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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN JOSE DIVISION
12

13 Edna Williams, et. al ,)
14 Plaintiff,)
15 v.)
16 CALIFORNIA DEPARTMENT OF FOOD)
AND AGRICULTURE (CDFA), A.G.)
17 KAWAMURA, in his Capacity as Secretary)
of CDFA, NANCY LUNGREN, in her)
18 capacity as Deputy Secretary of Public)
Affairs of CDFA, CALIFORNIA)
19 DEPARTMENT OF PESTICIDE)
REGULATION (CDPR), MARY-ANN)
20 WARMERDAM, in her capacity as Director)
of CDPR, UNITED STATES)
21 DEPARTMENT OF AGRICULTURE)
(USDA), HELENE R. WRIGHT, in her)
22 capacity as the Director of Plant Protection)
Quarantine for the state of California,)
23 Defendants.)
24

Case No. C 07 - 05587 JW

FEDERAL DEFENDANTS' MOTION TO
DISMISS; SUPPLEMENTAL
DECLARATION OF JAMES A. SCHARF
AND REQUEST FOR TELEPHONIC
APPEARANCE BY AGENCY CO-
COUNSEL

Date: November 20, 2007
Time: 10:00 a.m.
Courtroom: 8
Judge: Hon. James Ware

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1 **NOTICE OF MOTION**

2 TO PLAINTIFFS:

3 PLEASE TAKE NOTICE that on November 20, 2007, at 10:00 a.m., or as soon thereafter as
4 the matter may be heard in Courtroom 8, 280 South First Street, San Jose, California, the
5 Honorable James Ware presiding, defendants United States Department of Agriculture and
6 Helene Wright (“federal defendants”) will appear and move the Court for an order dismissing the
7 amended complaint pursuant to Rule 12(b)(1), 12(b)(6) and 12(b)(5) of the Federal Rules of
8 Civil Procedure for lack of subject matter jurisdiction, failure to state a claim upon which relief
9 can be granted, and failure to serve the federal defendants. This motion will be based upon said
10 Rules, this Notice of Motion and Motion, the Memorandum of Points and Authorities set forth
11 below, the Declaration of James A. Scharf set forth below, the pleadings and records on file in
12 this matter, and upon such further evidence and argument as the Court may consider at the time
13 of the hearing on this motion.

14 **RELIEF SOUGHT BY FEDERAL DEFENDANTS**

15 Federal defendant move for dismissal of the amended complaint in its entirety with prejudice,
16 as follows: (1) dismissal for lack of subject matter jurisdiction; (2) dismissal for failure to state a
17 claim upon which relief can be granted; and (3) dismissal for failure to serve the federal
18 defendants.

19 **ISSUES TO BE DETERMINED**

- 20 1. Whether the Court lacks subject matter jurisdiction.
21 2. Whether plaintiffs’ amended complaint fails to state a claim upon which relief can be
22 granted against the federal defendants.
23 3. Whether plaintiffs failed to properly serve the federal defendants.

24 **MEMORANDUM OF POINTS AND AUTHORITIES**

25 **I. INTRODUCTION**

26 On November 5, 2007, plaintiffs filed an amended complaint and a “renewed” motion for
27 a temporary restraining order, to enjoin the spraying for the Light Brown Apple Moth in Santa
28 Cruz and Monterey Counties. That same day, this Court denied plaintiffs’ motion for a

1 temporary restraining order,¹ but scheduled an evidentiary hearing, presumably on plaintiffs'
2 request for a preliminary injunction, for November 21, 2007. On November 7, 2007, federal
3 defendants filed a motion for continuance of the November 21, 2007, hearing. Federal
4 defendants mentioned in their motion for continuance that they would be filing a motion to
5 dismiss. Thereafter, in an Order dated November 8, 2007, this Court vacated the evidentiary
6 hearing set for November 21, 2007, in order to consider whether it has subject matter
7 jurisdiction. The Court directed the defendants to file and serve a motion to dismiss by
8 November 14, 2007, and invited the defendants to address any abstention issues.

9 II. PLAINTIFFS' ALLEGATIONS

10 In essence, plaintiffs are challenging the reasonableness of the decision by both federal
11 and state officials to control the very destructive Light Brown Apple Moth ("LBAM") infestation
12 in California.² Both federal and state officials determined that the only effective way to control
13 the LBAM infestation in the various counties in California was by aerial spraying, including
14 areas in Monterey and Santa Cruz counties. In light of several state court judges' refusal to
15 enjoin the spraying, and in a rather obvious effort to create federal jurisdiction, plaintiffs claim in
16 their amended complaint that the spraying violates their constitutional rights. Even a cursory
17 reading of the amended complaint reveals that plaintiffs are actually claiming that the spraying is
18 unnecessary, and that the artificial pheromone being used is unsafe. For a myriad of reasons, this
19 Court does not have jurisdiction to adjudicate plaintiffs' alleged grievances.

20 Plaintiffs allege causes of action under 42 U.S.C. Sections 1985 and 1986. Amended
21 Complaint at 16:10-11. Specifically, plaintiffs allege that defendants failed "to act in a truthful
22

23 ¹As this Court is aware, similar requests for a Temporary Restraining Order ("TRO") have been denied by
24 several other judges in state cases filed in Monterey and Santa Cruz counties. See Exhibits A and B to Declaration
25 of James A. Scharf in support of federal defendants' opposition to plaintiffs' request for a TRO, filed November 5,
2007. Unless otherwise indicated, all documents referenced herein are attached to that declaration.

26 ²Lead plaintiff Edna Williams summarized the basis for the amended complaint as follows when
27 interviewed by a writer from the Santa Cruz Sentinel: "I am really concerned about the health of the people . . . and
28 it's my right as a private citizen to challenge them on it. The law says that if you are aggrieved by your government,
then you have the right to redress, and that's what I'm doing here." State and federal governments "have breached
their duty to serve the public and protect both the laws and the natural and agricultural resources of the United States
and California." Exhibit A, Supplemental Declaration of James A. Scharf. As explained below, plaintiffs lack
standing to pursue such a generalized challenge in this forum.

1 and lawful manner as public servants and protectors of the State of California and the United
2 States of America” and that defendants “have violated [plaintiffs’] civil rights.” Amended
3 Complaint at 5:16-19. Plaintiffs also allege that defendants violated plaintiffs’ First, Fourth and
4 Fourteenth Amendment rights, including their due process rights by defendants’ alleged failure to
5 obtain the “standard EPA review and the conduction of Environmental Impact Reports (EIR) as
6 required by the California Environmental Quality Act (CEQA).” Amended Complaint at 18:13 -
7 19:15; 19:18 - 20:21.³ Three of the plaintiffs also allege what appear to be state tort claims of
8 assault (Amended Complaint at 21:1-13) and nuisance. Amended Complaint at 21:16-22:5.⁴
9 Finally, plaintiffs allege that one of the state defendants has “failed to fulfill his obligations” as a
10 public official. Amended Complaint at 23:1-9.

11 For the reasons that follow, these allegations are insufficient to establish federal
12 jurisdiction.

13 III. ARGUMENT

14 A. This Court Lacks Subject Matter Jurisdiction.

15 A Rule 12(b)(1) motion can either challenge the sufficiency of the pleadings to establish
16 federal jurisdiction or the substance of the jurisdictional allegations despite the formal
17 sufficiency of the complaint. *Thornhill Publ. Co. v. Gen’l Tel. & Electronics Corp.*, 594 F.2d
18 730, 733 (9th Cir. 1979). Federal defendants challenge the substance of the jurisdictional
19 allegations for the reasons enumerated below. Accordingly, where the defendants challenge the
20 actual existence of jurisdiction, as in this case, plaintiffs’ allegations are not presumed to be
21 truthful, and plaintiffs have the burden of proving jurisdiction exists. *Tosco Corp. v.*
22 *Communities for a Better Environment*, 236 F.3d 495, 499 (9th Cir. 2001); *Thornhill Publ. Co.*
23 *Inc.*, 594 F.2d at 733. Plaintiffs must present admissible evidence to satisfy this burden. *Ass’n of*
24 *Am. Medical Colleges, v. United States*, 217 F.3d 770, 778 (9th Cir. 2000); *St. Clair v. City of*

26 ³One plaintiff alleges in general terms that defendants “have threatened and deprived her person and
27 property, without due process and equal protection under the law, and interfered with her right to be secure in her
person and property.” Amended Complaint at 22:8-10.

28 ⁴Plaintiffs allege that “the aerial applications of the pheromone-pesticide constitute human pesticide and
medical experimentation.” Amended Complaint at 22:13-23:9.

1 *Chico*, 880 F.2d 199, 201 (9th Cir. 1989), *cert denied*, 493 U.S. 993 (1989). Thus, the Court is
2 presumed to lack subject matter jurisdiction until plaintiffs prove otherwise. *Stock West, Inc. v.*
3 *Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989); *Calif. ex. rel. Younger v. Andrus*, 608
4 F.2d 1247, 1249 (9th Cir. 1979). In sum, plaintiffs have the burden of proving subject matter
5 jurisdiction in order to survive a motion to dismiss.

6 This Court can resolve factual disputes, if necessary, to determine whether subject matter
7 jurisdiction exists. *Dreier v. United States*, 106 F.3d 844, 847 (9th Cir. 1997). “The district
8 court obviously does not abuse its discretion by looking to this extra pleading material in
9 deciding the issue [of subject matter jurisdiction] even if it becomes necessary to resolve factual
10 disputes.” *St. Clair*, 880 F.2d at 201. The district court’s findings of fact must be accepted
11 unless clearly erroneous. *See, e.g., Ass’n of Am. Medical Colleges*, 217 F.3d at 778; *La Reunion*
12 *Francaise SA v. Barnes*, 247 F.3d 1022, 1024 (9th Cir. 2000); *United States ex rel Newsham v.*
13 *Lockheed Missiles & Space Co.*, 190 F.3d 963, 968 (9th Cir. 1999), *cert. denied*, 530 U.S. 1203
14 (2000). Thus, it is error to treat a Rule 12(b)(1) motion as one for summary judgment, or apply
15 summary judgment standards. *Dreier*, 106 F.3d at 847.

16 This Court lacks subject matter jurisdiction for no less than five separate reasons:

17 **1. Plaintiffs Lack Standing.**

18 The doctrine of standing is based both on prudential concerns and on constitutional
19 limitations on the jurisdiction of the federal courts. *Bennett v. Spear*, 520 U.S. 154, 162 (1997);
20 *Warth v. Seldin*, 422 U.S. 490, 489 (1975). The United States Supreme Court has articulated a
21 three-element test to determine whether a dispute presents a case or controversy sufficient to
22 establish federal jurisdiction:

23 First, the plaintiff must have suffered an “injury in fact” – an invasion of a legally
24 protected interest which is (a) concrete and particularized, and (b) actual or imminent, not
25 conjectural or hypothetical. Second, there must be a causal connection between the injury
and the conduct complained of . . . Third, it must be likely, as opposed to merely
speculative, that the injury will be redressed by a favorable decision.”

26 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)(internal quotation marks, citations,
27 and footnote omitted).

28 Here, plaintiffs have not and cannot allege that they suffered an “injury in fact.”

1 Plaintiffs have not alleged that their property has been or will be sprayed or that they suffered any
2 ill effects from the past spraying or that they will be harmed by the next round of spraying in
3 February 2008. At best, they can only allege that there is a possibility that they will be harmed. At
4 this point, their claims are merely conjectural and hypothetical. Plaintiffs certainly cannot
5 demonstrate a real or immediate threat of irreparable injury, as this Court held in denying both
6 their original and renewed requests for a TRO.

7 There are also compelling prudential reasons why plaintiffs lack standing. The prudential
8 rule of standing is based on the Court's reluctance to decide abstract questions of wide public
9 significance when other governmental institutions may be more competent to address them, and
10 where judicial intervention may be unnecessary to protect individual rights. *Elk Grove Unified*
11 *School District v. Newdow*, 542 U.S. 1, 12 (2004). Prudential standing encompasses three
12 factors: the general prohibition on a litigant asserting another person's legal rights, the rule
13 barring adjudication of generalized grievances more appropriately addressed to the representative
14 branches, and the rule that a plaintiff's complaint fall within the zone of interests protected by the
15 law involved. *Id.*

16 Here, plaintiffs specifically ask this Court to decide questions of wide public interest and
17 significance – whether there are compelling plant pest and related economic and environmental
18 needs to eradicate the LBAM and, if so, what is the most appropriate way to do so. These policy
19 questions are best left to state and federal agencies who are charged and authorized to control and
20 eradicate plant pests and possess the appropriate and necessary expertise and resources to address
21 them more competently.

22 The Supreme Court, with a nod to Justice Marshall's opinion in *Marbury v. Madison*, 1
23 Cranch 137, 178 (1803), has justified the principles behind prudential standing in a memorable
24 way:

25 These principles rest on more than the fussiness of judges. They reflect the
26 conviction that under our constitutional system courts are not roving commissions
assigned to pass judgment on the validity of the Nation's laws.

27 *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973) (citing *Younger v. Harris*, 401 U.S. 37, 52
28 (1971)).

1 In short, this Court should decline plaintiffs' invitation to pass judgment on the
2 reasonableness of defendants' lawful regulatory decisions regarding the methods and manners to
3 control and eradicate appropriately a very destructive plant pest like the LBAM.

4 Plaintiffs similarly lack standing to assert their constitutional claims. Plaintiffs vague
5 and generalized grievances of constitutional violations by federal defendants are inadequate to
6 invoke standing. The United States Supreme Court has rejected claims of standing predicated on
7 such abstract injury, stating that "[s]uch claims amount to little more than attempts "to employ a
8 Federal court as a forum in which to air...generalized grievances about the conduct of
9 government." *Valley Forge Christian College v. Americans United for Separation of Church*
10 *and State, Inc., et al.*, 454 U.S. 464, 483 (1982) quoting *Flast v. Cohen*, 392 U.S. at 106.

11 **2. Plaintiffs' Claims Are Not Ripe.**

12 Additionally, both the United States Department of Agriculture (USDA) and the
13 California Department of Food and Agriculture (CDFA) have publicly stated that, as of the time
14 this brief has been filed, spraying efforts involving the CheckMate® artificial pheromone are
15 finished until at least February 2008. Osama El-Lissy stated in his declaration that "the
16 pheromone treatment scheduled for November 4-12 will be the last application in 2007."⁵ CDFA
17 has publicly announced that aerial pheromone applications for the Light Brown Apple Moth are
18 concluded for 2007.⁶ In their amended complaint petitioners repeatedly challenge the safety of
19 the aerial spraying of the CheckMate®⁷ artificial pheromone.⁸ However, "[a]t present, USDA
20 does not know which specific pheromone product or products will be used in 2008 for aerial
21 spraying to control LBAM in California as this will be determined through bidding and

22
23 ⁵ Declaration of Osama El-Lissy, ¶ 3

24 ⁶ Final Update, Light Brown Apple Moth Project, California Department of Food and Agriculture,
25 available at http://www.cdfa.ca.gov/phpps/PDEP/lbam/lbam_main.html (Last visited Nov. 12, 2007).

26 ⁷ Plaintiffs never expressly state the name of the pheromone product that they are referring to in their
27 complaint. However, CheckMate® is the only product that was aerially sprayed in 2007 so it must be assumed that
28 this is what Plaintiffs are referring to. See Declaration of James E. Warren, ¶ 3; Declaration of Osama El-Lissy, ¶ 4.

⁸ Amended Complaint, 6:14-20; 7:1-3; 9:19-22; 10:1-5; 11:5-22; 12:1-13; 14:8-21; 15:1-24; 16:1-7; 22:17-21; 23:20-22; 24:3-8.

1 contractual processes which are scheduled to take place in December 2007. Regardless of which
2 pheromone formulations are used next year, as was required and done with CheckMate, any other
3 potential pheromone product designed to control LBAM may have to undergo certain federal
4 evaluations and analyses if they have not already been evaluated and analyzed as required, e.g.,
5 EPA review, an APHIS environmental analysis, and any other applicable analyses as may be
6 required by other federal statutes, e.g., the Endangered Species Act, as well as any similar
7 applicable state laws, before being used by USDA and CDFA.”⁹

8 In light of the fact that both the federal and state defendants have made it clear that
9 the CheckMate® aerial spraying in Santa Cruz and Monterey counties is finished for 2007¹⁰, and
10 that it is currently unknown which sprays will be used in 2008¹¹, the plaintiffs’ claims are not ripe
11 and therefore this Court does not have jurisdiction to review plaintiffs’ claims. The Supreme
12 Court has applied the ripeness doctrine to “prevent the courts, through avoidance of premature
13 adjudication, from entangling themselves in abstract disagreements over administrative policies,
14 and also to protect the agencies from judicial interference until an administrative decision has
15 been formalized and its effects felt in a concrete way by the challenging parties.”¹² A case is not
16 ripe if it rests upon “contingent future events that may not occur as anticipated, or indeed may not
17 occur at all.”¹³

18 To evaluate ripeness, a court should consider “both the fitness of the issues for judicial
19 decision and the hardship to the parties of withholding court consideration” before exercising its
20 jurisdiction.¹⁴ As the aerial spraying of artificial pheromone products has concluded for 2007, as
21

22 ⁹ Declaration of Osama El-Lissy, ¶ 4.

23 ¹⁰ Declaration of Osama El-Lissy, ¶ 3; Final Update, Light Brown Apple Moth Project, California
24 Department of Food and Agriculture, available at http://www.cdfa.ca.gov/phpps/PDEP/lbam/lbam_main.html (Last
25 visited Nov. 12, 2007).

26 ¹¹ Declaration of Osama El-Lissy, ¶ 3.

27 ¹² *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967).

28 ¹³ *Texas v. United States*, 523 U.S. 296, 300 (1998).

¹⁴ *Id.* at 149.

1 the products to be aerially sprayed next year are not yet known, and as the plaintiffs' amended
 2 complaint is premised on the notion that CheckMate® is the product to be aerially sprayed, this
 3 case must be dismissed as not ripe for adjudication.

4 **3. Plaintiffs Have Failed to Exhaust Administrative Remedies.**

5 Congress enacted the Plant Protection Act ("PPA"), 7 U.S.C. §§ 7701, *et seq.*, because it
 6 found that, *inter alia*, "the detection, control, eradication, suppression, prevention, or retardation
 7 of the spread of plant pests¹⁵ ... is necessary for the protection of the agriculture, environment,
 8 and economy of the United States." 7 U.S.C. § 7701(1). It was further found in the PPA that the
 9 existence "of a plant pest .. new to or not known to be widely prevalent in or distributed within
 10 and throughout the United States could contribute a threat to crops and other plants or plant
 11 products of the United States and burden interstate commerce or foreign commerce." 7 U.S.C.
 12 § 7701(8).

13 The Secretary [of Agriculture] has been granted the authority under the PPA to determine
 14 what are plant pests¹⁶ and

15 to prohibit or restrict the movement in interstate commerce of any ... article if the Secretary
 16 determines that the prohibition or restriction is necessary to prevent the dissemination of a
 plant pest within the United States. 7 U.S.C. § 7712(a)

17 The Secretary, pursuant to 7 C.F.R. §§ 2.22 and 2.80, has delegated this authority to the
 18 Administrator ("Administrator") of the Animal and Plant Health Inspection Service ("APHIS").

19 The PPA further details that

20 The Secretary may cooperate with other Federal agencies or entities, States or political
 21 subdivisions of States, national governments, local governments of other nations, domestic
 22 or international organizations, domestic or international associations, and other persons to

23 ¹⁵ The term "plant pest" means:

24 any living stage of any of the following that can directly or indirectly injure, cause
 25 damage to, or cause disease in any plant or product: (A) A protozoan. (B) A nonhuman
 26 animal. (C) A parasitic plant. (D) A bacterium. (E) A fungus. (F) A virus or viroid. (G)
 27 An infectious agent or other pathogen. (H) Any article similar to or allied with any of the
 articles specified in the preceding subparagraphs. 7 U.S.C. § 7702(14).

28 ¹⁶ 7 U.S.C. § 7711.

1 carry out this chapter. 7 U.S.C. § 7751(a)

2 Pursuant to these authorities, APHIS has properly declared LBAM a pest, enacted measures
3 to contain, mitigate, and eradicate LBAM, and worked with CDFA in a cooperative effort to
4 eradicate LBAM, an acknowledged serious threat to California and potentially to American
5 agriculture as a whole. The California State Legislature also explicitly acknowledged this threat in
6 the Light Brown Apple Moth Act of 2007, wherein it was found that “[t]he light brown apple moth
7 represents a clear, present, significant, and imminent danger to California’s natural environment,
8 agricultural industry.... and to California’s native areas.”¹⁷

9 The presence of LBAM in California was confirmed on March 16, 2007.¹⁸ This was the first
10 ever confirmed detection of LBAM in the Continental United States.¹⁹ LBAM has been recognized
11 as a plant pest for years prior to its initial discovery in the Continental United States, and was
12 immediately recognized and declared as such when discovered in California.²⁰ To prevent the
13 further spread of LBAM, APHIS issued a Federal Quarantine Order on May 2, 2007, and further
14 amended this order on September 17, 2007.²¹ This Federal Order quarantined areas of California that
15 are currently infested with LBAM and requires inspection and certification of all nursery stock and
16 host commodities from those LBAM infested areas, and is designed to prevent human-assisted
17 movement of LBAM from the quarantined areas of California.²²

18 Plaintiffs’ repeated claims that the federal defendants’ determinations that LBAM is a plant
19 pest, is a serious threat to California and American agriculture and to the overall environment, and
20
21

22 ¹⁷ Cal. Food & Ag. Code, §§ 6050(a) & (b).

23 ¹⁸ Declaration of Helene R. Wright, ¶ 6.

24 ¹⁹ *Id.*

25 ²⁰ Declaration of Helene R. Wright, ¶ 3, ¶ 9; Mini Risk Assessment, pg. 1; Treatment Program for Light
26 Brown Apple Moth in Santa Cruz and Northern Monterey Counties, California - Environmental Assessment,
27 September 2007, pg. 1.

28 ²¹ Federal Domestic Quarantine Order, DA-2007-42 (Sept. 17, 2007); Declaration of Helene R. Wright, ¶ 6.

²² *Id.*

1 warrants aerial spraying treatment by the use of CheckMate® are “fallacious” or otherwise wrong²³
2 are not yet reviewable by this Court.

3 The USDA, and specifically APHIS, an agency of the USDA, pursuant to its obligations and
4 responsibilities under the PPA, has determined that LBAM is a plant pest in the United States, and
5 has every competent authority to review and address the plant pest problem.²⁴ Plaintiffs have not
6 submitted any evidence indicating that LBAM is not a plant pest. Nevertheless, if plaintiffs wish
7 to challenge this determination, they must comply with the appropriate means to do so. The PPA
8 states that “Any person may petition the Secretary to..remove a plant pest from, the regulations
9 issued by the Secretary...”²⁵ To date, plaintiffs have never filed any petition with the USDA to
10 reverse the determination that LBAM are a plant pest, nor do plaintiffs indicate that they ever
11 attempted to do so. There is a “long-settled rule of judicial administration that no one is entitled to
12 judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been
13 exhausted.”²⁶ Plaintiffs herein have not availed themselves of the proper means for attempting to
14 challenge or overturn APHIS’s lawful determination that LBAM is a plant pest and they should not
15 be permitted to circumvent the legal processes with which they must comply. Until such time as
16 plaintiffs have properly filed a petition requesting that LBAM be no longer considered as a plant
17 pest, and said petition is denied, plaintiffs cannot avail themselves of the courts to reverse the lawful
18 USDA plant pest determination.

19 Plaintiff’s potential tort claims under the Federal Tort Claims Act (FTCA) against the United
20 States of America are barred because plaintiffs have not exhausted their administrative remedies.
21 An action under the FTCA requires that the plaintiff first exhaust his administrative remedies. 28
22 U.S.C. § 2675(a). Section 2675(a) provides, “An action shall not be instituted upon a claim against
23

24 ²³ Amended Complaint 2:9-14; 6:9-13; 8:18-21; 9:1-6, 13-22; 10:1-5; 12:6-8; 13:9-11, 15-16; 16: 1-7;
19:18-21; 20:6-10, 20-21.

25 ²⁴ Declaration of Helene R. Wright, ¶ 3, ¶ 9; Mini Risk Assessment, pg. 1; Treatment Program for Light
26 Brown Apple Moth in Santa Cruz and Northern Monterey Counties, California - Environmental Assessment,
27 September 2007, pg. 1.

28 ²⁵ 7 U.S.C. § 7711(c)(2)

²⁶ *Myers v. Bethlehem Shipping Corp.*, 303 U.S. 41, 50 (1938).

1 the United States for money damages for the injury or loss of property or personal injury or death
2 caused by the negligent or wrongful act or omission of any employee of the Government while acting
3 within the scope of his office or employment, unless the claimant shall have first presented the claim
4 to the appropriate Federal agency and his claim shall have been finally denied by the agency in
5 writing.”

6 “The claim requirement of section 2675 is jurisdictional in nature and may not be
7 waived.” *Burns v. United States*, 764 F.2d 722, 723 (9th Cir. 1985). Administrative law requires
8 proper exhaustion of administrative remedies, which “means using all steps that the agency holds
9 out, and doing so *properly*.” *Woodford v. Ngo*, 126 S.Ct. 2378, 2381 (2006), *quoting Pozo v.*
10 *McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002). Plaintiffs must present admissible evidence
11 showing that this Court has subject matter jurisdiction over their claims, meaning they must show
12 that they have properly exhausted their administrative remedies. *Ass’n of Am. Medical Colleges*, 217
13 F.3d at 778.

14 Here, plaintiffs cannot pursue any tort claims, including their claim for nuisance, against the
15 United States of America because they did not first file an administrative claim.

16 **4. Plaintiffs’ Claims Are Barred By Sovereign Immunity.**

17
18 “It is elementary that the United States, as sovereign, is immune from suit save as it consents
19 to be sued.” *U. S. v. Mitchell*, 445 U.S. 535, 538 (1980) (internal quotations omitted). The question
20 of whether or not the United States has waived sovereign immunity is a question of subject matter
21 jurisdiction. *Id.*; *McCarthy v. U.S.*, 850 F.2d 558, 560 (9th Cir. 1988). “A waiver of sovereign
22 immunity cannot be implied but must be unequivocally expressed.” *Mitchell*, 445 U.S. at 538
23 (internal quotations omitted); *Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983), *cert. denied*
24 *sub nom Holloman v. Clark*, 466 U.S. 958 (1984). The burden is on the plaintiffs to prove the
25 existence of the government's waiver of sovereign immunity. *Holloman*, 708 F.2d at 1401.

26 Plaintiffs’ amended complaint alleges claims under the federal civil rights statutes 42 U.S.C.
27 §§ 1985 and 1986. Under the doctrine of sovereign immunity, however, federal defendants USDA
28 and Helene Wright are immune from suit on such claims. It has long been recognized that suits

1 against the United States brought under the civil rights statutes are barred by the doctrine of
2 sovereign immunity. *West v. United States Secretary of Transportation, et al.*, No. C06-5516 RBL
3 (D. Wash. June 15, 2007)(2007 U.S. Dist. LEXIS 43517), citing *Davis v. U.S. Department of Justice*,
4 204 F.3d 723, 726 (7th Cir. 2000); *Affiliated Professional Home Health Care Agency v. Shalala*, 164
5 F.3d 282, 286 (5th Cir. 1999); *Unimex, Inc. v. United States Dept. of Housing and Urban*
6 *Development*, 594 F.2d 1060, 1061 (5th Cir. 1979). The doctrine of sovereign immunity also bars
7 suits against officers of the United States acting in their official capacity. *Davis*, 204 F.3d at 726.
8 Therefore, the USDA and Helene R. Wright, a USDA Federal government official acting in her
9 official capacity, are immune from suit under the doctrine of sovereign immunity.

10 Moreover, any potential claims against the United States for misrepresentation are barred
11 by sovereign immunity. Although the FTCA contains a general waiver of the United States'
12 sovereign immunity for state common law or statutory torts arising out of the negligence of an officer
13 or employee of the United States acting within the course and scope of his or her duties, the FTCA
14 specifically excludes actions arising out of "libel, slander, misrepresentation [or] deceit." 28 U.S.C.
15 § 2680(h). This exclusion clearly prevents any court from exercising jurisdiction over such a claim
16 against the federal government. See *id.*; *Mount Homes, Inc. v. United States*, 912 F.2d 352, 354 (9th
17 Cir. 1990); *Owyhee Grazing Ass'n, Inc. v. Field*, 637 F.2d 694, 697 (9th Cir. 1981) ("[C]laims
18 against the United States for fraud or misrepresentation by a Federal officer are absolutely barred by
19 28 U.S.C. § 2680(h).").²⁷

20 **5. Abstention is Appropriate.**

21
22 In *Younger v. Harris*, 401 U.S. 37, 49-53, 91 S.Ct. 746, 753-754 (1971) the Supreme Court
23 "espouse[d] a strong Federal policy against Federal-court interference with pending state judicial
24 proceedings." *Middlesex County Ethics Comm. v. Garden State Bar Ass'n.*, 457 U.S. 423, 431, 102
25 S.Ct. 2515, (1982) "Absent extraordinary circumstances, *Younger* abstention is required if the state
26 proceedings are (1) ongoing, (2) implicate important state interests, and (3) provide the plaintiff an

27
28 ²⁷In addition, the federal regulatory decisions being challenged by plaintiffs are clearly discretionary in
nature are thus protected by the doctrine of discretionary function sovereign immunity. 28 U.S.C. § 2680(a); See
United States v. Varig Airlines, 467 U.S. 797 (1984), see also *Dalehite v. United States*, 346 U.S. 15 (1953).

1 adequate opportunity to litigate Federal claims." *Lebbos v. Judges of the Superior Court of Santa*
2 *Clara County*, 883 F.2d 810, 814 (9th Cir.1989). When the case is one in which the *Younger*
3 doctrine applies, the case must be dismissed. *See Delta Dental Plan of Cal., Inc. v. Mendoza*, 139
4 F.3d 1289, 1294 (9th Cir.1998). Avoidance of duplicative proceedings may also counsel the refusal
5 of a federal court to decide a case when the same issues are pending in the state courts. *Colorado*
6 *River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236 (1976).

7 There can be no doubt that the first prong of the three part test for the *Younger* abstention
8 doctrine is met in this case. There are three pending state court cases.²⁸

9 As for the second requirement, the *Younger* abstention doctrine is "fully applicable to
10 noncriminal judicial proceedings when important state interests are involved." *Middlesex*, supra, 457
11 U.S. at 432, 102 S.Ct. at 2521. California certainly has a critical interest irradiating the LBAM, a
12 plant pest that has harmed and will continue to harm California's agricultural economy and
13 environment.²⁹ As previously noted, the California State Legislature, in passing the Light Brown
14 Apple Moth Act of 2007, specifically found the LBAM to constitute a "clear, present, significant,
15 and imminent danger."

16 The final requirement for invocation of the *Younger v. Harris* abstention doctrine is that
17 plaintiffs must have an adequate state forum in which to pursue their Federal claims. Likelihood of
18 success in the state proceeding is irrelevant; all that is required for abstention is that an opportunity
19 exist to raise the federal claims in the state court proceedings. *Dubinka v. Judges of Sup. Ct.*, 23 F.3d
20 218, 224 (9th Cir. 1994).

21 The issues plaintiffs attempt to litigate here (the necessity for and safety of the usage of the
22 pheromone Checkmate) are currently being litigated by similarly situated parties in three separate
23 state court actions. Plaintiffs' interest as concerned citizens will be well represented by the plaintiffs
24
25

26
27 ²⁸*Helping Our Peninsula's Environment v. CDFG*, Case No. 86553 (Monterey Superior Court); *County of*
28 *Santa Cruz v. CDFG*, Case No. 158516 (Santa Cruz Superior Court); *City of Santa Cruz v. CDFG*, Case No. 158523
(Santa Cruz Superior Court).

²⁹ Declaration of Helene R. Wright, ¶¶ 3, 6-10.

1 in those cases – an environmental organization and local governmental entities. Plaintiffs,
2 moreover, could intervene in those actions. Although the federal defendants are not and cannot be
3 defendants in the pending state court litigation, that is of no matter as plaintiffs cannot assert any
4 valid constitutional or federal statutory claims against them, as demonstrated below.

5
6 **B. Plaintiffs’ Complaint Fails to State a Claim Against the Federal Defendants.**

7 Federal Rule of Civil Procedure 12(b)(6) provides that a complaint may be dismissed for
8 failure to state a claim upon which relief can be granted. In order to survive a 12(b)(6) motion to
9 dismiss, a complaint must provide “grounds” for entitlement to relief beyond mere “labels,
10 conclusions”, or “formulaic recitation of the elements of a cause of action”. *Bell Atlantic Corp. v.*
11 *Twombly*, 127 S.Ct. 1955, 1965 (2007). While Plaintiffs need not set out in detail the facts upon
12 which they base their claims, the general rule governing pleadings still requires a showing, rather
13 than a blanket assertion, of entitlement to relief. *Conley v. Gibson*, 355 U.S. 41, 47 (1957).
14 Moreover, Rule 8(a)(2) requires a complaint to contain a “short and plain statement of the claim
15 showing that the pleader is entitled to relief” such that it provides “the defendant fair notice of what
16 the claim is and the grounds upon which it rests”. *Twombly*, 127 S.Ct. 1955, 1964.

17 **1. Plaintiffs’ Complaint Fails to State a Claim for Violation of Plaintiffs’ Constitutional**
18 **Rights.**

19
20 Plaintiff’s amended complaint alleges claims under the First, Fourth and Fourteenth
21 Amendments to the United States Constitution. However, plaintiffs’ vague claims asserted under
22 the Fourteenth Amendment for deprivation of liberty and property, due process and equal protection
23 violations are inapplicable against federal defendants USDA and Ms. Wright. Section 1 to the
24 Fourteenth Amendment provides that “No State shall make or enforce any law which shall abridge
25 the privileges or immunities of the citizens of the United States; nor shall any State deprive any
26 person of life, liberty, or property, without due process of law; nor deny to any person within its
27 jurisdiction the equal protection of the laws.” U.S. CONST. AMEND. XIV, § 1. As the Fourteenth
28 Amendment applies only to actions by the State, claims alleging violations of the Fourteenth

1 Amendment cannot be brought against federal defendants USDA and Ms. Wright.

2 Plaintiffs cite the Fourth Amendment but misstate or misrepresent the protected activity
3 under the Fourth Amendment. The Fourth Amendment provides in part that “The right of the people
4 to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure,
5 shall not be violated, and no Warrants shall issue, but upon reasonable cause...” U.S. CONST.
6 AMEND. IV. The plaintiffs’ fail to include the words “unreasonable searches and seizures” in their
7 complaint and fail to allege any facts concerning an unreasonable search or seizure conducted by
8 federal defendants USDA and Ms. Wright. Amended Complaint at 18:17-22. Therefore, the Court
9 must dismiss this claim for failing to state a claim upon which relief can be granted.
10

11 Plaintiffs have also failed to state a cause of action under the First Amendment. Plaintiffs
12 allege that defendants interfered with their “right to a reasonable expectation of the freedom to
13 assembly” because they could not leave their home at night during aerial spray application.
14 Amended Complaint at 19:3-4. The First Amendment states in part “Congress shall make no law
15 ... or prohibited the free exercise thereof; or abridge the freedom of speech, or of the press; or the
16 right of the people peaceably to assemble, and to petition the Government for a redress of
17 grievances.” U.S. CONST. amend. IV. The First Amendment protects speech and the right of
18 assembly to speak; staying in or leaving one’s home during aerial pesticide spray application is not
19 a right of assembly protected by the First Amendment. The plaintiffs fail to state any facts where
20 their right to assemble under the First Amendment has been abrogated. Therefore, the Court must
21 dismiss this claim against federal defendants USDA and Ms. Wright for failing to state a claim upon
22 which relief can be granted.
23

24 **2. Plaintiffs Have No Private Right of Action Under The Federal Food, Drug and**
25 **Cosmetic Act.**

26 Plaintiffs bring a cause of action under the Federal Food, Drug and Cosmetic Act, 21 U.S.C.
27 § 301 *et seq.*, alleging that the aerial applications of the pheromone-pesticide constitute human
28 pesticide and medical experimentation under the Act. Amended Complaint at 22:13-18. However,

1 the Act specifies that all proceedings for the enforcement or to restrain violations of this Act shall be
2 by and in the name of the United States. 21 U.S.C. § 337. Plaintiffs lack standing because they have
3 no private right of action under the Act, and this cause of action must be dismissed by the Court for
4 lack of subject matter jurisdiction. *See Ginochio v. Surgikos, Inc.*, 864 F. Supp. 948, 956 (N.D. Cal.
5 1994) (there is no private right of action under the Food, Drug, and Cosmetics Act).

6 **3. Federal Defendants Have Complied With All Relevant and Applicable Federal Laws.**

7
8 Finally, plaintiffs' allegations that federal defendants have failed to comply with certain
9 federal laws governing the review of artificial pheromones are without merit. Quite the contrary, the
10 federal defendants have complied with all relevant and applicable laws governing their conduct in this
11 matter, including any applicable EPA review of the artificial pheromone products. The two artificial
12 pheromone products used by CDFA in Santa Cruz and Monterey counties, CheckMate OLR-F® and
13 CheckMate LBAM-F®, have both been registered with the Environmental Protection Agency
14 ("EPA"), the agency entrusted and authorized under the Federal Insecticide, Fungicide and
15 Rodenticide Act ("FIFRA")(7 U.S.C. § 136 *et seq.*) with reviewing pesticides for safety for humans
16 and the environment. The EPA has reviewed both CheckMate OLR-F® and CheckMate LBAM-F®
17 and approved their use pursuant to Section 18 of FIFRA (7 U.S.C. § 136p) and its regulations.³⁰

18 **4. Plaintiffs Cannot Sue APHIS Employee Helene Wright for her Alleged Torts.**

19
20 Under the FTCA, individual government employees are not personally liable for tort claims
21 alleging a negligent or wrongful act on the part of a government employee in the course and scope
22 of his employment. 28 U.S.C. § 2679(b)(1). Such tort suits can be brought only against the United
23 States of America. See 28 U.S.C. § 2679(d). As plaintiffs have sued defendant Wright in her capacity
24 as the Director of Plant Protection Quarantine for the state of California, petitioners implicitly
25 concede that she acted within the course and scope of her employment as an APHIS employee in
26 addressing the LBAM plant pest problem in California. Accordingly, she is not a proper defendant.

27
28

³⁰ See Exhibit "M", EPA Quarantine Exemptions for Light Brown Apple Moth Pheromones, pp. 1-4.

1 **C. Plaintiffs Still Have Not Served the Federal Defendants.**

2 Petitioners have not complied with this Court’s Order, directing them to serve all defendants
3 with a copy of the amended complaint by November 13, 2007. Although plaintiff Williams hand
4 delivered a copy of the amended petition to Assistant United States Attorney James A. Scharf at the
5 November 5, 2007, hearing on her renewed request for a TRO, plaintiffs have not yet served the
6 United States Attorney General or defendant Helene Wright. Scharf Declaration at paragraph 2.
7

8 Rule (4) controls the manner and means by which service of a summons and complaint must
9 be accomplished. When a plaintiff fails to comply with Rule 4, her complaint is subject to dismissal
10 pursuant to Rule 12(b)(5) for insufficiency of service of process. The plaintiff bears the burden of
11 establishing that service of process has been accomplished in a manner that complies with Rule 4.
12

13 Where, as here, the defendants are an agency of the United States and one of its employees
14 sued in an official capacity, service of the Complaint must be made on the United States Attorney’s
15 Office in the district in which the action is brought, the Attorney General of the United States in
16 Washington, District of Columbia, as well as the named agency and employee. Fed. R. Civ. P.
17 4(i)(1)(A-C) and (2).

18 Plaintiffs have not served the United States Attorney General, the USDA or defendant
19 Wright as required by Rule 4. Supplemental Declaration of James A. Scharf at paragraph 2.

20 **IV. CONCLUSION**

21 For these reasons, this Court is not the proper forum for plaintiffs to challenge state and federal
22 policy regarding the handling of the LBAM problem. Accordingly, federal defendants respectfully
23 request the Court to dismiss the amended complaint in its entirety with prejudice.
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DATED: November 14, 2007

SCOTT N. SCHOOLS
United States Attorney

_____/S/_____
James A. Scharf
Assistant United States Attorney

Agency Co-Counsel:

James A. Booth
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SUPPLEMENTAL DECLARATION OF JAMES A. SCHARF

1
2 1. I am an Assistant United States Attorney and represent the federal defendants in this
3 action.

4
5 2. To my knowledge, plaintiffs have not served a copy of either the original complaint or
6 the amended complaint on the Attorney General, USDA or Helene R. Wright as required by Fed.
7 R. Civ. P. 4(i)(1)(A-C) and (2). Although I am informed that lead plaintiff Edna Williams e-
8 mailed Ms. Wright a copy of the amended complaint, this does not constitute service as required
9 by the Fed. R. Civ. P. 4(i)(2)(A), which requires sending the summons and complaint by registered
10 or certified mail.

11 3. A true and correct copy of an article entitled "New lawsuit to stop moth plan"
12 appearing in the November 5, 2007, edition of the Santa Cruz Sentinel is attached hereto as
13 Exhibit A.

14 I declare under penalty of perjury that the foregoing is true and correct.
15

16
17 Dated: November 14, 2007

_____/S/
James A. Scharf
Assistant United States Attorney

November 5, 2007

New lawsuit filed to stop moth plan

TOM RAGAN

SENTINEL STAFF WRITER

SAN JOSE -- In a last-ditch effort to stop aerial spraying aimed at eliminating the light brown apple moth, three Santa Cruz County women are suing the U.S. Department of Agriculture and the state Department of Food and Agriculture, saying their civil rights have been violated and that they have not received due process.

Edna Williams, Aubrey Belgard and Marilyn Garrett are set to appear before U.S. District Court Judge James Ware today at 11:30 a.m. in the 9th District Court in San Jose, according to the court docket. State airplanes were scheduled to spray portions of Santa Cruz County tonight. However, spraying that was set to start Sunday night in parts of northern Monterey County was called off due to heavy fog, and that likely will delay spraying here.

The federal lawsuit was filed late Friday, a day after Santa Cruz County Superior Court Judge Paul P. Burdick denied a temporary restraining order sought by the county against the spraying of LBAM-F. He ruled that county attorneys failed to prove the pesticide would harm the public.

A similar pesticide, OLR-F, was sprayed in Monterey County in September. Since then, more than 100 residents there have reported minor respiratory illnesses, including bouts of coughing, wheezing and problems breathing. Many have blamed the pesticide, manufactured by the Bend, Ore.-based Suterra LLC. The company also manufactures LBAM-F, which is said to be similar in nature. The long-term health effects of the pesticides are unknown.

Santa Cruz City Councilman Tony Madrigal and other spraying opponents staffed a table outside the O'Neill shop on Pacific Avenue in Santa Cruz on Sunday. They handed out information on the spraying, as well as surgical masks, which they suggested people wear when the spraying occurs.

Opponents have criticized the state's eradication tactics, questioning its effectiveness and stressing that it's never been conducted over such a vast urban setting but rather only in rural parts of Australia, where the moth is a native and has been known to feed on some 250 fruits and vegetables.

Although the state was required to conduct an environmental impact report before it started spraying, it sought and received an EIR exemption in early October, arguing the presence of the invasive moths -- spotted in California for the first time in February -- constituted an emergency. If not stopped fairly soon, the state maintains, the moths could cause \$640 million a year in crop damages in California. As of Nov. 1, there were more than 8,600 moths in Santa Cruz County, the highest infested area in the state.

The state has said the pheromone found in LBAM-F is "virtually nontoxic" and merely mimics the scent of a female moth. It confuses the male moths and throws the mating cycle into disarray, eventually killing off the population.

Williams, who graduated from UCSC in 1983 with a bachelor of arts in biology, also has a master's degree in human nutrition. She called the spraying an "extreme situation."

"I am really concerned about the health of the people," said Williams, 47, who has lived in the county since 1979. "Our public officials are not doing their jobs. And it's my right as a private citizen to challenge them on it. The law says that if you are aggrieved by your government, then you have the right to redress, and that's what I'm doing here."

Nancy Lungren, deputy secretary for public affairs for the state Department of Food and Agriculture and one of the defendants listed in the lawsuit, acknowledged receiving a summons but declined further comment. However, the state spraying will proceed as planned, she said.

Others defendants listed in the lawsuit were state Secretary of Food and Agriculture A.G. Kawamura; Mary Anne Warmerdam, director of the Pesticides and Environmental Program for the California Department of Pesticide Regulation; Helene R. Waters, director for the USDA's plant protection and quarantine.

Although the grievances listed in Williams' lawsuit appear to be the same as those listed in temporary restraining orders in Monterey and Santa Cruz County courts in the past month, what makes her case different, she said, is that it's going to be heard in federal court and it alleges that the state and federal governments have "breached their duty to serve the public and protect both the laws and the natural and agricultural resources of the United States and California."

"Respondents have claimed an emergency status based on falsehoods," Williams writes in her complaint. "Respondents have acted in concert to deprive citizens of due process and to circumvent all authorities pertaining to actual pesticide regulation by declaring a fallacious state of emergency."

She also alleges that the defendants "falsely claim" the pheromone is "not a pesticide."

Contact Tom Ragan at tragan@santacruzsentinel.com.

REQUEST FOR TELEPHONIC APPEARANCE BY AGENCY CO-COUNSEL

1. James A. Booth, Esq., is a Deputy Assistant General Counsel in the USDA Office of General Counsel, Washington, DC, and has worked on this case and on the preparation of this brief, and wishes to appear telephonically in the hearing to be held on this motion scheduled for 10:00 a.m., November 20, 2007.
2. Krishna G. Ramaraju, Esq., is an Attorney-Adviser in the USDA Office of General Counsel, Washington, DC, and has worked on this case and on the preparation of this brief, and wishes to appear telephonically in the hearing to be held on this motion scheduled for 10:00 a.m., November 20, 2007.
3. Mr. Booth and Mr. Ramaraju can be reached at 202-690-0672. Neither anticipates presenting an oral argument in support of federal defendants' motion to dismiss, which will be made by Assistant United States Attorney James A. Scharf, lead attorney for federal defendants. However, both would like to be available to answer any technical, procedural, administrative or other questions, which may arise.

