

April 8, 2008 (c)

Lindsay Vurek  
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Berkeley, CA 94705

**RE: Potential Liabilities to Holdings in Visitor Serving Facilities and Real Estate Property Resulting from the Scheduled Upcoming Light Brown Apple Moth (LBAM) Aerial Spraying of the Greater San Francisco and Monterey Bay Area**

Pages 1-2: Brief background information

Pages 2-4: Legal liabilities and the possibility of mitigation issues for visitor services and facilities (tourism) and real estate property sellers

Pages 5-7: Annotated references and additional information

Dear Mr. Vurek:

This letter is a response to your recent request that I briefly research potential liabilities to your holdings in visitor serving facilities and real estate property located in the Light Brown Apple Moth (LBAM) aerial spray zone. I have researched this issue and concluded that you may incur liability as a result of the LBAM spraying. My rationale for this conclusion is outlined below. Included in this letter is brief background information about the spray, followed by a synopsis of my conclusion of potential legal liability and advice for mitigating your liability. Additionally, references are included at the end of this letter, to assist you in ascertaining additional information about the potential negative impact on real estate holdings resulting from the planned aerial spraying.

**Brief Background Information Regarding the LBAM Aerial Spray:**

In Fall 2007, the California Department of Food and Agriculture (CDFA) ordered the spraying of aerial pesticides, specifically Checkmate OLR-F and Checkmate LBAM-F, in Santa Cruz and Monterey counties, to eradicate the Light Brown Apple Moth (LBAM). The aerial spraying of Checkmate OLR-F in Santa Cruz and Monterey counties was completed in November 2007, and was the first time this chemical composition had been sprayed on an urban population. The CDFA has now ordered the aerial spraying of the Greater San Francisco Bay Area, as well as the continued spraying of the Monterey Bay Area. The expanded aerial spray zone is currently defined as the counties and cities within Monterey, Santa Cruz, San Mateo, San Francisco,

Marin, Contra Costa and Alameda Counties. The aerial spraying could be extended to additional counties and cities if the CDFA finds the moth in other California regions.

The spraying is scheduled to begin on June 1, 2008 in the Monterey region and move north into the San Francisco-Oakland-Berkeley region by no later than August 1, 2008. If the CDFA uses the same procedure as they used in Santa Cruz and Monterey counties in 2007, then low flying planes would be slated to spray every thirty (30) days until the beginning of the winter rainy season. The CDFA has stated that the spraying is likely to occur each season over at least a three-to-five (3-5) year period, and could extend indefinitely, depending upon the results of the spraying.

Checkmate OLR-F and Checkmate LBAM-F, were used in the 2007 Monterey and Santa Cruz region sprayings. CDFA said this formula may change but has not yet published the new formula. The formula previously used was a micro-capsulated, synthetically derived pheromone that also contained over ten (10) chemical compounds, some listed as “suspected cancer agent” in the Material Data Safety Sheets. The ingredients, published on October 24, 2007 LBAM-F, were listed as (E)-11-Tetradecen-1-yl Acetate, (E,E)-9, 11 Tetradecadien-1-yl Acetate, Crosslinked polyurea polymer, Butylated Hydroxytoluene aka DBPC, Polyvinyl Alcohol, Tricaprylyl Methyl Ammonium Chloride (Aliquat 336), Sodium Phosphate, Ammonium Phosphate, 1,2-benzisothiazoli-3-one, 2-hydroxy-4-n-octyloxybenzophenone. The pheromone is encapsulated in a microscopic plastic-like capsule that breaks down over time, releasing the pheromone into the environment over a thirty-to-seventy (30-70) day period.

The reported size of the microcapsule to be used is 10 to 190 microns. The American Lung Association states that particles measuring 10 microns in diameter are *small enough to lodge deep in the lungs where they can do serious damage*. Several of the ingredients are *known to have toxic properties and could easily cause inflammation of lung tissue in young, healthy adults - not to mention children, seniors and those who are already physically impaired*.

On April 1, 2008, Secretary of Agriculture Kawamura at the City at Alameda council chambers under questioning said that if Checkmate was being aerially applied over a agriculture field, the field workers would be required to leave the fields during spraying due to the “caution” requirements and liability issues associated with the Checkmate (recorded testimony).

Approximately 640 adverse human health reactions were reported after the Fall 2007 spraying of Monterey and Santa Cruz counties. These reactions ranged from mild sore throats and respiratory distress to severe reactions in children that required immediate hospitalization. There was a large range of symptoms, with respiratory related symptoms being the most frequently reported. Additionally, hundreds of birds and many cats were found dead within three (3) days of the spraying. There has been no easily accessible method to report incidents associated with the spray, so the number of reactions is likely understated. As stated above, the 2007 sprayings were the first time this product had ever been applied aerially over populated urban areas in the U.S. or anywhere else. Therefore, the long-term health consequences to humans and animals, as well as to the environment and ecology of the area, are difficult to determine. I could find no long-term health data on these pesticides.

### **Legal Liabilities and Possible Mitigations for Visitor Serving Facilities and Real Estate Property Sellers:**

You asked me to research the question of whether the scheduled LBAM aerial spraying could create any liabilities for you with respect to your holdings in visitor serving facilities and real estate property. Of the two liability issues you asked me to address, the issue of potential liability respecting real estate holdings is the easiest to address, so I will do so first. Some of the discussion of liability pertaining to real estate holdings may also apply to visitor serving facilities (tourist trade).

California Civil Code Section 1102 requires sellers, transferors and agents of real property to disclose relevant information to buyers regarding the condition of the property, and information pertinent to the value of the property, prior to sale. The disclosures are particularly important with respect to information not easily discoverable by buyers; in other words, it is the intent of the legislature to provide the buyer with reasonable access to information impacting the value and condition of the property prior to the sale. The court interpreted the purpose of the disclosure requirement in *Alexander v McKnight* (1992) 7 C.A. 4<sup>th</sup> 973, 9 C.R. 2d 453, holding that “the purpose of section 1102.6 requires that it be liberally interpreted so that a buyer will be fully informed on matters affecting the value of the property to be purchased”.

**I believe you would need to disclose the scheduled LBAM spraying to potential buyers on two bases: environmental hazard and nuisance.**

First, section 1102.6 of the California Civil Code requires the disclosure of environmental hazards relating to real property. Specifically, the law requires disclosure of: “substances, materials, or products which may be an environmental hazard, such as, but not limited to, asbestos, formaldehyde, radon gas, lead-based paint, mold, fuel or chemical storage tanks, and contaminated soil or water on the subject property”. Given the information known about the potential toxicity of the aerial spray, the seriousness of the potential health consequences and the unknown long-term effects of the chemicals, I believe you would be required to make full disclosure of these facts to any potential buyer of real property in the designated spray area.

Additionally, one of the standard items the law requires be disclosed is “neighborhood noise problems and other nuisances”. The scheduled spraying is likely to rise to the level of common law nuisance. Nuisance is a common law tort, defined as the interference with one’s quiet enjoyment of his or her property. The residents of Monterey and Santa Cruz counties lodged several complaints of noise pollution during the aerial spraying of the counties in 2007. The noise from the low flying planes is extremely loud, and the planes flew relentlessly from 8 p.m. to 5 a.m., disturbing and/or preventing sleep for many residents. Several Monterey and Santa Cruz residents reported difficulty performing job duties the following days and/or lowered levels of productivity. The noise from the planes also has the potential of disturbing war veterans or others with Post Traumatic Stress Disorder (PTSD), as several residents described the noise as akin to being in a war zone.

There are substantial penalties for failing to disclose required information. Failure to disclose information about the spray leaves you vulnerable to a lawsuit for nondisclosure. Even with disclosure, there is no guarantee that the buyer will not sue, but the disclosure can lessen the probability of a buyer-initiated lawsuit, as well as mitigating damages resulting from a lawsuit.

In rural agricultural areas of California, it is a common practice for sellers of real property to disclose whether the property is in an agricultural zone and whether there is a possibility of aerial spraying occurring nearby. On the attached reference page, I have included a link to a Mendocino County disclosure form for agricultural zoning that includes language associated with aerial spraying. I can draft a more appropriate disclosure for the urban areas that are due to be sprayed if you wish.

The unfortunate side effect of disclosure is that some buyers will abandon pursuing close of escrow once they read the disclosure. This may or may not lower the selling price for a given property, but there is a higher probability that the average price of houses in the spray zones will decline over time. This may happen in the aerial spray regions of California as the pool of buyers becomes aware of the issues associated with the spray and the regions impacted. This same economic downward force may also gradually affect the viability of rental properties as well as property values themselves.

For potential home buyers already living in the spray region, the seller may have some degree of mitigation without disclosure due to the seller being able to point to fairly wide spread local media about the spray. This,

of course, would not apply to the pool of buyers coming from outside the aerial spray region where there has been little media coverage.

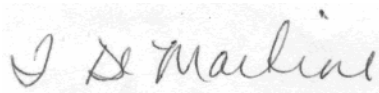
Some of the above principles apply to visitor serving facilities as well (hotels, motels, inns, convention centers and visitor based businesses). The same logic would apply (to a lesser extent) to large groups of travelers from outside the spray region, i.e., written disclosure of the impending spray would tend to mitigate the ability of visitors to file lawsuits, however, written disclosure would also likely lead to loss of revenue from cancellations. There may be a gradual decline in regional tourism as the public becomes aware and educated about the aerial spray campaign.

**Conclusion:**

- 1) Written disclosure can mitigate legal liability and possible lawsuits related to aerial spray zone issues for property owners and visitor server facilities owners.
- 2) There is likely to be some downward pressure on home prices, rental prices and visitor serving facility bookings due to the aerial spraying.
- 3) Proposed California legislation aimed at preventing the aerial spraying (AB2892, AB 2763, AB2764, AB2765 and AB2760) is not likely to be passed in time to prevent the upcoming spraying plan and the legislation will require a large effort to be passed.
- 4) Of the two government officials in California who are in a position to cancel the aerial spraying before it occurs in 2008, Governor Schwarzenegger is likely to be most responsive to home owner and business owner input on the subject.
- 5) See the Annotated Reference section (pages 5-7) for the likely reasons why this emergency LBAM aerial spraying is scheduled.

Please feel free to contact me at (831) 600-3030 with questions pertaining to this letter.

Sincerely,



Tracey DeMartini  
Attorney at Law

TLD: kb

Enclosure

## **Annotated References:**

### **Sample Disclosure Form**

Disclosure form used in rural areas near aerial spraying (see Agricultural Land Zoning disclosure on form)  
<http://norbarrealtor.com/upldocs/mendodisclosuresadvisory1-12-07.pdf>

### **Toxicology of Checkmate (pesticide used in aerial spraying)**

Checkmate OLR-F and Checkmate LBAM-F warning labels  
<http://media.portland.indymedia.org/images/2007/10/366799.png>  
[http://www.aphis.usda.gov/plant\\_health/plant\\_pest\\_info/lba\\_moth/downloads/CheckMate%20LBAM.pdf](http://www.aphis.usda.gov/plant_health/plant_pest_info/lba_moth/downloads/CheckMate%20LBAM.pdf)

Website page detailing chemical composition and health effects of Checkmate [http://www.hopefortruth.com/checkmate\\_lbam.htm](http://www.hopefortruth.com/checkmate_lbam.htm)

Declaration of Richard Philp, Professor of Pharmacology and Toxicology  
[http://www.hopefortruth.com/LBAM\\_Forms/Toxicology\\_report.pdf](http://www.hopefortruth.com/LBAM_Forms/Toxicology_report.pdf)

Information about Checkmate's particle size and composition  
From: Aquatic Toxicology Laboratory the University of California, Davis  
[http://lbamspray.com/00\\_Documents/2007/ATL\\_Pheromone\\_Toxicity\\_Testing\\_112807.pdf](http://lbamspray.com/00_Documents/2007/ATL_Pheromone_Toxicity_Testing_112807.pdf)

American Lung Association information on lung damage and particle size  
[http://lungaction.org/reports/sota05\\_heffects.html#pp](http://lungaction.org/reports/sota05_heffects.html#pp)

Toxicology of one the "inert" ingredients in Checkmate Butylated Hydroxytoluene aka 2,6-di-tert-butyl-p-cresol  
The compound (a preservative) has been banned for use in food in Japan (1958), Romania, Sweden, and Australia. The US has barred it from infant foods. It is well know that infants will be both breath and ingest this chemical during the aerial spray.  
<http://msds.chem.ox.ac.uk/DI/2,6-di-t-butyl-p-cresol.html> (MSDS Oxford University)  
[http://en.wikipedia.org/wiki/Butylated\\_hydroxytoluene](http://en.wikipedia.org/wiki/Butylated_hydroxytoluene) (general chemistry and synonyms)

### **Health reports related to the Fall 2007 Spraying of Monterey and Santa Cruz Counties**

Executive Summary Report of 643 complaints of adverse reaction to aerial spraying in Santa Cruz and Monterey counties  
[http://www.indybay.org/uploads/2008/01/05/executive\\_summary\\_mike\\_lynberg.pdf](http://www.indybay.org/uploads/2008/01/05/executive_summary_mike_lynberg.pdf)

Full report of 643 complaints of adverse reaction to aerial spraying (192 pages - 8 mega bytes)  
<http://www.indybay.org/uploads/2008/01/05/spraycompl2.pdf>

Forum posting on Monterey and Santa Cruz sprayings  
"...At least four of them required hospitalization, including a 12-month old boy whose parents had to rush him to the emergency room after his condition grew progressively worse the week of the spraying. He got to the point where he couldn't breathe on his own and was in the hospital for three days. Two weeks later, he had a relapse and was rushed to the hospital again. He has now been diagnosed with asthma, a condition he did not have before the spraying began..."  
<http://forums.myspace.com/t/3820183.aspx?fuseaction=forums.viewthread>

### **Impact of Light Brown Apple Moth (LBAM) on California Agriculture**

Testimony of Entomologist, Professor James R. Carey  
James R. Carey, Professor of Entomology at the University of California, Davis, testified to the likelihood that CDFA's effort to eliminate the Light Brown Apple Month will be a failure and that crop damage using the normal natural predators would be limited. He also testified to the fact that the CDFA's effort will likely be counterproductive (expensive and more harmful than the natural course of the

moth). Professor Carey's testimony before State Senators Simitian and Migden in Marin County on March 13, 2008 demonstrated a LBAM spread model that strongly indicates that CDFA trapping data and LBAM spread models are likely flawed.

[http://www.albanyca.org/archiPage 6 of 7ve/pdf/012208\\_E\\_CareyTestimony.pdf](http://www.albanyca.org/archiPage%206%20of%207%20ve/pdf/012208_E_CareyTestimony.pdf)  
[Democrats.assembly.ca.gov/MEMBERS/A27/pdf/AssemblyAg\\_Committee\\_LBAM2](http://Democrats.assembly.ca.gov/MEMBERS/A27/pdf/AssemblyAg_Committee_LBAM2)

Video of testimony of Professor Carey and Harder PH.D before Senator Simitian committee  
[http://www.youtube.com/watch?v=2Zc7I\\_o0M6E&feature=related](http://www.youtube.com/watch?v=2Zc7I_o0M6E&feature=related) (15 minutes total)

Statements by Daniel Harder, Ph.D., UC Santa Cruz Arboretum Director  
Exaggeration of threat of LBAM  
Existence of LBAM in New Zealand for over 100 years with only minor crop damage  
[www.santacruzsentinel.com/ci\\_8559269](http://www.santacruzsentinel.com/ci_8559269)  
[http://www.hopefortruth.com/LBAM\\_Forms/Harder\\_Report.pdf](http://www.hopefortruth.com/LBAM_Forms/Harder_Report.pdf)

Report on Daniel Harder's trip to New Zealand and control of LBAM with natural predators and Dr. Carey's statement that the LBAM has probably been in California for decades.  
<http://www.berkeleydailyplanet.com/issue/2008-03-11/article/29430>

IPM Practices for the LBAM in NZ: Implications for California: -Harder/Rosendale, March 08 2008  
<http://forum.stopthespray.org/download/file.php?id=114>

#### **Connections between USDA decision to eradicate LBAM and international trade issues:**

The US has engaged in protectionist activities by using the LBAM to prevent agricultural shipments from other countries, thereby promoting American produce. Now other countries are using the small LBAM USA infestation to their advantage. The European Union does not block fruit or vegetable shipments due to LBAM infestation.

[http://www.register-pajaronian.com/V2\\_news\\_articles.php?heading=0&page=&story\\_id=3655](http://www.register-pajaronian.com/V2_news_articles.php?heading=0&page=&story_id=3655)

"...As has been researched and indicated by premier UC scientists, the class A classification of the LBAM as a pest is not only disputable, it is incorrect. Mexico and Canada only have their ludicrous import restrictions in place because of US Policy. If we change ours, they'll change theirs."

<http://www.topix.com/forum/state/ca/TPPH45FSK9CKTGTR>

See last page of attachment – in the past Mexico has waited for the US to take the lead in modifying the threat conditions to allow "harmonization" of trade policies.)

[http://www.cdca.ca.gov/phpps/pdep/lbam/pdfs/PSA12\\_2007.pdf](http://www.cdca.ca.gov/phpps/pdep/lbam/pdfs/PSA12_2007.pdf) (

CDFA claims to have eradicated LBAM in LA and Napa counties without aerial spraying and Mexico has lifted moratorium from those counties. Also Mexico has modified the trapping requirements at the CDFA request.

<http://westernfarmpress.com/news/lbam-protocol-0326/>

Invasive Species Management: Programs, Policies, and Institutions for Preventing and Managing Invasive Agricultural Pests:  
Supporting Tables (including trade treaty related information)

<http://www.ers.usda.gov/briefing/InvasiveSpecies/supportedtables.htm>

## Political Reasons for Spray

On January 24th, 2008, United States Department of (USDA) Agriculture Secretary Chuck Conner announced the availability of \$74.5 million in emergency funding to combat the light brown apple moth (LBAM) infestation in California. This announcement comes in conjunction with the release of the California Department of Agriculture's (CDFA) expanded aerial spray zone, which includes the entire cities of San Francisco, Oakland, Berkley and many others.

[http://www.organicconsumers.org/articles/article\\_10711.cfm](http://www.organicconsumers.org/articles/article_10711.cfm)

Contractor, Dynamic Aviation Group Inc Bridgewater, VA, Air Transport, contributed exclusively to Republican candidates, the Republican Party and Republican PACS in 2007.

[http://vpap.org/donors/results\\_level2.cfm?Key=ORP000226214](http://vpap.org/donors/results_level2.cfm?Key=ORP000226214)

STEWART A. RESNICK - Chairman & President: Roll International Corp. (a major California agri-business), and Suterra LLC, maker of Checkmate pesticide used for aerial spraying in California, contributed a \$144,600 to California Governor Schwarzenegger.

[http://www.arnoldwatch.org/special\\_interests/index.html](http://www.arnoldwatch.org/special_interests/index.html)

Also see <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/03/08/BAF1VG26A.DTL>

"...each aerial application of Checkmate OLR-F and Checkmate LBAM-F costs approximately \$3.5 million and that \$3 million is paid directly to the manufacturer Suterra, LLC of Bend, Oregon.

<http://nationalexpositor.com/News/870.html>

A \$497,000 Public Relations contract was awarded in November to Porter Novelli after hundreds of residents complained about breathing problems and other health effects from the (LBAM aerial) spraying.

The California Department of Food and Agriculture invoked emergency powers to award the contract without competition. Porter Novelli is affiliated with Donna Lucas, former chief of staff to first lady Maria Shriver and a member of Schwarzenegger's inner circle during his first years in office. The firm subcontracted some of the work to Jeff Randle, a frequent campaign and political adviser to Schwarzenegger.

<http://www.star-telegram.com/462/story/533063.html> (originally AP story that caused them to cancel contact after the fact)

AG Kawamura, Secretary of the Department of Food and Agriculture: Governor Schwarzenegger appointee Secretary Kawamura is a produce grower and shipper from Orange County, where his family grows strawberries, green beans and other specialty crops.

[http://www.causeusa.org/add\\_blog.asp?cid=204](http://www.causeusa.org/add_blog.asp?cid=204)

Kawamura, who is set to be the California Secretary of Agriculture, signed on as a New Majority member shortly after the group endorsed the Governor. He gave \$21,200, the legal limit, to Schwarzenegger in September.

[http://findarticles.com/p/articles/mi\\_m5072/is\\_46\\_25/ai\\_110741291](http://findarticles.com/p/articles/mi_m5072/is_46_25/ai_110741291)

"I'm honored to be appointed by Governor Schwarzenegger and to be a part of his team. Agriculture in California faces many challenges, but I know Schwarzenegger is someone who will listen to the rancher, growers and shippers of California to help relieve the overtaxation and overregulation that we face as farmers," said Kawamura.

The Department of Food and Agriculture oversees programs to assist and promote California's agriculture industry. The department operates as an advocate for the industry. Approximately 1,800 employees work for the department with a budget of \$270 million.

[http://westernfarmpress.com/news/farming\\_kawamura\\_tapped\\_state/](http://westernfarmpress.com/news/farming_kawamura_tapped_state/)