

**SUMMONS ON FIRST AMENDED
(CITACION JUDICIAL) COMPLAINT**

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)
2009 SEP 21 AM 10:07
CLERK
SAN DIEGO COUNTY COURT

**NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):**

D.S. ZEISSLER, INC., a corporation doing business as SERVPRO OF ESCONDIDO and/or SERVPRO OF ESCONDIDO/TEMECULA; and, DOES 1 to 50, Inclusive.

**YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):**

RICHARD KURLAND and MARY KURLAND

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association. **NOTE:** The court has a statutory lien for waived fees and costs on any settlement or arbitration award of \$10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case. **¡AVISO!** Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de Ayuda de California (www.sucorte.ca.gov), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.sucorte.ca.gov) o poniéndose en contacto con la corte o el colegio de abogados locales. **AVISO:** Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de \$10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

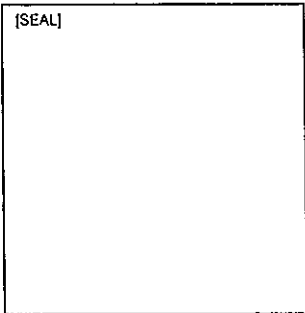
The name and address of the court is:
(El nombre y dirección de la corte es): Superior Court State of California
325 S. Melrose Drive North County Judicial Branch
Vista, CA 92081

CASE NUMBER:
(Número del Caso):
37-2009-00057605-CU-MC-NC

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):
James A. Testa (SB#64660); Gregory J. Testa (SB#176318), Testa & Associates, LLP
570 Rancheros Drive, Suite 250, San Marcos, CA 92069 (760) 891-0490 /FAX (760) 891-0495

DATE: SEP 21 2009 Clerk, by T. Ozenbaugh, Deputy
(Fecha) (Secretario) (Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)
(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).



NOTICE TO THE PERSON SERVED: You are served

- as an individual defendant.
- as the person sued under the fictitious name of (specify):
- on behalf of (specify):

under: <input type="checkbox"/> CCP 416.10 (corporation)	<input type="checkbox"/> CCP 416.60 (minor)
<input type="checkbox"/> CCP 416.20 (defunct corporation)	<input type="checkbox"/> CCP 416.70 (conservatee)
<input type="checkbox"/> CCP 416.40 (association or partnership)	<input type="checkbox"/> CCP 416.90 (authorized person)
<input type="checkbox"/> other (specify):	
- by personal delivery on (date):

2009 SEP 21 AM 10:07
NORTH COUNTY JUDICIAL DISTRICT
SAN DIEGO, CALIFORNIA

1 JAMES A. TESTA (SB#64660)
2 GREGORY J. TESTA (SB#176318)
3 TESTA & ASSOCIATES, LLP
4 570 Rancheros Drive, Suite 250
San Marcos, California 92069
(760)891-0490 / FAX (760)891-0495

5 Attorney for Plaintiffs, RICHARD KURLAND and MARY KURLAND

6
7
8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF SAN DIEGO – NORTH COUNTY JUDICIAL DISTRICT**
10

11 RICHARD KURLAND and
12 MARY KURLAND,

13
14 Plaintiffs,

15 -vs-

16 D.S. ZEISSLER, INC., a corporation doing
17 business as SERVPRO OF ESCONDIDO
and/or SERVPRO of
18 ESCONDIDO/TEMECULA; and,
19 DOES 1 to 50, Inclusive,

20 Defendants.
21

)CASE NO.: 37-2009-00057605-CU-MC-NC
) **FIRST AMENDED**
) **COMPLAINT FOR DAMAGES:**
) **1. Negligence**
) **2. Negligence Per Se - Violation of**
) **California Health & Safety Code -**
) **§25249.5, et. seq. – Prop. 65)**
) **3. Negligence Per Se – Violation of**
) **California Health & Safety Code -**
) **§25300, et. seq. (“HSAA”)**
) **4. Violation of the Federal**
) **Insecticide, Fungicide, and**
) **Rodenticide Act (“FIFRA”), 7 USC §136a,**
) **et. seq.)**
) **5. Strict Liability for Ultrahazardous**
) **Activity**
) **6. Strict Products Liability – Failure to**
) **Warn**
) **7. Violation of Proposition 65 (Cal.**
) **Health & Safety Code §25249.5, et. seq.)**

22
23 **GENERAL ALLEGATIONS**
24

25
26 1. Plaintiffs RICHARD and MARY KURLAND are individuals, husband and wife,
27 with their residence located in the County of Riverside, State of California and the owners of certain
28

1 improved residential real property commonly described as 24577 Pantera Court, Murrieta,
2 California 92561 (the "Residence").

3 2. Plaintiffs are informed and believe, and based thereon allege, that Defendant D.S.
4 ZEISSLER, INC. is a corporation organized and existing under the laws of the State of California,
5 doing business as SERVPRO OF ESCONDIDO and/or SERVPRO OF
6 ESCONDIDO/TEMECULA (hereinafter "SERVPRO"), with its principal place of business located
7 in the City of Escondido, County of San Diego, State of California. Plaintiffs are informed and
8 believe and based thereon allege that Defendant SERVPRO is a general contractor, licensed by the
9 California State Contractors' License Board, license no. 781470.
10

11 3. The true names or capacities, whether individual, corporate, associate or otherwise
12 of the defendants named herein as DOES 1 through 50, inclusive, are presently unknown to
13 plaintiffs. Plaintiffs are informed and believe and based thereon allege that each of the fictitiously
14 named defendants in some way contributed to, or is responsible for the damages claimed herein.
15 Plaintiffs will amend this Complaint to show the true and correct names and capacities of said
16 fictitiously named defendants when the same have been ascertained.
17

18 4. Plaintiffs are informed and believe and thereon allege that, all of the defendants,
19 including the fictitiously named defendants, at all times herein mentioned were the agents and/or
20 employees of their co-defendants and each other defendant, at all times herein mentioned, was
21 acting in the course and scope of that agency and/or employment and with the permission and
22 consent of their co-defendants, and therefore are jointly and severally liable to plaintiffs herein.
23

24 5. On or about August 6, 2007, Plaintiffs suffered a water loss at their Residence. At
25 the recommendation of Plaintiffs' insurance carrier, Defendant SERVPRO was retained to repair
26 and restore the Residence by drying the water up, tearing out damaged walls and baseboards and
27
28

1 reconstructing the damaged portions of the residence.

2 6. On or about August 6, 2007, after the water-damaged portions of the Residence had
3 been removed, Defendant SERVPRO's technician applied a chemical spray to those areas to
4 prevent the growth of mold in the water-damaged areas. Defendant SERVPRO's technician,
5 identified as "Dave", told Plaintiffs that he had prepared the spray solution from "three or so
6 chemicals". Plaintiffs are informed and believe, and based thereon allege, that Defendant
7 SERVPRO's technician, "Dave", combined chemicals, including but not limited to Sporacidin and
8 chlorine bleach.
9

10
11 7. Immediately after the chemical spray was applied to the Residence, Plaintiffs
12 noticed a strong smell and odor in the Residence. Defendant SERVPRO's technician, "Dave", told
13 Plaintiffs that the odor would go away in a couple of hours. Before leaving, the technician hooked
14 up two fans and dehumidifiers and closed all windows and doors to the Residence.
15

16 8. The next day, on or about August 7, 2007, Plaintiffs were still experiencing a strong
17 smell and odor in the Residence and tried to stay outside of the Residence.

18 9. On or about August 8, 2007, the smell and odor remained at the Residence and
19 Plaintiffs contacted Defendant SERVPRO about the problem. Defendant SERVPRO advised that
20 they would come out the next day to pick up the fans.
21

22 10. On or about August 9, 2007, Defendant SERVPRO's President, Dwight Zeissler,
23 came out to the Residence to remove the fans. At that time, the strong smell and odor remained at
24 the Residence and Mr. Zeissler sprayed another chemical solution on the affected areas of the
25 Residence.
26

27 11. The strong smell and odor at the Residence did not go away and in fact, permeated
28 Plaintiffs' Residence, furnishings, personal belongings, clothing, skin and hair. During this time,

1 Plaintiffs and their children experienced headaches, nausea and vomiting.

2 12. On or about August 21, 2007, air samples were taken from the kitchen area of the
3 Residence for analysis. On or about August 29, 2007, additional air samples and samples of
4 building materials where the chemical solutions were applied were taken at the Residence for
5 analysis.
6

7 13. The results of the samples tested revealed the presence of chlorophenol chemicals on
8 the sprayed building materials (2,4,6-trichlorophenol) and in the air (2-Chlorophenol). Plaintiffs are
9 informed and believe, and based thereon allege, that 2,4,6 Trichlorophenol has been classified by
10 the State of California under Proposition 65 as a carcinogen since January 1988.
11

12 14. In order to attempt remove the chemicals from the Residence, Plaintiffs were
13 required to retain specialists to evaluate, remediate and restore the Residence, including their
14 personal belongings and furnishings, and were required to relocate until the remediation and
15 restoration process was complete, at a cost and expense in excess of \$350,000. Plaintiffs were
16 physically displaced from the Residence for more than one year during this process.
17

18 **FIRST CAUSE OF ACTION**

19 **(Negligence Against All Defendants)**

20 15. Plaintiffs repeat, reallege and incorporate herein by reference the allegations
21 contained in paragraphs 1-14, inclusive, as though set forth here in full.
22

23 16. In performing the services herein described, Defendant SERVPRO owed a duty to
24 Plaintiffs to exercise reasonable care and skill in the use and application of chemical solutions
25 within the Residence.
26

27 17. Plaintiffs are informed and believe, and based thereon allege, that Defendants, and
28 each of them, breached this duty of care by improperly mixing and applying chemicals within the

1 Residence resulting in the presence of chemicals that are known carcinogens.

2 18. As a result of Defendants' negligence, Plaintiffs have suffered general and special
3 damages, including but not limited to repair, remediation and restoration of the Residence, repair
4 and replacement of Plaintiffs' furnishings and personal belongings, expenses of relocation, and
5 physical and emotional injuries to their health, strength and activity, all in amount to be proven at
6 the time of trial herein.

8 **SECOND CAUSE OF ACTION**

9 **(Negligence Per Se Against All Defendants – Violation of**
10 **California Health & Safety Code §25249.5, et. seq. (Proposition 65).)**

11
12 19. Plaintiffs repeat, reallege and incorporate herein by reference the allegations
13 contained in paragraphs 1-18, inclusive, as though set forth here in full.

14 20. Statutes exist for the benefit of the public health and safety, including the health and
15 safety of Plaintiffs herein. In particular, California Health & Safety Code §25249.5, et. seq.
16 (Proposition 65 – Safe Drinking Water and Toxic Enforcement Act of 1986, hereinafter
17 “Proposition 65”) requires that persons exposed to chemicals listed pursuant to the act be warned
18 prior to exposure.

19
20 21. Defendants caused Plaintiffs to be exposed to 2,4,6 Trichlorophenol, (which has
21 been classified by the State of California under Proposition 65 as a carcinogen since January 1988),
22 without warning Plaintiffs concerning their exposure to this toxic chemical, in violation of
23 Proposition 65.

24
25 22. As a result of Defendants' violation of the above-referenced statute and Plaintiffs'
26 involuntary and unknowing exposure to this, and perhaps other, toxic chemicals, Plaintiffs and their
27 children experienced headaches, nausea and vomiting, and physical and emotional injuries to their
28

1 health, strength and activity, all in amount to be proven at the time of trial herein.

2 23. In addition, as a result of Defendants' violation of the above-referenced statute,
3 Plaintiffs have suffered general and special damages, including but not limited to repair,
4 remediation and restoration of the Residence, repair and replacement of Plaintiffs' furnishings and
5 personal belongings, expenses of relocation, and such other damages as may be proven at the time
6 of trial herein.

7
8 24. The injuries and damages alleged herein are of the kind that the statute (Proposition
9 65) was designed to prevent.

10
11 25. Plaintiffs, as members of the general public, belong to the class of persons for whose
12 protection the statute was adopted.

13 **THIRD CAUSE OF ACTION**

14 **(Negligence Per Se Against All Defendants – California**

15 **Health & Safety Code §25300, et. seq. ("HSAA")**

16
17 26. Plaintiffs repeat, reallege and incorporate herein by reference the allegations
18 contained in paragraphs 1-25, inclusive, as though set forth here in full.

19 27. Statutes exist for the benefit of the public health and safety, including the health and
20 safety of Plaintiffs herein. In particular, California Health & Safety Code §25300, et. seq. (the
21 Carpenter-Presley-Tanner Hazardous Substance Account Act ("HSAA")) prohibits the release or
22 discharge of hazardous substances.

23
24 28. Defendants caused the release of hazardous substances at the Residence and exposed
25 Plaintiffs to danger as a result of their violation of the above-referenced statute.

26 29. As a result of Defendants' violation of the above-referenced statute and Plaintiffs'
27 involuntary and unknowing exposure to this, and perhaps other, toxic chemicals, Plaintiffs and their
28

1 children experienced headaches, nausea and vomiting, and physical and emotional injuries to their
2 health, strength and activity, all in amount to be proven at the time of trial herein.

3 30. In addition, as a result of Defendants' violation of the above-referenced statute,
4 Plaintiffs have suffered general and special damages, including but not limited to repair,
5 remediation and restoration of the Residence, repair and replacement of Plaintiffs' furnishings and
6 personal belongings, expenses of relocation, and such other damages as may be proven at the time
7 of trial herein.
8

9 31. The injuries and damages alleged herein are of the kind that the statute (HSAA) was
10 designed to prevent.
11

12 32. Plaintiffs, as members of the general public, belong to the class of persons for whose
13 protection the statute was adopted.
14

15 **FOURTH CAUSE OF ACTION**

16 **(Negligence Per Se Against All Defendants – Violation of the Federal**

17 **Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 USC §136a, et. seq.)**

18 33. Plaintiffs repeat, reallege and incorporate herein by reference the allegations
19 contained in paragraphs 1-32, inclusive, as though set forth here in full.

20 34. Statutes exist for the benefit of the public health and safety, including the health and
21 safety of Plaintiffs herein. In particular, the Federal Insecticide, Fungicide and Rodenticide Act
22 ("FIFRA"), 7 USC §136a, et. seq. requires the registration and labeling of pesticides. FIFRA, at 7
23 USC §136j(a)(2)(G) prohibits the use of any pesticide in a manner inconsistent with its labeling.
24

25 35. Plaintiffs are informed and believe, and based thereon allege, that Defendants used
26 the registered pesticide, Sporacidin, at Plaintiffs' residence. Plaintiffs are informed and believe, and
27 based thereon allege, that the labeling for Sporacidin states "Do not mix with other chemicals".
28

1 the combined chemicals to result in the presence of, and exposure to, known carcinogens at the
2 Plaintiffs' Residence.

3 42. As a result of Defendants engaging in such ultrahazardous activity, Defendants are
4 strictly liable to Plaintiffs for their injuries and damages.
5

6 43. As a result of Defendants' engaging in such ultrahazardous activities, Plaintiffs and
7 their children experienced headaches, nausea and vomiting, and physical and emotional injuries to
8 their health, strength and activity, all in amount to be proven at the time of trial herein.

9 44. In addition, as a result of Defendants' engaging in such ultrahazardous activities,
10 Plaintiffs have suffered general and special damages, including but not limited to repair,
11 remediation and restoration of the Residence, repair and replacement of Plaintiffs' furnishings and
12 personal belongings, expenses of relocation, and such other damages as may be proven at the time
13 of trial herein.
14

15 SIXTH CAUSE OF ACTION

16 (Strict Products Liability Against All Defendants – Failure to Warn)

17 45. Plaintiffs repeat, reallege and incorporate herein by reference the allegations
18 contained in paragraphs 1-44, inclusive, as though set forth here in full.
19

20 46. At all relevant times, the chemical solution created by Defendants for application in
21 Plaintiffs' Residence was defective as a result of the Defendants' failure to warn Plaintiffs
22 concerning the risks of exposure to the combined chemical solution, including the presence of
23 known carcinogens, rendered the chemical solution product unsafe for its intended or reasonably
24 foreseeable use.
25

26 47. Plaintiffs are informed and believe, and based thereon allege, that Defendants had
27 specific knowledge of the risk or Defendants could have known of the risk by the application of
28

1 scientific knowledge available at the time. As a result, Defendants are strictly liable to Plaintiffs for
2 their resulting injuries and damages.

3 48. As a result of Defendants' actions herein alleged, Plaintiffs and their children
4 experienced headaches, nausea and vomiting, and physical and emotional injuries to their health,
5 strength and activity, all in amount to be proven at the time of trial herein.
6

7 49. In addition, as a result of Defendants' actions herein alleged, Plaintiffs have suffered
8 general and special damages, including but not limited to repair, remediation and restoration of the
9 Residence, repair and replacement of Plaintiffs' furnishings and personal belongings, expenses of
10 relocation, and such other damages as may be proven at the time of trial herein.
11

12 50. At all times herein mentioned, Defendants knew that the chemical solution they
13 created and applied in the Residence was defective in the manner herein alleged, that it would result
14 in the exposure of known carcinogens or other harmful chemicals to Plaintiffs and their Residence,
15 which in turn would cause serious personal injury or property damage, and yet, notwithstanding this
16 knowledge, Defendants despicably, and in willful and conscious disregard of the health and safety
17 of Plaintiffs, and without any warning as to same, intentionally used the chemical solution in
18 commerce, by applying it to Plaintiffs' Residence and exposing Plaintiffs' to unnecessary health and
19 safety risks. Plaintiffs, therefore, are entitled to an award of exemplary or punitive damages in an
20 amount to be proven at the time of trial herein.
21
22

23 SEVENTH CAUSE OF ACTION

24 (Violation of Proposition 65 (Cal. Health & Safety Code §25249.5, et. seq.)

25 Against All Defendants)

26 51. Plaintiffs repeat, reallege and incorporate herein by reference the allegations
27 contained in paragraphs 1 through 50, inclusive, as though set forth here in full.
28

1 52. Plaintiffs are informed and believe, and based thereon allege that Defendants are
2 engaged in the business of applying pesticides and chemicals to residential property and regularly
3 employ 10 or more employees.

4 53. Plaintiffs are informed and believe, and based thereon allege, that Defendants
5 exposed Plaintiffs to known carcinogens without first giving clear and reasonable warnings.
6

7 54. On or about July 21, 2009, Plaintiff mailed an Amended 60-Day Notice of Intent to
8 Sue under Health & Safety §25249.6 ("60-Day Notice") to Defendant D.S. ZEISSLER, INC. In
9 addition, Plaintiff mailed copies of said notice to the Office of the Attorney General, State of
10 California, Department of Justice ("Attorney General") and the Riverside County District
11 Attorney's office.
12

13 55. The 60-Day Notice included a certificate of merit executed by the attorney for the
14 noticing party as required by 11 Cal. Code Regulations §3100, et. seq.
15

16 56. Plaintiffs are commencing this action more than sixty (60) days from the date
17 Plaintiff gave notice of the alleged violations of Proposition 65.

18 57. As a result of Defendants' violation of Health & Safety Code §25249.5 and /or
19 25249.6, Plaintiffs are entitled to a temporary and permanent injunction preventing Defendants from
20 continued violations of Proposition 65.
21

22 58. As a result of Defendants' violation of Health & Safety Code §25249.5 and /or
23 25249.6, Plaintiffs are entitled to recover civil penalties not to exceed \$2,500 per day for each
24 violation in addition to any other penalty established by law.

25 59. As a result of Defendants' violation of Health & Safety Code §25249.5 and /or
26 25249.6, Plaintiffs are entitled to recover reasonable attorney's fees to the extent that this action
27 results in the enforcement of an important right affecting the public interest.
28

1 WHEREFORE, Plaintiffs pray for damages against Defendants as follows:

2 AS TO THE FIRST THROUGH FIFTH CAUSES OF ACTION:

- 3 1. For general and special damages according to proof at the time of trial.
4

5 AS TO THE SIXTH CAUSE OF ACTION:

- 6 1. For general and special damages according to proof at the time of trial.
7 2. For an award of exemplary or punitive damages.

8 AS TO THE SEVENTH CAUSE OF ACTION:

- 9 1. For a preliminary and permanent injunction pursuant to Health & Safety Code §25249.7,
10 and the equitable powers of the court;
11 2. For civil penalties pursuant to Health & Safety Code §25249.7 not to exceed \$2,500 per day
12 for each violation in addition to any other penalty established by law.
13 3. For reasonable attorney's fees pursuant to Code of Civil Procedure Section 1021.5.

14 AS TO ALL CAUSES OF ACTION:

- 15 1. For costs of suit incurred herein.
16 17 2. For such other and further relief as the Court may deem just and proper.

18 DATED: September 21, 2009

19
20 
21 _____
22 GREGORY J. TESTA, TESTA & ASSOCIATES, LLP
23 Attorney for Plaintiffs, RICHARD and MARY KURLAND
24
25
26
27
28