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7 SUPERIOR COURT OF THE STATE OF CALIFORNIA

8 IN AND FOR THE COUNTY OF MONTEREY

9 HELPING OUR PENINSULA'S) Case No.: M86553
10 ENVIRONMENT,)
11) SUPPLEMENTAL MEMORANDUM OF
12) POINTS AND AUTHORITIES IN
13) SUPPORT OF IMMEDIATE INJUNCTIVE
14) RELIEF
15)
16) Date: October 18, 2007
17) Time: 9:00a.m.
18) Dept: 14
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INTRODUCTION AND SUMMARY

Respondent has failed to show any direct evidence that the proposed aerial spraying of the greater Monterey Peninsula with the Checkmate formula will not harm the people living there. As set out in the exhaustive analysis of the Checkmate information available to the public, Edward Urbansky, Ph.D. in Chemistry, The "inert ingredients" are not inert and they have never been tested for the effects of inhalation by mammals. The application of the substances reportedly in Checkmate may cause the types of

1 symptoms complained of by people of the Monterey Peninsula after
2 the last spraying.

3 Petitioner had hoped and expected the State, or Suterra,
4 would provide a list of all the ingredients of Checkmate
5 together with the results of tests performed to examine the
6 impacts of Checkmate dust on mammals when inhaled, which tests
7 proved the product was benign. The State's reply is to focus on
8 the safety of pheromones without discussing just what is mixed
9 in with the pheromone package sprayed over the public. Since
10 there is a total failure to provide any assurance this Checkmate
11 product is not toxic when inhaled, the Court is requested to
12 continue the TRO until Respondent has had an opportunity to
13 prove to a very apprehensive citizenry that the government is
14 not poisoning them.

15 FURTHER STATEMENT OF FACTS

16 The Technical Working Group for the Light Brown Apple Moth
17 met the weekend of May 16-18, 2007, to develop a plan for the
18 response by the United States Department of Agriculture and the
19 Respondent herein to recent evidence of the presence of the
20 light brown apple moth (LBAM) in California. Exhibit A to
21 Declaration of John Connell In Opposition To Petition. The Group
22 determined since there was no evidence of the LBAM in California
23 from surveys taken in 2005, the moth must have arrived later.
24 Id. There is insufficient data to date the introduction of the
25 moth into the state. Id.

1 The Group recommends the development of effective mating
2 disruption technology for use in a variety of situations. Id. It
3 also recommends a program to identify and register effective
4 sprayable formulations and to assess the functionality of aerial
5 application. Id. Also recommended is the evaluation of the
6 effectiveness of mobile mating disruption of LBAM. Id.

7 In addition to the foregoing recommendations concerning
8 mating disruption, the Group recommended biologic controls such
9 as Trichogramma egg parasites, pesticides, and development of a
10 sterile insect facility. Id p.5

11 However, unlike the current assertions by the State, the
12 Group did not mention aerial spraying of pheromones. It did say
13 that aerial spraying of pesticides will likely be needed to
14 reduce high LBAM populations to the point where other tactics
15 (e.g. mating disruption, SIT) will be effective." Id, p.4 Of
16 particular note was the recommendation, "successful eradication
17 will rely on refinement and adaptation of multiple control and
18 regulatory tactics. A strong research and methods development
19 component will be critical to success." Id., p.1

20 Thereafter these recommendations morphed into the LIGHT
21 BROWN APPLE MOTH ERADICATION PROJECT WORK PLAN. See Exhibit C to
22 Declaration of John Connell This work plan has three options for
23 "treatment"; aerial treatment, ground application of pheromone
24 disruption ties, and ground bait spray with bacillus
25 thuringiensis, a biologic agent. Id. All other recommendations

1 by the Group are omitted, Id, including any study or research
2 protocols. Id

3 Meanwhile on July 24, 2007, the EPA granted Checkmate an
4 exemption to allow the use of this unregistered pheromone
5 pesticide using aerial or ground equipment with a statement that
6 the EPA has "evaluated the inert ingredients in the formulation
7 and determined that they are acceptable for use on food
8 commodities." Exhibit 1 to Second Supplemental Declaration of
9 Alexander Henson p.2 While there is an additional finding that
10 the EPA has determined that exposure by the public to residues
11 of Checkmate LBAM-F as authorized is not expected to result in
12 any risks of concern for infants, children, the general
13 population, domestic animals or the environment, Id., there is
14 no finding regarding the effects of inhalation of the product
15 residue by mammals.

16 Thereafter, the Respondent adopted the "FINDING OF
17 EMERGENCY". This statement, while discussing the enormous
18 potential cost of a blight by LBAM, asserts the emergency is
19 necessitated "to ensure it conducts the most efficient and
20 effective eradication project with the greatest chances of
21 success, eradication activities will need to begin as soon as
22 possible." Exhibit C to DECLARATION OF WILLIAM JENKINS IN
23 OPPOSITION TO MOTION ETC., p.7.

24 There is no other finding explaining why this is an
25 emergency. Id. There is no finding in the FINDING OF EMERGENCY

1 as to why aerial spraying must be used as part of this emergency
2 response. Id.

3 After the aerial spraying with Checkmate occurred over
4 September 9 to 12, 2007, many residents of the areas sprayed
5 complained of asthmatic-like attacks, or allergic-type
6 reactions. RESIDENTS' DECLARATIONS Several persons in the
7 categories of young and infirm were hospitalized or taken to
8 doctors for care. Id.

9 After this restraining order was filed for on October 5,
10 2007, David Dilworth uncovered a possible connection between the
11 symptoms reported after the spraying and the symptoms occurring
12 in response to contact with polymethylene polyphenyl isocyanate
13 (PPI), Supplemental Declaration of David Dilworth. On October 9,
14 2007, Petitioner filed two declarations from local doctors
15 concerning the negative health impacts from any dosage of this
16 chemical on the population, particularly the young and infirm.
17 Declarations of Aida Hasburn, MD, and Donald Hulstedt MD.

18 Meanwhile also on October 9, 2007, the Respondent filed the
19 Declaration of Dr. Peter Kurtz which clearly spells out that the
20 research to date on pheromones indicate at worst the substance
21 may produce "only mild and rapidly reversible irritation."
22 Declaration of Peter H. Kurtz in Opposition to Petition, p.3
23 There were no statements in Respondents' Opposition to the TRO
24 as to toxicity analyses of Checkmate.

1 In light of the lacuna of information, the Court issued a
2 TRO halting the aerial spraying while requiring the parties to
3 provide further information about the safety of aerial
4 application of Checkmate. Order dated October 10, 2007.

5 Thereafter, on October 12, 2007, the EPA posted on its
6 website the assertion PPI was erroneously disclosed as one of
7 the inert ingredients in Checkmate. Supplemental Declaration of
8 Edward Urbansky, p.1 Edward Urbansky, who has a Ph.D. in
9 chemistry, and who has worked for the EPA National Risk
10 Management Research Laboratory for 6 years, has submitted three
11 declarations in response to the Court's request for further
12 information. The Supplemental Declaration of Edward Urbansky
13 makes it clear that while there may be no PPI in the final
14 product, that is because during the manufacturing process the
15 PPI put into the ingredients has been reformulated. Id. It
16 appears the basis for the assertion was a simple nomenclature
17 technicality. Id.

18 Then Suterra LLC, the manufacturer of Checkmate sought to
19 secure an order sealing the documents in the file in this case
20 on October 15, 2007. See Court file. In doing so, Suterra
21 submits the declarations of Joseph Konopelski and Kristin
22 Ketner, the Director of Research and Development at Suterra. The
23 latter explains in her declaration that polymethylene polyphenyl
24 isocyanate is used in Checkmate. Declaration of Kristin C.
25 Ketner. The Konopelski Declaration backs up the assertion that

1 PPI reacts with water to form an amine and carbon dioxide.
2 Declaration of Joseph Konopelski. As pointed out in the Second
3 Supplemental Declaration of Edward Urbansky, these declarations
4 submitted by Suterra do not address the question of whether
5 isocyanate containing chemical species contact humans at
6 biologically, toxicologically, or physiologically significant
7 levels. Id., p.2.

8 This omission is critical in answering this Court's request
9 for more information on the safety of Checkmate. As set out in
10 the Declaration of Edward Urbansky, there are more than one
11 constituents of Checkmate that are contra-indicated for spraying
12 over a residential population. One of the by-products of the
13 manufacturing process using tricaprylylmethyl ammonium chloride
14 is 1-octanol, also referred to as "caprylol", which can be quite
15 annoying and have a tussive effect at higher concentrations.
16 Declaration of Edward Urbansky., p.4 Also referenced as being
17 potentially a problem for which there evidently has been no
18 research are (Z)-11-tetradecen-1-ol and (E)-11-tetradecen-1-ol
19 which are leftover starting materials or byproducts of
20 hydrolysis. Id, p.3. It is recommended that these aerosols
21 should be avoided because of their extremely low solubilities.
22 Id. There are no OSHA permissible exposure limits or American
23 Conference of Government Industrial Hygenists threshold limit
24 values making it difficult to assess the physiological impacts
25 of exposure.

1 Declaration of Peter Kurtz In opposition To Petition and in the
2 three declarations of Edward Urbansky. The declaration of Kurtz
3 only speaks to the benign impacts from pheromone applications.
4 It does not address any impacts to human health from inhalation
5 of Checkmate. The declarations of Urbansky detail why the
6 substances contained in Checkmate are harmful when applied
7 aerially to the entire population, particularly from inhalation.

8 B. The Balance of Conveniences Favor Maintaining the TRO

9 Respondent has not made any showing that alternatives to
10 aerial spraying will not be as efficacious as aerial spraying in
11 halting the infestation of LBAM. There is nothing in the FINDING
12 OF EMERGENCY which indicates twist ties, pheromone traps, and
13 other assorted techniques would not be as efficient or effective
14 in eradication of LBAM. There is nothing in the papers filed
15 herein that states that absent aerial spraying, eradication is
16 not possible. There is a reference to the inability to muster
17 the manpower and number of twist ties needed, but there is no
18 foundation provided as to why such numbers are necessary. There
19 is no information whether the last spraying had any observable
20 effect on the LBAM population. Since Respondent has not
21 established as part of its program any avenue for persons
22 feeling afflicted by the spray to be seen and tested by
23 competent medical help, there is no evidence concerning the
24 health impacts from the spraying except that introduced by
25 Petitioner.

1 In sum, the balancing of the conveniences clearly favor the
2 continuation of the TRO.

3 C. Petitioner is Likely To Succeed On the Merits

4 Respondent is incorrect when it asserts it is likely to
5 prevail on the merits, and that the case of *Californians For*
6 *Alternatives To Toxics v. Dept. of Food and Agriculture* (2006)
7 136 Cal.App.4th 1 supports its position.

8 Indeed this case supports Petitioner's position that the
9 previous certification of Checkmate by the EPA does not excuse
10 or substitute for CEQA compliance. The Court wrote,

11 "Given the potential adverse impacts to human health and the
12 environment from a statewide program authorizing pesticide use
13 in numerous settings that could expose humans, animal and
14 aquatic life and surface water and air to pesticide residue, at
15 a minimum the EIR should contain a serious risk assessment of
all pesticides that could be used in the rapid response and
containment programs of the PDCP. " Id. 136 Cal.App.4th at 18.

16 While that case concerned the adequacy of an EIR, it is
17 clear the case offers no support for Respondent's position that
18 this is an emergency under CEQA.¹ On the other hand, it is clear
19 that CEQA Guideline Section 15269 exempts only those emergency
20 projects which do not include long-term projects undertaken for
21 the purpose of preventing or mitigating a situation that has a
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1 low probability of occurrence in the short-term. Herein the
2 project is admittedly long term, the goal is the long term
3 eradication of the LBAM. Thus the only question is whether the
4 "emergency" has a low probability of occurrence in the short
5 run. Guideline Section 15269(c). Here the alleged emergency is
6 the loss of crops from LBAM. Compare FINDING OF EMERGENCY,
7 Exhibit C to Declaration of William Jenkins In Opposition To
8 Petition, p.6. However, there is no statement indicating why the
9 component of this project involving aerial spraying is necessary
10 on an emergency basis, and there is no showing the claimed
11 emergency of crop loss from LBAM has anything other than a low
12 probability of occurrence in the short term. It has been here
13 since at least February, 2007. Respondent has not cited to any
14 information indicating a loss of crops from this pest has
15 occurred in California. Thus, there is no evidence to support
16 the finding of an emergency under Section 15269.

17
18 While Respondent has also cited to the Light Brown Apple
19 Moth Act, Opposition To Motion, p.9, there is nothing therein
20 applicable to this case. There is nothing in the act which
21 states the infestation constitutes an emergency under CEQA.

23 ¹ Petitioner is unable to find anything in the citation given by Respondent,
24 OPPOSITION TO MOTION SEEKING TEMPORARY RESTRAINING ORDER, p.10, lines 1-2,
25 that supports the proposition cited by Respondent.

1 Certainly the Legislature is conversant on how to exempt certain
2 projects from CEQA. Compare Exemption for Olympic Games, Public
3 Resources Code Section 21080(b)(7).

4 There is no authority which supports the assertion the
5 program adopted herein is necessary due to an emergency as that
6 is defined under the statute.

7 CONCLUSION

8 For each of the foregoing reasons the TRO ought to be
9 extended. If and when Respondents can produce evidence that
10 clearly demonstrates Checkmate will not harm the residents
11 living in the area being sprayed, then and only then should the
12 Court consider lifting the injunctive relief. However, given the
13 likelihood of success on the merits Respondents should be
14 enjoined unless and until they have caused to be prepared and
15 considered an EIR for this project.
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17 Dated this 16th day of October,
18 2007

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