

1 Michael C. Normoyle, No. 10039
Michael L. Abbott, Esq., No. 148917
2 NORMOYLE & NEWMAN
1700 Standiford Avenue, Suite A-340
3 Modesto, CA 95350
(209) 521-9521

93 JUN 10 11 10 AM '92
FILED
ALAMEDA COUNTY

MAY 5 1992

4 Attorneys for Plaintiff
5 Melvin E. Kauffman

FEE PAID
\$136.00

RONALD G. OVERHOLT, Exec. Off./Clerk
By R. Gault

7 SUMMONS ISSUED

8 SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA
9 SOUTHERN DIVISION

10 MELVIN E. KAUFFMAN,) NO. **H 161761-6**
11)
12 Plaintiff,) COMPLAINT FOR
13 vs.) DAMAGES, NUISANCE, EXPRESS
14) AND IMPLIED INDEMNITY,
15 BRIAN P. BURNS, Individually) BREACH OF WRITTEN CONTRACT,
16 and dba EAST BAY SCAFFOLDING) AND DECLARATORY RELIEF.
17 COMPANY, and DOES 1 through)
50, inclusive,)
Defendants.)

18 COMES NOW Plaintiff, MELVIN E. KAUFFMAN, and alleges as
19 follows:

20 ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

21 1. Plaintiff, MELVIN E. KAUFFMAN (hereinafter
22 "Kauffman") is, and at all times mentioned herein was, an
23 individual residing in the City of Lathrop, County of San Joaquin,
24 California, and the owner of certain real property located at 2552
25 San Carlos Avenue, City of Castro Valley, County of Alameda,
26 California (hereinafter "the Property").

27 2. Kauffman is informed and believes, and thereon
28 alleges, that Defendant BRIAN P. BURNS (hereinafter "Burns") is,

NORMOYLE & NEWMAN
A PROFESSIONAL CORPORATION
1700 STANDIFORD AVENUE
SUITE A-340
MODESTO, CA 95350
(209) 521-9521

MAY - 6 1992

136.00
05/05/92 CU-COMPL
3603A

1 and at all times mentioned herein was, an individual residing in
2 the City of Hayward, Alameda County, California, and the president
3 of Defendant EAST BAY SCAFFOLDING, INC. (hereinafter "EBS".)

4 3. Kauffman is informed and believes, and thereon
5 alleges, that EBS is, and at all times mentioned herein was, a
6 corporation duly created and existing under the laws of the State
7 of California, and doing business in Alameda County, California.

8 4. Kauffman is ignorant of the true names and capacities
9 of Defendants sued herein as DOES 1 through 50, inclusive, and
10 therefore sues these Defendants by such fictitious names. Kauffman
11 will amend this Complaint to allege their true names and capacities
12 when ascertained.

13 5. Kauffman is informed and believes, and thereon
14 alleges, that each of these fictitiously named Defendants is
15 responsible in some manner for the acts and omissions herein
16 alleged and that Kauffman's injuries as herein alleged were
17 proximately caused by the acts and omissions of said Defendants.

18 6. Kauffman is informed and believes, and thereon
19 alleges, that at all times herein mentioned, each Defendant was the
20 agent and employee of each other Defendant and, in doing the things
21 herein alleged, was acting within the course and scope of such
22 agency and employment with the permission and consent of each other
23 Defendant.

24 7. On April 1, 1988, Kauffman and Burns entered into a
25 written lease agreement (hereinafter "the Lease") wherein Burns and
26 EBS (hereinafter referred to collectively as "Defendants") agreed
27 to lease the Property from Kauffman for a period of one year,
28 commencing on April 1, 1988 and ending on March 31, 1989, with

1 possible extensions of the Lease thereafter. A true and correct
2 copy of the Lease is attached hereto as Exhibit "A", and is
3 incorporated herein by this reference.

4 8. Extensions of the Lease were thereafter executed.
5 Under the terms of those extensions, the Lease was to remain in
6 effect according to its original terms for additional one year
7 periods from April 1, 1989 until March 31, 1990 and from April 1,
8 1990 until March 31, 1991, respectively.

9 9. During the period of time covered by the Lease,
10 including the extensions, Burns contacted Kauffman regarding the
11 use of an underground storage tank (hereinafter "the UST") which
12 was located on the Property and which had not been used for a
13 period of approximately seven (7) years prior to the term of the
14 Lease.

15 10. Kauffman granted permission orally for Defendants to
16 use the UST but made no representations about its status or
17 condition. Kauffman also stated, in substance, that if Defendants
18 wished to use the UST, they would be completely responsible for
19 doing whatever was necessary to insure that it was operated in a
20 safe and secure manner, and that Defendants would be responsible if
21 any injuries, damages or violations of law occurred. Defendants did
22 in fact thereafter place the UST into service.

23 11. Kauffman is informed and believes, and thereon
24 alleges that in connection with the use of the UST, Defendants did
25 not secure the necessary operating permits for the UST, Defendants
26 removed the UST from the ground without the authorization of
27 Kauffman or local administrative agencies, Defendants attempted to
28 perform repairs to the UST by applying a fiberglass lining to the

1 exterior of the UST, Defendants replaced the UST without the
2 supervision of local administrative agencies, and Defendants
3 thereafter operated the UST in a manner so as to cause petroleum
4 products to leak from the UST into the soil at the Property.
5 Further, Defendants caused to be erected on the Property certain
6 additions to the structures which structures were existing on the
7 Property at the time of the inception of the Lease, for which
8 additions Defendants did not secure the necessary building permits
9 or inspections by municipal authorities.

10 12. On or about February 18, 1991, Defendants vacated
11 the Property and terminated the Lease.

12
13 FIRST CAUSE OF ACTION

14 (BREACH OF WRITTEN CONTRACT)

15 13. Kauffman repeats, repleads and realleges the
16 allegations contained in Paragraphs 1 through 12 of this Complaint
17 and sets forth said allegations for this First Cause Of Action as
18 though herein repeated in full.

19 14. Under the terms of the Lease, Defendants covenanted
20 as follows:

21 (6) ORDINANCES AND STATUTES: Lessee shall comply with all
22 statutes, ordinances, and requirements of all municipal,
23 state, and federal authorities now in force, or which may
24 hereafter be in force, pertaining to the premises,
25 occasioned by or affecting the use thereof by Lessee.
The commencement or pendency of any state or federal
court abatement proceeding affecting the use of the
premises shall, at the option of the Lessor, be deemed a
breach hereof.

26 15. Defendants breached the Lease and the covenants
27 described therein in that they failed to comply with municipal,
28 state and federal statutes, ordinances and requirements relating to

1 the use of the UST on the Property, as described in Paragraph 10.

2 16. Kauffman has performed all conditions, covenants,
3 and promises required of him on his part to be performed in
4 accordance with the Lease.

5 17. As a direct and proximate result of Defendants'
6 breach of the Lease, Kauffman has been damaged in that he is
7 presently under order from municipal authorities to abate the
8 environmental damage caused by the leakage of petroleum products
9 from the UST and to bring the structural additions erected by
10 Defendants into compliance with local ordinances, all in a sum to
11 be established according to proof at trial, but within the
12 jurisdiction of this Court.

13 WHEREFORE, Kauffman prays judgment against defendants, and
14 each of them, as hereinafter set forth.

15
16 SECOND CAUSE OF ACTION

17 (EXPRESS INDEMNITY)

18 18. Kauffman repeats, repleads and realleges the
19 allegations contained in Paragraphs 1 through 12 of this Complaint
20 and sets forth said allegations for this Second Cause Of Action as
21 though herein repeated in full.

22 19. Under the terms of the Lease, Defendants covenanted
23 as follows:

24 (9) INDEMNIFICATION OF LESSOR: Lessor shall not be liable
25 for any damage or injury to Lessee, or any other person,
26 or to any property, occurring on the demised premises or
27 any part thereof, and Lessee agrees to hold Lessor
28 harmless from any claims or damages, no matter how
caused.

20. As stated previously, in addition to expressly

1 agreeing to indemnify Kauffman under the terms of the Lease,
2 Defendants also orally agreed, prior to their usage of the UST,
3 that they would assume all responsibility for the operation of the
4 UST.

5 21. On October 21, 1991, Kauffman wrote to Defendants
6 and requested that Defendants assume responsibility for the
7 remediation of the environmental contamination at the Property,
8 which contamination occurred during the pendency of the Lease, and
9 which contamination was the subject of the express indemnification
10 agreement entered into between Kauffman and Defendants, as that
11 agreement was phrased in the Lease. A copy of that letter is
12 attached hereto as Exhibit "B", and is incorporated herein by this
13 reference.

14 22. On November 7, 1991, Defendants wrote a letter to
15 Kauffman wherein Defendants refused to indemnify Kauffman or to
16 participate in the remediation of the contamination on the Property
17 in any way.

18 23. Kauffman has performed all of the conditions and
19 obligations to be performed on his part under the Lease, except
20 those conditions and obligations which he has been unable to
21 perform as a result of the actions of Defendants.

22 24. By reason of the foregoing, Kauffman is entitled to
23 be indemnified by Defendants for the costs associated with
24 remediation of the contamination at the Property in an amount
25 according to proof at trial.

26 WHEREFORE, Kauffman prays for judgment against
27 Defendants, and each of them, as hereinafter set forth.

28 \\\

1 reimburse Kauffman for all expenses, costs of suit, legal fees,
2 attorney's fees, judgments or other claims or awards arising out of
3 the above-described actions framed against Kauffman.

4 WHEREFORE, Kauffman prays for judgment against
5 Defendants, and each of them, as hereinafter set forth.

6
7 FOURTH CAUSE OF ACTION

8 (NUISANCE)

9 28. Kauffman repeats, repleads and realleges the
10 allegations contained in Paragraphs 1 through 12 of this Complaint
11 and sets forth said allegations for this Fourth Cause Of Action as
12 though herein repeated in full.

13 29. During the term of the Lease, and continuing until
14 February 18, 1991, Defendants occupied, used and maintained the
15 Property in such a manner so as to cause petroleum products to leak
16 from the UST into the soil at the Property.

17 30. Further, Defendants caused to be erected on the
18 Property certain additions to the structures which structures were
19 existing on the Property at the time of the inception of the Lease,
20 for which additions Defendants did not secure the necessary
21 building permits or inspections by municipal authorities.

22 31. The aforementioned occupation, use and maintenance
23 of the Property by Defendants constitutes a nuisance condition
24 within the meaning of Section 3479 of the Civil Code, in that the
25 condition created by Defendants is injurious to the health of the
26 public at large and especially to Kauffman in that it interferes
27 with Kauffman's quiet use and enjoyment of the Property. The
28 nuisance condition created by Defendants is of a continuing nature

1 in that the extent of the contamination has not yet been
2 ascertained and may in fact be expanding.

3 32. On or about October 21, 1991, Kauffman wrote to
4 Defendants and gave notice to Defendants of the damage caused by
5 the nuisance condition and requested Defendant's participation in
6 its abatement.

7 33. On November 7, 1991, Burns wrote to Kauffman and
8 expressed an unwillingness to participate in the abatement of the
9 nuisance condition created by Defendants.

10 34. Defendants have threatened to and will, unless
11 restrained by this court, continue to maintain the nuisance
12 condition and continue the acts complained of, and each and every
13 act has been, and will be, without the consent, against the will,
14 and in violation of the rights of Kauffman and in violation of
15 local, state and federal laws and ordinances.

16 35. As a further proximate result of the nuisance, the
17 value of the Property has been reduced by an amount to shown
18 according to proof at trial. Unless the nuisance is abated, the
19 Property will be progressively further diminished in value.

20 36. Unless Defendants are enjoined by order of this
21 court from continuing the nuisance condition on the Property,
22 Kauffman will be required to commence many successive actions
23 against Defendants to secure compensation for damages sustained,
24 thus requiring a multiplicity of suits, and Kauffman will be daily
25 threatened with the continued presence of contamination on the
26 Property, and the presence of unpermitted construction.

27 37. Unless Defendants are enjoined from continuing the
28 nuisance condition, Kauffman will suffer irreparable injury in that

1 he will be required by governmental authorities to abate the
2 nuisance condition created by Defendants. Further, the value of
3 the Property will be substantially and progressively diminished,
4 and Kauffman will be deprived of the quiet use and enjoyment of the
5 Property.

6 38. Kauffman has no plain, speedy, or adequate remedy at
7 law, and injunctive relief is expressly authorized by Sections 526
8 and 731 of the Code of Civil Procedure.

9 39. In maintaining the nuisance, Defendants are acting
10 with full knowledge of the consequences and damage being caused to
11 Kauffman and to the public at large, and their conduct is willful,
12 oppressive and malicious; accordingly, Kauffman is entitled to
13 punitive damages against Defendants in the sum of one million
14 dollars (\$1,000,000.00).

15 WHEREFORE, Kauffman prays for judgment against
16 Defendants, and each of them, as hereinafter set forth.

17
18 FIFTH CAUSE OF ACTION

19 (DECLARATORY RELIEF)

20 40. Kauffman repeats, repleads and realleges the
21 allegations contained in Paragraphs 1 through 12 of this Complaint
22 and sets forth said allegations for this Fifth Cause Of Action as
23 though herein repeated in full.

24 41. An actual controversy has arisen and now exists
25 between Kauffman and Defendants regarding their various rights and
26 responsibilities in that Kauffman alleges that Defendants have
27 created and are responsible for a nuisance condition on the
28 Property whereas Defendants allege that they are not responsible