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ENDORSED  
FILED  
ALAMEDA COUNTY  
SEP 20 2016

CLERK OF THE SUPERIOR COURT  
By Johnson Deputy

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 COUNTY OF ALAMEDA  
11

12 CENTER FOR ENVIRONMENTAL HEALTH, )  
13 a non-profit corporation, )

14 Plaintiff, )

15 v. )

16 DOW AGROSCIENCES LLC; and DOES 1 )  
17 through 100, inclusive, )

18 Defendants. )  
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Case No.

RG 16831783

COMPLAINT FOR INJUNCTIVE  
RELIEF AND CIVIL PENALTIES

Health & Safety Code § 25249.6, *et seq.*

(Other)

1 Plaintiff Center for Environmental Health, in the public interest, based on  
2 information and belief and investigation of counsel, except for information based on knowledge,  
3 hereby makes the following allegations:

4 **INTRODUCTION**

5 1. This Complaint seeks to remedy Defendants' continuing failure to warn  
6 individuals in California that they are being exposed to 1,3-Dichloropropene ("1,3-D"), a  
7 chemical known to the State of California to cause cancer. Such exposures have occurred, and  
8 continue to occur, through the manufacture, distribution, sale and use of soil fumigants that  
9 contain 1,3-D as an active ingredient such as Telone II™ sold by Defendants ("Telone").  
10 Individuals, including pregnant women and children, living or working in and around Township  
11 and Range 28S25E in Shafter, California ("Shafter") where Telone is used are exposed to 1,3-D  
12 when they breathe the air following applications of Telone to agricultural crops.

13 2. Under California's Proposition 65, Health & Safety Code § 25249.5, *et*  
14 *seq.*, it is unlawful for businesses to knowingly and intentionally expose individuals in California  
15 to chemicals known to the State to cause cancer without providing clear and reasonable warnings  
16 to individuals prior to their exposure. Defendants manufacture and sell Telone for use on  
17 agricultural crops to control pests. 1,3-D is released into the air following applications of Telone  
18 to the agricultural crops, thereby exposing individuals living or working in and around Shafter to  
19 1,3-D.

20 3. Despite the fact that Defendants expose pregnant women, children and  
21 other individuals to 1,3-D, Defendants provide no warnings whatsoever about the carcinogenic  
22 hazards associated with 1,3-D exposure. Defendants' conduct thus violates the warning  
23 provision of Proposition 65. Health & Safety Code § 25249.6.

24 **PARTIES**

25 4. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH ("CEH") is a  
26 non-profit corporation dedicated to protecting the public from environmental health hazards and  
27 toxic exposures. CEH is based in Oakland, California and incorporated under the laws of the  
28 State of California. CEH is a "person" within the meaning of Health & Safety Code





1 amounts of Telone have been used and continue to be used in and around Shafter. Thus, the  
2 exposures occur in and around Shafter.

3           16.     1,3-D is designated as a hazardous air contaminant under federal and  
4 California law. 42 U.S.C. § 7412; Cal. Code Regs., tit. 3, § 6860. In addition to being a known  
5 carcinogen, Defendants acknowledge that excessive inhalation of 1-3-D “may cause serious  
6 adverse effects, even death” as well as causing “irritation to upper respiratory tract (nose and  
7 throat) and lungs.” Material Safety Data Sheet for Telone E.C. Soil Fumigant, *available at*  
8 <http://www.dowagro.com/en-us/usag/labels-and-safety-data-sheets>. Likewise, the labels of  
9 Defendants’ Telone acknowledge the “high acute inhalation toxicity and carcinogenicity” of  
10 Telone. Specimen Label for Telone EC, *available at*  
11 <http://www.dowagro.com/en-us/usag/labels-and-safety-data-sheets>.<sup>1</sup> Despite 1,3-D’s widely  
12 recognized hazardous health effects, Telone is one of the most commonly used soil fumigants in  
13 California.

14           17.     No clear and reasonable warning is provided to individuals living or  
15 working in and around Shafter regarding the carcinogenic hazards of 1,3-D.

16           18.     Any person acting in the public interest has standing to enforce violations  
17 of Proposition 65 provided that such person has supplied the requisite public enforcers with a  
18 valid 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the  
19 action within such time. Health & Safety Code § 25249.7(d).

20           19.     More than sixty days prior to naming each Defendant in this lawsuit, CEH  
21 provided a 60-Day “Notice of Violation of Proposition 65” to the California Attorney General,  
22 the District Attorneys of every county in California, the City Attorneys of every California city  
23 with a population greater than 750,000 and to each of the named Defendants. In compliance with  
24 Health & Safety Code § 25249.7(d) and 27 C.C.R. § 25903(b), the Notice included the following  
25 information: (1) the name and address of each violator; (2) the statute violated; (3) the time  
26 period during which violations occurred; (4) specific descriptions of the violations, including (a)

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28           <sup>1</sup> This Complaint does not challenge the sufficiency of the labeling of Defendants’  
Telone.

1 the route of exposure to 1,3-D from the use of Telone, and (b) the location of the exposures; and  
2 (5) the name of the specific Proposition 65-listed chemical that is the subject of the violations  
3 described in the Notice.

4           20. CEH also sent a Certificate of Merit for the Notice to the California  
5 Attorney General, the District Attorneys of every county in California, the City Attorneys of  
6 every California city with a population greater than 750,000 and to each of the named  
7 Defendants. In compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3101, the  
8 Certificate certified that CEH's counsel: (1) has consulted with one or more persons with  
9 relevant and appropriate experience or expertise who reviewed facts, studies or other data  
10 regarding the exposures to 1,3-D alleged in the Notice; and (2) based on the information obtained  
11 through such consultations, believes that there is a reasonable and meritorious case for a citizen  
12 enforcement action based on the facts alleged in the Notice. In compliance with Health & Safety  
13 Code § 25249.7(d) and 11 C.C.R. § 3102, the Certificate served on the Attorney General  
14 included factual information – provided on a confidential basis – sufficient to establish the basis  
15 for the Certificate, including the identity of the person(s) consulted by CEH's counsel and the  
16 facts, studies or other data reviewed by such persons.

17           21. None of the public prosecutors with the authority to prosecute violations  
18 of Proposition 65 has commenced and/or is diligently prosecuting a cause of action against  
19 Defendants under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in  
20 CEH's Notice.

21           22. Defendants both know and intend that individuals will be exposed to 1,3-  
22 D from the use of Telone manufactured and sold by Defendants.

23           23. Under Proposition 65, an exposure is “knowing” where the party  
24 responsible for such exposure has:

25                   knowledge of the fact that a[n] . . . exposure to a chemical listed  
26                   pursuant to [Health & Safety Code § 25249.8(a)] is occurring. No  
27                   knowledge that the . . . exposure is unlawful is required.  
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1 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final  
2 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,  
3 § 12201).

4           24. Defendants know that Telone contains 1,3-D because it is the active  
5 ingredient in Telone.

6           25. The fact that individuals living or working near agricultural areas where  
7 Telone is used are exposed to 1,3-D has also been widely discussed in media reports and  
8 government studies such that Defendants have knowledge of the exposures that result from use  
9 of Telone.

10           26. Defendants have also been informed of the 1,3-D exposures caused by use  
11 of Telone by the 60-Day Notice of Violation and accompanying Certificate of Merit served on  
12 them by CEH.

13           27. Defendants know or should know that every application of Telone to  
14 agricultural crops causes 1,3-D to be emitted into the air. Defendants thus know and intend that  
15 individuals who live or work near areas where Telone is used inhale the 1,3-D emitted into the  
16 air following applications of Telone. These 1,3-D exposures are a natural and foreseeable  
17 consequence of Defendants' placing of Telone into the stream of commerce.

18           28. Nevertheless, Defendants continue to expose individuals living or working  
19 in and around Shafter to 1,3-D without providing prior clear and reasonable warnings regarding  
20 the carcinogenic hazards of 1,3-D.

21           29. CEH has engaged in extensive good faith efforts to resolve the claims  
22 alleged herein prior to filing this Complaint.

23           30. Any person "violating or threatening to violate" Proposition 65 may be  
24 enjoined in any court of competent jurisdiction. Health & Safety Code § 25249.7. "Threaten to  
25 violate" is defined to mean "to create a condition in which there is a substantial probability that a  
26 violation will occur." Health & Safety Code § 25249.11(e). Proposition 65 provides for civil  
27 penalties not to exceed \$2,500 per day for each violation of Proposition 65.

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1 **FIRST CAUSE OF ACTION**

2 **(Violations of the Health & Safety Code § 25249.6)**

3 31. CEH realleges and incorporates by reference as if specifically set forth  
4 herein Paragraphs 1 through 30, inclusive.

5 32. By placing Telone into the stream of commerce, each Defendant is a  
6 person in the course of doing business within the meaning of Health & Safety Code § 25249.11.

7 33. 1,3-D is a chemical listed by the State of California as known to cause  
8 cancer.

9 34. Defendants know that average use of Telone will expose individuals living  
10 or working in and around Shafter where Telone is used to 1,3-D. Defendants intend that Telone  
11 be used in a manner that results in exposures to 1,3-D from Telone.

12 35. Defendants have failed, and continue to fail, to provide clear and  
13 reasonable warnings regarding the carcinogenic hazards of 1,3-D to individuals living or working  
14 in and around Shafter where Telone is used.

15 36. By committing the acts alleged above, Defendants have at all times  
16 relevant to this Complaint violated Proposition 65 by knowingly and intentionally exposing  
17 individuals living or working in and around Shafter to 1,3-D without first giving clear and  
18 reasonable warnings to such individuals regarding the carcinogenic toxicity of 1,3-D.

19 **PRAYER FOR RELIEF**

20 CEH prays for judgment against Defendants as follows:

21 1. That the Court, pursuant to Health & Safety Code § 25249.7(b), assess  
22 civil penalties against each of the Defendants in the amount of \$2,500 per day for each violation  
23 of Proposition 65 according to proof;

24 2. That the Court, pursuant to Health & Safety Code § 25249.7(a),  
25 preliminarily and permanently enjoin Defendants from exposing individuals living or working in  
26 and around Shafter to 1,3-D without providing prior clear and reasonable warnings, as CEH shall  
27 specify in further application to the Court;

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3. That the Court, pursuant to Health & Safety Code § 25249.7(a), order Defendants to take action to stop ongoing unwarned exposures of individuals living or working in and around Shafter to 1,3-D resulting from use of Telone sold by Defendants, as CEH shall specify in further application to the Court;

4. That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other applicable theory, grant CEH its reasonable attorneys' fees and costs of suit; and

5. That the Court grant such other and further relief as may be just and proper.

Dated: September 20, 2016

Respectfully submitted,  
LEXINGTON LAW GROUP



Howard Hirsch  
Attorneys for Plaintiff  
CENTER FOR ENVIRONMENTAL HEALTH