

EXHIBIT

A



Oct 26 2009
10:29AM

1 Duane C. Miller, #57812
Michael Axline, #229840
2 A. Curtis Sawyer, Jr., #101324
Tracey L. O'Reilly, #206230
3 **MILLER, AXLINE & SAWYER**
A Professional Corporation
4 1050 Fulton Avenue, Suite 100
Sacramento, CA 95825-4225
5 Telephone: (916) 488-6688
Facsimile: (916) 488-4288
6

Exempt from Filing Fee
[Govt. Code, § 6103]

7 Attorneys for plaintiffs Saldana, et al.,
Jensen, et al., City of Redlands, City of Atwater,
City of Fresno, and City of Clovis
8

9 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF SAN BERNARDINO**

11 COORDINATION PROCEEDING)
12 SPECIAL TITLE RULE 1550(b))

Case No. SCVSS 120627

13)
14 **TCP CASES**)

Judicial Council Coordination
Proceeding No. 4435

15)
16 _____)
17 This Document Relates To:)

NOTICE OF ENTRY OF ORDER
DENYING DEFENDANT SHELL
OIL COMPANY'S MOTION FOR
SUMMARY ADJUDICATION ON
THE FIRST THROUGH EIGHTH
CAUSES OF ACTION AND THE
JOINDER OF OCCIDENTAL
CHEMICAL CORPORATION

18 *City of Redlands v. Shell Oil Co., et al.*)
19 Case No. SCVSS120627)
20)
21)
22)
23)
24)
25)
26)
27)
28)

Hearing Date: August 7, 2009
Dept: S33
Judge: Hon. Donald Alvarez

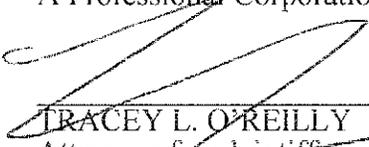
1 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

2 **NOTICE IS HEREBY GIVEN** that on October 6, 2009, the Court entered the attached
3 Ruling on Motion for Summary Adjudication denying defendant Shell Oil Company's Motion for
4 Summary Adjudication on the First Through Eighth Causes of Action and Joinder by Occidental
5 Chemical Corporation and Occidental Petroleum Corporation heard before Judge Alvarez, San
6 Bernardino Superior Court, Department S-33 on August 7, 2009.

7
8 DATED: October 26, 2009

MILLER, AXLINE & SAWYER
A Professional Corporation

9
10 By:


TRACEY L. O'REILLY
Attorneys for plaintiff

1 Superior Court of California
2 County of San Bernardino
3 Civil Division, Department S-33
4 303 West Third Street
5 San Bernardino, California 92415

FILED-Central District
SUPERIOR COURT
SAN BERNARDINO COUNTY

OCT - 6 2009

By *Stephanie Chandler*
Deputy

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF SAN BERNARDINO
10 SAN BERNARDINO DISTRICT

12 CITY OF REDLANDS

13 Plaintiff,

14 vs.

15 SHELL OIL COMPANY

16 Defendant.
17
18

Case No.: SCVSS 120627
JCPSS 4435

RULING ON MOTION FOR SUMMARY
ADJUDICATION (SHELL OIL COMPANY
MOTION OF AUGUST 7, 2009 – WITH
JOINDER BY OCCIDENTAL CHEMICAL
CORPORATION, ET AL.

19
20 This matter came before the court for a hearing on a motion for summary
21 adjudication as to the second amended complaint by moving Defendants.

22 The court has reviewed and considered the extensive briefs by and between the
23 parties as well as the oral arguments of counsel and issues its ruling as follows.

24 A. Background

25 The City's second amended complaint alleges eight causes of action: (1) strict
26 liability regarding TCP; (2) negligence regarding TCP; (3) continuing nuisance regarding
27 TCP; (4) continuing trespass regarding TCP; (5) strict liability regarding DBCP;
28

1 (6) negligence regarding DBCP; (7) continuing nuisance regarding DBCP; and
2 (8) continuing trespass regarding DBCP.

3 In this motion for summary adjudication against all eight causes of action of
4 plaintiffs' complaint, defendant shell challenges but one element that is common to each
5 of these causes of action: damages.

6 Specifically, with regard to the first four causes of action based on TCP
7 contamination, Shell argues that the City can show no damages because it cannot show
8 that Shell contaminated its wells such that the water in its wells contained TCP above
9 the California Department of Public Health "MCL" levels¹ . . . simply because the DPH
10 has not yet set any MCL levels for TCP. Additionally, Shell argues that two of the wells
11 are not currently used to supply potable drinking water.

12 With regard to the last four cause of action based on DBCP contamination, Shell
13 argues that levels exceed the DPH's MCL level for DBCP in only two the City's wells,
14 and those two are not currently being used by the City as a source of potable drinking
15 water.

16 B. Preliminary Considerations

17 Very recent California appellate authority from our own Fourth District,
18 Division Two, has approved the procedure of limiting the consideration of evidence
19 presented at summary judgment to that evidence "called to the trial court's attention in
20 the separate statement of one side or the other." Specifically, our court of appeal stated:

21 Because this is an appeal from a summary judgment, we draw the
22 following facts from the moving and opposition papers in connection
23 with defendants' motion for summary judgment. We accept all facts
24 listed in defendants' [i.e., the moving parties'] separate statement that
25 plaintiffs [i.e., the responding parties] did not dispute. We also accept
26 all facts listed in defendants' separate statement that plaintiffs did
27 dispute, to the extent that (1) there is evidence to support them (Code
28 Civ. Proc., § 437c, subd. (b)(1)), and (2) there is no evidence to
support the dispute (Code Civ. Proc., § 437c, subd. (b)(3)). Finally, we
accept all facts listed in plaintiffs' separate statement, to the extent

¹ "MCL" means Maximum Contaminant Level.

1 that there is evidence to support them. (*ibid.*) We disregard any
2 evidence not called to the trial court's attention in the separate
3 statement of one side or the other, except as necessary to provide
4 nondispositive background, color, or continuity. (See *San Diego*
Watercrafts, Inc. v. Wells Fargo Bank (2002) 102 Cal.App.4th 308,
314–316)

5 (*Doe v. California Lutheran High School Assn.* (4th Dist., Div. 2, 2009) 170 Cal.App.4th
6 828, 830-831, *rev. den., req. for depub. den.*) (Opinion by Richli; Ramirez and Miller
7 concurring. Boldface emphasis added.)

8 Accordingly, the trial court summary judgment procedure approved by our Fourth
9 District, Division Two, in *Doe, supra*, is as follows:

10 [1] Accept all facts listed in the moving party's separate statement that
11 the responding party did not dispute.

12 [2] Accept all facts listed in the moving party's separate statement that
13 the responding party *did* dispute, to the extent that (1) there is
14 evidence to support them (Code Civ. Proc., § 437c, subd. (b)(1)), and
15 (2) there is no evidence to support the dispute (Code Civ. Proc.,
§ 437c, subd. (b)(3)).

16 [3] Accept all facts listed in plaintiffs' separate statement, to the extent
17 that there is evidence to support them. (*ibid.*)

18 [4] Disregard any evidence not called to the trial court's attention in the
19 separate statement of one side or the other, except as necessary to
20 provide nondispositive background, color, or continuity.

21 Turning now to the statement of undisputed material facts that are currently
22 before this court:

23 Analysis

24 C. The TCP causes of action (1st through 4th causes of action for (1) strict liability; (2)
25 negligence; (3) continuing nuisance; and (4) continuing trespass.

26 . Moving party Shell relies on only two undisputed material facts to defeat these
27 four causes of action:
28

1 1. The California Department of Public Health (fka (sic) "Department of
2 Health Services") has not yet set a Maximum Contaminant Level
3 "MCL") for 1,2,3-trichloropropane ("TCP").²

4 2. The City's New York Street Well, Well no. 11 and Well no. 41 are
5 not currently used to supply potable drinking water.

6 Preliminarily, it can be noted that moving party's undisputed material fact no. 2
7 pertains to two wells only, whereas the City applies these four causes of action of its
8 second amended complaint to many more wells than simply these two. Consequently,
9 there is no way that Shell's undisputed material fact no. 2, even if true and undisputed,
10 can assist in disposing of any of these four causes of action.

11 Shell impliedly argues that each well is a separate cause of action, but as Shell's
12 own cited authority points out, summary adjudication may be granted as to "separate
13 and distinct wrongful acts," not separate and distinct damaged items. The City's wells
14 are separately-damaged items—not separate wrongful acts. As addressed before, there
15 is an alleged violation of only one primary right here by Shell's wrongful act of including
16 the toxic agent TCP in its agricultural products sold and used in Redlands during the
17 1960s.

18 Shell argues that a court may grant summary adjudication as to "one or more
19 claims for damages," which is a materially incomplete quotation of Code of Civil
20 Procedure section 437c, subdivision (f)(1).

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 _____
28 ² Shell does not contest that the California Department of Public Health currently is in the process of setting an MCL for TCP.

1 In truth, this is not the case except for *punitive* damages, not relevant here.
2 (*DeCastro, West, Chodorow & Burns v. Superior Court* (1996) 47 Cal.App.4th 410,
3 420-421.)³

4 Shell's first undisputed material fact is central to its argument, which is that
5 Shell's TCP that has leached into the City's water wells through the soil have not
6 caused the City any damage because the City can be damaged only if the TCP level in
7 its wells rises above the MCL set by the Department of Public Health. But the DPH has
8 not yet set an MCL for TCP, therefore the City cannot have been damaged by Shell's
9 TCP contaminating its wells. Apparently, no matter how high the TCP level is. For this
10 proposition, Shell relies heavily on the following California appellate authority: *Hartwell*
11 *Corp. v. Superior Court* (2002) 27 Cal.4th 256; *In re Groundwater Cases* (2007) 154
12 Cal.App.4th 659; *City of Watsonville v. State Dept. of Health Services* (2005) 132
13 Cal.App.4th 875; and *Paredes v. County of Fresno* (1986) 203 Cal.App.3d 1. These
14 cases do not assist Shell for the following reasons:

15 *Groundwater, Watsonville, and Paredes* establish that *water users* may not hold
16 their water providers to higher standards—i.e., lower MCLs—for contaminants than
17 those set by the California Department of Public Health. They hold that the MCLs
18 established by the DPH afford a "safe harbor" to water providers from suit by their users
19 for such contaminants because the water providers are controlled by the DPH, with
20 whose regulations the water providers must comply. Here, Shell seeks shelter in the
21 City's "safe harbor." But Shell is not regulated by the DPH. *Groundwater, Watsonville,*
22 *and Paredes* were lawsuits between water providers controlled by the DPH and their
23
24

25 ³ In an earlier motion, co-defendant Dow asserted that this case is controlled by *County of Santa Clara v.*
26 *Atl. Richfield Co.* (2006) 137 Cal.App.4th 292, which Dow argued for the proposition that the City had
27 experienced no property damage. This court's ruling rejected that argument because, while the mere
28 presence of lead within paint on a building does not itself constitute a "property damage" to the building,
a toxic substance contaminating a water well certainly does. Defendant Shell does not repeat Dow's
argument at this motion.

1 users. There is simply nothing in any of these cases that controls lawsuits between a
2 water provider and a third party that has contaminated its wells.

3 In *Hartwell, supra*, the Supreme Court specifically addressed the issue of
4 whether Public Utilities Code section 1759—which prohibits the courts from reviewing
5 decisions of the Public Utilities Commission except by writ of mandamus from the
6 Supreme Court. A private corporation not regulated by the PUC sought to benefit from
7 that section by arguing that the superior courts had no jurisdiction over *it* involving
8 matters regulated by the PUC, either. But the Supreme Court rejected that argument,
9 quoting the court of appeal below, as follows: “By no stretch of language or logic does
10 this mean that trial courts may not decide issues between parties not subject to PUC
11 regulation simply because the same or similar issues are pending before the PUC or
12 because the PUC regulates the same subject matter in its supervision over public
13 utilities.’ (Fn. omitted.) [¶] We agree.” (*Hartwell, supra*, at p. 280.)

14 This motion does not raise a jurisdictional question, but the reasoning is
15 analogous: There simply is no language or logic extending the “safe harbor” policy that
16 protects PUC-regulated water providers from lawsuits from its users alleging personal
17 injury due to contaminated water so as to protect private corporations that are not
18 regulated by the PUC from lawsuits by water providers for damage to their property.
19 Neither *Groundwater* nor *Watsonville* nor *Paredes* stands for such a proposition.

20 In sum, Shell’s motion for summary adjudication as to these four causes of action
21 fails since it is entirely based on its claim that the City has experienced no damages to
22 any of its wells from TCP, which factual claim is supported solely by undisputed material
23 fact no. 1. That undisputed material fact is relevant only if Shell is entitled as a matter of
24 law to “safe harbor” treatment vis-à-vis MCLs set by the DPH. Shell’s authorities do not
25 establish that legal proposition.

26 Accordingly, the court denies Shell’s motion as to the City’s first four causes of
27 action for the above reasons.

1 D. The DBCP causes of action (5th through 8th causes of action for (1) strict liability;
2 (2) negligence; (3) continuing nuisance; and (4) continuing trespass.)

3 Regarding these causes of action, Shell relies on seven undisputed material
4 facts, but at the bottom line the principle is the same. In the case of DBCP, the
5 California Department of Public Health *has* set an MCL (Shell's undisputed material fact
6 no. 3), and Shell's undisputed material facts concede that the City contends its testing
7 reveals DBCP in ten of its wells (undisputed material fact no. 4) and DBCP at levels
8 exceeding the MCL in two of its wells (undisputed material fact no. 5). But, Shell argues,
9 the City is not currently using those two wells for drinking water (undisputed material
10 fact no. 6)—therefore it has not been damaged.

11 Shell's argument as to these four DBCP causes of action fails for the same
12 reason that its argument as to the first four TCP causes of action fails: Shell indirectly
13 seeks the "safe harbor" protection that California appellate authority affords to the City
14 from lawsuits by its users for personal injuries due to contaminants. But Shell cites no
15 authority that would extend the DPH's "safe harbor" protection to private corporations
16 not regulated by the Department in lawsuits against those corporations brought by
17 DPH-regulated water providers for property damage.

18 Shell's point regarding the fact that wells no. 14 and 41 were not currently being
19 used by the City for potable drinking water fails independently, because that does not
20 establish that the City has experienced no property damage to those wells⁴.

21 Shell's remaining undisputed material fact relates to its implied argument
22 that this court should summarily adjudicate on a well-by-well—i.e., on a
23 damaged-item-by-damaged-item—basis, which the court need not even reach here

24 ///

26 ⁴ An analogy: If one is using only 250 GB of a 1000 GB hard drive, and a friend temporarily uses some of the
27 remaining space, and in the process the friend permanently destroys 500 GB of the heretofore unused capacity of
28 hard drive, it cannot be said that one has experienced no property damage simply because you weren't yet using the
part that was destroyed. The hard drive has been damaged because it has lost capacity, and in this case the City has
been damaged because that capacity is no longer available for use.

1 since adopting the above discussion would preclude summary adjudication in any
2 event.

3 Accordingly, the court will deny Shell's motion as to the City's last four causes of
4 action for the above reasons.

5 E. Disposition

6 Shell's motions for summary adjudication as to each of the City's eight causes of
7 action are denied. The court finds that Shell's motions fail on a point of law in that,
8 contrary to Shell's argument, it is not entitled to the benefit of the "safe harbor"
9 protection afforded by California Department of Public Health Maximum Contaminant
10 Levels to water providers regulated by the Department regarding lawsuits against said
11 water providers by their users. (Distinguishing *In re Groundwater Cases* (2007) 154
12 Cal.App.4th 659, *City of Watsonville v. State Dept. of Health Services* (2005) 132
13 Cal.App.4th 875, and *Paredes v. County of Fresno* (1988) 203 Cal.App.3d 1. See also,
14 by analogy, *Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256, 280.)

15 Shell's May 22-filed requests for judicial notice of Exhibits F through L are denied
16 for lack of authentication.

17 The City's July 24-filed requests for judicial notice nos. 1 through 9 are denied for
18 lack of authentication.

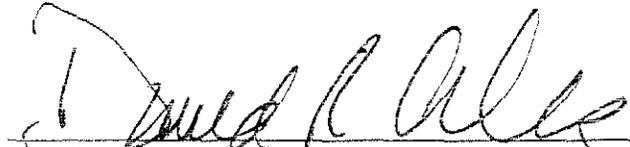
19 Shell's July 31-filed requests for judicial notice nos. 3-5, 8 and 9 are denied for
20 lack of authentication.

21 Shell's July 31-filed objections to plaintiff City's evidence are overruled as to
22 objections nos. 1, 3 and 5 to the Diggs declaration, as to objections nos. 1, 2 and 4 of
23 the McIntyre declaration, as to objection no. 1 to the Cohen declaration, and—on the
24 basis stated therein, as to objection no. 1 to the City's request for judicial notice. Shell's
25 objections are sustained as to objection no. 1 to the Austin declaration, as to objections
26 nos. 2 and 4 to the Diggs declaration, as to objection no. 3 of the McIntyre declaration,
27 and as to objections 2 through 7 of the City's request for judicial notice.

28

1 Dow's objection is overruled and its request for judicial notice is denied. (The
2 court always notices published opinions of California appellate authority.)
3
4

5 Dated this 6 of October 2009
6
7

8 
9 _____
10 DONALD R. ALVAREZ
11 Judge of the Superior Court
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SERVICE LIST

1
2 Duane C. Miller, Esq.
Michael Axline, Esq.
3 Tracey L. O'Reilly, Esq.
Miller Axline & Sawyer
4 1050 Fulton Avenue, Suite 100
Sacramento, CA 95825-4225
5 Tel: (916) 488-6688
Fax: (916) 488-4288
6 *Counsel for Plaintiffs City of Redlands, City
of Atwater, City of Clovis, City of Fresno,
7 and Saldana, et al.*

8
9 Marnie Riddle, Esq.
10 Victor M. Sher, Esq.
Todd E. Robins, Esq.
11 Sher Leff, LLP
450 Mission Street, Suite 400
12 San Francisco, CA 94105
Tel: (415) 348-8300
13 Fax: (415) 348-8333
14 *Counsel for Plaintiffs Montara Water
District, City of Oceanside, City of
Alhambra, City of Livingston, City of
15 Shafter, City of Delano, and City of Wasco*

16 Gennaro A. Filice, III, Esq.
17 Nicholas D. Kayhan, Esq.
Richard H. Poulson, Esq.
18 Filice Brown Eassa & McLeod LLP
1999 Harrison Street, 18th Floor
19 Oakland, CA 94612
Tel: (510) 444-3131
20 Fax: (510) 839-7940
21 *Counsel for Defendants The Dow Chemical
Company and Dow AgroSciences, LLC*

Scott Summy, Esq.
Cary McDougal, Esq.
Stephen Johnston, Esq.
Stephen Blackburn, Esq.
Cristina M. Sanchez, Esq.
Baron & Budd, PC
3102 Oak Lawn Ave., Suite 1100
Dallas, TX 75219
Tel: (214) 521-3605
Fax: (214) 520-1181
*Counsel for Plaintiffs Montara Water
District, City of Oceanside, City of
Alhambra, City of Livingston, City of
Shafter, City of Delano, and City of Wasco*

Daniel J. McHugh, Esq.
Michael Reiter, Esq.
City of Redlands
35 Cajon St., Suite 400
PO Box 3005
Redlands, CA 92502-1028
Tel: (909) 798-7595
Fax: (909) 798-7503
Counsel for Plaintiff City of Redlands

Dean T. Barnhard, Esq.
Barnes & Thornburg LLP
11 South Meridian Street
Indianapolis, IN 46204
Tel: (317) 236-1313
Fax: (317) 231-7433
*Counsel for Defendants The Dow Chemical
Company and Dow AgroSciences, LLC*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Lawrence P. Riff, Esq.
Jay E. Smith, Esq.
Steptoc & Johnson LLP
633 West Fifth Street, Suite 700
Los Angeles, CA 90071
Tel: (213) 439-9400
Fax: (213) 439-9599
*Counsel for Defendant Shell Oil Company,
dba Shell Chemical Company*

Counsel for Defendant Puregro Company
Montara, Oceanside, Alhambra, Livingston,
Shafter, Delano, Wasco

*Counsel for Defendant Chevron U.S.A. Inc.,
Chevron Chemical Company, L.L.C.*
Oceanside, Delano

Richard C. Coffin, Esq.
Jon Enscoe, Esq.
Barg Coffin Lewis & Trapp, LLP
350 California Street, 22nd Floor
San Francisco, CA 94104-1435
Tel: (415) 228-5400
Fax: (415) 228-5450
*Counsel for Defendant Wilbur-Ellis
Company and John Taylor*
Alhambra, Delano, Livingston, Montara,
Oceanside, Shafter, Wasco, Jensen

Mark S. Kannett, Esq.
Paul S. Lecky, Esq.
Becherer, Kannett & Schweitzer
1255 Powell Street
Emeryville, CA 94608-2604
Tel: (510) 658-3600
Fax: (510) 658-1151
*Counsel for Defendant Wilbur-Ellis
Company*
Atwater, Clovis, Redlands, Fresno

James J. Dragna, Esq.
Nancy Wilms, Esq.
Gabriel J. Padilla, Esq.
Bingham McCutchen LLP
355 South Grand Avenue, Suite 4400
Los Angeles, CA 90071-3106
Tel: (213) 680-6400
Fax: (213) 680-6499
*Counsel for Defendant Western Farm
Service, Inc.*

Tracie Renfroe, Esq.
Robert E. Meadows, Esq.
Andrew S. Hicks, Esq.
King & Spalding LLP
1100 Louisiana Street, Suite 4000
Houston, TX 77002
Tel: (713) 751-3200
Fax: (713) 751-3290
*Counsel for Defendant Shell Oil Company,
dba Shell Chemical Company*

Maureen L. King, Esq.
Stephen C. Lewis, Esq.
Morgan Gilhuly, Esq.
Brett S. Henrikson
Barg, Coffin, Lewis & Trapp, LLP
350 California Street, 22nd Floor
San Francisco, CA 94104-1435
Tel: (415) 228-5400
Fax: (415) 228-5450
*Counsel for Defendants Occidental
Chemical Corporation, Occidental
Petroleum Corporation, and Occidental
Chemical Corporation*

Jay W. Jeffcoat, Esq.
M. Ray Hartman, III, Esq.
Christopher M. Young, Esq.
DLA Piper US LLP
401 B Street, Suite 1700
San Diego, CA 92101-4297
Tel: (619) 699-2700
Fax: (619) 699-2701
*Counsel for Defendant Helena Chemical
Company*

1 Sandra A. Kearney, Esq.
James H. Colopy, Esq.
2 Sarah F. Peterman, Esq.
Farella Braun & Martel, LLP
3 235 Montgomery Street, 17th Floor
San Francisco, CA 94104
4 Tel: (415) 954-4400
Fax: (415) 954-4480
5 *Counsel for Defendant FMC Corporation*

Jason F. Meyer, Esq.
Dennis M. Nino, Esq.
Carol Urzi, Esq.
Gordon & Rees, LLP
101 W. Broadway, Suite 2000
San Diego, CA 92101
Tel: (619) 696-6700
Fax: (619) 696-7124
*Counsel for Defendants Trical, Inc. and
Agrichemical & Supply Inc.*

6
7
8 Stephen C. Snider, Esq.
Mullen, Sullivan & Newton, LLP
1111 W. Tokay Street
9 PO Box 560
Lodi, CA 95241
10 Tel: (209) 334-5144
Fax: (209) 333-1034
11 *Counsel for Defendant J.R. Simplot
Company*

Scott Mroz, Esq.
Sedgwick, Detert, Moran & Arnold, LLP
One Market Plaza - Steuart Tower
San Francisco, CA 94105
Fax: (415) 781-2635
*Counsel for Defendant Great Lakes
Chemical*

12
13 Patrick J. Foley, Esq.
Lewis Brisbois Bisgaard & Smith
14 One Sansome Street, Suite 1400
San Francisco, California 94104
15 Tel: (415) 362-2580
*Counsel for Southern Valley Chemical
Company, Inc.*

Thomas F. Vandenburg
Dongell Lawrence Finney LLP
707 Wilshire Blvd, 45th Floor
Los Angeles, CA 90017
Phone: 213-943-6100
Fax: 213-943-6101
tvandenburg@dlflawyers.com
Counsel for Agri Chemical & Supply, Inc.