, PCB remediation may be conducted in one of three ways: self-
13 implementing on-site cleanup, performance-based disposal, or risk-based disposal. 40 CFR §
14 761.61(a)-(c). It is clear from the regulations that agency approval is required for risk-based
15 disposals. § 761.61(c) “No person may conduct cleanup activities under this paragraph prior to
16 obtaining written approval by EPA.” However, the approval requirement for self-implementing
17 cleanup proposals is less firm. § 761.61 (a). Under § 761.61(a)(3)(ii), notice of the remediation
18 plan must be given to the EPA, and “[i]f the EPA Regional Administrator does not respond
19 within 30 calendar days . . . the person submitting the notification may assume that it is complete
20 and acceptable and proceed with the cleanup . . .”

21 Here, Tyco elected to conduct self-implementing disposal of the PCBs found at the
22 Property. EPA Approval Letter at 2 (“[Tyco] submitted the PCB Cleanup Notification under 40
23 CFR § 761.61(a).”). Under these circumstances, it is somewhat disingenuous for Tyco to argue
24 that EPA approval was *required* prior to implementation of the CRWQCB plan. Nonetheless,
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26 _____
27 was “substantially in place” for the purposes of barring RCRA recovery under *Express Car*
28 *Wash.* Order Denying Motion to Dismiss, Case No. 10-cv-01606 Dkt. 32.

1 because Tyco provided defective notice of the plan to the EPA, the thirty-day response provision
 2 was deemed waived, and Tyco could not commence cleanup prior to receiving a response from
 3 the EPA. *Id.* at 1. Additionally, in a departure from what Tyco had intended, the agency chose to
 4 approve the plan under a hybrid approach, requiring both a self-implementing and risk-based
 5 disposal. *Id.* at 4. However, regardless of how the CRWQCB plan was approved, the fact
 6 remains that indeed it was approved, and with relatively minor changes,¹¹ and it is reasonable to
 7 conclude that a plan was in place at the time Tyco filed its RCRA claim.

8 As the Court has acknowledged, even when a plan is substantially in place at the time of
 9 suit, *Express Car Wash* permits plaintiffs to seek an injunction requiring defendants to assume
 10 responsibility for completing remediation:

11 [M]any RCRA citizen suits would continue to be viable if a plaintiff *who had*
 12 *begun remediation* at a site sued to have defendants install additional remediation
 13 systems or perform different required activities than plaintiff *had already*
undertaken, or if a plaintiff sought to have defendants completely take over
 responsibility for completing a remediation that plaintiff *had begun*.

14 Order Granting Motions for Approval of Settlement and to Dismiss at 30-31 (quoting *Express*
 15 *Car Wash*, 967 F. Supp. at 1194 n. 5.) (emphasis added). In *ABB Indus. Sys., Inc. v. Prime*
 16 *Technology, Inc.*, 32 F. Supp. 2d 38, 42 (D. Conn. 1998), the court concluded that injunctive
 17 relief was warranted under the *Express Car Wash* exception because plaintiff began remediation
 18 after filing suit and cleanup was not yet complete.

19 In this case, however, Tyco concedes that no physical remediation has taken place. FAC
 20 ¶ 13; Opp. Br. to Rowe December 2010 Mot. for Summary Judgment at 16 (“In the instant case,
 21 no cleanup has begun—no dirt has been moved, nothing has yet been remediated.”), Dkt. 258.
 22 Arguably, the *Express Car Wash* exception could be extended to situations in which remediation
 23 is deemed to have “begun” once a cleanup plan has received regulatory approval, but such an

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 25 ¹¹ The EPA has directed Tyco to: (1) conduct additional soil sampling; (2) demonstrate
 26 that sampling has been conducted with an adequate number of samples; (3) provide an estimate
 27 of the number of concrete samples that would be collected to characterize concrete for on-site
 and off-site disposal; and (4) erect a physical barrier to separate the soil on the northern boundary
 of the Property from the railroad spur. *Id.* at 1.

1 interpretation of *Express Car Wash* then could be used as an end-run around RCRA's bar to
 2 damages, allowing plaintiffs to obtain approval of a remediation plan and thereafter seek a court
 3 order requiring defendants to "take over" the remediation.

4 There is no binding authority with respect to this issue. *Meghrig* did not address this
 5 precise question, nor did the cases relied upon by Tyco in its moving papers. *See Continental*
 6 *Carbon Co., Inc. v. Am. Int'l Specialty Lines Ins. Co.*, No. H-05-1187, 2006 U.S. Dist. LEXIS
 7 33545, *41 (S.D. Tex. May 23, 2006); *City of Waukesha v. Viacom Int'l, Inc.*, 362 F. Supp. 2d
 8 1025 (E.D. Wis. 2005); *Spillane v. Commonwealth Edison Co.*, 291 F. Supp. 2d 728 (N.D. Ill.
 9 2003); *ABB Indus.*, 32 F. Supp. 2d 38; *PMC, Inc. v. Sherwin-Williams Co.*, No. 93 C 1379, 1997
 10 U.S. Dist. LEXIS 6013, *37 (Apr. 23, 1997), *aff'd*, 151 F.3d 610 (7th Cir. 1998) (ruling issued
 11 prior to *Express Car Wash*). This Court finds the reasoning of *Express Car Wash* persuasive.
 12 Based on the plain language of the exception outlined in that decision, it is clear that injunctive
 13 relief is not available when abatement of the contamination has not yet begun. Because no
 14 remediation has occurred at the Property, the Court concludes that Tyco is not entitled to
 15 injunctive relief under RCRA.¹²

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 23 ¹² Tyco is not without recourse. RCRA does not preempt state law tort claims premised
 24 upon facts similar to those giving rise to a RCRA claim. *See, e.g., Nutrasweet Co. v. X-L Eng'g*
 25 *Corp.*, 926 F. Supp. 767, 771 (N.D. Ill. 1996) ("[T]he court disagrees that Plaintiffs are barred by
 26 RCRA from bringing a state law tort claim premised on facts similar to those which might also
 27 violate RCRA. . . . RCRA is mere evidence, to be used at trial, which could establish to a jury or
 28 judge that a duty existed and that the failure to meet RCRA requirements constitutes a breach of
 that duty.).

IV. ORDER

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2 Good cause therefor appearing, summary judgment is GRANTED in favor of Rowe as to
3 Tyco's claim for relief under RCRA. Summary judgment is DENIED as to Tyco's CERCLA
4 claim.

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6 IT IS SO ORDERED.

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8 DATED: September 19, 2011

9 
10 JEREMY FOGEL
11 United States District Judge