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6 NORTH COAST RIVERS ALLIANCE, a non-profit, unincorporated  
association, FRANK EGGER, TIMOTHY WILCOX, in his own behalf  
7 and on behalf of his 1-year old son, JACK WILCOX, KRISTA MARIE  
ALONGI ARON, on her own behalf and on behalf of her minor daughter  
8 NORA ARON, SANDIE SCHMAIER, SHARON LUEHS, GAYLE  
McLAUGHLIN, WHITNEY MERCHANT, ROBERT LIEBER,  
9 MICHAEL LYNBERG, and TONY MADRIGAL

10 IN THE UNITED STATES DISTRICT COURT  
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA

12 NORTH COAST RIVERS ALLIANCE, a non-profit, )  
unincorporated association, FRANK EGGER, )  
13 TIMOTHY WILCOX, in his own behalf and on behalf of )  
his 1-year old son, JACK WILCOX, KRISTA MARIE )  
14 ALONGI ARON, on her own behalf and on behalf of her )  
minor daughter NORA ARON, SANDIE SCHMAIER, )  
15 SHARON LUEHS, GAYLE McLAUGHLIN, )  
WHITNEY MERCHANT, ROBERT LIEBER, )  
16 MICHAEL LYNBERG, and TONY MADRIGAL, )

CASE NO.: 08-05328-SBA

**PLAINTIFFS' OPPOSITION TO  
DEFENDANTS'  
ADMINISTRATIVE MOTION TO  
FILE UNDER SEAL LIMITED  
PORTIONS OF THE ANSWER**

17 Plaintiffs, )

18 v. )

19 LISA P. JACKSON, Administrator, United States )  
20 Environmental Protection Agency, and the UNITED )  
STATES ENVIRONMENTAL PROTECTION )  
21 AGENCY, )

22 Defendants. )  
23

24 **I. INTRODUCTION**

25 During September, October, and November, 2007, pursuant to approvals unlawfully granted by  
26 defendants, the California Department of Food and Agriculture repeatedly sprayed dangerous pesticides  
27 over urban and rural areas of Monterey and Santa Cruz Counties at night. The spraying of "CheckMate  
28 OLR-F" and "CheckMate LBAM-F" injured hundreds of persons including infants, children, and the

1 elderly, and killed and injured thousands of wild and domestic animals, including more than 650 sea  
2 birds. Among those severely injured by these aerial assaults were plaintiffs Jack Wilcox, the infant son  
3 of Monterey County resident Major Timothy Wilcox, and Nora Aron, the 9-year old daughter of Santa  
4 Cruz County resident Krista Aron.

5 Plaintiffs ask this Court to declare the defendants’ purported exemption of these dangerous  
6 pesticides from quarantine under the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7  
7 U.S.C. § 136 *et seq.*, unlawful. Central to the Court’s inquiry is a determination of the specific  
8 chemicals used in these two pesticide sprays. The defendants contend that the public is not entitled to  
9 disclosure of the chemicals sprayed on urban populations, notwithstanding the widespread,  
10 demonstrable physical harm to infants, children, the elderly, and the chemically sensitive, as well as to  
11 sea birds, upland birds, and other wild and domestic animals. At the behest of the manufacturer of these  
12 pesticides, Suterra, LLC of Bend, Oregon, defendants seek to suppress all public dialogue – including  
13 argument and testimony in this case, before this Court – regarding the dangers to public and  
14 environmental health and safety posed by defendants’ indiscriminate spraying of its products over  
15 unsuspecting urban populations. Defendants’ strategy to squelch informed public debate and effective  
16 judicial review of the lawfulness of defendants’ conduct is embodied in their pending motion to file  
17 under seal limited portions of their Answer.

18 The public’s fundamental right to public disclosure and proper evaluation of the chemicals  
19 contained in pesticides proposed to be sprayed over urban populations trumps Suterra’s narrow  
20 pecuniary interest in secreting such information from potential commercial competitors. Nothing in  
21 FIFRA or any other law invests Suterra with the right to cause widespread harm to public health and  
22 environmental safety. None of the statutes, regulations, or cases cited by defendants in their pending  
23 motion justifies suppression of the ingredients of the two pesticides whose approval is challenged  
24 herein, as plaintiffs explain below.

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1           **II.     THE PESTICIDES’ INGREDIENTS WERE PUBLICLY DISCLOSED LONG**  
2           **AGO.**

3           The ingredients of the two pesticides in question, OLR-F<sup>1</sup> and LBAM-F, are not confidential.  
4           To the contrary, they are widely available on the world wide web. Indeed, in October 2007, Governor  
5           Schwarzenegger and the California Department of Food and Agriculture (“CDFA”) issued a News  
6           Release, attached to the accompanying Declaration of Counsel as Exhibit 1, *listing all of the “inert”*  
7           *and the “active” ingredients of Checkmate LBAM-F* with the statement that it is the position of the  
8           State of California “that, to the maximum extent possible under U.S. trademark law, the list of  
9           ingredients in the product used to eradicate the Light Brown Apple Moth should be disclosed to the  
10          public.” This official News Release of the agencies that carried out the spraying program under  
11          direction from defendants states that “[t]he Governor supports the public’s right to know every  
12          ingredient in the product . . . .” *Id.* at 1.

13          When the State of California officially disclosed the ingredients of LBAM-F over one year  
14          before the instant litigation was filed, it did so apparently without objection from either defendants or  
15          the manufacturer of the pesticides, Suterra. The News Release states that “[t]he Governor and Suterra  
16          have upheld a commitment to keep Californians and the foods we eat safe.” The intended and natural  
17          inference to be drawn from the State’s News Release is that Suterra had knowledge of the disclosure  
18          and approved it.

19          Hence the premise of the instant motion – that the ingredients of these pesticides are confidential  
20          business information – is simply untrue. The Governor’s News Release has been available on CDFA’s  
21          website since October 2007. Plaintiffs are informed and believe – and request the opportunity to  
22          conduct discovery to prove – that the ingredients were also publicly disclosed in the court proceedings  
23          challenging the Apple Moth spray program in both Santa Cruz and Monterey Counties, as part of  
24          CDFA’s official administrative record therein, as well as in those superior courts’ own public records.  
25          As the State’s News Release explains, the Monterey Superior Court also considered a previous  
26          disclosure of the ingredients of the earlier, similar pesticide, OLR-F, in making its rulings. *Id.* at p. 1.

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28           <sup>1</sup>OLR-F was the first generation Apple Moth pesticide sprayed in Monterey County  
between September 9 and 13, 2007. Complaint, ¶ 35. Thereafter, only the second generation  
pesticide, LBAM-F, was sprayed. *Id.*

1 Both Superior Courts ultimately entered judgments overturning CDFA’s spraying program as unlawful.  
2 Since it appears that those courts openly considered these ingredients, this Court may certainly do so as  
3 well, as neither pesticide’s ingredients remain confidential.

4 Despite its knowledge of these disclosures, Suterra apparently failed to prevent or curtail them.  
5 Whatever rights Suterra might have possessed to prevent disclosure, it has waived them. In any event,  
6 it is now too late to unring the bell. Since these ingredients have not been kept confidential, and indeed  
7 have been widely and officially disclosed by the State of California, and relied upon by its courts in  
8 ruling the Apple Moth spray program unlawful, they are not “confidential” and thus are not entitled to  
9 “protection” through the contrivance of filing them under this Court’s seal.

10 **III. FIFRA REQUIRES PUBLIC DISCLOSURE TO PROTECT PUBLIC AND**  
11 **ENVIRONMENTAL HEALTH.**

12 More importantly, even had these ingredients not already been fully disclosed to the public,  
13 there is scant basis in either FIFRA or the regulations and case law defendants cite, for their asserted  
14 claim of confidentiality. The cases on which defendants rely are readily distinguishable. None involved  
15 official agency publication of the chemicals in question. None involved prior, repeated disclosure of the  
16 ingredients in multiple, separate court proceedings. None involved documented harm to the public from  
17 the intended use of the chemicals over urban populations. None involved a spray program that two  
18 separate courts have declare unlawful due to its failure to adequately address impacts on public health  
19 and the environment.

20 Furthermore, neither FIFRA’s plain language, nor Congress’ intent in its enactment, supports  
21 defendants’ position. In 1978 FIFRA was amended to add subsections (d) through (g) of 7 U.S.C. §  
22 736h. Section 136h(d)(1) imposes a duty on the EPA Administrator to disclose test results and “all  
23 information” regarding the “separate ingredients, impurities, or degradation products” of pesticides.  
24 Although subsection 136h(d)(1)(C) exempts disclosure of “the identity . . . of any deliberately added  
25 inert ingredient of a pesticide,” this exception is not applicable where “the Administrator has first  
26 determined that disclosure is necessary to protect against unreasonable risk of injury to health or the  
27 environment.” By previously designating tricapyryl methyl ammonium chloride (“TMAC”), one of the  
28 inert ingredients of both pesticides, for only *non*-food use, the Administrator has *already determined*

1 that this chemical may not be used where, as here, it would contact food crops including those  
2 commonly found in urban gardens. For this reason, its disclosure is necessary under FIFRA to assure  
3 the public's safety is protected. Several of the other inert ingredients of these pesticides likewise pose a  
4 risk of injury to public health and to the environment. Plaintiffs also request leave to conduct discovery  
5 to show that Suterra has waived any expectation of confidentiality it might otherwise assert.

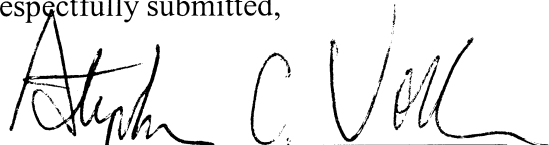
6 Defendants' regulations do not avail them. 40 C.F.R. section 156.10(g)(7) imposes a duty on  
7 the Administrator to disclose the names of pesticide ingredients on the label if they "pose a hazard to  
8 man or the environment." This duty is widely recognized in the case law. *See, e.g., Ruckelshaus v.*  
9 *Monsanto Co.*, 467 U.S. 986, 1006 (1984). Thus, far from providing a basis for withholding disclosure  
10 of these ingredients, FIFRA and its regulations impose a duty on the Administrator to disclose these  
11 ingredients where, as here, they pose a risk of injury to public health and to the environment. And, as  
12 defendants' motion admits, 40 C.F.R. section 2.209(d) authorizes this Court to order disclosure even if  
13 either pesticide is otherwise protected from disclosure. Defendants' Motion at p. 2.

14 **IV. DEFENDANTS' MOTION SHOULD BE DENIED.**

15 For the foregoing reasons, defendants' motion lacks merit and should be denied. The public has  
16 a vital right to know the contents of pesticides to which they will be exposed. There is no  
17 countervailing justification for keeping the public in the dark. To the contrary, in light of the facts that  
18 (1) the Governor publicly disclosed the ingredients of LBAM-F, (2) the use of both pesticides causes  
19 harm to the environment and to public health, (3) other courts have openly considered these ingredients  
20 in declaring the Apple Moth spray program unlawful, and (4) the overarching purpose of FIFRA is to  
21 protect the health of the environment and the public, defendants' proposal to draw a veil of secrecy  
22 around these pesticides' ingredients at this late date is ill-considered and should be denied.

23 Dated: February 5, 2008

Respectfully submitted,

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27 ALLIANCE, et al.  
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