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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 OAKLAND DIVISION
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14 _____)
NORTH COAST RIVERS ALLIANCE, a)
15 non-profit, unincorporated association, et al.,)

16 Plaintiffs,)

17 v.)

18 LISA P. JACKSON, Administrator,^{1/})
19 United States Environmental Protection)
Agency, and the UNITED STATES)
20 ENVIRONMENTAL PROTECTION)
AGENCY,)
21

22 Defendants.)
23 _____

Case No. 08-cv-05328 SBA

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

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27 ^{1/} Stephen L. Johnson was previously named as the lead defendant in this case in his official
28 capacity as Administrator of the United States Environmental Protection Agency. Pursuant to
Federal Rule of Civil Procedure 25(d), his successor, Lisa P. Jackson, is automatically substituted
as the lead defendant.

1 Pursuant to Local Rules 7-11 and 79-5, Defendants Lisa P. Jackson, in her official
2 capacity as Administrator of the United States Environmental Protection Agency, and the United
3 States Environmental Protection Agency (collectively, “Defendants” or “EPA”), hereby seek
4 leave from the Court to file under seal limited portions of the Answer that reference certain
5 claimed trade secret and confidential business information. The relief requested in this motion is
6 narrowly tailored and supported by the following:

7 1. Courts have recognized that injury may result from disclosure in litigation of trade
8 secret and confidential business information, such as use of the information by competitors to
9 duplicate products, compete for customers, or otherwise gain a competitive market advantage.
10 See Felix v. Davis Moreno Const., Inc., No. CV F 07-0533 LJO GSA, 2008 WL 3009867, at *1
11 (E.D. Cal. Aug. 1, 2008) (citing Intel Corp. v. Via Tech., Inc., 198 F.R.D. 525, 531 (N.D. Cal.
12 2000)). In light of this potential injury, filings under seal are one of the “primary means by
13 which the courts ensure full disclosure of relevant information, while still preserving the parties’
14 (and third parties’) legitimate expectation that confidential business information, proprietary
15 technology and trade secrets will not be publicly disseminated.” In re Adobe Systems, Inc.
16 Securities Litigation, 141 F.R.D. 155, 161-62 (N.D. Cal. 1992).

17 2. Plaintiffs’ Complaint, see Dkt. 1, challenges EPA’s decision to grant emergency
18 exemptions allowing use of two pesticides, CheckMate LBAM-F (“LBAM-F”) and CheckMate
19 OLR-F (“OLR-F”), pursuant to the emergency exemption provision in Section 18 of the Federal
20 Insecticide, Fungicide and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136p, and EPA’s
21 implementing regulations at 40 C.F.R. part 166. Relevant here, Plaintiffs’ Complaint alleges that
22 LBAM-F and OLR-F contain certain inert ingredients, and that EPA failed to adequately consider
23 those inert ingredients in granting the exemptions. See Dkt. 1. at ¶¶ 45, 46, 47, 50, 51 and 59.
24 As explained below, the identities of ingredients other than the active ingredients (i.e., inert
25 ingredients or “other ingredients”) in LBAM-F and OLR-F (and other information pertaining to
26 the formulations) have been claimed as confidential by Suterra, LLC, the manufacturer of
27 LBAM-F and OLR-F.

28 3. Section 10(b) of FIFRA, 7 U.S.C. § 136h(b), limits public disclosure of

1 information that contains or relates to trade secrets or confidential business information
2 submitted under the statute.

3 4. EPA's regulations at 40 C.F.R. part 2, subpart B require that information claimed
4 as confidential be protected from public disclosure unless and until the information is determined
5 eligible for public disclosure pursuant to these regulations and all applicable regulatory
6 procedures at 40 C.F.R. part 2, subpart B have been followed. These regulations permit
7 disclosure of such information only under special circumstances, such as when EPA is required
8 to do so pursuant to court order. See 40 C.F.R. § 2.209(d).

9 5. In a letter to EPA dated January 16, 2009 (as well as in earlier communications)
10 Suterra, LLC, the manufacturer of LBAM-F and OLR-F, asserted a claim of confidentiality over
11 the identity of the inert ingredients contained in those pesticides and other information pertaining
12 to the formulations.

13 6. EPA routinely protects the identities of most inert/other ingredients in pesticide
14 products. However, in September 2007, an EPA employee inadvertently provided to the *Santa*
15 *Cruz Sentinel* certain information, erroneous in part, concerning the ingredients in OLR-F, which
16 the paper published on September 28, 2007. EPA also is aware that the State of California issued
17 a press release on October 20, 2007, listing the ingredients of LBAM-F. Because Suterra
18 maintains that the identities of the inert/other ingredients of LBAM-F and OLR-F remain subject
19 to a claim of confidentiality, EPA continues to treat this information as confidential business
20 information. See Nat'l Wildlife Fed'n v. EPA, 286 F.3d 554, 576 (D.C. Cir. 2002) ("any
21 protection afforded [confidential business] information was not waived through the inadvertent
22 disclosure of that information by EPA"); United States v. de la Jara, 973 F.2d 746, 749-50 (9th
23 Cir. 1992) (in the event of an involuntary disclosure, a privilege remains preserved if the
24 privilege holder made reasonable efforts to protect and preserve the privilege).

25 7. EPA, in its Answer, can neither admit nor deny the allegations in Plaintiffs'
26 Complaint that relate to the identities of inert ingredients in LBAM-F and OLR-F without
27 revealing information claimed as confidential. Because of the Agency's ongoing obligation to
28 protect business information claimed as confidential, EPA seeks to file under seal its responses to

1 the paragraphs in Plaintiffs' Complaint that include allegations concerning the identities of inert
2 ingredients in LBAM-F and OLR-F. In particular, EPA requests an order directing the Clerk to
3 file under seal the relevant responses in paragraphs 45, 46, 47, 50, and 59 of the Answer.

4 8. Should the court grant the relief requested in this motion, EPA will work with
5 Plaintiffs and Suterra to develop appropriate procedures to allow for the disclosure of this
6 information in the Answer and subsequent filings to Plaintiffs for purposes of this litigation only
7 through a protective order.

8 9. Counsel for EPA has conferred with counsel for Plaintiffs, who indicates that
9 Plaintiffs will oppose this motion.

10 10. Pursuant to Local Rule 79-5(c), EPA will immediately lodge with the Clerk a
11 proposed order that is narrowly tailored to seal only those portions of the Answer claimed to be
12 sealable – i.e., the relevant portions of the responses in paragraphs 45, 46, 47, 50, and 59 of the
13 Answer. EPA also will lodge with the Clerk: (1) two copies of the unredacted Answer, with the
14 sealable portions flagged and highlighted in yellow, one of which is to be delivered to Chambers;
15 and (2) a redacted version of the Answer that the Clerk may file in the public record should the
16 Court grant the sealing order.

17 For the foregoing reasons, EPA respectfully requests the Court to direct the Clerk to file
18 under seal the relevant portions of the responses contained in paragraphs 45, 46, 47, 50, and 59 of
19 EPA's Answer, and to file the redacted Answer in the public record pursuant to Local Rule 79-
20 5(c)(5). A proposed order and declaration establishing the confidential nature of the sealable
21 responses is attached.

22 Respectfully submitted,

23 Dated: February 2, 2009

24 JOHN C. CRUDEN
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Environment & Natural Resources Division

25 /s/ Rochelle L. Russell
26 ROCHELLE L. RUSSELL
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27 U.S. Department of Justice
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2 **CERTIFICATE OF SERVICE**

3 I certify that on February 2, 2009, a true and correct copy of the foregoing
4 **DEFENDANTS' ADMINISTRATIVE MOTION TO FILE UNDER SEAL LIMITED**
5 **PORTIONS OF THE ANSWER** and attached **PROPOSED ORDER** and **DECLARATION**
6 **OF DENNIS L. GORRES, JR. IN SUPPORT OF DEFENDANTS' ADMINISTRATIVE**
7 **MOTION TO FILE UNDER SEAL LIMITED PORTIONS OF THE ANSWER** were
8 served electronically via the Court's e-filing system to Counsel of Record.

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10 /s/ Rochelle L. Russell

11 ROCHELLE L. RUSSELL
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